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**The Postwar Consumer as Feminized
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THE POSTWAR CONSUMER AS FEMINIZED LEGAL SUBJECT

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I. INTRODUCTION

The tearful, thirtysomething woman walked to the front of the stage set in Hollywood's Moulin Rouge and struggled to tell her story. The unctuous master of ceremonies, alternately jocular and sympathetic, coaxed the account from her, prompting her with factual details: she'd been drifting for the past six months; her husband had died; she was raising two of the "sweetest girls"; she needed a job, preferably as a switchboard operator; she hoped for advice on how to be the mother . . . (the emcee filled in the sentence she could not complete) . . . "she wanted to be." The host assured her that she seemed to be an "awfully good mother," who had endured the "bad luck," the "terrible thing," of losing her husband.¹

This exchange between avuncular emcee and dutiful mother was endlessly repeated from the mid-1950s to the early 1960s on *Queen for a Day*, a popular daytime television program. Dubbed the "Cinderella show," it offered a window into the quotidian experience of women who, in the aftermath of World War II, struggled to find a place for themselves and their families in an expanding middle class.² In these broadcasts, a succession of luckless women told their stories and made their requests for washing machines, food, clothing, and help in locating lost family members. Virtually all of the women who would be queen were married with children; the women whose appeals were most likely to receive consideration were those thought to be exemplars of "good" mothers or whose altruistic requests on behalf of a disabled parent-in-law, or the patients of a tuberculosis sanatorium, were in accord with the program's ideal of good mothering.

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¹ *Queen for a Day*. Host John Bailey. NBC, March or April, 1966. Unless otherwise noted, all discussions of individual programs are based on viewing the video archives at the Museum of Television and Radio (MTR) in New York City.

² Although females who reigned as queen ranged in ages from ninety-five to eight months, a study by UCLA sociologist Franklin Fearing indicated that the "typical" queen was a 29-year-old housewife who had at least one child and a "high school or college background." MTR Clippings File, ABC News Release, April 13, 1964.

Trading on the plight of these women, *Queen for a Day* offered a momentary spotlight and respite from care. For a contestant who had survived the program's vetting process, *Queen for a Day* also presented the chance to win an array of consumables that, it was presumed, would relieve some of the oppressive circumstances that brought her to the program. The winning candidate was determined by an applause meter that measured the intensity of the studio audience's response to the sad or inspirational details of her story. The special rewards of temporary royalty included a makeover at a Max Factor salon, dinner at the Coconut Grove, and an array of clothing, appliances, and beauty aids from named manufacturers. Women who qualified as "new citizen queens" were whisked off to Washington, D.C., in the company of a local congressman for a tour of government sites and possibly a photo opportunity with then Vice-President Richard Nixon. At a time when tension between the United States and Eastern bloc countries was high, members of *Queen for a Day's* staff communicated regularly with the State Department to secure entry of candidates' relatives from "behind the Iron Curtain."³

Amid all this largesse, the also-ran contestants did not go home empty-handed; everyone received gifts from the program's sponsors. Using a variety of rhetorical and representational postures, *Queen for a Day* offered these women to viewers as caring, selfless—and dependent. The host's structured interactions with the candidates during the on-air interviews seemed designed to reinforce the culturally dominant idea that a woman worthy to be queen was a dutiful and devoted stay-at-home mom whose foray into the public world of broadcast network programming left her daunted, and sometimes literally speechless. Ignoring evidence that many of his interviewees worked or needed to work outside the home for economic reasons—as factory workers, bowling-alley pin setters, or aircraft assemblers—the emcee unvaryingly asked candidates what their husbands did for a living, and how many children they had. Discussions about a candidate's own employment only followed a disclosure that she had a history of working to meet family expenses, usually because her husband was absent or disabled. It was this contingency—the loss of a male breadwinner—that insurance companies warned about in *Life* magazine advertisements,⁴ while child-rearing and sex-role experts worried over its socially subversive

³ Dwight Anthony, *Mesmerizer of the Middle-aged*, TV Guide, Sept. 7, 1963 at 19.

⁴ Wendy Kozol, *LIFE'S AMERICA: FAMILY AND NATION IN POSTWAR PHOTOJOURNALISM* 126 (1994).

implications.⁵ In these instances the emcee typically was approving: working to support a dependent family was what any good mother would do.

Queen for a Day's rituals—the detailed description of consumer goods, the advertisements promoting labor-saving items and appearance-enhancing cosmetics, the women's diffidence in relation to a slickly reassuring male emcee, the focus on child rearing, the portrayal of women's employment as a financial necessity brought on by a husband's death or incapacity, the celebration of American citizenship—were emblematic of deeply gendered postwar views of suburban consumerism. As historian Elaine Tyler May has shown, this domestic ideology celebrated traditional gender roles in a suburban “nuclear” family in which women's principal contribution was the reproduction of patriotic (anti-communist) citizens/consumers.⁶ At the height of the early Cold War era, no less an authority than the then unassailable F.B.I. Director J. Edgar Hoover reminded women that they performed a crucial civic duty when they took up motherhood as a “career,” helping the nation's efforts to battle the two principal social pathologies and threats to a free state, “crime and communism.”⁷ Because the nuclear family strengthened the moral resolve of good citizens against the prospect of nuclear attack, women's civic-minded conjugal sexuality was held out as a kind of patriotic familialism, constituting an act of citizenship in itself.⁸ At the same time, government policy makers and big business assumed that the combination of affordable suburban housing, modern appliances, and “the right to choose” among competing consumer brands, would satisfy women/homemakers—U.S. consumers *par excellence*—and solidify the

⁵ Barbara Ehrenreich & Deirdre English, *FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN* 225 (1978).

⁶ Elaine Tyler May, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 174, 181 (1988); Elaine Tyler May, *BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS* 132-133, 153 (1995). Cold war anxieties influenced the physical removal of white urban residents to the suburbs as well as the ideology that produced, in Richard Sennett's words, an “intense family life.” While federally-subsidized highways leading to suburban towns doubled as evacuation routes, the strategy of “defense through decentralization” countered the risk that large concentrations of city-based industrial capital and workers would be targeted for a nuclear attack. *Homeward Bound, id.* at 132-33.

⁷ May, *Barren in the Promised Land, supra* note 6, at 133.

⁸ At the same time, popular cultural representations of the communist threat often depicted the forces of subversion in the form of a seductive woman—highlighting the double-edged, contradictory images of women's sexuality that circulated in postwar U.S. culture. See, e.g., *Homeward Bound, supra* note 6, at 109-112.

appeal of the "free market," the American way.⁹ During this cultural moment, *Queen for a Day* played its part in promoting "family-centered" consumption of televised products and traditional gender values.

* * *

This cultural linkage between the domestic/dependent woman and consumption also appears in the law of products liability. The acceleration of mass-production and marketing practices in the postwar economy was marked by a shift in the legal rules relating to sales of consumer goods. A crucial component of this doctrinal shift was a broadening of the category of buyer to that of *consumer*. By the postwar period, the law had retreated from the long-entrenched principle of *caveat emptor* and moved toward an extraordinary solicitude for the "powerless" consumer. Legal commentators conventionally explain this doctrinal change as courts fashioning doctrinal rulings in response to problems created by technological advances or other economic and social factors.¹⁰ This legal functionalism was embossed with a legal realist "gloss" to emphasize social policy. As the standard analysis goes, the move to a regime of strict liability within the law of sales (and ultimately in the law of torts) was an appropriate response to heightened levels of risk resulting from (1) the proliferation of mass-produced goods in the postwar era, and (2) the use of mass advertising strategies that, in creating demand, induced undue reliance on product safety.¹¹

In this Article, I offer a cultural-narrative analysis of postwar consumer protection doctrine. By drawing on interdisciplinary approaches developed in feminist legal studies, lawyering theory, critical legal history, media studies, and cultural studies, the article traces the consolidation of the consumer as a feminized legal subject. Analyzing the rhetorics and narrative structures of influential postwar judicial opinions, advocates' arguments, and legal commentaries, it will show how an emerging doctrinal trend of protecting consumers against the risks of living in a mass-marketed society responded to a culturally pervasive sense of disempowerment linked to gendered "types" in postwar popular culture—the feminized "organization man" and the stay-at-home woman. By emphasizing the ways in which law resonates with cultural knowledge, this article offers a critical historical perspective and illuminates the hidden narratives and ideologies that shaped

⁹ May, *Homeward Bound*, *supra* note 6, 16-19, at 172.

¹⁰ See, e.g., Laura Kalman, *LEGAL REALISM AT YALE, 1927-1960* 17, 37-38 (1986).

¹¹ Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 63-65 (1984).

postwar consumer protection doctrine. In Robert Gordon's words, it attempts to "unsettle" and "destabilize" the functionalist explanation that consumer protection law responded to material and technological changes in society.¹²

I apply the cultural-narrative approach to developments in postwar consumer protection doctrine in the context of postwar suburbia, cold war consumerism, and domesticity, that viewed together, contributed to an ideology of powerlessness which manifested itself during the postwar era. I then map the changing landscape of the law of sales and its underlying ideology, with its shift from the knowledgeable buyer to the disempowered consumer. In this section I examine three influential cases from the New Jersey Supreme Court that, in the early 1960s, spearheaded a substantial expansion of legal protection for consumers nationally—*Henningsen v. Bloomfield Motors*,¹³ *Schipper v. Levitt & Sons, Inc.*,¹⁴ and *Santor v. A & M Karagheusian, Inc.*¹⁵ In each of these cases, the court adopted public policy considerations to benefit persons who were not eligible for redress under established liability rules.¹⁶

My analysis will focus attention on how consumer protection law internalized contemporary narratives of suburban consumerism and gender role stereotypes. I will examine ways in which the opinions, the parties' legal arguments, and influential treatises and commentaries invoked the cultural figure of the postwar suburbanite, personified as the feminized consumer, to signify the powerless position of the consumer in society and, in turn, to justify the law's increasingly protective stance. This reading will show that, unlike the long lineage of protective laws that explicitly drew their justification from conceptions of women as dependent, vulnerable, and in need of protection,¹⁷ the surface neutrality of the category of the consumer masked the ways in which postwar legal discourse coded the consumer as a helpless, suburban woman. Whatever salutary effect the law of consumer protection achieved as reform-minded legal doctrine, it should also, paradoxically, be understood as embracing and reinforcing pernicious cultural stereotypes about women and power.

¹² Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 *Stan. L. Rev.* 1023, 1024, 1026-27 (1997).

¹³ 32 N.J. 358 (1960).

¹⁴ 44 N.J. 70 (1965).

¹⁵ 44 N.J. 52 (1965).

¹⁶ *Schipper* and *Santor* also recognized an alternative tort basis for recovery that has since come to displace the warranty rationale for manufacturer liability.

¹⁷ For an extended discussion of these cases, see Barbara A. Babcock *et al.*, *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE AND THEORY* 80-130 (2d ed. 1996).

II. A CULTURAL-NARRATIVE APPROACH

Robert Cover, among other commentators, reminds us that the creation of legal meaning occurs through a cultural filter.¹⁸ Law's "deep meaning" is informed by subconscious cultural knowledge,¹⁹ and its methods, arguments, and reasons for exercising power are drawn from a "common stock of understanding in the surrounding culture."²⁰ A cultural-narrative approach entails tracing and deriving meaning from cultural logics that are embedded in legal discourse. Anthony Amsterdam and Jerome Bruner have shown in *Minding the Law*²¹ that judges and lawyers necessarily draw on "culturally shaped processes of categorizing, storytelling, and persuasion,"²² typically in the form of recognizable narratives²³ which bear what is significant to a culture, reflected in its "stories, its genres, its enduring myths."²⁴ The narratives of a community express, and confer meaning on, its rules and institutions—the "cultural understandings that constitute a community's internal norms."²⁵ The process of eliciting law's embedded narratives is, thus, crucial to legal analysis. And as Linda Edwards demonstrates, competing narratives reveal tensions in legal doctrine that are also tensions within culture and society.²⁶ Moreover, narrative logic, no less than propositional logic, functions *rhetorically*—courts and advocates use it as a form of persuasion.²⁷ Drawing attention to narrative modalities such as the temporality of events—*when* a "relevant" legal story begins—and character—whether and how a legal text includes a party's perspective and voice—reveals much about how judges as well as trial and appellate advocates have framed legal and factual issues in a case, and how they have come to terms with precedent and history.²⁸

The focus of lawyering theory on cultural narratives that shape legal doctrine intersects with work in feminist legal studies concerning the

¹⁸ Robert Cover, *The Supreme Court 1982 Term: Foreword: Nomos as Narrative*, 97 Harv. L. Rev. 4, 11 (1983).

¹⁹ See Lea VanderVelde, *The Legal Ways of Seduction*, 48 Stan. L. Rev. 817, 830 (1996).

²⁰ Gordon, *supra* note 11, at 90.

²¹ Anthony G. Amsterdam & Jerome Bruner, *MINDING THE LAW* (2000).

²² *Id.* at 7.

²³ *Id.* at 154.

²⁴ *Id.* at 111-112.

²⁵ Cover, *supra* note 18, at note 137.

²⁶ Linda Edwards, *The Convergence of Analogic and Dialectic Imaginations in Legal Discourse*, 20 Legal Stud. F. 7, 12 (1996).

²⁷ Amsterdam & Bruner, *supra* note 21, at 134-135.

²⁸ *Id.* at 150-153.

pervasiveness of mythic thinking about women, thinking which comes at the expense of the complexity of women's lived experience.²⁹ Because, as Peggy Cooper Davis reminds us, language is a "window to the unconscious," the appearance of proverbial stories in legal discourse can illuminate the ways in which legal actors have reinforced "unconsciously gendered thinking."³⁰ To borrow Martha Chamallas's terms, excavating the "deep structures"³¹ of legal doctrine reveals constitutive gender bias and "implicit hierarchies of value"³² that have influenced the ways in which law develops. As feminist critics have shown, attending to cultural narratives in legal doctrine reveals their gendered nuances, and our culture's stereotypes about women, in two distinct ways. First, a cultural focus draws attention to the gender-based social contexts in which ostensibly gender-neutral legal categories and rules have actually developed (i.e., women's experiences and limited social roles become an unacknowledged measure of general doctrinal categories such as compensable injuries in tort).³³ Second, analyzing law through a cultural prism shows how the use of legal language and reasoning, built around polarities, conflicts, or social hierarchies, assimilates women to men's experience and perspectives, or to formally neutral standards that are in fact male-normed.³⁴

Martha Chamallas and Linda Kerber's deconstruction of the gendered dimensions of the law of fright³⁵ illustrates the first of these gender-inflected approaches, focusing on how women's social roles have been incorporated into the body of tort doctrine. In their historical analysis, they show that traditionally the common law allowed only a narrow scope of recovery for plaintiffs, typically women, who sought

²⁹ Judith Olans Brown, et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 *UCLA Women's L. J.*, 457, 458-459, 461; Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 886, 905 (1989); Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 *Am. U. J. Gender & Law* 147, 157-158, 168 (1996).

³⁰ Peggy Cooper Davis, *The Proverbial Woman*, 48 *Rec. Assoc. Bar City N.Y.* 7 (1993).

³¹ Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 *U. Pa. L. Rev.* 463 (1998).

³² See Martha Chamallas, *The Disappearing Consumer, Cognitive Bias, and Tort Law*, 6 *Roger Williams L. Rev.* 9, 23-28 (2000) (positing that courts consider not only the kind of injury but the identity of the person injured—including gender—when categorizing legally compensable losses).

³³ See, e.g., Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 *Mich. L. Rev.* 814 (1990).

³⁴ See text accompanying notes 43 to 47.

³⁵ Chamallas & Kerber, *supra* note 33.

compensation for fright-induced injuries after witnessing an upsetting event.³⁶ In routinely devaluing women's experience of emotional trauma on the basis of stereotypes about women's emotionally unstable, neurasthenic proclivities, courts first limited recovery for bystanders of traumatic events to those who experienced some physical impact.³⁷ Later courts expanded recovery to include fright-based emotional injuries for bystanders whose injuries were caused by fear of personal harm, or who were in the zone of physical danger.³⁸ It was only in 1968, in a case in which a mother watched as her child was struck and killed by a car, that the California Supreme Court broadened the basis for recovery in fright-based claims to plaintiffs who were within an emotional zone of danger.³⁹ The plausibility that a mother would be in such a childcare-taking situation—the conjunction of the facts and the court's own understanding of pro-natalist ideology during the height of the cold war—enabled the court to appreciate that emotional trauma was legitimately compensable—and not for women only.⁴⁰ Thus, in both its liability-restricting and expanding phases, the law of fright had a gender-ideological basis, resonating with the ways in which the culture valued or considered women's experience.

Along similar lines, Lea VanderVelde has examined the gendered social context in which the negative-covenant rule restricted the circumstances under which female performers—but ultimately male as well as female defendants—were granted the right to be released from their employment contracts upon paying money damages.⁴¹ To explain the frequency with which suits were brought against women performers—a fact which may be related, VanderVelde suggests, to women's perceived need to break away from oppressive employment situations—VanderVelde highlighted the narrow scope for independent action allowed to women performers, and women generally, in nineteenth-century society.⁴²

At the same time, close scrutiny of the rhetoric of law reveals another kind of gender inflection, in which legal language and structures privilege social understandings of men's experience and thus

³⁶ *Id.*

³⁷ *Id.* at 824-834.

³⁸ *Id.* at 821, 837-851.

³⁹ *Dillon v. Legg*, 68 Cal.2d 728 (1968)(en banc).

⁴⁰ Chamallas & Kerber, *supra* note 33, at 860-861.

⁴¹ Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 108 Yale L. J. 775 (1992).

⁴² Chamallas & Kerber, *supra* note 33, at 825-834.

suppress women's differences.⁴³ Lucinda Finley's discussion of the gendered nature of legal reasoning is instructive. Finley has emphasized the problem of "fit" between women's experience and the frameworks in which legal doctrine has been cast, for example, the extent to which law frames women's concerns in terms of oppositional interests (fetus versus mother, sexual domination versus free speech rights), and how legal discourse leaches out emotion and expressiveness.⁴⁴ In a similar vein, Joan Williams has argued that the unthinking use of the rhetoric of "choice" assimilates women to a liberal, facially gender-neutral view of the self-interested, autonomous individual that overlooks the countervailing rhetoric of domesticity. This domestic rhetoric, in turn, not only critiques liberal self-interest but, more problematically, is linked to a "covert norm of selflessness."⁴⁵ Leslie Bender follows this approach in her critique of tort law's use of the reasonable man/reasonable person standards in a culture that treats women as lacking reason.⁴⁶ Arguing, for example, that the "no duty to rescue" rule reflects tort law's assumption that humans are "individualistic, autonomous, and self-interested," she proposes in its place an ethic of care.⁴⁷

* * *

In this Article, I examine how postwar strict liability doctrine expanded protection for consumers generally by drawing on cultural understandings of the powerlessness of women. Thus, unlike the focus of Finley, Bender, and Frug's work, I emphasize ways in which postwar legal discourse feminized rather than masculinized or neutralized the

⁴³ See, e.g., Mary Joe Frug, *POSTMODERN LEGAL FEMINISM* (1992); Finley, *supra* note 29; Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. Legal Educ.* 3 (1981); Sherry F. Colb, *Words That Deny, Devalue and Punish: Judicial Responses to Fetus-Envy?* 72 *B.U. L. Rev.* 101, 126-139 (1992). Cf. Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 *Harv. Women's L.J.* 79 (1998) (arguing that courts recognized women's relevant differences); Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 *L. & Soc. Inq.* 369 (1994) (arguing that women were held to a lesser standard of care based on stereotypes). See Gary T. Schwartz's discussion of these historical analyses in Schwartz, *Feminist Approaches to Tort Law*, 2 *Theoretical Inquiries L.* 175, 180-186 (2001).

⁴⁴ Finley, *supra* note 29, at 900-904.

⁴⁵ Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 68 *N.Y.U. L. Rev.* 1559, 1562, 1566-67, 1572, 1581-83, 1592, 1612 (1991).

⁴⁶ Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 *Cornell L. Rev.* 575, 579 (1993); Bender, *supra* note 43 at 20-25.

⁴⁷ Bender, *An Overview*, *supra* note 46, at 580; Bender, *supra* note 43, at 31.

legal category of the consumer. As the gendered underpinnings of the law of fright and the *Lumley* rule suggest, it is productive to map shifts in legal doctrine by attending to the social contexts in which women have participated in litigation as plaintiffs (injured bystanders) and defendants (employees seeking relief from contractual performance obligations). But unlike the link between gender and culture revealed in the *Lumley* and the law of fright doctrines, I draw attention not to the actual social experience of women as consumers but to those consumer protection cases which resonate with cultural perceptions of powerlessness, a culture in which women's disempowerment is emblematic.

These discourses of powerlessness range from the popular and scholarly literature on suburbia to *Queen for a Day's* melding of consumerism, pro-natalism, and cold war ideologies. The New Jersey Supreme Court reinforced this cultural link between consumer and women in a series of case narratives in which the court portrayed women in the sexualized terms of their reproductive capacity—not as agents “capable of making trustworthy decisions in complex situations.”⁴⁸ Consumers were either actual mothers who lacked agency or they were *represented* as (potential) mothers,⁴⁹ through a process in which the consumer's gender was enacted metaphorically—the consumer as a seduced, inseminated woman. In its emphasis on the gendered dimensions of legal discourse—in examining how language resonates in gendered and sexualized ways in legal texts, in exposing the cultural stereotypes that lay behind legal reasoning and rhetoric, and in using gender categories to interpret putatively ungendered issues—this article is guided by the postmodern sensibility developed in Mary Joe Frug's foundational work.⁵⁰

III. IN THE GRIP OF POWERLESSNESS

Postwar women's privatized, housebound world—where the only option was, as Betty Friedan has put it, “Occupation: Housewife”⁵¹—was premised on an oppressive, gendered model of family life and division of labor. Touting the pleasures of the suburban home—preferably a sprawling, one-story ranch-style model tailored to the needs of families

⁴⁸ Reilly, *supra* note 29, at 157-158, 168.

⁴⁹ Here I borrow Elizabeth A. Reilly's actual/potential dyad. See *id.* at 168.

⁵⁰ Judith G. Greenberg, *Introduction to Frug, supra* note 43, at xix, xiv; Frug, *supra* note 43, at 107, 112-114, 118.

⁵¹ Betty Friedan, *THE FEMININE MYSTIQUE* 18 (1963).

with children⁵²—advertisers of consumer products held up suburban life as an antidote to the corporatist, bureaucratized workplace. Home was haven for a male work force and site of a domestic woman's uncompensated labor.⁵³ As *Queen for a Day* offered its televisual model of good-mother citizenship, popular periodicals such as *Life* and *Reader's Digest* performed a similar function. Both publications conjoined the quotidian and the personal with a grander sense of geopolitical mission and history⁵⁴—or, to paraphrase cultural studies scholar Lauren Berlant—they demonstrated ways in which the political was in fact also the personal.⁵⁵ Like *Queen for a Day*, *Life's* photojournalism valorized the ideals of domesticity, suburban living, and the patriotic character of consumption while highlighting the metonymic role of “ordinary” people—stand-ins for a broader social landscape.⁵⁶

As these popular media and familial themes occupied a more central role in daily life, a body of sociological and psychological literature, itself often popularized—Maryna Farnham and Ferdinand Lundberg's *Modern Woman: The Lost Sex*,⁵⁷ John Bowlby's theory of parental attachment,⁵⁸ Talcott Parsons' work on parental gender roles,⁵⁹ and Benjamin Spock's child development books—addressed the crucial importance of proper mothering to the formation of loyal, national subjects with appropriate gender identities.⁶⁰ In these works, the dangers of both permissiveness and overprotectiveness loomed large.⁶¹ As if to allay the undercurrent of anxiety within this literature about women's role, prime-time television programming, daytime game/giveaway formats such as *Queen for a Day*, and the corporate advertising that paid for them, offered a picture of family harmony, stability, and broad social consensus in which women—

⁵² See, e.g., Dolores Hayden, REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE 6, 12, 18 (1984).

⁵³ Lynn Spigel, “Women's Work,” in Horace Newcomb (ed.), TELEVISION: THE CRITICAL VIEW 19-45 (5th ed. 1994).

⁵⁴ See Joanne P. Sharp, CONDENSING THE COLD WAR: READER'S DIGEST AND AMERICAN IDENTITY xvi, 82, 85 (2000); Kozol, *supra* note 4, at 5.

⁵⁵ Lauren Berlant, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP 178 (1997).

⁵⁶ Kozol, *supra* note 4, at 9.

⁵⁷ Ehrenreich & English, *supra* note 5, at 212, 222.

⁵⁸ For differently nuanced treatments of Bowlby's theories compare Ehrenreich & English, *supra* note 5, at 206-208 and Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. Rev. L. & Soc. Change 347 (1996).

⁵⁹ Ehrenreich & English, *supra* note 5, at 223.

⁶⁰ *Id.* at 217-226.

⁶¹ *Id.* at 195-198, 208-211.

actual and fictive—tended to be stay-at-home mother-nurturers.⁶² At the same time, the integrative effects of mass media, especially advertising and television programming, mitigated woman's suburban isolation. As media scholar Lynn Spigel has noted, postwar television, the "suburban home companion," offered a "window on the world," ranging from images of social interaction which invited viewers to join in, to program themes of neighborhood bonding.⁶³ Programs like *Queen for a Day* and its corporate sponsors played their part, holding up a seemingly attainable ideal of consumer-oriented domesticity and temporary immersion in a public world.

The Uses of Mass Psychology: Manipulating the Woman as Consumer

National advertising may have enjoyed its highest level of influence in the postwar era, in large part because of the pervasiveness of television, but it was not without its detractors. The critical discussion of mass advertising focused on the way advertisers for big business helped to secure widespread acceptance of consumerism throughout society.⁶⁴ Although postwar corporate public relations campaigns such as those of master publicist Edward Bernays sought to maximize profit, the corporate advertisers for whom Bernays and others worked also waged an "ideological war" against New Deal-style big government and other social and geopolitical forces that threatened their long-term property interests.⁶⁵ Both medium and message, advertising deployed a variety of rhetorical and iconic strategies to reinforce a set of cultural assumptions about the American way. As sociologist David Riesman has argued, the effect of the media on the "style of perception . . . the sense of what it means to be an American boy or girl, man or woman, or old folks" was far more pervasive than the vaunted power to sell a product.⁶⁶

Paradoxically, in the midst of the paranoia of the Cold War, the very methods advertisers used to activate subliminal desires for consumer goods appeared suspiciously like social engineering, raising concerns that a manipulable populace might be susceptible to more subversive

⁶² Ella Taylor, *PRIME-TIME FAMILIES* 20-21, 27, 29-40 (1992).

⁶³ Lynn Spigel, "The Suburban Home Companion: Television and the Neighborhood Ideal in Postwar America," in Julie D'Acci et al. (eds.), *FEMINIST TELEVISION CRITICISM: A READER* 211-234, at 213, 223-226 (1997).

⁶⁴ Jackson Lears, *FABLES OF ABUNDANCE: CULTURAL HISTORY OF ADVERTISING IN AMERICA* 235 (1994).

⁶⁵ Stuart Ewen, *PR: A SOCIAL HISTORY OF SPIN* 357-359, 362-364 (1996).

⁶⁶ David Riesman, *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* liv (1969 ed.) (1948) (with Nathan Glazer and Reuel Denney).

even seditious, mind-control techniques.⁶⁷ As Marshall McLuhan commented in 1947, "this kind of action for direct social control is politics . . . these appetites for private power are inventing the means of possessing political power for the future."⁶⁸ Perhaps more than any other work of postwar popular discourse, Vance Packard's 1957 bestseller, *The Hidden Persuaders*, captured this sense of paranoia in relation to powerful promotional methods.

This book is . . . about the large-scale efforts being made, often with impressive success, to channel our unthinking habits, our purchasing decisions, and our thought processes by the use of insights gleaned from psychiatry and the social sciences. Typically these efforts take place beneath our level of awareness; so that the appeals which move us are often, in a sense, "hidden." The result is that many of us are being influenced and manipulated, far more than we realize, in the patterns of our everyday lives.⁶⁹

For Packard, the relentless pursuit of motivation for behavior created a disquieting Orwellian world. If manufacturers' "antihumanistic" promotion of mass psychology could induce consumers to suspend their powers of discernment in the marketplace, Packard worried that a large state apparatus stood ready to use these same mechanisms to "protect" citizens against external encroachments, treating voters like "Pavlov's conditioned dog."⁷⁰

If some present-day commentators reject Packard's assumption that consumers are passive "morons [or] puritans,"⁷¹ Packard is still applauded for "demystifying" the advertiser's toolkit⁷² in which industry spent "billions" annually on advertising, and used social science techniques to cultivate a sense of "psychological obsolescence" and a desire for novelty.⁷³ Infusing new meaning into the warning: "let the buyer beware,"⁷⁴ Packard recapitulated the terms of an earlier debate about manipulative advertising. In 1908, Walter Dill Scott's *The Psychology of*

⁶⁷ Lears, *supra* note 64, at 251-252.

⁶⁸ Marshall McLuhan, "American Advertising," in Bernard Rosenberg & David Manning White (eds.), *MASS CULTURE: THE POPULAR ARTS IN AMERICA* 435-442, at 437 (1957).

⁶⁹ Vance Packard, *THE HIDDEN PERSUADERS* 3 (1957).

⁷⁰ *Id.* at 4.

⁷¹ Virginia Postrel, *Pleasures of Persuasion*, <<http://www.reason.com.10peda/op080299/html>>.

⁷² Futrelle, *Media Circus: The Hidden Persuaders*, <<http://www.salon.com/media/media/96/217.html>>.

⁷³ Packard, *supra* note 69, at 21-22.

⁷⁴ *Id.* 27.

Advertising, and Edward Bernays' 1928 primer on public relations, *Propaganda*, had anticipated approvingly examining the marketing potential of subliminal appeals to the realm of feeling.⁷⁶ On the other hand, consumer-oriented books such as *Your Money's Worth* by Stuart Chase and Frederick Schlink⁷⁶ and *Our Master's Voice*, James Rorty's 1934 Veblenesque critique, considered this prospect with alarm. Anticipating Packard's concerns from a left perspective, Rorty argued that advertising was essentially entrepreneurs' "special pleading," a frank appeal to the "material, moral, and spiritual contents of the Good Life," and an exercise in "creative psychiatry."⁷⁷

As Betty Friedan, David Riesman, William Whyte, and other postwar social commentators would also do, Packard drew attention to ways in which women figured in postwar consumerist ideology⁷⁸ based on the

⁷⁶ See T.J. Jackson Lears, "From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930," in Richard Fox & T.J. Jackson Lears (eds.), *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980* 3-38 (1983). See also discussion of Scott in Susan Strosser, *SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET* 148 (1989); Ewen, *supra* note 85, at 94, 164-170 (discussing Bernays).

⁷⁶ See Robert N. Mayer, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE* 20-21 (1989).

⁷⁷ James Rorty, *OUR MASTER'S VOICE* 16, 239 (1934). In the 1920s generally, the belief that consumers were easily manipulated found expression in advertisements that lacked informational content. In fact, as Stuart Ewen has documented, the exercise of the intellect, the very possibility of giving informed consideration to consumer products, seemed entirely foreclosed by the complexities of the manufacturing process. In 1929, one home economist lamented that it was "impossible for the homemaker to have command of all the information demanded to buy intelligently." Stuart Ewen, *CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE* 165 (1976). During the Depression, the same attributes that led advertisers to think of the buying public as having a "group mind," also encouraged the view that the electorate was simply a mass audience waiting to be persuaded by the platforms of managerial elites. Rorty developed these concerns in *Our Master's Voice*. Observing that: "[m]ass literacy, mass communication and mass advertising . . . pervert[s] the integrity of the editor-reader relationship essential to . . . democracy" because it involves "reader-exploitation, cultural malnutrition and stultification," *Our Master's Voice, id.*, at 16-17, Rorty feared not the masses but the self-deluded advertising professionals who, he believed, were headed for a fascist future. "Advertising is propaganda, advertising is education, propaganda is advertising, education is propaganda, educational institutions use and are used by advertising and propaganda. . . it is impossible to dissociate the phenomena . . . all three, each in itself, or in combination are *instruments of rule.*" *Id.* at 170 (italics in original). As the Depression wore on, business interests resorted to market surveys and opinion research, engaging academics who applied the methods of behavioral psychology to measuring public opinion—and even to shaping it through the ways in which questions were framed and results reported. Ewen, *supra* note 65 at 183, 185, 188.

⁷⁸ Packard, *supra* note 69 at 116.

paradox that women, albeit disempowered in the larger culture in relation to men, nonetheless managed consumption for the family.⁷⁹ Although sellers of goods continued pre-war, pretelevision marketing strategies that also had been pitched to women,⁸⁰ the postwar availability of the vastly more influential medium of television, coupled with an ideology that redomesticated American women, only intensified that gendered address.⁸¹ The automotive industry was illustrative, sponsoring ads that were aesthetically oriented and even enlisted women's interest in servicing and repair. Ernest Dichter, a psychologist whose Institute of Motivational Research performed countless "depth studies" to probe the psychology of consuming, concluded that "the woman has taken over and she has taken over quite thoroughly."⁸² Betty Friedan, whose influential *Feminine Mystique* challenged the cult of domesticity and its popularizers in the advertising industry, quoted a representative advertising text:

Are you this woman? Giving your kids the fun and advantages you want for them? Taking them places and helping them do things? Taking the part that's expected of you in church and community affairs . . . developing your talents so you'll be more interesting? You can be the woman you yearn to be with a Plymouth all your own. Go where you want, when you want in a beautiful Plymouth that's yours and nobody else's.⁸³

Summing up Dichter's approach, Friedan offered this assessment: "Properly manipulated, the American housewife can be given the sense of identity, purpose, creativity, self-realization, even the sexual joy they lack—by the buying of things."⁸⁴

⁷⁹ *Id.* at 3-7, 92-93, 107.

⁸⁰ See Ewen, *supra* note 77, at 167-176; Lears, *supra* note 75, at 26-27.

⁸¹ May, *Homeward Bound*, *supra* note 6, at 87, 166-167; see generally Spigel, *supra* note 53.

⁸² Packard, *supra* note 69, at 92-93.

⁸³ Friedan, *supra* note 51, at 229.

⁸⁴ *Id.* at 208. Looking back from the 1990s to the postwar era, Joanne Meyerowitz has taken issue with the assumption that postwar women had no alternative space within which to challenge the cult of domesticity. Arguing that Friedan and Elaine Tyler May have universalized the experience of white, middle-class women who did not work outside the home, she suggests that other political and sexual identities coexisted with the dominant domestic ideology. See generally Joanne Meyerowitz, "Beyond the Feminine Mystique," in Joanne Meyerowitz (ed.), *NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWARD AMERICA* 229-262 (1994). See also Meyerowitz, "Introduction: Women and Gender in Postwar America, 1945-1960," in *Not June Cleaver*, *id.*, at 1-18. The numbers of working women who appeared on *Queen for a Day* offer support for Meyerowitz's argument. Nonetheless, the domestic ideology was dominant precisely because mainstream

These gendered appeals took account of phenomena like "impulse buying," which seemed to intensify with the growing dominance of the supermarket. By the mid-1950s, for example, beer and spirits ads used packaging and configuration of containers to stimulate buying among women.⁸⁵ Packard recounted one experiment that used a hidden camera to demonstrate the relationship between women's impulse buying and the varying levels of tension they experienced when faced with a plethora of products. Noting that the observed women's eye-blink rate plummeted as they began to stroll along the aisles, one researcher linked impulse buying among these subjects with the hypnotic effects of abundance. Armed with this information, advertisers devised package-design and shelving strategies that would heighten the hypnotic effect—using eye-catching colors, choosing images that stimulated the senses, shelving products at eye level.⁸⁶

For Packard, the upshot of this preoccupation with subliminal, non-rational appeals was diminished personal autonomy: "The most serious offense many of the depth manipulators commit . . . is that they try to invade the privacy of our minds. It is this right to privacy in our minds—privacy to be either rational or irrational—that I believe we must strive to protect."⁸⁷

It was only a short step, Packard seemed to suggest, from advertisers' struggles to win over individual minds at (the suburban) home to the global battle for ideological dominance.

From Groupmindedness to the Unwitting Consumer

Packard's critique of advertising resonated with William H. Whyte's observations in *The Organization Man*, the 1956 study of the influence of corporate organizational values in the workplace and on social roles and interactions more generally.⁸⁸ Whyte drew attention to the risks of "deifying" bureaucratic structures and the set of values that bureaucracies typically encourage: respect for authority, passivity, the cultivation of loyalty to the organization, the subordination of the individual to the group, the emergence of a technocratic orientation.⁸⁹ The crux of Whyte's argument was that the ideology of the organization

political and cultural fixtures, from J. Edgar Hoover to the mediated world of *Queen for a Day*, presented it as normative.

⁸⁵ Packard, *supra* note 69, at 93-95.

⁸⁶ *Id.* at 105-110.

⁸⁷ *Id.* at 286.

⁸⁸ William H. Whyte, *THE ORGANIZATION MAN* (1956).

⁸⁹ *Id.* at 7, 12-13, 63-64, 66, 70-72, 78-89.

encouraged an "idolatry of the system" and an improper use of science to accomplish this bureaucratization. In his studies of widely used personality tests, Whyte saw instead a pernicious, value-laden "loyalty test" designed to identify the "conformist, the pedestrian, the unimaginative."⁹⁰ His interviews of corporate wives disclosed that these women also acquiesced to organizational imperatives. In the main, his interviewees concurred that a "good wife" is one who subordinates her will to the organization and suppresses "open intellectualism or the desire to be alone."⁹¹

In his study of the postwar suburb of Park Forest, Illinois, Whyte saw an extension of organizational values, a "constantly replenished, nonsatiable reservoir of 30,000 people."⁹² The suburban development was a "second melting pot" and "ideal way station" for the rootless, corporately mobile middle class.⁹³ In the standard critical narrative, the new suburbanites were upwardly striving and excessively willing to conform to "social virtues," while cut off from the variety and richness of urban experience.⁹⁴ Whyte's study tended to confirm this perception; even granting that many of his subjects were not "unwitting pawns," he concluded that suburbia reflected the "interchangeability so sought by organization." And many organization people admitted that they felt passive and objectified, "more acted upon than acting."⁹⁵

Whyte's investigations of group conformity echoed James Rorty's Depression-era concern about the coercive potential of government radio broadcasts. These broadcasts, Federal Radio Commissioner LaFount opined in 1933, would ensure, more effectively than a "standing army," a stabilizing groupmindedness: the "whole nation would be thinking together."⁹⁶ In a related vein, Vance Packard had noted how postwar suburban developments such as Florida's Miramar traded on a manufactured sense of community, in which gregarious neighborliness and preplanned sociability left little room for idiosyncratic expression. Beyond the relentless togetherness that Whyte observed in Park Forest,

⁹⁰ *Id.* at 182.

⁹¹ *Id.* at 258-259.

⁹² *Id.* at 282-283.

⁹³ *Id.* at 280-282, 298, 300.

⁹⁴ *See, e.g., id.* at 312-317, 396; Richard Sennett, *THE USES OF DISORDER*, 72, 184-188 (1970). *See also* discussion in Jackson Lears, *supra* note 64, at 236.

⁹⁵ *Id.* at 395-396.

⁹⁶ Rorty, *supra* note 77, at 278. Hadley Cantril and Gordon Allport's 1935 collaboration perceived a similar homogenizing potential in radio, noting the character of radio to "encourage people to think and feel alike." Hadley Cantril & Gordon Allport, *THE PSYCHOLOGY OF RADIO* 20 (1935).

Miramar represented a truly "packaged" development in which friends as well as furnishings were supplied.⁹⁷

For Whyte, the consumerism that marked the burgeoning middle class was linked to the passivity that had become identified with the new suburbanites. Their "budgetism," a preference for making pre-scheduled payments of all monthly expenses, was, he concluded, a program for divesting personal control over finances.⁹⁸ In matters of the marketplace, these suburbanites seemed positively ingenuous, if not incompetent:

A pathetic spectacle is the show of zeal the husband will affect when reading a sales contract; it wouldn't make the slightest difference what outrageous provisions were inserted, he would still read on, comprehending nothing. Among young people there seems to be a strong faith that the protective legislation of the last 20 years such as the small loan acts, has somehow reversed the law of *caveat emptor*. One would think, for example, that they had lived long enough to be implacably suspicious of any automobile dealer, but they are not. They are so trusting that they almost never multiply to find out how much of a "pack" the dealer is taking them for.⁹⁹

Budgetism—if not the overbearing effect of the dealers' practices, Whyte concluded—had dulled these suburbanites' wits and powers of discernment.

Whyte's focus on groupmindedness also resonated with David Riesman's influential 1950 study, *The Lonely Crowd*.¹⁰⁰ Canvassing the attitudes and behavior of the "new" middle class of bureaucrats and salaried white-collar workers, Riesman described as a distinctive social type the "other-directed" person—marked by a "heightened self-consciousness about relations to people" and a desire to be "loved rather than esteemed."¹⁰¹ Acknowledging the powerful pull of this desire toward the preferences of others, Riesman saw the potential for "close behavioral conformity."¹⁰² In a period of abundance, the world of work became bound up with methods of "communication and control, not of tooling or factory layout."¹⁰³

Riesman was especially sensitive to postwar society's threat to women's autonomy: as part of the peacetime effort to "reprivatize"

⁹⁷ Packard, *supra* note 69, at 233-235.

⁹⁸ Whyte, *supra* note 89, at 323-326.

⁹⁹ *Id.* at 323-325.

¹⁰⁰ See note 66, *supra*.

¹⁰¹ *Id.* at xiv, xxxii.

¹⁰² *Id.* at 21.

¹⁰³ *Id.* at 128.

women into a “comfortably domestic and traditional” role, the “housewife’s” labor produced social value that was not defined as work.¹⁰⁴ And although he initially looked to popular culture as a possible source of autonomy for the other-directed person, Riesman later rejected the national chauvinism of the press, caught up in the “self-serving slogans and misleading rhetoric of the Cold War.”¹⁰⁵ It was in self-awareness and resistance to overconformity, Riesman suggested, that the possibility for autonomy existed.

Whether the perceived threat to autonomy originated from totalitarian regimes or the corporate employers of motivational researchers, the sense of siege that these discourses registered gave them their distinctive, if alarmist, shape. At the same time, postwar discourses about suburbia were never monolithic; more nuanced accounts did moderate the critique, while retaining the prevailing conceptual and rhetorical framework. In the ethnographic study, *The Levittowners*, sociologist Herbert Gans concluded that on balance the new community of Willingboro, New Jersey, founded by the Levitt organization, was “a good place to live.”¹⁰⁶ Suburbia was not a new social formation, but simply “old social structures on new land.”¹⁰⁷ Although New Jersey’s Levittown was not without its limitations, Gans did not find within it the threat to autonomy that other commentators had emphasized:

Levittowners are not really members of . . . a mass society. They are not apathetic conformists ripe for a takeover by a totalitarian elite or corporate merchandiser; they are not conspicuous consumers and slaves to sudden whims of cultural and political fashion; they are not even organization men or particularly other-directed personalities.¹⁰⁸

¹⁰⁴ *Id.* at 262, 280, 282.

¹⁰⁵ *Id.* at iv.

¹⁰⁶ Herbert J. Gans, *THE LEVITTOWNERS: WAYS OF LIFE AND POLITIC IN A NEW SUBURBAN COMMUNITY* 432 (1967).

¹⁰⁷ *Id.* at vi.

¹⁰⁸ *Id.* at 417. Other commentators on suburbia remind us that the critical discourses have been reductive in assuming, or emphasizing, that the postwar suburb was the preserve of white-collar middle-class consumers. As Bennett Berger argued in “The Myth of Suburbia,” the anti-suburban critics assumed homogeneity, flattening out the differences among the suburban communities in terms of cost of housing, income level, occupation, and educational attainment. Noting the emergence of working-class suburbs made possible by postwar prosperity, he concurred with Gans that suburban living per se does not create a new social entity. Rather, he marshalled evidence that working class suburbs were marked by “working-class attitudes,” that the residents of these communities were not transformed by the suburban form. Nor does Bennett see any intrinsic connection between suburbia and the evils usually attributed to it: “Surely, there

Yet even among Gans and other "dissenters," the links between conformity, consumerism, and domesticity loomed large. Within these discourses, the integral relation of powerlessness to women's disempowerment was a defining, if debated, issue.¹⁰⁹

IV. FROM THE AUTONOMOUS TO THE POWERLESS CONSUMER: A LEGAL PERSPECTIVE

In the post-World War II era of labor peace and national prosperity, mass-mediated marketing of consumer products promoted a highly specific, class-inflected vision of the good life marked by distinctive trends in commercial practice, residential and employment patterns, ideas about leisure, and an orientation favoring consumption of goods. In the postwar era, the development of suburbs, spurred by federally-subsidized highway construction and favorable credit terms for residential building,¹¹⁰ literally created new landscapes that needed to be filled in with automobiles and single-family homes. To keep pace with these spatial and demographic trends, manufacturers increasingly relied on mass production techniques introduced earlier in the century. With its uniform systems and design features, the turn to mass-produced consumer goods meant that a design flaw that was replicated in thousands of identical units exposed a broad swath of consumers to the risk of injury. While the mass production of cars and housing essential to suburban spaces created new levels of risk, mass advertising strategies created unprecedented levels of consumer demand: as television became a fixture in U.S. homes, a new medium of visually arresting, imagistic advertising became the marketing tool of choice for mass manufacturers.¹¹¹

Against this background, courts began to reassess the rationale for rules that limited the liability of manufacturers whose defective

is nothing specifically suburban about conformity, status anxiety, and the rest; nor is there anything necessarily diabolical about mass-produced domestic comfort and conservatively cut clothes." In the end, writing from the vantage point of the late 1960s-early 1970s, he argued that there was far too little information about suburban communities to ascribe a "unique" status to suburbia. Bennett M. Berger, "The Myths of Suburbia," in Charles M. Haar (ed.), *THE END OF INNOCENCE: A SUBURBAN READER* 36-46, at 39-40, 42, 45-46 (1972).

¹⁰⁹ See *supra* note 84.

¹¹⁰ See, e.g. Kenneth T. Jackson, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); Jane Holz Kaye, *ASPHALT NATION: HOW THE AUTOMOBILE TOOK OVER AMERICA AND HOW WE CAN TAKE IT BACK* (1997); May, *Homeward Bound*, *supra* note 6, at 169.

¹¹¹ May, *Homeward Bound*, *supra* note 6, at 172.

products caused injuries. Until 1907, when state legislatures began to adopt the Uniform Sales of Goods Act, sales transactions were largely unregulated matters of private negotiation governed by the principle of *caveat emptor*,¹¹² associated with a laissez faire preference for individual monitoring of contractual fairness over more formalized institutional oversight.¹¹³ In an era of handcrafted production in which sellers' interactions with buyers were shaped by considerations of personal esteem, face-to-face dealing, and more readily inspectable products, a buyer would have no reason, and no legal right, to expect that merchandise would be of a particular caliber, unless a seller expressly warranted the quality of the goods. In a classic statement of the doctrine, *caveat emptor* held that the purchaser had to "apply his attention to those particulars which may be supposed, within the reach of his observations and judgment, and the vendor to communicate those particulars, and defects, which cannot be supposed to be immediately within the reach of such attention."¹¹⁴ Under classic liberal assumptions, the buyer was presumed capable of inspecting the product and inquiring about the method of production in direct, arm's-length discussions with the seller.¹¹⁵ Absent fraud or a seller's express representation about the quality of the goods, the seller was not held accountable for incorrect statements about merchandise. The risk that the seller erred in describing the goods fell entirely on the buyer on the theory that society's interest in the integrity of transactions justified the extra imposition.¹¹⁶ It was thus up to the buyer to exercise the powers of observation and sound judgment before making a purchase.

The adoption of the Sales of Goods Act recognized some limits on the rights of sellers to avoid liability for defective merchandise, in the form of express and implied warranty obligations. Although the boundaries between warranty categories have been permeable,¹¹⁷ typically an express warranty is based on explicit promises or representations by a seller about the quality of merchandise; an "implied" warranty such as

¹¹² Lawrence Vold, *LAW OF SALES* 428-429 (2d ed. 1959); Derrick Owles, *THE DEVELOPMENT OF PRODUCT LIABILITY IN THE UNITED STATES* 28 (1978).

¹¹³ Allison Dunham, *Vendor's Obligation As To Fitness of Land For A Particular Purpose*, 37 *Minn. L. Rev.* 108, 110 (1953).

¹¹⁴ Chancellor Kent in 1804, cited in Mark Geistfeld, "The 'Powerless' Consumer, the Product Warranty and Strict Products Liability: An Analysis of Liability Rules and the Market Control of Product-related Losses," unpublished dissertation, Columbia University, 1990.

¹¹⁵ Vold, *supra* note 112, at 428-429.

¹¹⁶ *Id.*

¹¹⁷ See, e.g., Friedrich Kessler, *Products Liability*, 76 *Yale L. J.* 887, 898-900 (1967).

a warranty of merchantability or warranty of fitness for a particular purpose is imposed by law, either on the basis of implicit representations that induce the buyer to rely on the quality of the product (for example, promoting the product for sale) or for an independent policy reason.¹¹⁸ Resolving the question whether the facts of any transaction triggered the warranty provisions of a sales-of-goods statute often required adjudication.¹¹⁹ Courts responded episodically and unsystematically as particular doctrinal problems arose. In any case, despite warranty law's hybrid origins, the link between sales and warranty situated these transactions within the law of contracts,¹²⁰ making them subject to an overlay of enforcement rules that could limit the scope or availability of the warranty. Chief among these rules was the privity doctrine, which held that only a party to a contract could claim rights under it. Thus, if a member of a household became ill after eating tainted food that a retailer had sold to another household member, the strict application of the privity rule precluded any right of action by the person who had been harmed. To mitigate the harshness of this result, courts looked for ways to avoid the operation of the privity bar, fashioning alternative theories where the facts permitted (for example, the court deemed the injured person to be a third-party beneficiary of the contract of sale or determined that the injured person had taken title to the item under a gift theory before sustaining the injury).¹²¹

Manufacturers, in turn, tried to neutralize the effects of these rulings. Most common were contractual disclaimer clauses added to industry-wide standardized contracts (for example, a typical warranty that manufactured parts would be free from defects was "expressly in lieu of all other warranties expressed or implied").¹²² In theory, contracting parties operating from a position of equal knowledge should be permitted to bargain freely to limit the scope of the warranty provisions. However, modern manufacturing and marketing techniques disrupted the idea that a buyer would ever have a sufficient level of knowledge about the production process to enable a truly unconstrained

¹¹⁸ See Vold, *supra* note 112 at 427; Karl N. Llewellyn, *On Warranty of Quality and Society*, 6 Colum. L. Rev. 699 (1936).

¹¹⁹ Vold, *supra* note 112, at 424-463.

¹²⁰ Although the origins of warranty doctrine are traceable to tort, over time warranty concepts had become assimilated to the body of contract law and were analyzed within a contracts framework.

¹²¹ William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099, 1123-1124 (1960).

¹²² *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 367 (1960).

choice.¹²³ As Jackson Lears has documented, in the 1920s the view that consumers lacked technical knowledge and thus could be manipulated found expression in advertisements that appealed to “nonrational longings” for adventure and cachet.¹²⁴ Increasingly, the targets of these ads were women, who were thought to control the home economy and to be susceptible to non-technical sales pitches, such as ads for “tinker-proof” radios that they could listen to while engaged in domestic chores.¹²⁵ At the same time, concerns that the manufacturing process had become too complex, foreclosing the possibility of giving informed consideration to consumer products, led one home economist to lament that it was “impossible for the homemaker to have command of all the information demanded to buy intelligently.”¹²⁶

As conditions of manufacturing and marketing became more complicated, legal scholars and advocates argued that the ordinary buyer was rarely in a position to predict the likely level of risk in using a product. Nor could such a buyer evaluate the wisdom of agreeing to a disclaimer-of-liability clause inserted in the contract by the seller. In effect, such conditions of contracting disabled the buyer from exercising any genuine choice. As Lawrence Vold pointed out in his treatise on sales law, the ordinary buyer, vis-a-vis the manufacturer, had the least capacity to prevent the occurrence of defects in the product and was less able than the manufacturer to bear (or deflect) the costs of defects when injuries occurred.¹²⁷ Nor was there a range of choices to make, even assuming adequate information; mass entrepreneurs such as the Levitt organization used a limited number of models to take advantage of economies of scale.¹²⁸ It was this situation that Vold and contemporary commentators described as one of “helplessness” and dependency.¹²⁹

No longer presuming the buyer’s knowledge or capacity to discern and choose wisely, legal texts began to embrace the idea that those for and to whom manufacturers market their products—the emergent category of the consumer—were “powerless,” in need of protection in the

¹²³ Vold, *supra* note 112, at 428-429, 436-437, 447.

¹²⁴ Lears, *supra* note 80, at 19-20, 27.

¹²⁵ Louis Cariat, “A Cleanser for the Mind: Marketing Radio Receivers for the American Home, 1922-1932,” in Roger Horowitz & Arwen Mohun (eds.), *HIS AND HERS: GENDER, CONSUMPTION, AND TECHNOLOGY* 115-137, at 121-122, 125-128 (1998).

¹²⁶ Ewen, *supra* note 77, at 165.

¹²⁷ Vold, *supra* note 112, at 436-437, 447.

¹²⁸ Gans, *supra* note 106, at 6-7; *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90-92 (1966).

¹²⁹ See Vold *supra* note 112, at 447; Prosser, *supra* note 121 at 1122; Note, 77 Harv. L. Rev. 318, 321, 323, 328 (1963).

marketplace. A few legal scholars and judges, notably, Karl Llewellyn and Roger Traynor, had begun to conceptualize the consumer in these terms in the 1930s and 1940s. In a 1937 law review article on warranty, Llewellyn contributed to the ideology of the "helpless" consumer who "does not know enough, technically, to test even what is before his eyes."¹³⁰ In 1944, Traynor's widely-cited concurrence in *Escola v. Coca-Cola Bottling Co.*,¹³¹ which upheld the plaintiff's right, in the absence of direct proof of a manufacturer's negligence, to recover for injuries caused by an exploding soda bottle, articulated a broader public policy rationale for this ruling recognizing the modern-day limitations on consumers' cognitive abilities to evaluate products:

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. (Citations omitted.) Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark.¹³²

Following this line of thought, the legal commentary of Vold and Frederick Kessler was influential in the evolving ideology of the consumer. Kessler developed the theory of exploitation in the 1940s to explain the operation of standardized mass contracts. He reasoned that the sheer economic power of large-scale manufacturers enabled them to dictate the terms and conditions of sale. This economic disparity placed the buyer at a distinct legal disadvantage, as an unwilling party to a contract of adhesion.¹³³ In later work, Kessler elaborated his justification for the theory, emphasizing the buyer's unequal level of expertise vis-a-vis the manufacturer, the "lack of technical knowledge, his inability to evaluate the quality of many goods, and his lack of opportunity to

¹³⁰ Karl N. Llewellyn, *On Warranty of Quality and Society II*, 37 Colum. L. Rev. 341, 404 (1937).

¹³¹ 24 Cal. 2d 463 (1944).

¹³² 24 Cal. at 467 (Traynor, J., concurring).

¹³³ Geistfeld, *supra* note 114, at 35-36 (citing Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 632 (1943)).

inspect due to the rapid flow of goods."¹³⁴ Noting the passing of the "personal relationships" around which sales transactions in an earlier era had been structured, Kessler advocated a straightforward functionalist view that law should be responsive to technical change and shifting social understandings about what is just.¹³⁵

Continuing the forward-looking work of legal commentators, William Prosser's classic 1960 law review article "The Assault Upon the Citadel (Strict Liability to the Consumer)"¹³⁶ developed the link between expanding legal protection for the consumer and the consumer as woman. Emphasizing the origins of warranty in the law of tort,¹³⁷ Prosser set out a rationale in favor of a torts-based rather than a contracts-based theory of liability for injuries resulting from defective goods. Here, Prosser carried forward the thinking of torts scholar Fleming James, who had emphasized the goals of compensation for injuries and loss spreading, and had embraced the social insurance rationales developed by Crystal Eastman and Emma Corstvet in (respectively) the Pittsburgh¹³⁸ and Columbia¹³⁹ studies, which considered the social impact of uncompensated loss.

As James Hackney has shown, Eastman's and Corstvet's studies used narrative techniques to portray the human (and gendered) impact of such loss, premised on women's presumed vulnerability in their cultural roles as reproducers and nurturers—the glue holding families together.¹⁴⁰ Prosser, too, invoked a gendered cultural category—the housewife as consumer *par excellence* and proxy for *women*—in assessing the extent to which warranty law left consumer injuries unredressed. Deploying gendered scenarios loosely inspired from actual cases, he posited that the contract-based reliance theory was underinclusive because it did not cover the injuries of a person who was not also the buyer of a defective product ("a guest who eats a plate of beans seldom

¹³⁴ Kessler, *supra* note 117, at 926.

¹³⁵ *Id.* at 891.

¹³⁶ See *supra* note 121.

¹³⁷ See also James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study of American Pragmatic Instrumentalism*, 39 *Am. J. Legal Hist.* 443, 494 (1995); Prosser, *supra* note 121, at 1126-1127.

¹³⁸ Eastman gathered data on industrial accidents for Paul Kellogg's *The Charities and the Commons* which culminated in a book, *Work-Accident and the Law*. See Hackney, *id.* at 474-75.

¹³⁹ Corstvet participated in a joint study at Columbia and Yale between 1928-1930 documenting the effects of accidents on individuals, litigation options, and the availability of insurance. See Hackney, *supra* note 137, at 493.

¹⁴⁰ Ultimately, the grounding of strict liability in torts would become the standard in most states.

asks the housewife whose . . . they are and where she bought them").¹⁴¹ Similarly, if a warranty could be said to run with the goods, it did not protect a person lacking legal title to them, such as "the friend of the housewife who cuts her hand in a helpful attempt to reseal a glass jar."¹⁴² The very notion of reliance was limited to persons who were in the business of selling, as distinguished from "the housewife who sells a jar of jam to her neighbor."¹⁴³ (By contrast, Llewellyn's pre-World War II consumer was represented as male or as a gender-neutral "householder"¹⁴⁴ and Traynor's concurrence in *Escola* also had gendered the consumer as male.¹⁴⁵)

Whether favoring a contracts or tort rationale, by the early 1960s, influential commentators and some courts acknowledged the need to protect the vulnerable consumer from injury, or, at least, from the costs of injury. Drawing extensively on the work of Prosser and others, courts in a number of jurisdictions began to stretch the boundaries of products liability law by developing an ideology of consumer powerlessness. As Prosser's insistently gendered references suggest, by the postwar era the buyer's descent from autonomy to dependency increasingly became linked to women in terms of their more marginalized cultural status.

V. WOMAN AS CONSUMER/CONSUMER AS WOMAN IN THE LAW OF PRODUCTS LIABILITY

Faced with the liability-limiting rules that had evolved under the social and economic conditions of an earlier era, courts that were so inclined could apply the incremental techniques of common-law adjudication to moderate the rigor of existing rules. At times, courts interpreted language in the Sales of Goods law to rule that particular statements made to promote the sale of a product qualified as express or implied warranties. On other occasions they exploited the ambiguities of contractual language to invalidate questionable disclaimers of liability. Case-by-case approaches benefited particular consumers on whose behalf these rulings were decided but had limited precedential value. To achieve more sweeping change, courts had to be willing to break with precedent. Given the reactive nature of the adjudicative process, courts had to seek out, or create, occasions to exercise jurisdiction.

¹⁴¹ Prosser, *supra* note 121, at 1128.

¹⁴² *Id.* at 1133.

¹⁴³ *Id.* at 1123-1129; 1133-1134.

¹⁴⁴ Llewellyn, *supra* note 118, at 799.

¹⁴⁵ See text accompanying *supra* note 133.

The affirmative reaching out for cases whose decision could advance a law-reform agenda is a marker of judicial activism. As an approach to adjudication, activism entails the acceptance of the proposition that lawmaking is within the scope of judicial authority. Branded as anti-democratic in the sense that a (typically) unelected appellate judiciary takes on functions usually exercised by a legislature, judicial activism in the postwar era became an even more controversial practice because of the then more generalized concern about threats to democratic structures. Measured against Cold War sensibilities, judicial activism's ostensible retreat from democratic principles was cause for disquiet, if not alarm, among both liberals and conservatives who favored "neoconstitutional" restraint upon the power of the state.¹⁴⁶ Still, during this postwar period, shifting jurisprudential currents encouraged some courts to resort more forthrightly to policy considerations in developing legal doctrine. Most notably, the functionalist school, bearing the imprint of legal realism, rejected a formalist approach to adjudication—looking exclusively to statements of rules elucidated in prior judicial opinions—in favor of greater attentiveness to the facts of a case and the economic and social consequences of legal rules.¹⁴⁷

After a state constitutional convention adopted an amendment in 1947 restructuring the New Jersey court system, the New Jersey Supreme Court assumed a broad policymaking role which it has invoked to prevent a rigidifying of legal doctrine.¹⁴⁸ Under the shaping influence of Chief Justices Arthur Vanderbilt and Joseph Weintraub during the 1950s and 1960s, the court acquired a reputation as an independent, influential, and progressive bench.¹⁴⁹ In three decisions handed down between 1960 and 1965, the court reached out to review cases that presented the opportunity to dismantle the armature of court-made rules limiting the right to recover damages against manufacturers of defective merchandise. In *Henningsen* and *Schipper*, the court took the

¹⁴⁶ Kalman, *supra* note 10, at 154-155.

¹⁴⁷ *Id.* at 221-224, 231.

¹⁴⁸ Stanley H. Friedelbaum, *JUDICIAL FEDERALISM AND RELATED DEVELOPMENTS: A DECADE OF CHANGE IN NEW JERSEY* 6 (1990). The actual scope of cases that the court reviews is limited; a few categories of cases are subject to obligatory review and the balance of the court's jurisdiction is discretionary, administered through a certification provision that restricts review of decisions of the intermediate appellate courts to special circumstances. *Id.* at 8.

¹⁴⁹ Henry Robert Glick & Kenneth N. Vines, *Law Making in the State Judiciary: A Comparative Study of the Judicial Role in Four States*, 2 *Polity* 142, 148-149, 158 (1969). See also Robert A. Kagan, et al., *The Evolution of State Supreme Courts*, 76 *Mich. L. Rev.* 961, 993 (1978) (noting frequency with which the New Jersey Supreme Court was cited by out-of-state courts during 1940-1970 as an indicator of the court's influence).

unusual step of bypassing the intermediate appellate court and certifying the case to itself for review. In all three cases, the court used the occasion of discretionary review to announce doctrinal change that incorporated explicit social policy considerations. Yet if the supreme court acted in functionalist fashion in these cases, responding to changing social and economic conditions, I argue that these cases also serve as deeply gendered cultural narratives of the postwar period. Drawing on deconstructive approaches that unmask oppositional or suppressed elements in texts that on their surface seem to cohere,¹⁵⁰ the discussion that follows will consider the ways in which the court helped to consolidate a legal category, constructing the consumer in feminized terms that resonated with postwar discourses of suburban entropy, conformity, and domesticity.

The Madwoman of Keansburg

On May 19, Helen Henningsen drove her new Plymouth car, a Mother's Day gift from her husband, to Asbury Park. On the return trip to her home in suburban Keansburg, the steering mechanism spun out of control, the car swerved sharply to the right, and crashed into a brick wall. The damage was so extensive that it was impossible to tell whether the steering mechanism was defective prior to the impact. Helen and her husband Claus Henningsen sued Chrysler and the dealer for damages resulting from Helen's injuries and Claus's loss of consortium. After a jury trial, the couple recovered against both defendants under the theory that a disclaimer of liability provision in the sales documents was ineffective, and that the manufacturer and dealer had breached an implied warranty of merchantability.¹⁵¹

Affirming the trial court's judgment, Judge Francis's unanimous opinion for the court held that under modern conditions of marketing, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use accompanies it into the hands of the ultimate purchaser.¹⁵² The court also held a disclaimer of liability void as a matter of law, noting the purchaser's inequality of bargaining position vis-a-vis the automobile industry.¹⁵³ Although the widespread practice of interposing a putatively independent dealer between car manufacturers

¹⁵⁰ Frug, *supra* note 43, at 118.

¹⁵¹ 32 N.J. at 364-365.

¹⁵² *Id.* at 384.

¹⁵³ *Id.* at 404.

and the consuming public insulated manufacturers from liability under the privity rule, the court concluded that neither Claus Henningsen's lack of privity with Chrysler, nor Helen Henningsen's lack of privity with Chrysler or the dealer, was a bar to their recovery of damages.¹⁵⁴

The *Henningsen* ruling marked a significant movement in New Jersey case law in favor of the consumer. To achieve this result, the court analogized the question presented in the suit to a series of out-of-state cases in which producers of injurious food and beverages were held liable, in the absence of privity, under the warranty doctrine. Under the circumstances, the *Henningsen* court saw "no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile."¹⁵⁵ Requiring the manufacturer to bear the burden of loss was in society's interest because the manufacturer was in a position to control the risk or equitably allocate losses when they occurred. At the same time, because the manufacturer invested in mass advertising strategies, the court understood that the manufacturer had recognized and was addressing the "consumer"—an entity distinct from the purchaser to the extent that the consumer encompassed any reasonably foreseeable user of a product, whether or not the person participated in its acquisition.¹⁵⁶

Central to the court's reasoning was the concern that overbearing marketing practices had disabled the purchaser from exercising independent judgment and free will. Commenting on the variations in size and legibility of typeface on the single-page sales contract, for example, the court noted the small type in which the manufacturer's warranty disclaimers on the back of the document had been cast.¹⁵⁷ (The court emphasized that no one at the dealership had drawn Claus Henningsen's attention to these provisions, which he admitted he did not read. Mindful, perhaps, of *The Organization Man's* uncomprehending husband, whose effort to read a sales contract offered no illumination about its terms, the court did not mention Henningsen's admission at trial (which Chrysler's appellate brief repeated) that he routinely signed papers without reading them: "Put it in front of me and I sign it.")¹⁵⁸

Moreover, the manufacturer's use of mass-mediated sales promotion techniques reinforced the risk that the consuming public would be

¹⁵⁴ *Id.* at 394, 415-416.

¹⁵⁵ *Id.* at 388.

¹⁵⁶ *Id.* at 379.

¹⁵⁷ *Id.* at 365-368.

¹⁵⁸ Brief for Defendant, Chrysler Corporation as Cross-Respondent and Appellant, Docket No. A-185-58, September, 1969, 3.

unable to evaluate products on their merits. The court took judicial notice of the fact that auto manufacturers underwrote large-scale promotional efforts to persuade the public to buy their products.¹⁵⁹ Responding, perhaps, to the Henningsens' citation to *The Hidden Persuaders*, which recorded the sizeable sums that major car manufacturers were spending on advertising,¹⁶⁰ the court was persuaded that *manufacturers* used the mass media to invite reliance on the quality of their products (even if the named sponsor of the ad was national car *dealer's* association).¹⁶¹ Even so, and perhaps because advertising heralded the liberatory effects of consumerism, the court remained skeptical of its claimed benefits. Rather, the court cited series of out-of-state opinions which drew attention to the effects of mass advertising on the perceptions of consumers. These cases recognized how consumers were targeted by mass marketing appeals, particularly those involving the direct importuning of radio (which Herbert Schiller had called the "most persuasive . . . salesman in the nation" before television¹⁶²) and the powerful visual symbols featured on billboards. In *Baxter v. Ford Motor Co.*,¹⁶³ for example, a personal injury case alleging defendant Ford Motor Company's failure to install an advertisement-shatter-proof windshield, the court acknowledged changes in the way in which manufacturers created demand for products:

Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structure of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, bill boards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny

¹⁵⁹ 32 N.J. at 385.

¹⁶⁰ Brief for Plaintiffs Claus H. Henningsen and Helen Henningsen as Cross-Appellants, Docket No. A-185-58, n. d., 15.

¹⁶¹ A popular example of that practice was the *The Dinah Shore Show*. Broadcast twice weekly during 1953, the program was sponsored by the Chevrolet Dealers of America. The text of the ad referred to the "Chevrolet dealer, the man who sells and service America's first choice in cars and trucks." Museum of Television and Radio Archives, New York, New York.

¹⁶² Herbert I. Schiller, *MASS COMMUNICATIONS AND AMERICAN EMPIRE* 25 (1971).

¹⁶³ 168 Wash. 456 (1932).

the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.¹⁶⁴

The *Henningsen* court drew similar support from *Worley v. Proctor & Gamble Manufacturing Co.*,¹⁶⁵ an opinion from the St. Louis Court of Appeals which held that the co-owner of a restaurant who suffered from a disabling skin irritation after using a popular detergent in her business operations failed to sustain her burden of proof in an action against the detergent manufacturer. Yet the court also recognized that manufacturers' representations in advertising can rise to the level of a warranty, even in the absence of a traditional contract with the ultimate consumer:

Under modern conditions of retail merchandising, and the employment of widespread advertising, representations are, in fact, made to the consuming public. Thus, the legend "Tide is kind to your hands" is not directed to the retail dealer—a mere conduit through which goods are distributed to the consuming public—but to the housewife, who is always solicitous of the condition of her hands. In such a situation, it would be in keeping with the realities of modern economic life to recognize the applicability of the principles of warranty as governing in a contest between the ultimate consumer and the party making such representations.¹⁶⁶

At the same time that the *Worley* court used "modern realities" to justify expanding the scope of a warranty, it relied on stereotypes of women—as vain, as housewives, and as prototypical consumers—to give content to warranty protection. In what would prove to be a recurrent rhetorical strategy in the legal discourse of this period, the court feminized the consumer by collapsing the "consuming public"—and the individual business-owning plaintiff in the case—into the social category of the housewife.

The *Henningsen* court also cited, without quoting, a decision from the Ohio Supreme Court that sounded a similar theme of modernity and evolutionary functionalism in a context in which a woman was the injured consumer. Recognizing the emergence of "new conditions and practices of our changing and progressing civilization," the court in *Rogers v. Toni Home Permanent Co.*,¹⁶⁷ had ruled that the petition of the plaintiff (a woman whose scalp had been burned after she used a home hair wave) had met the legal requirements for stating a warranty claim

¹⁶⁴ *Id.* at 462-463.

¹⁶⁵ 241 Mo. App. 1114, 1121 (1962).

¹⁶⁶ *Id.* at 1121.

¹⁶⁷ 167 Ohio St. 144, 149 (1958).

on the basis of the manufacturer's advertisements. In its supporting rationale, the court went on to note the use of mass media, from signboards to radio and television, in promotional campaigns pitched to the ultimate consumer.¹⁶⁸

The court did quote from *Jacob E. Decker & Sons v. Capps*,¹⁶⁹ a 1942 Texas Supreme Court case imposing warranty liability on a manufacturer of unwholesome food, which underscored the concern, even in a pretelevision world, that advertising had the power to blunt reasoning and sound judgment: "[A] modern manufacturer . . . not only processes the food and dresses it up so as to make it appear appetizing, but he uses the newspapers, magazines, billboards,¹⁷⁰ and the radio to build up the psychology to buy and consume his products. The invitation extended by him is not only to the housewife . . . but to the members of the family and guest to eat it."¹⁷¹ In the gendered terms of the *Capps* court, the manufacturer (pronominally "he") succeeds who seduces the housewife, both by the cosmetic appeal of packaging (here the product, dressed up, is itself feminized) and by the inexorable power of a media-saturating message. Hence the need in the *Henningsen* case to protect the consumer through the judicial imposition of a warranty: "Under modern marketing conditions, the ordinary layman, responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer and to some degree on the dealer."¹⁷²

¹⁶⁸ *Id.* at 248-249.

¹⁶⁹ 139 Tex. 609 (1942).

¹⁷⁰ Complementing radio's importance as a promotional medium, by the late 1930s billboards installed by the National Association of Manufacturers, a consortium of trade groups, became ubiquitous across the U.S.; 20,000 billboards were put up in 1937 and an additional 45,000 the following year, all bearing the legend "There's no way like the American Way." Melding images of consumerism and (white) nuclear family values, the national billboard initiative touted a world of free enterprise, high wages, and short working hours. If these messages were mostly aspirational in the 1930s, the billboards served as an important and pervasive medium through which corporate interests held out the hope of prosperity and the pleasures of domesticity around the corner. Ewen, *supra* note 65 at 320-321.

¹⁷¹ *Id.* at 619.

¹⁷² 32 N.J. at 384. In the wake of *Henningsen*, other courts in the 1960s would take account of the effects of mass advertising by drawing on general cultural experience with television. Just a year after *Henningsen* was decided, the Connecticut Supreme Court in *Hamon v. Digliani*, 148 Conn. 710 (1961), registered its concern for the helpless, media-dazed consumer (whose gender shifts from male to female in the space of a sentence), holding that an injured plaintiff could proceed with a suit against the manufacturer of a household cleaning agent when she was induced to buy the product on the strength of advertising:

The reference in *Henningsen* to the consumer as "ordinary layman" does not suggest a retreat from the gender formulations in *Capps*. In fact, even if nominally male, the consumer in *Henningsen* is an unprepossessing specimen under traditional gender ideology, a man who not only is run-of-the-mill but is presumably passive and culturally feminized, a "lay" man. Nor does the passing reference to the consumer

The supermarkets and other retail outlets of our day dispense with the need for clerks behind counters to wait on customers. The goods are displayed on shelves and counters lining the aisles, and *the customer, as he searches for a product, is bewitched, bewildered, and bedeviled by the glittering packaging in riotous color and the alluring enticement of the products' qualities as depicted on labels.* The item selected is apt to be the one which was so glowingly described by a glamorous television artist on the housewife's favorite program just preceding the shopping trip. Or the media of advertising might have been radio, magazine, billboard or newspaper. All are widely used in the appeal directed to the ultimate consumer.

148 Conn. at 717-718 (italics added). Recalling Packard's accounts of the supermarket "impulse buying" studies, the explicitness of the *Hamon* court's concern about the effects of media on consumer decision making surfaced in cases involving a range of legal issues. See, e.g., *Jerry Finn v. Cooper's Inc.*, 292 F. 2d 555 (1961) (recognizing the visual power of trademarks, and the efficacy of television advertising to impress the consciousness of passive consumers, whose minds were blank screens upon which manufacturers' visual images could be projected):

[W]e must consider the visual impact of the marks on the minds of the prospective purchasers who view them. Such symbols are readily recognized by both literate and illiterate prospective purchasers and are as readily associated with particular goods by children as it is [sic] by adults. . . . Symbolic marks speak a universal language; they lend themselves to effective display in advertising and sales promotional activity and can thus become the dominant part of the mark on labels, packages, and point of purchase displays. They can catch the eye of the customer and create a lasting general impression. Current mass advertising media utilize symbols which are visually projected into millions of homes of prospective purchasers by television and these symbols frequently are associated with pictures of the goods of a particular user.

292 F.2d at 1136. In a case ordering the General Foods Corporation to divest itself of its holdings in a steel wool soap pad company because it had substantially lessened competition in that soap pad market, the U.S. Court of Appeals similarly emphasized the marketer's efforts to capture the mind of the consumer par excellence—the housewife. Assigning most of its spending on sales promotion to television advertising, "[G.] F. endeavors to create a desire for a particular product *in the mind* of the shopper, thereby enabling her to make a distinction among the different brands of a similar commodity. It is 'an unrelenting effort to presell the housewife.'" (italics added). *General Foods Corp. v. FTC*, 386 F.2d 936, 938 (3rd Cir. 1967). That same year, when the U.S. Court of Appeals held that the television marketing of Geritol (for "iron poor blood") was misleading under the Federal Trade Commission Act, it noted the powerful effect of mass media's "highly developed arts of persuasion" on the ability of the "typical" consumer to "make an intelligent choice," and appended the text of several ads, featuring Geritol's most famous pitchman, Ted Mack, to reinforce its point. *J.B. Williams Co. Inc. and Parkson Advertising Agency Inc. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967).

as male alter the fact that it is Helen Henningsen—a mother—who literally drives the litigation. Consistent with stereotypes that deny women's decision making capacity, Henningsen is portrayed as a legal non-entity, not a party to the sales contract; nor, apparently, does she have a public identity separate from her role as wife and mother. From the opinion she does not appear to be engaged in any productive labor, domestic or otherwise. All that we know is that she has driven down to Asbury Park, the famed seaside resort, presumably for a day of leisure.

The appellate brief submitted on the Henningsens' behalf offers a more nuanced narrative, though it reinforces in some respects the notion of Helen Henningsen as a non-entity. One of the six questions for appeal asks whether a "woman, who participated in the purchase of a vehicle, and was the person for whom the vehicle was purchased, may recover for a breach of implied warranty even though the vehicle was purchased in the name of her husband?"¹⁷³ The Statement of Facts attests that Helen was so thrilled to have a new car (a "Plymouth all [her] own"¹⁷⁴)—the first new vehicle the couple had purchased in their 17 years of marriage—that she "was running around like a madwoman."¹⁷⁵ Yet we also learn that her trip to Asbury Park was business-related; she had driven down to put a deposit on a summer food stand. From a section of the brief relating to her lost earning capacity we discover that she and her husband had worked as co-partners in a restaurant business and that she had been employed outside the home for 25 years.¹⁷⁶ She was, in fact, one among the 40% of postwar American women so employed,¹⁷⁷ the cult of domesticity notwithstanding. Though it is tempting to argue that the court has deliberately suppressed a subversive cultural detail, commentators in the lawyering theory tradition would suggest that the court acted unconsciously, falling back on a form of cultural cognitive dissonance in which the power of "proverbial models,"¹⁷⁸ based on cultural stereotypes, overwhelmed inconsistent facts.¹⁷⁹ For all its good intentions, the court exhibits stereotypical thinking about women's domesticity and incapacity in its portrayal of Helen Henningsen.

As George Lakoff's work in cognitive linguistics has shown, stereotypes express cultural expectations. They are metonymic in the

¹⁷³ See *supra* note 102, at 1.

¹⁷⁴ See *supra* note 54.

¹⁷⁵ See *supra* note 102, at 2.

¹⁷⁶ See *supra* note 102, at 43-44.

¹⁷⁷ May, *Homeward Bound*, *supra* note 6 at 84.

¹⁷⁸ Davis, *supra* note 30, at 11.

¹⁷⁹ See *id.* at 16; Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. Sch. L. Rev. 55, 104-110, 112, 117-118 (1992).

sense that they correspond to a subcategory that stands in for a larger conceptual category. And they facilitate the mental work of drawing conclusions, though always at the expense of critical analysis.¹⁸⁰ Writing specifically about gender stereotypes, Lakoff has shown that, in U.S. culture, the housewife-mother has been considered to be a better example of the category "mother"—a prototype—than mothers who are not housewives—thus the need to add the modifier "working" mother to differentiate her from the housewife-mother, the unmarked category.¹⁸¹

In *Henningsen*, the omission of facts relating to Helen Henningsen's employment history demonstrates the way in which the court viewed the housewife-mother as the norm for women's experience; the court's omission is a silence that speaks. The portrait of Helen that emerges in the opinion is based on a stereotype of an innocuous stay-at-home mother who ultimately loses control. Even more telling is the appellate brief's use of her testimony, invoking the stereotype of the irrational woman. It is impossible to tell whether the statement had been uttered spontaneously, rupturing the surface of her trial narrative (what literary scholar Priscilla Wald might see as a lapse, or verbal slip, expressing the tensions and paradoxes of Henningsen's own cultural position).¹⁸² Assuming that it was, Henningsen's lawyers were sufficiently taken with it to inscribe it in the brief's Statement of Facts, presumably because it seemed to augur well as a litigation theory (on the premise that portraying Henningsen as irrational or irresponsible would suggest to the court the "need" to intervene on behalf of feminized consumers—men and women—in increasingly complex transactions). Yet it is equally likely that her lawyers included the statement unconsciously,¹⁸³ responding to a powerful cultural stereotype which, over time, acquired a plausibility, a seeming naturalness, that foreclosed further consideration of its use. As the *Henningsen* court effectively silenced a narrative that would have placed Helen Henningsen outside the cultural "norm," Helen Henningsen's lawyers published a narrative detail in the appellate brief that drew on another culturally embedded story about gender. The effect was the same in both: gender details from the litigation plotline reinforced the position of the woman as disempowered consumer.

¹⁸⁰ George Lakoff, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 79, 85 (1980).

¹⁸¹ *Id.* at 80.

¹⁸² Priscilla Wald, *CONSTITUTING AMERICANS: CULTURAL ANXIETY AND NARRATIVE FORM* 1, 4, 6 (1995). See also Frug, *supra* note 43, at 114.

¹⁸³ Amsterdam & Hertz, *supra* note 179, at 117-118.

The Bad Mother

In a tract home designed and built by the Levitt organization in Willingboro, New Jersey, 16-month-old Larry Schipper was badly scalded by hot water running from the bathroom faucet. Larry's parents were leasing the home from another family, the Kreitzers, who had purchased it two years earlier from Levitt. Having been burned themselves on several occasions, the Kreitzers were aware that the water from the bathroom spigots was excessively hot—and posted a note warning users of the unusual condition. The Levitt organization had designed the home's gas-fired heating unit to draw on the same water source for heating and domestic purposes. The Homeowner's Guide pointed out that the house was equipped with mixing-type spigots to allow users to adjust the water temperature. The instructions simply directed users to turn on the cold water tap first, then the hot water, to avoid "wasting hot water and [to yield] properly tempered water for bathing and dishwashing." The Schippers discovered the problem by personal observation on the day they moved in, two days before their toddler was burned.¹⁸⁴

Reversing a trial court decision that had dismissed the *Schipper* lawsuit, the New Jersey Supreme Court held that buyers (and other foreseeable users) of a mass-produced development home could hold the manufacturer accountable not only under negligence principles but under the expanding parameters of implied-warranty doctrine (treated by the court as the equivalent of the tort doctrine of strict liability).¹⁸⁵ Specifically, the court ruled that Levitt's deliberate design of the heating units for the New Jersey homes without a mixing valve—a relatively inexpensive water-tempering device that would have avoided the resort to combination spigots—created a basis for liability under both negligence and warranty theories. (In a pointed reference to Levitt's discriminatory design decisions, the court referred to trial testimony indicating that none of the 20,000 New Jersey and Pennsylvania Levittown houses contained mixing valves, although the presumably more expensive Long Island units did.)¹⁸⁶ The court rejected "ancient distinctions" that no longer met the needs of a technologically advancing society, and invoked functionalist principles of adaptation to jettison the existing rules: "The law should be based on current concepts of what is

¹⁸⁴ 44 N.J. at 74-76.

¹⁸⁵ *Id.* at 80, 90-91.

¹⁸⁶ *Id.* at 79.

right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times."¹⁸⁷

Drawing heavily on *Henningsen's* rationale, the court extended the warranty doctrine to sales of newly constructed homes that were marketed on the basis of advertised models. In a sympathetic opinion, Judge Jacobs repeatedly invoked the role of "[l]aw as an instrument of justice"—its ability to adapt to "changing needs and mores."¹⁸⁸ The court emphasized that contemporary consumers were not on an equal footing with builders and no more able to protect themselves against the risk of injury from design defects than auto purchasers had been.¹⁸⁹ At the same time, the court focused closely on the facts of the case, writing against a sinister narrative developed in Levitt's brief. In its Statement of Facts, the Levitt organization reported that the injured toddler "apparently climbed, or was placed, into a downstairs powder room basin and the hot water was turned on . . . the child could not have reached the faucets without being lifted up or climbing up on something . . . it also appears that the accident could have been avoided by simply keeping the powder room door closed."¹⁹⁰

The implication of blame is unmistakable. The accident occurred on a weekday when the record showed that Lawrence Schipper was at work, leaving his wife Patricia Schipper home to care for their son. But, Levitt argued, Patricia Schipper was a classic bad mother (and, Levitt's counsel might have added, the antithesis of the reserve army of good mothers celebrated on *Queen for a Day*). If, as Martha Fineman has argued, the cultural construction of mother as "heterosexual, married, chaste, and self-sacrificing" is "statistically improbable" as well as "oppressive," it is this representation of motherhood that has long held cultural purchase. This "common image of the ideal mother," Fineman maintains, is the standard against which women with children are routinely appraised. At the same time, the very closeness of the culturally-defined mother-child connection is accompanied with an "aura of danger."¹⁹¹ Although Freudians have famously linked that danger to a mother's oppressive overprotectiveness, it is rather the risk created by the seemingly neglectful or reckless mother that has had a particularly

¹⁸⁷ *Id.* at 90.

¹⁸⁸ *Id.* at 89.

¹⁸⁹ *Id.* at 90-91.

¹⁹⁰ Brief for Respondent, *Levitt & Sons, Inc.*, Docket No. A-719-63, September 1964, 3.

¹⁹¹ Martha Albertson Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 57, 72 (1995).

powerful claim on the cultural imaginary, as Marie Ashe has shown.¹⁹² In a similar vein, Paula Cooley has argued that the idealization of motherhood in U.S. culture (in Peggy Cooper Davis's terms, the "fantasy of the perfect and all powerful mother"¹⁹³) has fueled an expectation of "nothing less than extraordinary mothers as normative."¹⁹⁴ Merely ordinary mothers who cannot live up to the exalted ideal are much more at risk of being identified as "bad."

The cultural trope of the neglectful mother is a crucial ingredient in the Levitt organization's argument. Having failed to organize every waking moment around her child, Patricia Schipper was, Levitt implied, non-nurturing and neglectful. Rejecting this mother-as-monster scenario, the court portrayed Mrs. Schipper as helpless bystander in the way it framed her testimony: "she was upstairs when she heard Larry crying. She came downstairs, heard the water running, found the hot water faucet in the bathroom sink turned on, and realized that Larry had been scalded. He was taken immediately to the doctor's office and then to Cherry Hill hospital where he remained for seventy-four days."¹⁹⁵ Rather than attributing agency to Patricia Schipper, the court's use of the passive voice seemed to suggest that an *unknown force* had turned on the faucet and scalded Larry. What was sinister was not the mother's carelessness but the unaccountability of the accident. In this scenario, Patricia Schipper was helpless rather than careless, powerless to prevent the scalding that unvaryingly and unavoidably results when water is drawn directly from the hot water spigot in a Levitt-designed (no longer a child-friendly, one-story) unit. Thus, the court traded one cultural stereotype for another, and, as in *Henningsen*, portrayed the woman-as-consumer as weak and ineffectual, in need of the court's protective intervention.

It is possible that the court deployed gender strategically here. Casting Patricia Schipper as powerless would support an outcome that imposed liability on the Levitt organization for her son's injuries. Yet

¹⁹² Ashe notes that in Western legal and literary discourse the bad mother is one whose "neglectful, abusive, reckless, or even murderous behaviors threaten to destroy her children." Marie Ashe, *The Bad Mother in Law and Literature: A Problem of Representation*, 43 *Hastings L. J.* 1017, 1019 (1992). See also Williams, *supra* note 45, at 1568, 1583.

¹⁹³ Cooper Davis, *supra* note 58 at 365-366. See generally Nancy Chodorow & Susan Contratto, "The Fantasy of the Perfect Mother," in Barrie Thorne (ed.), *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 191-214, at 191, 203 (1992).

¹⁹⁴ Paula M. Cooley, "Ordinary Mother' as Oxymoron: The Collusion of Theology, Theory, and Politics in the Undermining of Mothers," in Julia Hanigsberg & Sara Ruddick (eds.), *MOTHER TROUBLES* 229-249, at 229 (1999).

¹⁹⁵ 44 N.J. at 76.

nothing in the opinion indicates that the court had deliberately chosen this representational strategy. The ease with which the court could imagine that Patricia Schipper was powerless to protect her son from injury—or from the inexorable spread of Levittowns over the suburban landscape of New Jersey, New York, and Pennsylvania—is more consistent with Peggy Cooper Davis's suggestion that culturally coded stories tend to inform thinking at an unconscious level.¹⁹⁶

The Seduction

In September, 1957, Daniel Santor had purchased 96-2/3 yards of Gulistan carpeting, a nationally advertised brand, for his home. Almost immediately after the carpet was installed, he observed a line in the carpet that did not flatten out. After Santor made several unavailing complaints to the carpet dealer, who in the interim had liquidated his business, he learned for the first time that A. & M. Karagheusian, Inc., had manufactured the carpet. Santor asked to have it replaced but when Karagheusian did not respond, Santor sued. Relying on the rule announced in *Henningsen*, the trial court rendered judgment against the manufacturer for breach of an implied warranty of merchantability.¹⁹⁷ On appeal, the appellate division reversed, holding that absent privity of contract, the state recognized no cause of action for breach of warranty for defective goods unless personal injury resulted from their use. Defending its narrow reading of *Henningsen*, the appellate division intoned in classically formalist terms that "our responsibility is to apply the law as we find it to exist now."¹⁹⁸

Granting Santor's petition for certification and reversing the appellate division, the New Jersey Supreme Court ruled that an implied warranty of merchantability applied to the sale of defective carpeting. The court held that the plaintiff had the right to recover damages against the manufacturer, even in the absence of privity and even though no personal injury had resulted from the defect.¹⁹⁹ Alternatively, following Judge Traynor's 1963 opinion, *Greenman v. Yuba Power-Products, Inc.*,²⁰⁰ from the California Supreme Court, the court grounded recovery on the theory of strict liability in tort, which was not premised on promotional advertising but rather on the "mere presence of the

¹⁹⁶ See note 30, *supra*.

¹⁹⁷ 44 N.J. at 56-57.

¹⁹⁸ 82 N.J. Super. 319, 322 (1964).

¹⁹⁹ 44 N.J. at 63.

²⁰⁰ 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, (1962).

product on the market.²⁰¹ Here, the consumer's powerlessness was in relation to the dangers hidden within the product itself.²⁰²

In *Santor*, the litigation personae did not lend themselves to a "woman-as-consumer" plotline. Nonetheless, as Mary Joe Frug would say, the "gendered overtones" are striking. Using language which, as Frug has put it, "registers as sexual double entendre,"²⁰³ the court invoked gender figuratively, as a mode of representing the consumer in feminized and sexualized terms (the consumer-as-woman). The basis for liability was the manufacturer's release of its defective product into the marketplace, targeting persons who were "powerless" to protect themselves:

The manufacturer is the father of the transaction. He makes the article and puts it in the channels of trade for sale to the public . . . the article may pass through a series of hands . . . the dealer is simply a way station, a conduit on its trip from manufacturer and consumer . . . considerations of justice require a Court to interest itself in originating causes and to apply the principle of implied warranty on that basis . . . [even though] . . . implied warranty had its gestative stirrings because of the greater appeal of the personal injury claim [not property damage].²⁰⁴

Through metaphor, the court likened the marketing of the product to a process of insemination in which the manufacturer, gendered as the aggressive male, promotes the sale of the product through advertising, as he seeks out women as passive receptacles (suggested in the "gestative stirrings") at the point of consumption.

The images in the seduction narrative are linked to stereotypes of women's passive and vulnerable condition, and to a culturally embedded sense of their irresponsibility, their need to be managed and controlled. As Lea VanderVelde has shown with respect to the gendered origins of the *Lumley* rule, images of women that comported with their less-than-fully autonomous position in the workplace infiltrated legal reasoning and discourse in cases permitting negative injunctions when performers in the late nineteenth century—frequently actresses—sought to end a performance engagement. Social constraints on women shaped the development of a rule that covered male as well as women performers who sought to be released from their contracts.²⁰⁵ Similarly in the *Santor*

²⁰¹ 44 N.J. at 66-67.

²⁰² 59 Cal.2d 57, 63-64 (1963).

²⁰³ Frug, *supra* note 43, at 113.

²⁰⁴ 44 N.J. at 59-60.

²⁰⁵ See VanderVelde, *supra* note 41, at 800-821, 828-830, 834.

case, the court draws on tropes of women's sexual vulnerability and passivity, then applies them more broadly in conceptualizing the consumer's relation with the manufacturer. Though biologically male, rhetorically the plaintiff Santor is gendered female, seduced and then abandoned by the suitor-dealer, and rebuffed by the manufacturer-father.

The Texas Supreme Court had used a more blatantly gendered seduction narrative in the *Capps* case, cited earlier in the discussion of *Henningsen*. In the same year the *Capps* case was decided, the United States Supreme Court provided a model for this gendering and sexualizing of the seller-buyer relation in *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*²⁰⁶ In that trademark infringement case, the court noted the "psychological function of symbols," ascribing to trademarks the power to "induce . . . a purchaser to select what he wants, or what he has been led to believe he wants."²⁰⁷ Anticipating Packard's narrative of symbol manipulation, the court recognized that the trademark owner "exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol." The aim "is to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears." (Emphasis added.)²⁰⁸ Like *Henningsen*, the Court in *Mishawaka* refers to the male purchaser only to disaggregate his stereotypically male attributes. As the trademark does its symbolic work, it seeks out a feminized figure who passively waits, ripe for impregnation by the entrepreneur-patriarch, active inseminator, and agent of consumer desire. Though *Santor* does not cite to *Mishawaka*, the two courts draw on widely circulating cultural tropes of gender relations and sexuality in their strikingly similar representations of the entrepreneur-buyer relation.

VI. CONCLUSION

As Robert Gordon has shown in "Critical Legal Histories,"²⁰⁹ functionalist premises, for all their limitations,²¹⁰ are deeply implicated

²⁰⁶ 316 U.S. 203 (1942).

²⁰⁷ *Id.* at 205.

²⁰⁸ *Id.*

²⁰⁹ See *supra* note 11.

²¹⁰ Though the functionalist method is evolving and adaptive, critics of this approach have emphasized that functionalism can also lead to conformity, in the sense that it promotes adjustment rather than sweeping change. Referring to its application to the higher education of women in the 1950s, Betty Friedan has noted how it resulted in unstimulating courses on the subject of preparing for marriage that were geared to the

in legal discourse.²¹¹ At one level, as noted earlier, the New Jersey cases can be read as functionalist responses to changing manufacturing and marketing conditions.²¹² Recognizing that the interest of the consumer is broader than that of a buyer, the New Jersey Supreme Court broadened its rationale for imposing liability on the manufacturer—from promotional advertising in *Henningsen* to the “mere presence of the product on the market” in *Santor*²¹³—to sweep within its protective ambit a broad swath of foreseeable users of products. However, in analyzing these cases, this article has emphasized another level of meaning, and an alternative explanatory framework for the progression of consumer protection law. It has argued that postwar consumer protection doctrine incorporated culturally embedded understandings of gender roles that, in turn, were linked to anxieties about mass society and media. It has traced the resonances of this doctrine with the broader culture by paying close attention to the language inscribed in these legal texts—to narrative structure, rhetorical choice, and use of metaphor.

The value of such a narrative-based, gender-focused reading is that it illuminates an inescapable irony, and a cost, of the shift in the ideology of the consumer. In representing the consumer as powerless, the New Jersey Supreme Court conceptualized the consumer as a woman, then projected widely held cultural assumptions about women’s dependency and incapacity onto the category of the consumer generally. The court’s reform of the legal rules around products liability, however unwittingly, reinscribed “ancient doctrines” about gender and power that have long been invoked to justify paternalistic laws, starting with *Bradwell v. State*, which notoriously upheld an Illinois law banning women from admission to the bar.²¹⁴ Under the guise of protecting

same women who were discouraged from studying traditionally rigorous subjects: “There is little or no intellectual challenge or discipline involved in merely learning to adjust.” Friedan, *supra* note 51, at 171.

²¹¹ *Id.* at 68, 109, 122.

²¹² Gordon might argue that, in the context of products liability doctrine, functionalist legal discourse resulted in a set of “mandarin texts,” in the sense that the pro-consumer shift in the law was accomplished by elite policymakers rather than by grassroots activism. At the same time, all three rulings from the New Jersey Supreme Court preceded the active phase of the “third wave” of consumer activism that took hold in the late 1980s, after President Kennedy announced a Consumer’s Bill of Rights in 1962, and which led to a groundswell of grassroots activism and governmental action in the late 1960s and early 1970s. See Mayer, *supra* note 76, at 27-29. In this sense, the New Jersey Supreme Court proactively created a legal environment which was hospitable to the consumer and prepared the way for more pervasive legal change.

²¹³ 32 N.J. at 384; 44 N.J. at 65.

²¹⁴ 83 U.S. 130 (1872).

women's sexual integrity and reproductive capacity, legislatures have enacted protective measures—from the maximum-hours law upheld in *Muller v. Oregon*²¹⁵ to the restrictions barring women correction officers from guarding male prisoners at issue in *Dothard v. Rowlinson*.²¹⁶ However, unlike the legislation in these cases, which was predicated openly on women's need for bodily protection, postwar consumer protection doctrine operated more insidiously. Facially gender-neutral and liability-enlarging, the developments in consumer protection doctrine which the New Jersey Supreme Court spearheaded masked a narrative of traditional gender norms. It is this gendered narrative, built on the continued plausibility of women's powerlessness, that, I argue, has explanatory value when considering the shift in the law's conceptualization and treatment of the consumer in the postwar era.

²¹⁵ 208 U.S. 412 (1908).

²¹⁶ 433 U.S. 321 (1977). For extended discussions of judicial treatment of protective legislation, see Brown, et al., *supra* note 29, at 467-503. See generally Babcock, *supra* note 17.