the distributive IMPACTS of nudnik activism

Meirav Furth-Matzkin[[1]](#footnote-2)\*

# Introduction

We have all encountered nudniks in action.[[2]](#footnote-3) They complain when the music is too loud, post bad reviews online when their coffee is not hot enough, write angry letters, or threaten to switch their service provider if they have to wait too long on hold. These 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” (the Nudnik Article), Professors Yonathan Arbel and Roy Shapira propose that nudnik customers should be lauded for acting as engines of market discipline, arguing that nudnik consumers typically generate significant social benefits.[[3]](#footnote-4) According to Arbel and Shapira, the action s of nudniks can draw attention to seller misconduct, thereby imposing reputational costs that complement, and sometimes substitute for, direct legal sanctions.[[4]](#footnote-5)

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 lacunae by serving as *private enforcers* of consumers’ rights.[[5]](#footnote-6) Although firms constantly attempt to silence nudniks using a myriad of tools and technological advances, 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. This response seeks to complicate the theory, however, by considering the distributional implications of disciplining markets through nudnik-based activism. As presented by the authors, nudnik consumers can prompt sellers to enhance their quality of service for *all* consumers,[[6]](#footnote-7) and to generate “positive spillovers that reverberate throughout the economy.”[[7]](#footnote-8) 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 addresses the missing distributional aspect, suggesting that nudnik activism (and sellers’ responses to it) may not affect all consumers uniformly. Rather, over reliance on consumer nudniks, or activists, to discipline sellers could yield regressive distributional outcomes.

This response addresses three central 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 consumers *ex ante*, before they are even able to speak out.[[8]](#footnote-9) As a result, sellers often treat nudniks more favorably than they do non-complainers, seeking either to either silence them or to keep their business. Therefore, nudniks’ demographic traits may be significant from a distributional perspective. Empirical evidence suggests that it is often upper-class, better educated customers who feel entitled enough to complain. As a result, a nudnik-based segmentation of consumers could possibly 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 identify who benefits from this reputational information. Here, there is reason to believe that higher income, well-educated customers are likely to disproportionately obtain access, and consequently benefit, from the informational spillovers that nudniks disseminate. Third, if firms change their behavior or products 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 engendered by this theory, followed by the concluding remarks in Part III.

# I. Nudnik Theory

## The Disciplinary Role of Nudnik-Based Activism

The Theory of the Nudnik article extols the disciplinary power of nudnik consumers. Nudniks are generally defined as those nagging customers who complain, complete satisfaction surveys, demand to speak with managers, post detailed online reviews, and file lawsuits when their transactional expectations are not met.[[9]](#footnote-10) While nudniks are often ridiculed and mocked by society as nagging and petty complainers, Arbel and Shapira take a more position stance toward nudniks, explaining that they typically generate positive spillovers or externalities. Nudniks can provide reputational information that can benefit consumers and facilitate comparison shopping, while deterring sellers from behaving unfairly. The authors contend that nudnik consumers can “effectively solve some of the collective action problems that plague consumer markets.”[[10]](#footnote-11) According to the authors, nudniks can push sellers to meet (or go beyond) their contractual obligations.[[11]](#footnote-12)

In defining nudnik consumers, Arbel and Shapira identify two main characteristics shared by them: *activism*, i.e., nudniks’ inclination to act when their transactional expectations are not met; and an *idiosyncratic utility function*, that is, nudniks’ ability to derive satisfaction from pursuing grievances, even when their actions are not cost-beneficial from a purely monetary perspective. Nudniks may be perceived as “willing punishers,” of individuals, people who are willing to punish wrongdoers for misbehaving even at a cost to themselves.[[12]](#footnote-13)

Not limited to describing nudnik consumers, the Theory of the Nudnik also explains how nudnik-based activism can discipline sellers. Drawing on marketing and psychological literature on consumer complaining behavior (CCB), Arbel and Shapira show that consumer complaints can generate positive spillovers. Nudniks often express their grievances in public, disseminating information about seller misbehavior. This information then enables other consumers to decide whether or not to interact with that particular seller.[[13]](#footnote-14) According to the Theory of the Nudnik, active consumers can alert other consumers to seller misbehavior through four main channels: litigation (including class actions), media coverage, complaints to regulators (such as the CFPB or the FTC), or direct peer-to-peer information, circulated mainly through online customer reviews. In addition, the authors suggest that nudniks can also discipline sellers’ internal behavior by driving sellers to monitor their business performance.[[14]](#footnote-15) 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 lead to reforms in sellers’ policies or practices.[[15]](#footnote-16)

Existing theories of market discipline posit that certain subsets of consumers could discipline sellers, preventing them from behaving unfairly. Most prominently, the informed minority theory, which has dominated scholarly and policy approaches for decades, posits that even if most consumers do not read standard form contracts, there is a sufficiently large group of consumers who do read the fine print that sellers are thereby inhibited from presenting onerous terms.[[16]](#footnote-17) This informed minority of readers can help maintain a competitive market by incentivizing sellers to behave fairly, because sellers often cannot distinguish between informed and uninformed consumers. In contrast to the informed minority theory and other existing theories of market discipline, the Theory of the Nudnik does not rely on a significant number of informed consumers to hold sellers accountable. Indeed, according to the authors, “one nudnik may be enough.”[[17]](#footnote-18) This is because “[i]n today’s interconnected world, a single nudnik’s squawk can reach numerous other consumers and convince them to take their business elsewhere.”[[18]](#footnote-19)

Arbel and Shapira acknowledge that not all nudnik activities generate positive spillovers. Some complaints are frivolous or idiosyncratic. Others are the result of nudnik consumers’ inflated or unrealistic expectations. Yet, the authors contend that nudnik activism is, in general, welfare-enhancing, and that most nudnik consumers operate in good faith, identifying actual flaws in sellers’ products, services, or policies. 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.[[19]](#footnote-20)

## The Effects of Big Data on Nudnik-based Activism

As Arbel and Shapira recognize, the rise of the digital age, and social media in particular, have increased nudniks’ ability to discipline sellers by amplifying their signals.[[20]](#footnote-21) Yet, at the same time, these technological advances enable firms to identify, target, and silence nudniks.[[21]](#footnote-22) Indeed, firms increasingly use big data tools, including algorithmic intelligence, to study the widely available troves of data on consumer behavior. They then use predictive analytics models to estimate each consumer’s tendency to act publicly when dissatisfied.[[22]](#footnote-23)

According to the authors, sellers typically track consumers along three nudnik-relevant dimensions: their past complaining behavior, their likelihood of complaining in the future, and the impact that their complaint is likely to have on others.[[23]](#footnote-24) Sellers collect, store, and analyze data about each customer’s interactions with the firm, including past dealings, requests, complaints, and survey responses.[[24]](#footnote-25) Consumer data increasingly includes much more than the customer’s interactions with the particular seller, and this information is shared among multiple sellers, typically by data brokers, who collect and sell information about consumers’ demographics, locations, and financial and social status to the sellers.[[25]](#footnote-26)

In addition, sellers increasingly score consumers on various metrics, which then enable them to predict consumer behavior.[[26]](#footnote-27) In particular, sellers often use “customer lifetime value” score to estimate the probability that a customer will “bad-mouth a company.”[[27]](#footnote-28) As Arbel and Shapira recognize, “[t]he proliferation and growing sophistication of these scores allows firms to target nudniks more accurately than ever before.”[[28]](#footnote-29) Finally, sellers also track consumers’ social influence scores, based, for example, on their followers on social media and other indicia.[[29]](#footnote-30) Sellers can 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.[[30]](#footnote-31)

Drawing on big data, sellers can target nudniks and disarm them more easily than ever before. To prevent nudniks from causing reputational harm, sellers can bribe nudnik consumers with preferential treatment. Technological advances allow sellers to identify nudniks who need to be appeased and to understand how best to treat them. Sellers can then tailor their remedy to the specific consumer.[[31]](#footnote-32)

By using technology to identify and disarm nudniks early in the process, sellers can significantly diminish the legal and reputational risks posed by nudnik customers. The ability to silence nudniks before they squawk significantly reduces firms’ exposure to reputational risks.[[32]](#footnote-33)

The authors discuss the implications for consumers’ wellbeing of sellers’ use of big data to silence nudnik consumers. They suggest that since sellers are increasingly able to target nudniks and silence them before they manage to voice their complaints, nudnik activism may lose its ability to deter sellers through recourse to reputational channels. In light of this possibility, Arbel and Shapira make several policy proposals aimed at offsetting sellers’ attempts to silence nudniks.

The authors’ expectations about nudnik behavior and sellers’ reactions to it are enlightening and reasonable. However, the focus on the implications of these practices for consumers’ overall welfare overlooks the potential distributional implications of nudnik-based activism and screening.[[33]](#footnote-34) This response now addresses this issue.

# II. Three Distributional Concerns

## Who are the Nudniks Who Get Preferential Treatment?

### Nudniks’ Demographic Profiles

The advances in big data and algorithmic intelligence increasingly allows firms to identify and target nudnik consumers *ex ante*, before their complaints are heard by others. To prevent nudniks from disseminating harmful reputational information, sellers can treat nudniks more favorably than non-nudnik consumers. Nudniks’ demographic profiles may therefore be significant from a distributional perspective. If sellers treat nudniks more favorably, nudnik customers are likely to disproportionately benefit from nudnik-based activism compared to less active consumers. What, then, is known about nudnik consumers’ characteristics?

Arbel and Shapira paint a rich and colorful picture of the nudniks and their attributes. They explain that “these crusading consumers tend to share certain values and innate personality traits.”[[34]](#footnote-35) For example, they submit that some nudniks are simply more assertive and aggressive than most other consumers,[[35]](#footnote-36) while others have a strong commitment to honoring contracts,[[36]](#footnote-37) and some operate out of spite, feeling they have been wronged or disrespected.[[37]](#footnote-38)

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 $4 overcharge is not worth our time; for nudniks, it comes instinctively.”[[38]](#footnote-39) 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.[[39]](#footnote-40) These include sentiments towards the fairness of sellers’ behavior or the terms of the deal, or disappointment when their transactional expectations are not met.

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 (CCB) may provide some insights on this issue. Empirical studies conducted in this area reveal that complaining, more active customers are typically younger, better educated, and have higher incomes than most passive consumers.[[40]](#footnote-41)

Already in 1972, a comprehensive survey of more than 17,000 consumers in Canada found that those who complained (by writing letters to governmental or consumer service agencies) were mostly middle-aged, well- educated, and affluent consumers.[[41]](#footnote-42) A comprehensive survey of U.S. consumers, conducted in 1975 to explore consumers’ complaints in the context of product deficiencies, yielded similar results, with less educated, lower income consumers under-represented throughout the complaint process.[[42]](#footnote-43) The data showed that problem perception rates were lowest among households from lower socioeconomic groups, and highest among households from higher socioeconomic groups.[[43]](#footnote-44) The survey also found that better educated consumers tended to voice their complaints more frequently than less educated consumers.[[44]](#footnote-45)

Sociologists have also tested the relationship between consumer dissatisfaction and their complaint behavior.[[45]](#footnote-46) For example, Pennsylvania State University researchers surveyed 1,215 U.S. consumers about their consumption experiences, asking respondents to recall their most recent negative experience in the marketplace and to report their reaction to that experience. The study found that consumers’ most common response to dissatisfaction was to complain to the store manager, clerk, or company representative.[[46]](#footnote-47) Notably, the researchers observed that consumers who took action as a result of their dissatisfaction belonged to a “distinct socioeconomic group.” They were better educated and earned higher incomes than the other, passive, respondents.[[47]](#footnote-48) According to the study, those who decided not to take action regardless of their dissatisfaction “reported more financial strain” than the more assertive consumers.[[48]](#footnote-49) The authors concluded that overall, assertive consumers represented a “socially […] up-scale group.”[[49]](#footnote-50)

CCB studies conducted since these studies from the 1970s have consistently shown that complainers are typically more affluent, well-educated, and young compared to non-complainers.[[50]](#footnote-51) For example, in 2003, Heung and Lam surveyed 225 hotel customers in Hong Kong about their complaint behavior. Respondents were asked how likely they were to complain, warn their families and friends, or turn to the mass 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 most complainers (almost 70%) had a university degree or higher, compared to only 12% of the non-complainers.[[51]](#footnote-52)

Why do higher income, better educated consumers tend to complain more often than lower income and less educated customers? 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 they have purchased.[[52]](#footnote-53) 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.[[53]](#footnote-54) This socioeconomic knowledge gap is augmented by the “digital divide;” that is, the disparities in internet use along socio-demographic dimensions, including education, income, and age.[[54]](#footnote-55)

A second reason for a higher level of complaints among higher income, more educated customers is that they generally have higher transactional expectations,[[55]](#footnote-56) a higher sense of entitlement,[[56]](#footnote-57) and a greater willingness to bargain over payoffs[[57]](#footnote-58) than do consumers from lower socioeconomic backgrounds. Consequently, they are also more likely to voice their dissatisfaction when their transactional expectations are not met.[[58]](#footnote-59) Lower income, less educated consumers, and consumers belonging to minority groups, generally feel less entitled, and, as a result, are more likely to tolerate unsatisfactory goods and services and less likely to complain compared to consumers with higher socioeconomic backgrounds.[[59]](#footnote-60)

 Notably, race and gender were also found to influence what people expect and feel they deserve, with African-Americans and females feeling significantly less entitled than do Caucasians and males.[[60]](#footnote-61) For example, a survey conducted in 34 U.S. cities in 1975 found that, controlling for income and socioeconomic status, African-American households had significantly lower problem perception rates than did Caucasion households (15.4% compared to 21.8%).[[61]](#footnote-62) The study further found that “whites complain more than blacks within each SES category.”[[62]](#footnote-63) In the particular context of contracts, evidence suggests that African-American and female buyers, as well as lower income consumers, are more likely to feel bound by standardized agreements and to view the four corners of these agreements as the final word.[[63]](#footnote-64)

Finally, consumers are more likely to complain when the chances of obtaining redress from the seller are higher.[[64]](#footnote-65) The perception of a store’s willingness to provide a remedy is one of the most significant correlates of complaining behavior.[[65]](#footnote-66) The perceived benefits and costs of complaining have been shown to be critical components of the complaining process; consumers appear to complain primarily when they believe their efforts are likely to be successful.[[66]](#footnote-67)

This generates a vicious cycle. If low income, less educated consumers are accustomed to having their complaints rejected, 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.[[67]](#footnote-68)

### Firms Disproportionately Benefit Those Who Are Already Better Off

Firms are more likely to provide a remedy and address consumers’ complaints more carefully when dealing with their most valuable customers.[[68]](#footnote-69) They often decide on the remedy based on algorithmic intelligence which helps predict consumers’ responses to different levels of redress. This informs them of the likelihood of losing customers if full, partial, or no concession is made.[[69]](#footnote-70) As discussed above, customers’ expectations are correlated with income and education. Sophisticated consumers with the highest ability to pay are those more likely to be dissatisfied if no (or even partial) redress is provided.

Companies also increasingly incorporate assessments of consumers’ online social influence over other customers into their redress decisions and complaint resolutions processes.[[70]](#footnote-71) Social influence can be measured by the number of Twitter followers or Facebook friends a consumer has, for example.[[71]](#footnote-72) To the extent that higher income, more educated consumers tend to have more online social influence than do 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 internal data and external information such as the customer’s e-commerce purchasing history, the consumer’s “net worth,” or how profitable a consumer is likely to be.[[72]](#footnote-73)

This observation is supported by a series of qualitative interviews I conducted with retail sellers in the Chicago area as part of a research project on retailers’ implementation of their formal policies vis-à-vis consumers. In these interviews, I asked store clerks about their experiences with buyers for the purpose of studying the relationships between retail stores’ formal policies and their implementation by store clerks 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.”[[73]](#footnote-74)

If higher income, better educated customers receive preferential treatment by virtue of being nudniks, they are likely to disproportionately benefit from nudnik-based segmentation, at the expense of the remaining, lower income, less educated consumers, and those belonging to minority groups.

### Sellers’ Nudnik-Targeting Techniques

Notably, as Arbel and Shapira demonstrate, sellers have several ways in which they can respond to the nudnik threat. They can treat nudniks more favorably, but they can also drown out nudniks’ voices by increasing the volume of positive reviews or limiting consumers’ ability to complain after the purchase.[[74]](#footnote-75) As the authors 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.”[[75]](#footnote-76) Finally, sellers may disarm nudniks by refusing to do business with them to begin with. For example, some hosts on Airbnb reportedly refuse to rent out their homes to guests who tend to write negative online reviews.[[76]](#footnote-77)

Given that nudniks are typically higher income, better educated consumers, refusing to provide service to them is unlikely to yield regressive distributional outcomes. Yet, it is important to bear in mind that higher income consumers usually provide more value to the seller. Consequently, sellers are unlikely to stop doing business with such consumers even if they are nudniks.

For example, take the nudnik poster children Arbel and Shapira discuss in their Article, Harvard Business Professor Ben Edelman, Chicago businessman Hassan Syed, and country music singer Dave Carroll, all of whom are consumers to whom firms are unlikely to refuse to offer their services.[[77]](#footnote-78) It is more likely that sellers will consider denying service to nudniks only when dealing with lower-value, or one-time consumers, and only when denying service is unlikely to cause them considerable reputational harm or expose them to legal sanctions.

In the case of higher income nudniks, rational sellers will likely often resort to the “preferential treatment” option, thereby generating regressive distributional outcomes. Receiving preferential treatment *ex ante*, the higher income consumers will likely be cross-subsidized by the lower income consumers, who would not even get to benefit from the informational and reputational value of nudnik consumers because the latter would be silenced before they could voice their complaints. This phenomenon mirrors the debate on class action litigators as behaving opportunistically instead of deterring firms from misbehaving. Some consistently argue that class action attorneys, are, in fact, entrepreneurs acting in accordance with their own self-interests.[[78]](#footnote-79) This conventional wisdom further posits that there is substantial social harm arising from the fact that class actions are often associated with high agency costs. The concern is that litigation decisions will typically reflect the attorney’s economic interests instead of those of the class.[[79]](#footnote-80)

## Who Benefits from Nudnik-Generated Information?

Despite sellers’ attempts to screen out nudniks and silence them *ex ante*, certain nudniks do manage to voice their complaints. Some nudniks squawk loudly and long enough to successfully generate reputational information that could benefit other consumers. However, the important questions are whether, when, and to what extent other consumers obtain access to the relevant information and incorporate it in real time into their decision-making processes. And, more importantly in this context, who are the consumers most likely to benefit from this nudnik-generated informational flow? Here, I would suggest that nudnik-based information is most likely to benefit higher-income, more educated consumers, because they are more likely to seek, obtain, and accurately assess the reputational information generated by nudnik consumers than are lower income, less educated consumers.

Past studies have established that consumer demographics are correlated with internet access and use, information search, and purchase decisions.[[80]](#footnote-81) For example, a survey of 999 U.S. internet users revealed that better educated consumers were more likely to shop online frequently than lower educated consumers.[[81]](#footnote-82)

Under a standard economics approach, rational consumers would engage in an active search until the perceived marginal costs of additional searching would exceed the expected marginal benefits. Search costs include both monetary expenditures (e.g., payment to experts or intermediaries) and indirect costs, such as the time and effort spent searching. Previous research suggests that more educated consumers typically incur lower search costs because of their ability to better trace and understand the relevant information. At the same time, education is positively correlated with income, and higher income consumers typically have higher opportunity costs. 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,.[[82]](#footnote-83) Finally, higher educated consumers typically gain more from conducting online information searches, because of their superior ability to process and integrate the information they find into their decision-making processes.[[83]](#footnote-84) Furthermore, more educated and experienced consumers typically have a greater ability to ignore irrelevant information.[[84]](#footnote-85) 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.[[85]](#footnote-86)

 To the extent that higher income, better 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.

## Heterogenous Preferences

Even if nudnik consumers sometimes 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.

Thus, the concern here is that nudnik consumers might have distinctive, or idiosyncratic preferences, in effect, acting as independent entrepreneurs. 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.[[86]](#footnote-87) Nevertheless, firms are likely to try to tailor their products and services to the nudnik’s preferences to avoid the consequences of nudnik’s responses, rather than to the preferences of the more silent, acquiescent consumers.

 There is no evidence suggesting that nudnik consumers demand reforms that benefit all consumers. Instead, it can be assumed that nudniks demand changes that cater to their particular needs and preferences. The point here is that there is no 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 there is no evidence suggesting that these changes will conform to the overall preferences of consumers merely because nudniks demand them.

# Conclusion

The 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 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, better 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 their specific preferences, rather than those of the general population of consumers. This response does not address any direct policy prescriptions. Rather, the main takeaway is 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.

1. \*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 student editors for their invitation and engagement. Many thanks to Nikki Miller, Robert Moore, and Nicole Patolai for excellent research assistance. [↑](#footnote-ref-2)
2. 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). See Arbel & Shapira, Section I.A., for more details on the nudnik terminology. [↑](#footnote-ref-3)
3. Arbel & Shapira, *supra* note 1, at 933. [↑](#footnote-ref-4)
4. ,*Id.*  at 931. [↑](#footnote-ref-5)
5. *Id.*  at 939. [↑](#footnote-ref-6)
6. Yonathan A. Arbel & Roy Shapira, *Consumer Activism: From the Informed Minority to the Crusading Majority,* 69 DePaul. L. Rev. 601, 604 (2020). [↑](#footnote-ref-7)
7. Arbel & Shapira, *supra* note 1, at 931. [↑](#footnote-ref-8)
8. *Id.* at 960. [↑](#footnote-ref-9)
9. *Id*. at 931. [↑](#footnote-ref-10)
10. *Id.* at 933 [↑](#footnote-ref-11)
11. *Id.* at 936. [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. *Id.* at 945. [↑](#footnote-ref-14)
14. *Id.* at 946. [↑](#footnote-ref-15)
15. *Id*. [↑](#footnote-ref-16)
16. 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, 655 (1979). *But see* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1,4(2014) (finding that, at least in the context of EULAs, 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, 647-48 (1996). [↑](#footnote-ref-17)
17. Arbel & Shapira, *supra* note 1, at 953. [↑](#footnote-ref-18)
18. *Id*. [↑](#footnote-ref-19)
19. Arbel & Shapira, *supra* note 1, at 957 n.119. [↑](#footnote-ref-20)
20. *Id.* at 960–961. [↑](#footnote-ref-21)
21. *Id.*  [↑](#footnote-ref-22)
22. *Id.*  [↑](#footnote-ref-23)
23. *Id.* at 962. [↑](#footnote-ref-24)
24. *See, e.g*., Lakshman Jha, Customer Relationship Management: A Strategic Approach, 3 (2006). [↑](#footnote-ref-25)
25. *See, e.g*., Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer ‘Haves’ from ‘Have-Nots’*, 2014 Mich. St. L. Rev. 1411 at 1419–33 (2014); Kalev Leetaru, *The Data Brokers So Powerful Even Facebook Bought Their Data – But They Got Me Wildly Wrong*, Forbes (Apr. 5, 2018), <https://www.forbes.com/sites/kalevleetaru/2018/04/05/the-data-brokers-so-powerful-even-facebook-bought-their-data-but-they-got-me-wildly-wrong/#4a4e47ef3107>; 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/ (finding that cellphone apps are filled with trackers that send your real-time location to data brokers who then sell that data to third parties); Steven Melendez & Alex Pasternick, *Here Are the Data Brokers Quietly Buying and Selling Your Personal Information*, FastCompany (Mar. 2, 2019), <https://www.fastcompany.com/90310803/here-are-the-data-brokers-quietly-buying-and-selling-your-personal-information> (asserting that with the advent of the smartphone, companies can easily determine if you’ve just gone through a break-up, if you’re pregnant or trying to lose weight, whether you’re an extrovert, what medicine you take, and where you’ve been). [↑](#footnote-ref-26)
26. Arbel & Shapira, *supra* note 1, at 963. [↑](#footnote-ref-27)
27. *Id.* at 963 n.143; Khadeeja Safdar, *On Hold for 45 Minutes? It Might Be Your Secret Customer Score*, Wall St. J. (Nov. 1, 2018), <https://www.wsj.com/articles/on-hold-for-45-minutes-it-might-be-your-secret-customer-score-1541084656> (stating that companies utilize scores that measure the likelihood a person will bad-mouth a company when prioritizing customer complaints). [↑](#footnote-ref-28)
28. Arbel & Shapira, *supra* note 1, at 964. [↑](#footnote-ref-29)
29. *Id*. [↑](#footnote-ref-30)
30. *Id*. [↑](#footnote-ref-31)
31. *Id*. at 965–966; Schmitz, *supra* note 24, at 1429 (exploring how sellers have used gathered information to provide consumers with individualized deals and remedies). [↑](#footnote-ref-32)
32. Arbel & Shapira, *supra* note 1, at 971. [↑](#footnote-ref-33)
33. Arbel & Shapira, *supra* note 1, at 960 (for example, the authors explain that “the earlier the seller can identify and silence a nudnik, […] the less likely other consumers are to enjoy the positive spillovers from nudnik behavior.”). [↑](#footnote-ref-34)
34. *Id.* at 938. [↑](#footnote-ref-35)
35. *Id* (citing Marsha L. Richins, *A Multivariate Analysis of Responses to Dissatisfaction*, 15 J. Acad. Marketing Sci. 24 (1987). [↑](#footnote-ref-36)
36. *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. Marketing Sci. 172 (1998)). [↑](#footnote-ref-37)
37. Arbel & Shapira, *supra* note 1, at 938. [↑](#footnote-ref-38)
38. *Id*. [↑](#footnote-ref-39)
39. Similarly, a person’s decision of whether to perform or breach a contract may be motivated by fairness concerns. *See*, *e.g.*, Oren Bar-Gill & Omri Ben-Shahar, *Threatening an Irrational Breach*, 11 Sup. Ct. Econ. Rev. 143, 145 (2004). [↑](#footnote-ref-40)
40. *See, e.g.*, Gil Luria, Asaf Levanon, Dana Yagil & Iddo Gal, *Status, National Culture and Customers’ Propensity to Complain*, 126 Soc. Indicators Rsch. 309 (2016) (finding that customers with higher social status based on gender, education, and age recognize more service problems and complain more frequently); Rex H. Warland, Robert O. Herrmann & Jane Willits, *Dissatisfied Consumers: Who Gets Upset and Who Takes Action*, 9 J. Consumer Aff. 148 (1975)(finding that consumers who are younger, better educated, higher income earners, and more liberal, are more likely to take action expressing their dissatisfaction when their transactional expectations are not met); Vincent Heung & Terry Lam, *Customer Complaint B*e*haviour Towards Hotel Restaurant Services*, 15 Int’l J. Contemp. Hosp. Mgmt. 283, 288 (2003) (finding that “female, young and well-educated customers tend to complain more”); Diamond et al., *Consumer Problems and Consumerism: Analysis of Calls to a Consumer Hot Line*, 40 J. Marketing,  58 (1976); Landon, *The Direction of Consumer Complaint Research*, 7 Advances in Consumer Rsch. 335 (1980); F. Kelly Shuptrine & Gerhard Wenglorz, *Comprehensive Identification of Consumers’ Marketplace Problems and What They Do About Them*, 8 Advances in Consumer Rsch. 687 (1981); Jacob Jacoby & J.J. Jaccard *The Sources, Meaning, and Validity of Consumer Complaint Behavior: A Psychological Analysis*, J. Retailing, 57 (1981) (finding that customers with higher education were more likely to complain); Michelle A. Morganosky & Hilda M. Buckley, *Complaint Behavior: Analysis By Demographics, Lifestyle, and Consumer Values*, 14 Advances Consumer Rsch. 223 (1986) (finding that education is one of the significant characteristics of complainers); Ralph L. Day & Laird E. Landon, *Toward a Theory of Consumer Complaining Behavior* (1977) (finding that those who publicly complained were younger and had higher education and income than non-complainers); William O. Bearden & J. Barry Mason, *An Investigation of Influences on Consumer Reports*, 11 Advances Consumer Rsch. 490 (1984) (finding that complaint behavior was positively associated with income and education); Alan R. Andreasen, *Consumer Responses to Dissatisfaction in Loose Monopolies*, 12 J. Consumer Rsch. 135 (1985); Best & Andereasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 Law Soc’y Rev. 701(1977); Michelle A. Morganosky & Hilda M. Buckley, *Complaint Behavior: Analysis by Demographics, Lifestyle, and Consumer Values*, 14 Advances Consumer Rsch. –. 223-26 (1987) (finding that higher income and better educated consumers were reportedly significantly more likely to complain and return goods to stores than lower income and less educated consumers); Liefeld et al., *Demographic Characteristics of Canadian Consumer Complaints*, 9 J. Consumer Aff.73 (1975); Garrett & Toumanoff, *Are Consumers Disadvantaged or Vulnerable? An Examination of Consumer Complaints to the Better Business Bureau,* 44 J. Consumer Aff.3 (2010) (finding that income and high school graduation rates had a significantly positive relationship with complaining to the Better Business Bureau); David L. Jones et al., *Consumer Complaint Behavior Manifestations for Table Service Restaurants: Identifying Sociodemographic Characteristics, Personality, and Behavioral Factors,* 26 J. Hosp. & Tourism Rsch. 105 (2002). Less consistent results have been found when segmenting by gender, race, or marital status. *See, e.g.,* David L. Jones et al., *Consumer Complaint Behavior Manifestations for Table Service Restaurants: Identifying Sociodemographic Characteristics, Personality, and Behavioral Factors,* 26 J. Hosp. & Tourism Rsch. 105 (2002); Teresa Fernandes & Filipa Fernandes (2018) *Sharing Dissatisfaction Online: Analyzing the Nature and Predictors of Hotel Guests Negative Reviews*, 27 J. Hosp. Mktg. & Mgmt., 127-150 (finding, based on a sample of 1,191 Tripadvisor hotel reviews, that women complain on service significantly more often than men, while men are more likely to complain on parking); Heung & Lam, *Customer Complaint B*e*havior Towards Hotel Restaurant Services*, 15 Int’l J. Contemp. Hosp. Mgmt. 283, 288 (2003) (finding that “female, young and well-educated customers tend to complain more”). [↑](#footnote-ref-41)
41. Liefeld et al., *supra,* note 39. Similarly, a 1975 survey has found that those who took action in view of dissatisfaction with a product they had purchased had higher incomes, were primarily middle-aged, and were more likely to own their homes than those who did not take action (*see* Joseph B. Mason & Samuel H. Himes, *An Explanatory Behavioral and Socio-Economic Profile of Consumer Action About Dissatisfaction with Selected Household Appliances*, 7 J. Consumer Aff. 121 (1973). [↑](#footnote-ref-42)
42. Arthur Best & Alan P. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 Law & Soc’y Rev. 701, 707 (1977). [↑](#footnote-ref-43)
43. *Id.* at 707. [↑](#footnote-ref-44)
44. Best & Andresean, *supra* note 42 at 722. [↑](#footnote-ref-45)
45. Warland et al., *supra* note 39. [↑](#footnote-ref-46)
46. *Id.* at 152. [↑](#footnote-ref-47)
47. *Id.* at 155. [↑](#footnote-ref-48)
48. *Id.* at 159. [↑](#footnote-ref-49)
49. *Id.* at 154. [↑](#footnote-ref-50)
50. *See, e.g*., Bearden & Mason, *supra* note 39 (finding, based on a survey of 749 members of a regional consumer panel, that respondents reporting a significant problem and taking public action were younger with higher incomes); Kjell Gronhaug & Gerald Zaltman, *Complainers and Noncomplainers Revisited: Another Look at the Data*, 8 Advances Consumer Rsch. 83 (1981) (finding, based on surveys of 2,849 consumers, that active complainers had more buying experience, higher income, and better education than non-complainers, and that complainers also tended to be younger than noncomplainers); William O. Bearden, *Profiling Consumers Who Register Complaints Against Auto Repair Services*, 17 J. Consumer Aff. 315 (1983) (finding, based on a longitudinal study of consumers, that complainers tended to be younger, to have higher incomes, to trust others less on average, and to engage in more consumerism activities, compared to non-complainers); Mel S. Moyer, *Characteristics of Consumer Complainants: Implications for Marketing and Public Policy*, 3 J. Pub. Pol'y & Mktg. 67 (1984) (finding, based on a series of interviews with 956 consumers, that people in their middle years, parents, and those with superior education, jobs, and incomes, tended to be more likely to complain); Sara J. Solnick & David Hemenway, *Complaints and Disenrollment at a Health Maintenance Organization*, 26 J. Consumer Aff. 90 (1992) (finding that patients who registered complaints were older than typical members; and were more likely to be female and to live in neighborhoods with higher incomes); Keith Crosier et al., *The Risk of Collateral Damage in Advertising Campaigns*, 15 J. Mktg. Mgmt. 837 (1999) (finding that complainants had above-average education, managerial or professional status, and above-average income); Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 Wis. L. Rev. 1405, 1448–51 (1985) (providing anecdotal evidence that the relatively poor buyers are least likely to complain about defective goods). [↑](#footnote-ref-51)
51. Heung & Lam, *supra,* note 39. *See also* Terry Lam & Vienna Tang, *Recognizing Customer Complaint Behavior: The Case of Hong Kong Hotel Restaurants*, 14 J. Travel & Tourism Mktg. 69 (2003) (studying complaint behavior among Hong Kong consumers, finding that better educated and higher income restaurant customers tended to complain more than those who were less educated and had lower incomes); Saeideh Bakhshi et al., *Demographics, Weather and Online Reviews: A Study of Restaurant Recommendations*, *in* [WWW '14: Proceedings of the 23rd international conference on World wide web](https://dl.acm.org/doi/proceedings/10.1145/2566486) 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). [↑](#footnote-ref-52)
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 (2018) (showing that “people 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”). [↑](#footnote-ref-53)
53. Warland, et. al.*, supra* note 39 at 160. [↑](#footnote-ref-54)
54. *See, e.g.*, Suzanna Willis and Bruce Tranter, *Beyond the “Digital Divide” - Internet Diffusion and Inequality in Australia*, 42 J. Socio. 43 (2006) (finding, based on an Australian national survey data, that household income, age, education, and occupational class remain key dimensions 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 and Andrew Wyckoff eds., 2004); Gianni Zappala, *The Economic and Social Dimensions of the New Economy*, 35 Austl. J. Soc. Issues, 317 (2000). For a general overview of the digital divide, *see* Pippa Norria, Digital Divide: Civic Engagement, Information Poverty, and the Internet (Cambridge University Press, 2001). [↑](#footnote-ref-55)
55. *See, e.g.*, Jie Hu, Yuan Cao, Philip R. Blue, & Xiaolin Zhou, *Low Social Status Decreases the Neural Salience of Unfairness*, 8 Frontiers in Behav. Neuroscience 402 (2014) (demonstrating that a lower position within the social hierarchy is associated with a lesser inclination to believe that one is being treated unfairly); Warland, et. al.*, supra* note 39 at 157-59. [↑](#footnote-ref-56)
56. *See generally,* Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement and Narcissism*, 40 Personality & Soc. Psych. Bulletin 34 (2014) (demonstrating that higher socioeconomic class status is associated with higher levels of entitlement); Brenda Major, *From Social Inequality to Personal Entitlement: the Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 Advances in Exper. Soc. Psych. 293 (1994) (arguing that objectively disadvantaged groups experience lesser senses of personal entitlement); Laurie T. O’Brien & Brenda Major, *Group Status and Feelings of Personal Entitlement: The Roles of Social Comparison and System-justifying Beliefs, in* John T. Jost, Aaron C. Kay, & Hulda Thorisdottir, Series in Pol. Psych.: Soc. & Psych. Bases Ideology & System Justification427 (2009) (explaining that one’s sense of personal entitlement is impacted by both system justification and social comparison processes, by which low-status groups ultimately experience lesser senses of entitlement). [↑](#footnote-ref-57)
57. Candace N. Joyner, *Entitled to Expect: System Justification Theory, Socioeconomic Status, and the Ultimatum Game* (Spring 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). [↑](#footnote-ref-58)
58. *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). [↑](#footnote-ref-59)
59. *See, e.g.*, Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 Am. Soc. Rev. 747 (2002)(suggesting that middle and upper income white families raise their children with a sense of entitlement and assertiveness to get what they want later in life, while childrearing strategies among the lower classes and racial minorities tend to result in a lack of assertiveness and a lesser sense of entitlement, thereby limiting their access to educational and job opportunities later in life). [↑](#footnote-ref-60)
60. *See generally, e.g.*, 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); 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). African-American and lower-income people were also found to be less likely to seek legal help when encountering civil legal problems. *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2016). [↑](#footnote-ref-61)
61. Best & Andreasen, *supra* note 42, at 707. [↑](#footnote-ref-62)
62. *Id.* at 723-24. [↑](#footnote-ref-63)
63. *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. Choplin, Debra Pogrund Stark, & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 Law & Psyc. Rev. 61, 94 (2011) (presenting findings indicating that “those with lower status are more likely to agree and accept senseless explanations . . . Those with higher status seem to be more vigilant, perhaps in an effort to protect their higher status”); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 Wm. & Mary L. Rev. 445 (1994) (arguing that social class is an important determinant of one’s sense of entitlement, and that people with a higher sense of entitlement are more likely to bargain and to require more from their contracting parties during contract negotiations). [↑](#footnote-ref-64)
64. *See, e.g.*, Donald Granbois, John O. Summers, and Gary L. Frazier, *Correlates of Consumer Expectation and Complaining Behavior* *In* Consumer satisfaction, dissatisfaction and complaining behavior , 18 (R.L Day, ed., 1977); Ralph L. Day & Muzaffer Bodur, *Consumer Response to Dissatisfaction with Service and Intangibles*, 5 Advances Consumer Rsch. 263-272 (1978); 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 (1983)[hereafter: Richins 1983]; Marsha L. Richins, *An Analysis of Consumer Interaction Styles in the Marketplace*, 10 J. Consumer Rsch. 73, 81 (1983); Ralph L. Day& Muzaffer. Bodur, *Consumer Response to Dissatisfaction with Service and Intangibles*, 5 Advances in Consumer Rsch. 263-272 (1978). Bearden & Mason, *supra,* note 39; Jacoby and Jaccard, *supra,* note 39 at15. [↑](#footnote-ref-65)
65. Granbois et al., *supra* note 64. [↑](#footnote-ref-66)
66. *See, e.g.,* Richins 1982, *supra* note 64; Richins 1983, *supra* note 64, at 76 (concluding that the likelihood of consumers to complain depends to a large extent on the perceived responsiveness of the seller). [↑](#footnote-ref-67)
67. For similar distributional predictions, see, e.g., Eyal Zamir, *Contract Law 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”); Becher & Zarsky 2019, *supra* note 67, at 91 (suggesting that “uninformed and weak groups of consumers” will be disadvantaged, as “sophisticated and informed” groups will plausibly be treated more forgivingly or generously); Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 Jrsl. Rev. L. Stud. 137, 166 (2015); Van Loo, *supra* note 68, at 579–80. [↑](#footnote-ref-68)
68. *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, 882 (“the 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.”); Shmuel Becher & Tal Zarsky, *Minding the Gap*, 51 Conn. L. Rev. 69, 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”). [↑](#footnote-ref-69)
69. Rory Van Loo, *The Corporation as Courthouse*, 33 Yale J. Regul. 547, 565 (2016). [↑](#footnote-ref-70)
70. Van Loo, *supra,* note 68, at 565; Schmitz, *supra,* note 24at 1430 (finding that data brokers create consumer scores based on an individual’s connections, networks, and “friends” on social media); 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 brand’s prioritization decisions). [↑](#footnote-ref-71)
71. Van Loo, *supra,* note 68 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). [↑](#footnote-ref-72)
72. *See* Van Loo, *supra,* note 68 at 565; Natasha Singer, *Secret E-Scores Chart Consumers' Buying Power*, N.Y. Times, Aug. 18, 2012; Rory Van Loo, *Rise of the Digital Regulator*, 66 Duke L. J. 1267, 1283 (2017) (“Companies purchase informers’ 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.”). [↑](#footnote-ref-73)
73. Interview #13 with a local rug store clerk (recorded interview on file with the Author). [↑](#footnote-ref-74)
74. Arbel & Shapira, *supra* note 1, at 966–67. [↑](#footnote-ref-75)
75. *Id.* at 967. [↑](#footnote-ref-76)
76. *Id.* at 967–68. [↑](#footnote-ref-77)
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 “tend to be *repeat players.*”). [↑](#footnote-ref-78)
78. *See, e.g.,* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 882-83 (1987) (observing that “[h]igh agency costs” inherent in class action litigation “permit opportunistic behavior by attorneys”); 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) (noting that “the single most salient characteristic of class and derivative litigation is the existence of ‘entrepreneurial’ plaintiffs’ attorneys [who] … operate largely according to their own self-interest”); 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) (“No one doubts that class action plaintiffs’ attorneys operate, in reality, as independent entrepreneurs guided by self-interest.”); [↑](#footnote-ref-79)
79. *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) (“Most critiques of class actions assume that substantial [↑](#footnote-ref-80)
80. Phang et al., 2010; Ahuja et al., 2003 ; Li et al., 1999 ; Joines et al., 2003 ; Rohm and Swaminathan, 2004. [↑](#footnote-ref-81)
81. Li et al., *The Impact of Perceived Channel Utilities, Shopping Orientations, and Demographics on the Consumer’s Online Buying Behavior*, 5 J. Comput.-Mediated Commc’n (1999). [↑](#footnote-ref-82)
82. Punj & Staelin, *A Model of Consumer Information Search Behavior for New Automobiles*, 9 J. Consumer Rsch. 366 (1983); Slama & Tashchian, *Selected Socioeconomic and Demographic Characteristics Associated with Purchasing Involvement*, 49 J. Mktg. 72 (1985). [↑](#footnote-ref-83)
83. *See, e.g.,* 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); Girish N. Punj. & Richard Staelin, *A Model of Consumer Information Search Behavior or New Automobiles*, 9 J. Consumer Rsch. 366 (1983); Lisa R. Klein & Gary T. Ford, *Consumer Search for Information in the Digital Age: An Empirical Study of Prepurchase Search for Automobiles,* 17J. Interactive Mktg. 29 (2003). [↑](#footnote-ref-84)
84. E.J. Johnson & J. E. Russo, *Product Familiarity and Learning New Information,* 11 J. Consumer Rsch. 542 (1984). . [↑](#footnote-ref-85)
85. Phang et al*., Customers’ Preference of Online Store Visit Strategies: An Investigation of Demographic Variables,* 19 Eur. J. Info. Sys. 344 (2017). [↑](#footnote-ref-86)
86. 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); R. Ted Cruz & Jeffery J. Hinck, *Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 Hastings L. J. 635, 669-671 (1996). [↑](#footnote-ref-87)