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## The Distributive Impacts of Nudnik-based Activism

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# The Distributive Impacts of Nudnik-based Activism

*Meirav Furth-Matzkin\**

*In Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It, Professors Yonathan Arbel and Roy Shapira propose that nudnik customers should be lauded for acting as engines of market discipline. According to Arbel and Shapira, nudnik consumers typically generate significant social benefits. Through their complaints, nudniks often draw attention to seller misconduct. By imposing reputational costs on sellers, nudniks may complement, and sometimes even replace, regulatory sanctions. As presented by the authors, nudnik consumers can prompt sellers to enhance their quality of service for all consumers, consequently increasing consumer welfare.*

*This Response seeks to complicate the theory by addressing the missing distributional dimension. Namely, it suggests that nudnik-based activism (and sellers' responses to it) may not affect all consumers alike.*

*The Response addresses three main distributional concerns arising from the "Theory of the Nudnik." First, as the authors acknowledge, due to technological advances, sellers are increasingly able to target nudniks before they speak out. As a result, sellers often treat nudniks more favorably than they do non-complainers. Empirical evidence suggests that it is often the upper-class, better educated customers who feel entitled enough to complain. As a result, a nudnik-based segmentation of consumers would likely yield regressive distributional outcomes.*

*Second, to the extent that nudniks do manage to make their dissatisfaction public, it is important to identify who benefits from this reputational information. Here, there is reason to believe that higher income, better educated customers are likely to disproportionately obtain*

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\* Associate Professor, UCLA School of Law. I am grateful to Yonathan Arbel and Roy Shapira for the opportunity to respond to their Article. I thank the *Vanderbilt Law Review* editors for their invitation and engagement. Nury Albayrak, Nikki Miller, Robert Moore, and Nicole Patolai provided excellent research assistance.

access, and consequently benefit from the informational spillovers that nudniks generate.

Third, if firms change their behavior as a response to nudnik complaints, the question arises as to whether these changes benefit most other consumers, or mainly cater to the preferences of nudnik consumers. If nudnik-driven changes cater to nudniks' preferences, nudnik consumers' demographic traits again matter greatly from a distributional perspective.

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## INTRODUCTION

We have all encountered nudniks in action.<sup>1</sup> They complain when the music is too loud, post bad reviews when their coffee is not warm enough, or threaten to switch their service provider if they waited too long on hold. These nudnik consumers are often derided by social and mass media for their pettiness and nagging. Yet, in *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, Professors Yonathan Arbel and Roy Shapira propose that nudnik customers should be lauded for acting as engines of market discipline. According to Arbel and Shapira, nudnik consumers typically generate significant social benefits. Through their complaints, nudniks often

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1. The term "nudnik," derived from Yiddish, can be roughly defined as "busybody" or "nag." See Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 931 n.1 (2020). For further explanation on the term, see *id.* at Section I.A. See also Yonathan A. Arbel & Roy Shapira, *Consumer Activism: From the Informed Minority to the Crusading Majority*, 69 DEPAUL. L. REV. 233 (2020) [hereinafter *Crusading Majority*] (further exploring the role and prevalence of nudniks in consumer markets).

draw attention to seller misconduct. By imposing reputational costs on sellers, nudniks may complement, and sometimes even replace, regulatory sanctions.<sup>2</sup>

The “Theory of the Nudnik,” as developed by Arbel and Shapira, offers promise for policymakers and consumer protection advocates. According to their argument, nudnik customers can compensate for important regulatory deficiencies by serving as private enforcers of consumers’ rights.<sup>3</sup> Firms constantly attempt to silence nudniks, using a myriad of tools and technological advances. Yet, some nudniks manage to get heard, and, in the process, serve as important market discipliners, discouraging sellers from misbehaving.

There is undoubtedly a sound basis to the “Theory of the Nudnik,” and its normative message is appealing. As presented by the authors, nudnik consumers can prompt sellers to enhance their quality of service for *all* consumers, consequently generating “positive spillovers that reverberate throughout the economy.”<sup>4</sup> However, while focusing on nudniks’ contribution to consumer welfare in the *aggregate*, the authors overlook the distributional implications of nudnik-based consumer activism. This Response seeks to complicate the theory by addressing the missing distributional dimension. Namely, it suggests that nudnik-based activism (and sellers’ responses to it) may not affect all consumers uniformly. Rather, over-reliance on nudnik customers to discipline sellers could yield regressive distributional outcomes.

The response addresses three main distributional concerns arising from the “Theory of the Nudnik.”

First, as the authors acknowledge, owing to technological advances and the use of big data, sellers are increasingly able to target nudnik customers *ex ante*, before they are even able to speak out.<sup>5</sup> As a result, sellers often treat nudniks more favorably than they do non-complainers, seeking either to silence them or to keep their business. Empirical evidence suggests that it is often the upper-class, better educated customers who feel entitled enough to complain.<sup>6</sup> As a result, a nudnik-based segmentation of consumers would likely yield regressive distributional outcomes, transferring wealth from lower income consumers to those who are already better off.

Second, to the extent that nudniks do manage to (at least partially) voice or make public their dissatisfaction, it is important to

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2. Arbel & Shapira, *supra* note 1, at 931.

3. *Id.* at 939.

4. *Id.*

5. *Id.* at 960.

6. See discussion *infra* Section II.A.

identify who benefits from this reputational information. Here, there is reason to believe that higher income, better educated customers are likely to disproportionately obtain access, and consequently benefit from, the informational spillovers that nudniks disseminate.

Third, if firms change their behavior in response to nudnik activism, the question arises as to whether these changes benefit most (or all) other consumers, or mainly (if not solely) cater to the preferences of nudnik consumers. If nudnik-driven changes cater to nudniks' preferences, nudnik consumers' demographic traits again matter a great deal from a distributional perspective.

This Response will proceed as follows. Part I will briefly describe the "Theory of the Nudnik," as presented by Arbel and Shapira. Part II will address the three distributional questions arising from this theory, while presenting empirical evidence, mainly from the psychological and marketing literature, about the demographic profiles of nudnik consumers. Part III will briefly conclude, highlighting the need for further research about the distributional implications of nudnik-based activism before drawing normative conclusions from their potential to discipline markets.

#### I. THEORY OF THE NUDNIK: AN OVERVIEW

*Theory of the Nudnik* celebrates the disciplinary power of nudnik consumers, broadly defined as those who complain, write angry online reviews, demand to speak with managers, or file lawsuits against sellers who violate their expectations.<sup>7</sup> While nudniks are often ridiculed by society, Arbel and Shapira suggest that they may often contribute to social welfare. Nudniks can provide reputational information that benefits others and facilitates comparison shopping, thereby deterring sellers from behaving unfairly. As the authors point out, nudniks can "effectively solve some of the collective action problems that plague consumer markets"<sup>8</sup> by encouraging sellers to meet or exceed their contractual obligations.<sup>9</sup>

The authors highlight two main characteristics which are often shared by nudnik consumers. The first is *activism*, seen as nudniks' inclination to act when their expectations are not met. The second is an *idiosyncratic utility function*, defined as nudniks' ability to derive

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7. Arbel & Shapira, *supra* note 1, at 931.

8. *Id.* at 933.

9. *Id.* at 936.

satisfaction from pursuing grievances even when their actions are not cost-beneficial from a purely monetary perspective.<sup>10</sup>

The “Theory of the Nudnik” also explains how nudnik-based activism can discipline sellers. Nudniks often express their grievances in public, disseminating information about sellers’ misbehavior. This information then enables other consumers to decide whether to interact with any particular seller.<sup>11</sup> In addition, the authors suggest that nudniks can assist sellers in monitoring their business performance.<sup>12</sup> By raising their voices, nudniks can inform high-level managers or business owners about employee underperformance, product failures, and low-quality service. This information may then lead to reforms in sellers’ policies or practices.<sup>13</sup>

Notably, the “Theory of the Nudnik” is distinguishable from most other theories of market discipline which typically posit that a certain subset of consumers could discipline sellers. Most prominently, the “Informed Minority Theory,” which played a dominant role in consumer contracts scholarship for decades, posits that even if most consumers do not read standard form contracts, there is a significant minority of consumers who does read them.<sup>14</sup> This informed minority of readers can help maintain a competitive market by incentivizing sellers to behave fairly, because sellers often cannot distinguish between readers and non-readers. The problem is that in many consumer markets almost no one reads the fine print.<sup>15</sup> In contrast to the “Informed Minority Theory” and other existing theories of market discipline, the “Theory of the Nudnik” does not rely on a critical mass of informed consumers to hold sellers accountable. Indeed, according to the authors, “[o]ne nudnik may be enough.”<sup>16</sup> This is because “[i]n today’s interconnected world, a single nudnik’s squawk can reach

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10. Nudniks may be perceived as “willing punishers” who are prepared to punish wrongdoers for misbehaving even at a cost to themselves. *Id.* at 936.

11. According to the “Theory of the Nudnik,” active consumers can alert others to sellers’ misbehavior through four main channels: complaints to regulators, media coverage, direct peer-to-peer information circulated mainly through online customer reviews, and litigation (including class actions). *Id.* at 945.

12. *Id.* at 946.

13. *Id.*

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

15. See, e.g., Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (finding that, at least in the context of end-user license agreements, there is no such informed minority); R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L. J. 635 (1996) (detailing alleged limitations of the informed minority theory).

16. Arbel & Shapira, *supra* note 1, at 953.

numerous other consumers and convince them to take their business elsewhere.”<sup>17</sup>

Arbel and Shapira acknowledge that not all nudnik activities generate positive spillovers. Some complaints are frivolous or idiosyncratic. Others are the result of nudniks’ inflated or unrealistic expectations. Yet, the authors contend that nudnik activism is, in general, socially desirable, and that most nudnik consumers operate in good faith, identifying actual flaws in sellers’ products, services, or policies.<sup>18</sup>

As Arbel and Shapira recognize, sellers are also increasingly able to target nudniks and silence them before they voice their complaints. As a result, nudnik-based activism may lose its ability to deter sellers through recourse to reputational channels. In view of this possibility, Arbel and Shapira make several policy proposals aimed at offsetting sellers’ attempts to silence nudniks.<sup>19</sup> In particular, the authors discuss solutions that make it difficult for sellers to silence nudniks, for example by assuring that sellers are not allowed to block consumers from sharing and disseminating information.<sup>20</sup> They also propose solutions that make it easier for nudniks to convey their information, for example by urging regulatory agencies to investigate consumer complaints more quickly, or by allowing consumers to bring private actions against sellers who misbehave.<sup>21</sup>

The “Theory of the Nudnik” yields reasonable predictions about nudniks’ behavior and sellers’ reactions to it. Yet, it focuses on the implications of these practices for the *overall* social welfare, while overlooking the potential distributional implications of nudnik-based activism and screening.<sup>22</sup> This Response now turns to address these issues.

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17. *Id.*

18. In support of their position, the authors rely on several studies that demonstrate a significant correlation between product quality and consumer complaining behavior. Essentially, these studies find that consumers are significantly more likely to complain when the quality of the product or service is perceivably low. *See id.* at 957, n.119.

19. *Id.* at Section III.

20. *Id.*

21. *Id.*

22. *Id.* at 960 (for example, the authors explain that “the earlier a seller can identify and silence a nudnik . . . the less likely other consumers are to enjoy the positive spillovers from nudnik behavior”).

## II. THREE DISTRIBUTIONAL CONCERNS

A. *Some Consumers are more Equal than Others*

As Arbel and Shapira observe, the rise of the digital age has increased nudniks' ability to discipline sellers by amplifying their signals.<sup>23</sup> Yet, at the same time, these technological advances enable firms to identify, target, and silence nudniks.<sup>24</sup> Firms increasingly use big data tools, including algorithmic intelligence, to study the widely available data on consumer behavior.<sup>25</sup> They then use predictive analytics to estimate each consumer's tendency to complain when dissatisfied.<sup>26</sup>

In particular, sellers increasingly score consumers on various metrics, which then enable them to predict their tendency to complain.<sup>27</sup> As Arbel and Shapira explain, "[t]he proliferation and growing sophistication of these scores allows firms to target nudniks more accurately than ever before."<sup>28</sup> Sellers also track consumers' social influence scores, based, for example, on their followers on social media and other indicia.<sup>29</sup> Sellers then use this information to estimate the reputational risk posed by each consumer. Essentially, sellers can not only identify the consumers who are most likely to "squawk" loudly about the company's misconduct, but also quite accurately assess how much damage those squawks will cause.<sup>30</sup>

Drawing on big data, sellers can then disarm nudniks before they voice their complaints. To prevent nudniks from causing reputational harm, sellers can "bribe" nudniks with tailored

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23. *Id.* at 960–61.

24. According to the authors, sellers typically track consumers along three nudnik-relevant dimensions: their past complaining patterns, their propensity to complain, and the effects that their complaints will likely have on others. *Id.* at 962.

25. Sellers collect, store, and analyze data about each customer's interactions with the firm, including past dealings, requests, complaints, and survey responses. *Id.* at 962; see also Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer 'Haves' from 'Have-Nots'*, 2014 MICH. ST. L. REV. 1411, 1419–33 (2014).

26. Consumer data is increasingly shared among multiple sellers, typically by data brokers, who collect and sell information about consumers' demographics, locations, and financial and social status to sellers. Arbel & Shapira, *supra* note 1, at 962; see also Zack Whittaker, *Data Brokers Track Everywhere You Go, But Their Days May Be Numbered*, TECHCRUNCH (July 9, 2020), <https://techcrunch.com/2020/07/09/data-brokers-tracking/> [<https://perma.cc/EY6Q-FQ4R>] (finding that cellphone apps are filled with trackers that send users' real-time location to data brokers who then sell that data to third parties).

27. For example, sellers often use "customer lifetime value" score to estimate the probability that a customer will "bad-mouth a company." Arbel & Shapira, *supra* note 1, at 963.

28. *Id.* at 964.

29. *Id.*

30. *Id.* ("[B]eyond assessing how likely a given consumer is to publicly voice her frustration, sellers nowadays can also predict how strong and far the nudnik's cry will echo.").



preferential treatment.<sup>31</sup> By using technology to identify and disarm nudniks, sellers can significantly diminish the legal and reputational risks posed by nudnik customers.<sup>32</sup>

To prevent nudniks from disseminating harmful information, sellers often treat nudniks more favorably than non-nudnik consumers. Since nudnik customers are likely to disproportionately benefit from a more favorable treatment, nudniks' demographics may matter from a distributional perspective. What, then, is known about nudnik consumers' characteristics?

### 1. Nudniks' Demographics

Arbel and Shapira paint a rich and colorful picture of the nudniks and their attributes. They explain that "[t]hese crusading consumers tend to share certain values and innate personality traits."<sup>33</sup> For example, they submit that some nudniks are simply more assertive and aggressive than most other consumers,<sup>34</sup> while others have a strong commitment to honoring contracts,<sup>35</sup> and some operate out of spite, feeling they have been wronged or disrespected.<sup>36</sup>

Importantly, nudniks need not, and often do not, behave rationally from a standard economics perspective. As the authors explain, "for most of us, spending hours fighting a [four dollar] overcharge is not worth our time; for nudniks, it comes instinctively."<sup>37</sup> Nudnik consumers may act against sellers even if their absolute payoffs from acting are lower than the costs associated with their acts, because they are often motivated by factors that are not captured by standard pecuniary calculus.<sup>38</sup> These include sentiments towards the fairness of sellers' behavior or the terms of the deal, or disappointment when their expectations are not met.

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31. *Id.* at 965–66; Schmitz, *supra* note 25, at 1429 (exploring how sellers have used gathered information to provide consumers with individualized deals and remedies).

32. Arbel & Shapira, *supra* note 1, at 971 (explaining that the ability to silence nudniks before they squawk significantly reduces firms' exposure to reputational risks).

33. *Id.* at 938.

34. *Id.* (citing Marsha L. Richins, *A Multivariate Analysis of Responses to Dissatisfaction*, 15 J. ACAD. MKTG. SCI. 24, 25 (1987)).

35. *Id.* at 938 (citing Nancy Stephens & Kevin P. Gwinner, *Why Don't Some People Complain? A Cognitive-Emotive Process Model of Consumer Complaint Behavior*, 26 J. ACAD. MKTG. SCI. 172, 178 (1998)).

36. *Id.*

37. *Id.*

38. Similarly, a person's decision of whether to perform or breach a contract may be motivated by fairness concerns. *E.g.*, Oren Bar-Gill & Omri Ben-Shahar, *Threatening an Irrational Breach*, 11 SUP. CT. ECON. REV. 143, 145 (2004).

While this depiction is undoubtedly informative, it does not provide insight into nudnik consumers' *demographic* profile. We are then left wondering—who are these nudniks? Marketing research on consumer complaining behavior may provide some insights on this issue. Empirical studies conducted in this area reveal that more active customers are typically younger, better educated, and have higher incomes than most passive consumers.<sup>39</sup>

For example, a classic 1975 study of U.S. consumers has tested the relationship between consumer dissatisfaction and their complaint behavior in the context of product malfunction.<sup>40</sup> The study found that less educated and lower income consumers were significantly less likely to complain about problems with their purchases.<sup>41</sup> The study also found that consumers from lower income households identified problems with their purchases significantly less frequently than consumers from higher income households.<sup>42</sup>

Similarly, researchers have surveyed 1,215 U.S. consumers from a nationally representative sample about their consumption experiences, asking respondents to recall their most recent negative experience in the marketplace and to report their reaction to that experience.<sup>43</sup> The study found that consumers' most common response to dissatisfaction was to complain to the store manager, clerk, or company representative.<sup>44</sup> Notably, the researchers observed that consumers who took action as a result of their dissatisfaction were younger, better educated, and earned higher incomes than the other, more passive, respondents.<sup>45</sup> According to the study, those who decided not to take action regardless of their dissatisfaction "reported more financial strain" than the more assertive consumers.<sup>46</sup> The authors concluded that overall, assertive consumers represented a "socially . . . up-scale group."<sup>47</sup>

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39. See *infra* notes 40–53.

40. Arthur Best & Alan P. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & SOC'Y REV. 701, 707 (1977).

41. *Id.* at 711–24.

42. *Id.* A comprehensive survey of more than 17,000 consumers in Canada similarly found that those who complained (by writing letters to governmental or consumer service agencies) were mostly middle-aged, well-educated, and wealthy consumers. See J. P. Liefeld, F. H. C. Edgcombe & Linda Wolfe, *Demographic Characteristics of Canadian Consumer Complaints*, 9 J. CONSUMER AFF. 73, 80 (1975).

43. Rex H. Warland, Robert O. Herrmann & Jane Willits, *Dissatisfied Consumers: Who Gets Upset and Who Takes Action*, 9 J. CONSUMER AFF. 148, 148–62 (1975).

44. *Id.* at 152.

45. *Id.* at 155.

46. *Id.* at 159.

47. *Id.* at 154.

More recent studies, conducted both in and outside the U.S., reveal a similar pattern. For example, a study of more than 24,000 consumer complaints with the Wisconsin Better Business Bureau throughout a thirteen-year period (1994-2006) has found a significant correlation between average household income and consumer complaints. The study also found that consumers with high school education were significantly more likely to complain than those who did not graduate from high school.<sup>48</sup>

In Europe, a recent comprehensive study of thousands of consumers from twelve different countries also revealed that less educated (and older) consumers were less likely either to recognize a service failure or voice their complaints.<sup>49</sup> Finally, in Hong Kong, researchers surveyed 225 hotel customers about their complaint behavior. Respondents were asked how likely they were to complain, warn their families and friends, or turn to the media, in the event of dissatisfaction with one of the hotel's restaurants. The authors then divided participants into "complainers" and "non-complainers" based on their responses. They found that almost seventy percent of the complainers had a university degree or higher, compared to only twelve percent of the non-complainers.<sup>50</sup>

Taken together, these studies reveal a strong and significant relationship between consumers' demographics and their complaining behavior: complainers are typically wealthy, well-educated, and young, compared to non-complainers.<sup>51</sup>

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48. Dennis E. Garrett & Peter G. Toumanoff, *Are Consumers Disadvantaged or Vulnerable? An Examination of Consumer Complaints to the Better Business Bureau*, 44 J. CONSUMER AFF. 3, 15-16 (2010).

49. Gil Luria, Asaf Levanon, Dana Yagil & Iddo Gal, *Status, National Culture and Customers' Propensity to Complain*, 126 SOC. INDICATORS RSCH. 309, 318-21 (2016).

50. Vincent Heung & Terry Lam, *Customer Complaint Behaviour Towards Hotel Restaurant Services*, 15 INT'L J. CONTEMP. HOSP. MGMT. 283, 288 (2003) (the authors concluded that "young and well-educated customers tend to complain more"); see also Saeideh Bakhshi et al., *Demographics, Weather and Online Reviews: A Study of Restaurant Recommendations*, in PROCEEDINGS OF THE 23RD INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 443-54 (2014) (finding, based on a study of 1.1 million online restaurant reviews from 2002 to 2011, that neighborhoods with high percentage of college degrees are highly likely to have restaurants with a large amount of reviews).

51. For more studies reporting similar trends, see, for example, Ralph L. Day & Laird E. Landon, *Toward a Theory of Consumer Complaining Behavior*, in CONSUMER & INDUSTRIAL BUYING BEHAVIOR 425-37 (1977) (finding that those who publicly complained were younger and had higher education and income than non-complainers); Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405, 1448-51 (1985) (providing evidence that the relatively poor buyers are least likely to complain about defective goods); Michelle A. Morganosky & Hilda M. Buckley, *Complaint Behavior: Analysis By Demographics, Lifestyle, and Consumer Values*, 14 ADVANCES CONSUMER RSCH. 223 (1987); Keith Crosier et al., *The Risk of Collateral Damage in Advertising Campaigns*, 15 J. MKTG. MGMT. 837 (1999) (finding

## 2. Why are Nudniks wealthier and more educated than others?

As previously noted, evidence consistently shows that higher income, better educated consumers tend to complain more often than lower income and less educated customers. But why?

One reason is that higher income, better educated customers are typically more experienced and informed about consumer rights and about how to seek redress when they experience dissatisfaction with a product or service.<sup>52</sup> Past studies have indicated that consumers with higher educational levels are more informed about where and how to file complaints and tend to file complaints more often than do less educated consumers.<sup>53</sup> This knowledge gap is further exacerbated by the disparities in internet use along education, income, and age, with wealthier, better educated, and older consumers having more online experience than others.<sup>54</sup>

A second explanation for why higher income, more educated customers have a greater tendency to complain is that they generally have a higher sense of entitlement and consequently a stronger inclination to bargain over payoffs than consumers from lower socioeconomic backgrounds.<sup>55</sup> In the consumer context, this means that

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that complainants had above-average education, managerial or professional status, and above-average income).

52. Amy Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 312 (2012) (“Research indicates that complainers have not only greater ‘consumer sophistication’ in terms of knowledge and experience regarding their contract rights, but also higher incomes and educational resources than average consumers.”); Matthew A. Seligman, *The Error Theory of Contract*, 78 MD. L. REV. 147, 169 (2018) (“[P]eople with less education or lower household income are significantly more likely to have false beliefs about contract remedies than people with more education or higher household income.”).

53. Warland et al., *supra* note 43, at 160.

54. See, e.g., Suzanna Willis & Bruce Tranter, *Beyond the “Digital Divide”—Internet Diffusion and Inequality in Australia*, 42 J. SOCIO. 43 (2006) (finding that household income, age, education, and occupational class remain key predictors of differential internet use); Wehnhong Chen & Barry Wellman, *Charting Digital Divides: Comparing Socioeconomic, Gender, Life Stage and Rural-Urban Access and Use in Eight Countries*, in TRANSFORMING ENTERPRISE (William Dutton, Brian Kahin, Ramon O’Callaghan & Andrew Wyckoff eds., 2004); PIPPA NORRIA, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE (2001).

55. See generally, Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement and Narcissism*, 40 PERSONALITY & SOC. PSYCH. BULL. 34 (2013) (demonstrating that higher socioeconomic class status is associated with higher levels of psychological entitlement); Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES EXPERIMENTAL SOC. PSYCH. 293 (1994) (finding that disadvantaged groups experience a lower sense of entitlement); Laurie T. O’Brien & Brenda Major, *Group Status and Feelings of Personal Entitlement: The Roles of Social Comparison and System-justifying Beliefs*, in SERIES IN POLITICAL PSYCHOLOGY: SOCIAL & PSYCHOLOGICAL BASES OF IDEOLOGY & SYSTEM JUSTIFICATION 427 (2009) (observing that low-status groups ultimately experience a lower sense of entitlement); Jie Hu, Yuan Cao, Philip R. Blue & Xiaolin Zhou, *Low Social Status Decreases the Neural Salience of Unfairness*, 8 FRONTIERS BEHAV. NEUROSCIENCE 402 (2014) (demonstrating that a lower position within the social hierarchy

wealthier and more educated consumers are both more likely to experience dissatisfaction with a product or service and to voice their dissatisfaction publicly.<sup>56</sup> Lower income, less educated consumers, on the other hand, are more likely to tolerate unsatisfactory goods and services without complaining.<sup>57</sup>

Notably, race and gender were also found to influence what people expect and feel they deserve, with African-American and female respondents typically feeling less entitled than White and male respondents.<sup>58</sup> For example, a survey conducted in thirty-four U.S. cities in 1975 found that, controlling for income and socioeconomic status, African-American households had significantly lower problem perception rates than did White households (15.4 percent compared to 21.8 percent).<sup>59</sup> The study further found that “whites complain more than blacks within each [socioeconomic status] category.”<sup>60</sup> In the particular context of consumer contracts, evidence suggests that non-White and female buyers, as well as consumers from lower socioeconomic backgrounds, are more likely to feel bound by standardized agreements and to view the four corners of these agreements as the final word.<sup>61</sup>

is associated with a lower inclination to believe that one is being treated unfairly); Candace N. Joyner, *Entitled to Expect: System Justification Theory, Socioeconomic Status, and the Ultimatum Game* (2017) (unpublished B.S. thesis, University of Oregon) (on file with the Department of Psychology and the Clark Honors College of the University of Oregon) (showing, based on an ultimatum game experiment, that socioeconomic status predicts expectations about payoffs).

56. See, e.g., William O. Bearden, *Profiling Consumers Who Register Complaints Against Auto Repair Services*, 17 J. CONSUMER AFF. 315 (1983) (suggesting that increased confidence in one’s ability serves to increase consumer complaints); Warland et al., *supra* note 43, at 157–59 (finding that higher income and better educated consumers are both more likely to be dissatisfied with their transactions and more likely to act upon dissatisfaction than lower income and less educated consumers).

57. Bearden, *supra* note 56, at 315; Warland et al., *supra* note 43, at 157–59.

58. Laurie T. O’Brien, Brenda N. Major & Patricia N. Gilbert, *Gender Differences in Entitlement: The Role of System-Justifying Beliefs*, 34 BASIC & APPLIED SOC. PSYCH. 136 (2012) (finding lower levels of perceived pay entitlement among women in comparison to men); Best & Andreasen, *supra* note 40, at 707. Research suggests that African-American and lower-income people are also less likely to seek legal counsel when encountering legal problems. See, e.g., Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016).

59. Best & Andreasen, *supra* note 40, at 707. For general observations of these disparities, see, for example, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.–C.L. L. REV. 401 (1987) (arguing for racial differences in perceptions of rights-entitlements); Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 AM. SOCIO. REV. 747 (2002) (suggesting that upper income white families raise their children with a sense of entitlement and assertiveness, while childrearing strategies among the lower classes and racial minorities tend to result in a lack of assertiveness and a lower sense of entitlement).

60. Best & Andreasen, *supra* note 40, at 723–24.

61. See, e.g., Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN. L. REV. 503 (2020) (finding that nonwhite participants were inclined to see the consumer as more bound by the fine print than white participants); Jessica M.

Finally, consumers are more likely to complain when the chances of obtaining redress from sellers are higher.<sup>62</sup> Consumers' perception of a store's willingness to provide a remedy is one of the most significant correlates of consumer complaining behavior. Consumers appear to complain primarily when they believe that their efforts are likely to be successful.<sup>63</sup>

This generates a vicious cycle. If low income, less educated consumers do not feel entitled to complain, or do not anticipate a successful outcome to complaining, they are less likely to complain, thereby becoming even less likely to receive redress. At the same time, higher income, more educated consumers will complain more often, disproportionately benefitting from preferential treatment by the seller.

### 3. Firms disproportionately favor those who are already better-off

As the evidence surveyed above suggests, wealthier and more educated consumers are more likely to act when experiencing dissatisfaction with a particular service or transaction. This has regressive distributional consequences because firms are more likely to treat consumers who complain more favorably, both to keep their business and to mitigate potential harm to the firm's reputation.<sup>64</sup> But even among those consumers who complain, firms may discriminate between wealthy and influential consumers and those who are less valuable to the firm.<sup>65</sup> In particular, firms are more likely to provide a

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Choplin, Debra Pogrud Stark & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 L. & PSYCH. REV. 61, 94 (2011) (finding that "those with lower status are more likely to agree and accept senseless explanations . . . [t]hose with higher status seem to be more vigilant, perhaps in an effort to protect their higher status").

62. See, e.g., Donald Granbois, John O. Summers & Gary L. Frazier, *Correlates of Consumer Expectation and Complaining Behavior*, in CONSUMER SATISFACTION, DISSATISFACTION AND COMPLAINING BEHAVIOR 18, 18 (Ralph L. Day ed., 1977); Marsha L. Richins, *An Investigation of Consumers' Attitudes Toward Complaining*, 9 ADVANCES CONSUMER RSCH. 502 (1982); Marsha L. Richins, *Negative-Word-of-Mouth by Dissatisfied Consumers*, 47 J. MKTG. 68, 76 (1983) (observing that the likelihood of consumers to complain depends to a large extent on the perceived responsiveness of the seller).

63. See sources cited *supra* note 62.

64. See, e.g., Jason S. 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 (2005); Shmuel Becher & Tal Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69 (2019); Meirav Furth-Matzkin, *Selective Enforcement of Consumer Contracts: Evidence from the Retail Market* (working paper) (on file with author).

65. See, e.g., Johnston, *supra* note 64, at 882 ("[T]he complaint-based benefits strategy not only allows the firm to retain and add sophisticated, influential customers, but effectively gives those customers a price subsidy that is paid for by less-well-informed, or simply more acquiescent, consumers."); Becher & Zarsky, *supra* note 64, at 91 (noting that "sophisticated and informed groups [of consumers] are treated more forgivingly or generously" and concluding that "the firm's behavior may cause wealth transfer from weak to strong consumers"); Eyal Zamir, *Contract Law*

remedy and address consumers' complaints more carefully when dealing with their most valuable customers.<sup>66</sup>

Furthermore, in deciding how to treat consumer complaints, firms increasingly rely on algorithmic intelligence to predict consumers' responses to different levels of redress.<sup>67</sup> These technological tools inform firms of the likelihood of losing customers if full, partial, or no concession is made.<sup>68</sup> As discussed above, customers' expectations are correlated with income and education. Wealthy and sophisticated consumers are those more likely to be dissatisfied if no redress is provided. As a result, Algorithmic Intelligence and other big data tools may bias firms in favor of wealthier consumers even more than before.

Companies also increasingly incorporate assessments of consumers' online social influence over other customers into their redress decisions and complaint resolution processes.<sup>69</sup> Social influence can be measured by the number of Twitter followers or Facebook friends a consumer has, for example.<sup>70</sup> Since higher income, more educated consumers may have more online social influence than lower income, less educated consumers, firms' incorporation of such measures into their complaint resolution policies might also yield regressive distributional outcomes.

Even more concerning perhaps, in terms of distributional outcomes, is firms' ability to predict each consumer's buying power and profitability for the firm. Firms increasingly use algorithms that predict, based on information such as online purchasing history, the consumer's value to the firm.<sup>71</sup>

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*and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2100 (2014) (suggesting that reputational forces "are much more likely to work in favor of large, recurring, and sophisticated customers—whose goodwill the supplier values highly—than in favor of the weak, occasional, and unsophisticated customer, whose goodwill is valued less"); Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REGUL. 547, 579–80 (2016).

66. See sources cited *supra* note 64.

67. Van Loo, *supra* note 65, at 565.

68. *Id.*

69. *Id.*; see also Priyanga Gunarathne et al., *Whose and What Social Media Complaints Have Happier Resolutions? Evidence From Twitter*, 34 J. MGMT. INFO. SYS. 314, 320 (2017) (finding that online social influence has become an important factor driving a brand's prioritization decisions); Van Loo, *supra*, note 65, at 565; Nate Cullerton, *Behavioral Credit Scoring*, 101 GEO. L.J. 807, 816 (2013) (describing how lenders increasingly adopt ratings technologies currently used to predict consumers' social influence and online reputation, including metrics such as the number of followers a particular user has on Twitter, the level of "re-tweeting," and the user's blog and Facebook links).

70. Van Loo, *supra* note 65, at 565.

71. See Natasha Singer, *Secret E-Scores Chart Consumers' Buying Power*, N.Y. TIMES, Aug. 18, 2012, at BU1; Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L. J. 1267, 1283 (2017) ("[C]ompanies purchase . . . information to estimate a consumer's overall net worth, which then determines service levels, such as whether to direct a phone call to a VIP customer service line or to an unhelpful call center.").

This observation is supported by a series of qualitative interviews I conducted with retail sellers in the Chicago area as part of an ongoing research project on retailers' implementation of their formal policies vis-à-vis consumers.<sup>72</sup> In these interviews, I asked store clerks about their experiences with buyers and their implementation of the stores' formal policies on the ground. Some of the interviews may illustrate the distributional implications of complaint-based segmentation of consumers. For example, one of the interviewees, a former store clerk at a high-end rug store explained, in response to my question as to whether he had ever deviated from the store's formal policies, that:

Our policy was to charge a \$100 delivery fee, but there might be something in the conversation . . . where I'd say: 'Ok, I'll waive it for you' if they ask . . . Those who managed to get their fees waived were typically white baby-boomers . . . There are plenty wealthy people of color who buy rugs, but to my memory, the people who would get their fees waived were mainly white. The Black customers wouldn't typically ask for their fees to be waived.<sup>73</sup>

If wealthy White consumers receive preferential treatment when making complaints or requests, they are likely to disproportionately benefit from nudnik-based segmentation, at the expense of lower income, less educated, non-white consumers.

#### 4. Sellers' "Nudnik-targeting" techniques

Sellers can respond to the nudnik threat in several ways. First, sellers can treat nudniks more favorably, by providing them better service or a more lenient treatment. Second, sellers can drown out nudniks' voices by increasing the volume of positive online reviews.<sup>74</sup> As Arbel and Shapira explain, "while the first channel, selective remedies, is meant to convince nudniks not to disseminate damning information in the first place, the second channel, muffling of consumers' voices, is meant as damage control once the nudnik has already publicly voiced frustration."<sup>75</sup> Finally, sellers may disarm nudniks by limiting their ability to complain after the purchase or by refusing to do business with them to begin with.<sup>76</sup>

Given that nudniks are typically higher income, better educated consumers, refusing to provide service to them is unlikely to yield

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72. Furth-Matzkin, *supra* note 65.

73. Interview #13 with David, who worked as a store clerk at a small rug store in Evanston, Illinois (January 3, 2018) (on file with author) (citation limited for purposes of anonymity).

74. Arbel & Shapira, *supra* note 1, at 966–67.

75. *Id.* at 967.

76. For example, there is evidence suggesting that some Airbnb hosts refuse to rent out their homes to guests who tend to write negative online reviews. *See id.* at 967–68.



regressive distributional outcomes. But recall that higher income consumers usually provide more value to sellers. Sellers are unlikely to stop doing business with their most valuable consumers, even if they are nudniks. Take the examples of “nudniks” that Arbel and Shapira mention in *Theory of the Nudnik*: Chicago businessman Hassan Syed, Harvard Business Professor Ben Edelman, and country music singer Dave Carroll are all consumers with whom firms are unlikely to refuse to transact.<sup>77</sup> It is more likely that sellers will consider denying services to nudniks only when dealing with lower value, or one-time consumers, and only when denying service is unlikely to cause the firm considerable reputational harm or expose it to sanctions.

As a result, in the case of affluent nudniks, rational sellers may often resort to the “preferential treatment” option. This, in turn, exacerbates the regressive distributional outcomes discussed above.

### *B. Who Benefits from Nudnik-Generated Information?*

Despite sellers’ attempts to silence nudniks before they complain, some nudniks squawk long and loudly enough to successfully generate reputational information that could potentially benefit others. But who are the consumers who benefit from nudnik-based information? Here, I would suggest that this type of information is likely to benefit mainly higher income, more educated consumers, because they are more likely to seek, obtain, and accurately assess that type of information.

Past studies have established that consumer demographics are correlated with internet access and use, information search, and purchase decisions.<sup>78</sup> For example, a survey of hundreds of U.S. internet users revealed that more educated consumers shop online more often than less educated consumers.<sup>79</sup>

Under a standard economics approach, rational consumers would engage in an active search until the perceived marginal costs of additional searching exceed the expected marginal benefits. Search costs include both monetary expenditures, such as payment to experts or intermediaries, and indirect costs, such as the time and effort spent searching.

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77. *Id.* at 932, 939–43 (noting that Edelman, Syed, and Carroll were consumers that firms could not ignore or deny, because they, and other nudniks like them, “tend to be *repeat players*”) (emphasis in original).

78. See, e.g., Chee Wei Phang et al., *Customers’ Preference of Online Store Visit Strategies: An Investigation of Demographic Variables*, 19 EUR. J. INFO. SYS. 344 (2010); Hairong Li et al., *The Impact of Perceived Channel Utilities, Shopping Orientations, and Demographics on the Consumer’s Online Buying Behavior*, 5 J. COMPUT.-MEDIATED COMM’N. 521 (1999).

79. Li et al., *supra* note 78.

Previous research suggests that more educated consumers typically incur lower search costs because of their ability to better trace and understand the relevant information.<sup>80</sup> Furthermore, more educated consumers typically gain more from conducting online searches, because of their higher ability to process and integrate the information they find into their decision-making processes.<sup>81</sup> It has also been suggested that, with fewer alternatives to choose from, low income shoppers may be less motivated to engage in deliberative searches of information on different products.<sup>82</sup>

If higher income, more educated consumers are likely to benefit more from conducting online searches and reading consumer reviews, nudnik-based activism is likely to benefit them disproportionately compared to lower income, less educated customers.

### C. Heterogenous Preferences

Even if nudnik consumers can successfully lead sellers to adjust their policies, products, or services, it is likely that some consumers will benefit from these changes more than others. In effect, the small minority of consumers who are nudniks may not typify or advocate for all other consumers. Different consumers have different buying and contracting needs. The question is, then, if nudnik consumers can benefit the general pool of consumers by driving the market to a higher quality equilibrium, or whether such activism is more likely to only benefit some groups of consumers, while increasing prices for all consumers.

The concern here is that nudnik consumers might have distinctive or idiosyncratic preferences, such that, in effect, they would be acting as independent entrepreneurs rather than enhance consumers' collective interests. This concern echoes debates on the

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80. Girish N. Punj & Richard Staelin, *A Model of Consumer Information Search Behavior for New Automobiles*, 9 J. CONSUMER RSCH. 366 (1983); Mark E. Slama & Armen Tashchian, *Selected Socioeconomic and Demographic Characteristics Associated with Purchasing Involvement*, 49 J. MKTG. 72 (1985). Note, however, that for high income shoppers, whose hourly income-generating potential is greater, the opportunity cost of time is likely to be higher than that of those with lower incomes.

81. See, e.g., Punj. & Staelin, *supra* note 80; E.J. Johnson & J. E. Russo, *Product Familiarity and Learning New Information*, 11 J. CONSUMER RSCH. 542 (1984); Lisa R. Klein & Gary T. Ford, *Consumer Search for Information in the Digital Age: An Empirical Study of Prepurchase Search for Automobiles*, 17 J. INTERACTIVE MKTG. 29 (2003); David Gilo & Ariel Porat, *Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 998 (2006).

82. Phang et al., *supra* note 78.

desirability of consumer class litigation.<sup>83</sup> Some argue that class action attorneys, are, in fact, entrepreneurs acting in accordance with their own self-interests rather than promoting the collective interests of consumers as a class, and that litigation decisions typically reflect class attorneys' economic interests instead of consumers'.<sup>84</sup> In a similar vein, nudnik customers' actions might promote their specific interests rather than those of the entire consumer group.

As we have seen, there is reason to believe that nudnik consumers have specific characteristics, concerns, and demographic traits. Their preferences might, then, differ from those of more passive, non-complaining consumers. As a result, nudniks may fail to accurately represent the preferences of the general consumer population.<sup>85</sup> Nevertheless, firms are likely to try to tailor their products and services to nudniks' preferences to avoid nudniks' complaints, rather than cater to the preferences of the more silent, acquiescent consumers.

There is no evidence suggesting that nudnik consumers demand reforms that benefit *all* consumers; nor is there reason to expect nudniks to typify the demands of *all* non-nudnik consumers. If sellers are unable to distinguish between nudniks and non-nudnik consumers, and do not want to lose nudniks as buyers, they would adjust their products or services to conform with nudniks' demands, but these changes may not conform to the overall preferences of consumers. At the same time, all consumers will likely pay higher prices for these "improved" products or services.

#### CONCLUSION

*Theory of the Nudnik* demonstrates the important yet underappreciated role of active consumers—those who complain, nag, and post bad reviews online—in disciplining market players. It also reveals that nudniks serve yet another important purpose of informing other consumers about firm misbehavior through various reputational

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83. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 536 (1991); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2088 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

84. See sources cited *supra* note 83.

85. For similar critiques of the informed minority theory, see, e.g., Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 748–50 (2008); A. Michael Spence, *Monopoly, Quality and Regulation*, 6 J. ECON. 417, 418 (1975); Cruz & Hinck, *supra* note 15, at 669–71.

channels. Yet, nudnik-based activism is also likely to have substantial distributional implications that should not be discounted or ignored.

This Response has addressed three main concerns. First, that higher income, more educated consumers are over-represented in the nudnik group, and disproportionately benefit from firms' preferential treatment of nudniks. Second, that higher income, better educated consumers are likely to enjoy the reputational information conveyed by nudnik customers more than their lower income, less educated counterparts. And third, that—to the extent that nudnik customers have idiosyncratic needs and preferences—firms will try to make reforms that address nudniks' specific preferences rather than those of the general consumer population. While this Response does not address any direct policy prescriptions, it suggests that the distributional implications of nudnik-based activism should be further explored before nudniks can be celebrated as the engines of market discipline or replace other consumer protection safeguards.

