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INTRODUCTION

The term "hidden curriculum" is sometimes used by academics to describe an underlying structure beneath the catalogue listing of required and elective courses.[1] In the hidden curriculum are the "must-take" courses, the courses which are considered to be the most important and central and which acquire a higher status as a result of their informal ranking.[2] Other offerings are placed at the margins of the curriculum. Arguably, they have a lower status, even those they carry the same number of course credits and are no more elective than the more mainstream courses.[3] This notion of a hidden hierarchy is not unique to the structures of educational curricula. If you reflect on your own experience, I suspect that you have often had occasion to ferret out the implicit hierarchies that operate in the institutions and cultural groupings that form part of your life.

In this essay I advance the view that consumers and their interests have a marginal status in the study of law, generally squeezed out by courses and discussions focused on the legal status and regulation of business. I assert that the implicit low ranking of

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1. *Cf.* Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 Seton Hall L. Rev. 1, 3-12 (1983) (discussing the difference between core curriculum and peripheral courses).

2. I have in mind such favorites as Corporations, Income Tax and Trusts & Estates. These are typically high enrollment courses that are not, strictly speaking, required courses.

3. Although informal rankings differ from school to school, typically courses such as Sex Discrimination Law, Poverty Law and Native American Law have low enrollments and are considered peripheral or "boutique" courses.

consumer law and consumer issues in the current law school curriculum is a function of three interrelated factors: (1) the historical origins of the course; (2) the association of consumers with less dominant social groups, particularly women; and (3) the dormant state of the consumer movement in the United States. I then connect this assertion to the larger legal picture by reflecting more generally on implicit hierarchies in tort law.

This symposium is dedicated in part to dissecting consumers, explaining how they make choices, how they understand and process information, and how they are influenced or manipulated by advertising and marketing forces. Its innovation is to evaluate products liability law in light of behavioral research in psychology and, in the process, to question the foundation of much of the current legal doctrine and scholarship. The specific target of the critique is the construct of the "rational consumer," that cousin of the rational actor who has surfaced in so many law school offerings influenced by the law and economics movement.

The lens of behavioral research allows us to see that there are times when consumers act like rational fools, systematically under-estimating or over-estimating risk. However, even this augmented portrait of the consumer is quite abstract and objectified. What is obscured from these accounts is that, at least in some historical periods, consumers in the United States have self-consciously tried to define their own interests.[4] In approaching the key recurring questions, such as the level of safety consumers desire or the ethics of certain types of advertising and marketing practices, a broader, more historical lens seems in order.

CONSUMER PROTECTION LAW AND THE HISTORY OF THE CONSUMER MOVEMENT

This symposium's focus on the consumer took me back to the early 1970s when I was a law student and the law and economics movement had not yet taken hold in the legal academy.[5] At that

4. *See infra* text accompanying notes 18-53.

5. Richard Posner published the first edition of his casebook, Economic Analysis of Law, in 1973. The field did not begin to take off, however, until the early 1980s. *See* Thomas S. Ulen, *Firmly Grounded: Economics in the Future of Law*, 1997 Wis. L. Rev. 433, 434. By 1988, Robert D. Cooter and Thomas S. Ulen reported that having a course in law and economics had become a "part of the standard curriculum in leading law schools" and that a majority of the federal judiciary had been trained via short courses provided by academic centers for the study of

time, the consumer had direct billing in the law school curriculum and the course in Consumer Protection Law was considered one of the new, relevant courses to take. Students were being assigned to read prominent consumer law cases in the required, first year curriculum. In Contracts, Judge Skelly Wright's opinion in *Williams v. Walker-Thomas Furniture*[6] addressed the legality of adhesion contracts and introduced the concept of unconscionability in consumer finance loans.[7] In Constitutional Law, the Supreme Court's landmark procedural due process case, *Fuentes v. Shevin*,[8] accorded low-income minority consumers the right to be heard before their goods were repossessed; the interests of senior citizens and low-income patients were at the center of *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[9] the Supreme Court case which interpreted the First Amendment to invalidate a ban against advertising the prices of prescription drugs. This was a moment in history when the consumer protection movement was quite visible. In 1965 Ralph Nader had published his famous book,

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law and economics. Robert D. Cooter & Thomas S. Ulen, preface to Law and Economics (1988). By the early 1990s, Ulen claimed that "economic analysis suffused a modern legal education, even one devoid of an explicit course in law and economics." Ulen, *supra*, at 434.

6. 350 F.2d 445 (D.C. Cir. 1965).

7. *See id.* at 447-50. The famous case involved a challenge to an installment contract for furniture, in which the seller reserved the right to repossess all items (even those purchased years before) if the buyer became delinquent in payments. Ora Williams, a woman receiving public assistance, had charged $1800 worth of merchandise over a period of years and paid $1400 of the debt, when Walker-Thomas furniture sought to repossess all the items because she defaulted on a $500 stereo. Judge Wright recognized that standard form contracts could be "unconscionable," as evidenced by the gross inequality in bargaining position between the parties. *See id.* at 449-50. For commentary on *Walker*, see Katheryn K. Russell, *Affirmative (Re)Action: Anything But Race*, 45 Am. L. Rev. 803, 803-04 (1996); Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 Temple Pol. & Civ. Rts. L. Rev. 89 (1993); Stewart Maccaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 Houston L. Rev. 575, 578-82 (1989); J. Skelly Wright, *The Courts Have Failed the Poor*, N.Y. Times Mag., Mar. 9, 1969, at 26.

8. 407 U.S. 67 (1972). *Fuentes* also involved a dispute in connection with an installment sale of household merchandise, namely a stove and a stereo. When she defaulted, the plaintiff challenged the repossession of these items, claiming that the stove was defective and the manufacturer had failed to repair it. *See id.* at 70-71. The Supreme Court held that she was entitled to a hearing before the repossession could take place. *See id.* at 96.

9. 425 U.S. 748 (1976).

Unsafe at Any Speed,[10] which exposed the safety defects in the design of the Chevrolet Corvair.[11] For many observers, it looked like the political mobilization of consumers might have the effect of transforming consumers into a recognizable social and political force.

In the early 1970s, consumers also found their way into the law school curriculum in the relatively new offering called Products Liability or Enterprise Liability.[12] Less than a decade before, in 1963, Justice Traynor of the California Supreme Court had written *Greenman v. Yuba Power Products*,[13] the pathbreaking case that introduced strict liability for defective products into the law. In 1965, the American Law Institute had promulgated the influential §402A of the Restatement (Second) of Torts which adopted strict liability for "unreasonably dangerous" defective products.[14] The commentary to that section stated that unreasonable danger was to be judged by consumer expectations, that is, whether the article was "dangerous to any extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."[15]

Although both courses dealt with consumers, their focus was very different. The emphasis of Consumer Protection Law was on consumer fraud and nonphysical injuries. We studied Truth in Lending, sex discrimination by banks and other credit institutions, privacy issues and deceptive advertising.[16] Empowerment of con-

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10. Ralph Nader, Unsafe at Any Speed (1965).

11. One historian of the consumer movement explains that the Nader book was much more than an exposé of the Corvair. "It was an indictment of the entire automobile industry, and by extension other giant corporations, for ignoring the consumer's desire for a safe car and contributing so massively to air pollution." Robert N. Mayer, The Consumer Movement: Guardians of the Marketplace 28 (1989).

12. A casebook by Keeton & Shapo entitled "Products and the Consumer: Defective and Dangerous Products" was first published by Foundation Press in 1970. The first Nutshell on Products Liability by Jerry J. Phillips was published in 1974.

13. 377 P.2d 897 (Cal. 1963).

14. Restatement (Second) of Torts §402A (1965).

15. *Id.* at cmt. i. The consumer expectations test was largely dropped in the new Restatement of Products Liability. It was reserved only for food and some used products. *See* Restatement (Third) of Torts: Prod. Liab. §§ 2, 7 & 8, cmts. g & h.

16. Two contemporary casebooks, for example, cover such topics as regulation of deceptive trade practices by the FTC, truth in lending, protection of consumer

sumers was at the center of the course. Although it was never explicitly noted, I believe that the prototypical plaintiff in Consumer Protection Law was the homemaker or perhaps the elderly woman who was had been tricked or exploited into buying something she really did not want. The course also had a race and class dimension: many of the victims of consumer fraud were poor and minorities.

In contrast to Consumer Protection Law, the course in Products Liability focused on the consumer only indirectly. In Products Liability, the light shone on the conduct of manufacturers, particularly their decisions with respect to design and safety. Although one of the topics in the course was breach of warranty and nonphysical harm, the clear emphasis of the course was on physical harm to tort victims. The prototypical plaintiff of the Products Liability course was not the homemaker, but rather the (middle-class) homeowner using his lawnmower, or the man injured, like the plaintiff in *Greenman*, using his home power tool.

The differences in the emphasis and imagery of the two courses was understandable. To some extent, the course in Consumer Protection Law still bore some of the traces of the history of the consumer movement in the United States.[17] To a greater degree than the Torts offspring of Products Liability, Consumer Protection Law was a course sparked by a social movement and devoted to the study of legislative and regulatory measures that were a product of that movement.

Historians of the consumer movement in the United States typically begin their story with the Progressive Era. The National Consumers League (NCL), founded at the turn of the twentieth century, and headed by the progressive reformer Florence Kelley, first enlisted consumer action to protest abuses suffered by laborers.[18] Their campaigns centered on the abolition of child labor and

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privacy (Fair Credit Reporting Act), sex and race discrimination in credit transactions (Equal Credit Opportunity Act) and protection against coercive enforcement tactics. *See* Michael Greenfield, Consumer Transactions (3d ed. 1999); Douglas J. Whaley, Problems and Materials on Consumer Law (2d ed. 1998).

17. *See* Mayer, *supra* note 11, at 10-33 (describing three eras of consumer activism).

18. *See* Kathryn Kish Sklar, Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830-1900, 143 (1995). Kelley had a major role in determining the agenda of the NCL. She was a socialist who had translated Engels and Marx while studying abroad. When her husband began battering her, she

sweatshops. Women in particular played a key role in this first wave of consumer activism.[19] An important early campaign of the NCL, for example, tied the interests of largely middle-class female consumers to the plight of women and children who worked in the textile industry.[20] The NCL awarded its "White Label" to manufacturers who shunned child labor, and who followed state regulations on overtime and safety regulations pertaining to female employees.[21] By urging its membership to purchase only White Label garments, the NCL hoped to have an impact not only on what consumers purchased, but on the working conditions under which such goods were produced.[22] This interjection of the consumer into the production process was new to the *laissez-faire* world of American industrialism and afforded the first glimpse of the potential of consumers to use their buying power to effect social change. The campaign of these early consumer activists had a distinctly moral tone: they were not interested in lower prices if it meant endorsing cutthroat competition that drove down the price of goods through

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fled with her three children to Chicago, where she teamed up with Jane Addams at Hull House. The need to change the oppressive social conditions facing women and labor remained a constant theme throughout her work on behalf of consumers.

19. Robert Mayer identifies three distinct periods of consumer activism: the 1880s to World War I; the late 1920s to World War II; and the late 1950s to the early 1970s. In these periods, consumers organized, often around a particular publicized cause, effected social and legal change and then disbanded. Mayer asserts that the most recent Nader-inspired wave of the consumer movement ended in 1980 with the election of Ronald Reagan. Mayer, *supra* note 11 at 10-33.

20. Kathryn Kish Sklar, *Two Political Cultures in the Progressive Era: The National Consumers' League and the American Association for Labor Legislation*, *in* U.S. Women's History: New Feminist Essays 33, 41 (Linda K. Kerber et al. eds., 1995).

21. The NCL also campaigned for the passage of maximum hours legislation and minimum wage legislation for women workers. It targeted women workers in part because of concerns that the courts would rule unconstitutional any protective labor legislation that extended to all workers. To defend the gender-specific protective labor legislation, the NCL argued that women workers tended to be young, unskilled, and vulnerable because they were unlikely to be represented by labor unions. Defenders also invoked women's maternal role, asserting that women working long hours under oppressive conditions could lead to birth defects and other ill effects on the health and well being of children. In 1908, the Supreme Court upheld maximum hours legislation for women, citing the maternal justification. *See* Muller v. Oregon, 208 U.S. 412 (1908). With respect to minimum wage legislation for women, however, the Court refused to sustain such legislation until the political tide turned in 1937. *See* Adkins v. Children's Hosp. 261 U.S. 525 (1923) (holding minimum wage for women unconstitutional); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage for women).

22. *See* Sklar, *supra* note 20, at 44-46.

the use of cheap labor and unhealthy working conditions.[23] Historian Kathryn Kish Sklar explained that the NCL and Florence Kelley recognized that "righteously made goods cost more."[24] Through the consumer campaign, the NCL enlisted the predominantly white, Protestant membership to align themselves with women and children from a different social class, many of whom were immigrants and Catholics.[25]

One early target of the NCL, which would turn out to become a persistent theme of successive waves of the consumer movement, was its skeptical stance toward advertising. Kelley regarded advertising as contrary to the consumer's interest, particularly the moral consumer who used her freedom of choice to advance her political as well as economic objectives.[26] For Kelley, advertisements were "distinctly not meant to educate or instruct, but to stimulate, persuade, incite, entice, and induce the indifferent to purchase."[27]

After World War I, the volume of advertising of consumer products increased exponentially as consumers began to purchase a great variety of new electrical appliances and household products.[28] In the 1920s, however, advertising contained little objective information about the product itself, focusing instead on how purchasing the product would bring consumers "health, happiness, comfort, love, [and] social success."[29] Historians agree that the "point of greatest friction between business and the consumer

23. The publication in 1906 of Upton Sinclair's, *The Jungle*, a muckraking exposé of the meat packing industry, had shone the national spotlight on the inhumane and grossly unsanitary conditions prevailing at the Chicago stockyards. Although Sinclair wrote the book to inspire changes in the treatment of workers, the public outcry focused more on the risk to the consumer's health. Sinclair is reported to have said, "I aimed for the nation's heart, but I hit its stomach instead." Mayer, *supra* note 11, at 17-18.

24. Sklar, *supra* note 20, at 45.

25. *See id.* at 44.

26. *See id.*

27. *Id.* (citing Florence Kelley, *Aims and Principles of the Consumers' League*, 5 Am. J. Soc. 289, 294 (1899)).

28. It was not until the mid-1920s that a majority of American households had electricity. Once there was electricity, families then began purchasing a number of electrical appliances for the first time, including refrigerators, washing machines, electric irons, sewing machines and vacuum cleaners. *See* Mayer, *supra* note 11, at 19.

29. *Id.* at 20 (citing Stephen Fox, The Mirror Makers 95 (1984)).

movement was advertising."[30] As Lucy Black Creighton describes the rift:

> The movement resented the power of advertising over consumer values and asserted that advertising was a major force in establishing the patterns of American consumption. It saw advertising as often encouraging people to use their incomes in unwise and essentially wasteful expenditures. The consumer movement maintained that there was considerable evidence to the effect that highly advertised goods were nearly always higher in price and just as often of lower quality than similar unadvertised products. It was particularly critical of advertising that emphasized the emotional rather than the intelligent reasons for buying a good–such as buying to achieve popularity, success, or status. According to the consumer movement, advertising, instead of providing information that would assist consumers in making wise buying decisions, succeeded only in adding to their confusion–and vulnerability.[31]

The consumer-oriented antidote to useless, and sometimes false and misleading, advertising was independent product testing. One famous champion of product testing was Frederick Schlink, who with co-author Stuart Chase, published the best selling book *Your Money's Worth* in 1927, which one author describes as "the *Uncle Tom's Cabin* of the consumer movement."[32] The book exposed widespread consumer fraud, manipulative sales practices and deceptive advertising that "wasted the consumer's purchasing power and robbed the nation of the true benefits of mass production."[33] At the end of the book, the authors invited the reader to send in a dollar to receive a listing of products which had been rated as superior or inferior in the experience of users (who incidentally belonged to a club of which Schlink was a member).[34] When they were deluged with requests for the list, Schlink devel-

30. Lucy Black Creighton, Pretenders to the Throne: The Consumer Movement in the United States 28 (1976). *See also* The Consumer Movement: Lectures by Colston E. Warne 91 (Richard L.D. Morse ed., 1993) ("Fundamentally, it was advertising which was historically responsible for the birth and growth of the consumer movement here and abroad.").

31. Creighton, *supra* note 30, at 28.

32. Warne, *supra* note 30, at 19.

33. Mayer, *supra* note 11, at 20.

34. *See* Warne, *supra* note 30, at 21.

oped the list into a consumer information and testing service, which became known as Consumers' Research.[35]

In part because of the threat represented by consumer product testing, by the Depression the consumer movement had developed a very adversarial relationship with American business. For example, the fear of being sued for libel led Consumers' Research to adopt the practice of requiring their subscribers to sign a declaration promising they would keep the product ratings in complete confidence and would not disclose them to anyone outside their immediate family.[36] Businesses countered the consumer activists' campaign against advertising by arguing that advertising fostered the creation of mass markets and increased the availability of consumer goods.[37] Perhaps most importantly, business linked advertising with consumer choice and contended that "to distrust advertising was to oppose choice."[38] Some even regarded the consumer movement's distrust of advertising as un-American.[39] In 1938, the House Committee on Un-American Activities investigated charges that Consumers Union (a spin-off from Consumers' Research) was a communist front organization and in the 1950s Consumers Union made it onto the federal list of Subversive Organizations.[40] McCarthyism and the conservative political climate of the 1950s served to dampen the consumer movement at a time when Americans became voracious consumers during the booming economy following World War II.[41]

The third wave of consumer activism coincided generally with the more liberal political climate of the 1960s and the movements for social equality that escalated in the late 1960s and early 1970s. Like in the earlier eras, consumer activists complained about manipulative advertising[42] and the existence of unsafe products.[43] What marked out this era from earlier bursts of energy, however,

35. *See* Mayer, *supra* note 11, at 21.
36. *See* Warne, *supra* note 30, at 25.
37. *See* Creighton, *supra* note 30, at 28.
38. *Id.*
39. *See id.*
40. *See* Warne, *supra* note 30, at 138.
41. *See* Mayer, *supra* note 11, at 25-26.
42. *See* Vance Packard, The Hidden Persuaders 3-4 (1957). Packard set the stage for the renewed attack on manipulative advertising. He argued that, through motivation research, companies led consumers to make buying decisions based on subconscious, rather than rational processes, casting doubt on the authenticity of consumer choice.

was the presence of Ralph Nader and his organization's impact on the federal government.

Nader first became a household word when he took on General Motors and charged that American automobile manufacturers had succeeded in making the public believe that safety issues revolved around the driver and the highway, rather than the design of the automobile itself.[44] After Nader's highly visible campaign against the Corvair, General Motors hired private detectives to try to secure information to discredit Nader and his book.[45] Perhaps because Nader led such a spartan existence,[46] shunning material goods and making it impossible for critics to uncover conflicts of interests, his reputation remained untarnished. In a characteristic Naderesque move, he sued General Motors for invasion of privacy and used the half-million dollar settlement to finance his growing crusades.[47]

Throughout the late 1960s and early 1970s, Nader's Raiders[48] increasingly turned their focus on the failure of federal regulatory agencies to carry out their statutory responsibilities and protect consumers. The charge was that the agencies were often inactive and sometimes became the captives of the business interests they were supposed to regulate.[49] In Nader's view, in an economy where large concentrated corporate enterprises wielded considerable market power, government regulation was necessary to afford consumers a measure of countervailing power.[50] Nader's organization

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43. The thalidomide scandal in the early 1960s, sparked by the marketing of a drug which produced birth defects when taken by pregnant women in Great Britain and West Germany, prompted calls for stricter regulation of drugs in the United States, particularly when it was revealed that only the efforts of a single FDA doctor had prevented the marketing of the drug in the United States. *See* Mayer, *supra* note 11, at 26-27.

44. *See* Creighton, *supra* note 30, at 52.

45. *See id.*

46. One historian describes Nader as the "nation's premier consumer advocate" who is the "ultimate nonconsumer!" Mayer, *supra* note 11, at 29. The mythology that grew up around Nader stems from the fact that he did not own a car, lived in a rooming house in a low-rent district, read only nonfiction and had virtually no social life. *See id.*

47. *See* Creighton, *supra* note 30, at 52.

48. *See* Mayer, *supra* note 11, at 28-29 (describing how Nader's Raiders, typically idealistic students who spent their summers in Washington, descended on federal agencies such as the FTC, ICC and the FDA).

49. *See id.*

50. *See* Creighton, *supra* note 30, at 54.

helped to create a political climate that produced the wide array of consumer protection legislation, from the creation of the National Traffic and Vehicle Safety Act,[51] to legislation protecting against harmful products such as flammable fabrics and radiation, to disclosure acts designed to promote truth in lending and packaging.[52] The flurry of activity that peaked in the early 1970s with the creation of the Consumer Product Safety Commission became the critical core of the course in Consumer Protection.[53] By the 1980 election of Ronald Reagan, however, the third wave of consumer activism was dead and would remain dormant for the next twenty years.

Recurring Themes of Organized Consumer Activism

The foregoing sketch of the history of the consumer movement in the United States suggests some continuities and enduring themes, despite its admittedly sporadic and amorphous character. Additionally, the history helps to explain why consumer issues received more attention in the law school curriculum of the 1970s than at present.

First, it seems clear that periods of consumer activism and attempts by consumer groups and organizations to define and advance their own interests has coincided with larger periods of social reform. Not surprisingly, the first wave of activism occurred during the Progressive Era,[54] the second wave corresponded to the New Deal[55] and the most recent wave was part of the Great Society initiatives that marked the late 1960s and early 1970s.[56] These were periods in which the status quo was challenged, including the conventional wisdom that what is good for business is automatically good for the consumer.

To a significant extent, the consumer movement in the United States has defined itself in opposition to business. Much like the labor movement to which it was originally linked, the consumer movement has sought to create a collective voice for consumers that would serve to balance the enormous power of corporate en-

51. *See id.* at 52.
52. *See* Mayer, *supra* note 11, at 29.
53. *See id.* at 29-30.
54. *See supra* text accompanying notes 18-27; Mayer, *supra* note 11, at 12-19.
55. *See supra* text accompanying notes 36-38; Mayer, *supra* note 11, at 19-25.
56. *See supra* text accompanying notes 42-53; Mayer, *supra* note 11, at 25-33.

terprises.[57] Although the consumer movement never attained a degree of cohesion or influence comparable to the labor movement, it nevertheless serves as a reminder that the individualistic model of the rational consumer that dominates the discourse of law and economics bears little resemblance to historical actors who have agitated for consumer rights. Instead, the campaigns that energized consumer advocates and their constituencies most often were protests against unsafe products and deceptive business practices in which consumers charged that market forces were inadequate to protect consumers' health or prevent them from being exploited.[58] In these instances, it was the political mobilization of consumers which affected the level of safety of products, the prices of goods sold, or the conditions under which the goods were produced. Notably, at times consumers not only wanted their money's worth, but were concerned with specific ethical and political issues, such as child labor and unsafe working conditions.[59]

The second recurring theme in the history of the consumer movement is consumer skepticism about advertising. In each historical period, consumer advocates have complained that very often advertising neither serves the interests of consumers, nor protects consumer choice. Rather than provide consumers with the information they need to make sound selections, advertising can undermine consumer sovereignty by manipulating consumer preferences and constructing demand for useless or even harmful products. From early efforts to promote standardization of products and require substantiation for advertising claims, to more contemporary critiques of seductive imagery in ads and the proliferation of advertising generally, consumer advocates have decried the volume and the quality of advertising.[60] In this important respect, organized consumer interests have contested the prevailing view that advertising is crucial to consumer choice or at worst a benign distraction in the mass marketing of goods.

Thirdly, it is significant that the consumer movement has disproportionately enlisted the energies of women and that the cause of consumer rights has historically been associated with women's

57. *See* Creighton, *supra* note 30, at 69.

58. *See supra* text accompanying notes 23, 43-47.

59. *See supra* text accompanying notes 21-25.

60. *See supra* text accompanying notes 26-33, 42.

interests.[61] It is not a coincidence that President Johnson selected Esther Peterson to be the first presidential advisor for consumer affairs[62] and that a woman has occupied that post ever since. The link between women and consumers is historically grounded: Florence Kelley targeted women for her consumer organization because they would be more likely to empathize with the plight of female laborers and had a measure of autonomy with respect to the purchasing of household items and personal apparel. As volunteers, middle-class women also had the time to engage in grass roots organizing, were less likely to be beholden to an employer and did not tend to identify with business organizations. On the cognitive level, the world of business has been associated with men, while home and personal consumption are coded "female" and associated with women. Even though women's purchasing power and their influence as consumers is often exaggerated, this is one site when women's perspectives have counted heavily.

Finally, the consumer movement in the United States has generally been associated with the regulation, rather than the deregulation, of business. Although consumer advocates have touted increased competition as good for consumers and have supported enforcement of antitrust laws, the remedy of choice has most often been the passage of consumer protection legislation.[63] Periods of consumer activism have been marked by the passage of new laws and step-ups in enforcement of older measures. For the most part, it has been accepted that the antidote for big business must be big government, if the interests of consumers—separate and apart from business—are to have an effect on public policy or the economy.

What is perhaps most striking about these four consumer-oriented themes (the collective voice of consumers in opposition to business; skepticism about the benefits of advertising; the impor-

61. *See supra* text accompanying notes 19-22.

62. *See* Mayer, *supra* note 11, at 28. Peterson was replaced by Betty Furness, a TV personality, who surprised her critics by becoming a strong advocate for consumers during her two year tenure. Virginia Knauer held the post during the Nixon, Ford and Reagan administrations. President Carter selected Peterson to resume her old post. *See id.* Bonnie Guiton Hill served during the Bush Administration. *See* United States Government Manual 1990-1991 287 (1990). Leslie L. Byrne served during the Clinton administration. *See* United States Government Manual 1997-1998 263 (1997).

63. *See supra* text accompanying notes 51-53.

tance of women's perspectives and the impetus toward the regulation of business) is how infrequently they are sounded in contemporary policy debates about consumer transactions. The dormancy of the consumer movement in the 1980s and 1990s is reflected in legal scholarship which stresses efficiency and the growth and profitability of business and rarely takes account of the position of organized consumer groups. It is not surprising that we find that the course in Consumer Protection has lost its luster. If it is taught at all, it is marginalized, perhaps taught by an adjunct professor. The current AALS directory of law teachers lists only 49 faculty members who are currently teaching Consumer Law[64] among the 185 law schools included in the directory. Although I do not want to overstate its popularity in the law school curriculum, there is little question that both within the basic Torts course and as a separate offering, Products Liability has grown in importance. Notably, 102 faculty are listed in the same AALS directory as currently teaching a course in Products Liability Law.[65] Thus, the law student these days is likely to meet the consumer in the garb of an accident victim in a course primarily about the behavior of manufacturers and other business entities.

This development suggests that the status of the consumer has been downgraded in the implicit hierarchy of the law school curriculum. If the consumer has not disappeared altogether from the hidden curriculum,[66] surely her stature has diminished. The interests of consumers are less likely to be addressed in the first instance, apart from their effect on business. In the course on Products Liability, there is little chance that low-income consumers will receive specific attention or that the gender or race of consumer/

64. *See* The AALS Directory of Law Teachers 1096-97 (1999-2000). The Directory lists permanent faculty only, excluding adjunct professors who are hired on a contract basis to teach a specific course.

65. *See id.* at 1238-39. It should be noted that neither Consumer Law nor Products Liability is very popular among the elite law schools. In the top 21 law schools as measured by the 2000 U.S. News & World Report ranking, only 3 professors are listed as currently teaching a course in Consumer Law, compared to 7 professors for the course in Products Liability. *See* U.S. News & World Rep., Mar. 31, 2000.

66. Consumer interests are also very much implicated in the course on Antitrust and indeed trust busting was on the agenda of the first wave of the consumer movement in the United States. *See* Mayer, *supra* note 11, at 15-16. However, like Products Liability, the course on Antitrust is primarily about regulating business and promoting competition, with only an indirect focus on the well-being of the consumer.

victims will even be noticed. Finally, without a course of their own (i.e., like the specific offering in Consumer Law), consumer interests aside from product safety—notably nonphysical interests in freedom from exploitative and discriminatory practices–are not likely to be discussed or to stimulate student interest. There is little space in the current curriculum to consider the consumer as a whole person. Nor is the objective of empowering consumers as a social or political group likely to surface in classroom debates in courses other than Consumer Law.

By noting the vanishing act of the consumer in the law school curriculum, I do not want to suggest that Products Liability as a course and as a body of law is not highly important for consumers. Consumers are indeed protected by the constraints placed on manufacturers and distributors by the current law. My point is simply to highlight what has been left out or relegated to the margins of the debate when the focus is predominately about manufacturers' investment in product safety—namely, the other interests of consumers that are more likely to be seen as antagonistic to business, particularly an investigation of questionable or exploitative business practices that disproportionately affect women, low-income and minority consumers.

Implicit Hierarchies in Tort Law

This phenomenon of subtly steering the interests of less dominant social groups to the margins of the law and the law school curriculum is a recurring and important feature of our current system. In my scholarship on torts,[67] I have been fascinated with implicit hierarchies and have tried to evaluate the deep structures of tort law to unmask these judgments of value (for a hierarchy is basically a statement of relative value).[68] I analyze which social

67. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463 (1998); Martha Chamallas, *Vanished from the First Year: Lost Torts and Deep Structures in Tort Law, in* Legal Cannons (Jack Balkin & Sanford Levinson eds., 2000).

68. A focus on the deep structures of law is very much in keeping with the spirit of this symposium. In his 1977 article, Amartya Sen argued:

> [t]he economic theory of utility, which relates to the theory of rational behavior, is sometimes criticized for having too much structure; human beings are alleged to be "simpler" in reality . . . [p]recisely the opposite seems to be the case: traditional theory has *too little* structure . . . The *purely* economic man is indeed close to being a social moron. Economic theory has been much preoccupied with this rational fool decked in the

groups are advantaged and disadvantaged by the implicit hierarchies, with a special focus on the impact of hierarchies on women and racial minorities. The most intellectually challenging aspect of this work has been to consider how these hierarchies are maintained, in a legal regime that has long since eliminated most explicit gender and racial distinctions from the face of the law.[69] It is at this point that cognitive bias comes into play. In my view, the image of the prototypical plaintiff affects how the law categorizes the very nature of the harm suffered and depresses damage awards in personal injury litigation for women and racial minorities.

First, a bit about implicit hierarchies in the law of torts. Although the standard texts generally do not explicitly state so, there is little question that a higher value is placed on physical injury and property loss than on emotional injury or relational harm. This ranking of the types of injuries means that, as a practical matter, it is far more difficult to recover for both intentionally inflicted and negligently inflicted emotional harm. This is accomplished in the law by erecting doctrinal hurdles in the form of more exacting threshold requirements for those plaintiffs who cannot point to a specific physical injury directly traceable to the defendant's wrongful conduct.

For example, the tort of intentional infliction of mental distress was recognized only in the later half of the 20th century (in the torts world, it is a new tort) and is still approached cautiously

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> glory of his *one* all-purpose preference ordering. To make room for the different concepts related to his behavior we need a more elaborate structure.

Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 Phil. & Pub. Aff. 317, 335-36 (1977).

69. Older legal doctrines that explicitly limited legal recovery exclusively to one gender have either been abolished or extended on a gender neutral basis. Women as well as men may now recover for such claims as loss of spousal consortium and loss of a child's services. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts 931-32, 934-35 (5th ed. 1984). The legal disabilities that prevented slaves, free persons of color and married women from filing suit on their own behalf and giving testimony have been lifted by civil right legislation guaranteeing access to courts. *See* 42 U.S.C. § 1981(a) (1994) (guaranteeing blacks the same rights as whites in civil proceedings); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 103 Geo. L.J. 1359, 1423-24 (1983) (discussing legislation which permitted married women to sue on their own behalf and retain ownership of legal recoveries).

by the courts.[70] In contrast to the ancient tort of battery (which requires only that the plaintiff prove an unconsented-to touching of his or her person), there is no recovery for intentional infliction of mental distress unless the defendant's action is judged to be "extreme and outrageous" and the plaintiff's distress is characterized as "severe."[71] In theory at least, the intentional infliction of the most trivial physical harm is a legal wrong. With respect to emotional harm, however, the law responds only to severe injuries and only if the wrongdoer is of the worst order and deliberately oversteps the bounds of decency.

One consequence of the nonprivileged status of emotional harm is that tort law has never provided a solid basis for recovering for sexual harassment.[72] Although some forms of harassment take the form of physical contact amounting to a battery or assault, the far more common type of harassment consists of claims of hostile working environments, and involve verbal conduct and patterns of abuse that do not fall neatly into the traditional intentional tort categories.[73] It is telling that no legal category captures the full dimensions of sexual harassment as an injury. Tort law treats it primarily as a dignitary harm under the rubric of emotional distress.

The numerous empirical studies of sexual harassment in the workplace indicate that the vast majority of harassment victims

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70. *See* Richard A. Epstein, Torts 18 (1999) ("Liability for this tort is not easy to establish . . . juries are allowed to find liability only for behavior that is so obnoxious, rude and gratuitously cruel as to go beyond all possible bounds of decency.").

71. *See, e.g.,* Dan B. Dobbs, The Law of Torts 824-29 (2000). *See also* Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 353-55 (1992) (discussing proof outrageousness in sexual harassment cases).

72. *See* Catharine A. MacKinnon, Sexual Harassment of Working Women 164-174 (1979). The inadequacy of tort law as a basis for redressing the harms of sexual harassment was what prompted Catharine MacKinnon to call for the recognition of a Title VII claim prohibiting sexual harassment as a form of sex-based discrimination in employment. *See id.*

73. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1762-69 (1998). For example, harassers may seek to undermine a target employee's competence and confidence by verbally denigrating her abilities, deliberately sabotaging her work performance, denying adequate training, ostracizing her from informal networks, evaluating her by sexist standards, assigning her demeaning tasks, in addition to subjecting her to sexual assaults, crude overtures and sexual taunting. *See id.*

are women.[74] The law's treatment of sexual harassment is thus of special importance to women and any lack of protection tends to have a disparate impact on women. This example illustrates a broader point. In the abstract, the implicit hierarchies of value look neutral (physical harm over emotional distress; property damage over relational interests). They do not appear to be tied to any gender or other social group. Because all persons have a body, emotions, and personal relationships, it is often assumed that people possess "privileged" and "nonprivileged" interests in equal proportions. As they operate in social context, however, the implicit hierarchies of value tend to place women and racial minorities at a disadvantage. The important and recurring injuries in women's lives often tend to be classified as lower-ranked emotional or relational harm, or as noneconomic loss. This process of devaluation is hidden under the maze of special doctrinal rules for particular types of cases.

The gender impact of the low status of relational harm is most evident in the legal treatment of injuries sustained by persons who care for children. When a child suffers an injury or death, people who have a special responsibility for caring for the child typically also suffer a grievous loss. Particularly after a serious nonfatal accident, the caretaker must learn to deal with the child's resulting physical disability and the enormous change in daily routine that this often causes. For both the caretaker and the child, such an accident can be a life-altering event.[75]

Under current law, the child has a "primary" tort claim for the injury suffered, including an amount for medical and other rehabilitative expenses associated with the child's injury. The devastating impact of the accident on the daily life of the caretaker, however, is eclipsed because in most states there is no separate claim for the

74. Two studies of the federal workplace found that 42% of women experienced some form of sexual harassment during a two-year period. *See* Deborah L. Siegel, National Council on Research for Women, Sexual Harassment: Research and Resources 9 (Susan A. Hallgarth & Mary Ellen S. Capek eds., 1991). In comparison, from 1992-1996, approximately 10% of the sexual harassment complaints filed with the EEOC were filed by men. *See* Telephone interview with EEOC Headquarters (Mar. 3, 1998). *But see* Oncale v. Sundowner Offshore Serv., Inc. 523 U.S. 75 (1998) (indicating a growing recognition of the phenomenon of same-sex harassment of men by male supervisors and co-workers).

75. *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Class*, 1 Yale J.L. & Feminism 41, 50-51 (1989).

caretaker's loss of consortium.[76] Even in liberal states that allow parents to recover for loss of consortium when their child is injured, there may be a further negative racial impact. This impact occurs because even in these liberal states no recognition is given to injuries suffered by primary caretakers other than parents who take on primary caretaking roles. This limitation has a disproportionate impact on African Americans and other ethnic groups in which extended family members–most often grandparents–have the primary responsibility for raising children.

Closely related to the implicit hierarchy for types of *injuries* is another hidden value system in the law of torts, the implicit hierarchy of types of *damages*, which ranks pecuniary over nonpecuniary damages. I should note that many types of injuries give rise to both pecuniary and nonpecuniary damages. Thus, plaintiffs who suffer physical injury not only seek recovery for pecuniary damages consisting of medical expenses, wage loss and loss of future earning capacity. They also seek to recover for nonpecuniary damages of pain and suffering and loss of enjoyment of life. Similarly, a plaintiff suing for negligent infliction of mental distress typically has pecuniary, as well as nonpecuniary, losses. Such a victim is likely to incur medical expenses and loss of income. Thus, the hierarchy of damages operates within categories of types of injury to give higher priority to the pecuniary and economic aspects of the damage claim.

The implicit hierarchy of damages privileging economic over noneconomic damages is most evident in statutory proposals for tort reform, particularly the movement to put caps on noneconomic damages in actions for products liability and medical malpractice.[77] By 1990, some kind of cap or limit on noneconomic damages has been enacted in well over half the states, some extending beyond health care and products liability to encompass all personal injuries.[78] The claim by proponents of the caps is that the caps are warranted because the "real" losses, i.e., the economic damages, are still available, the implication being that noneconomic loss is somehow less essential to a fair system of compensation.

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76. Most states restrict claims for loss of consortium to loss of spousal consortium. *See* Dobbs, *supra* note 71, at 841-42.

77. *See id.* at 1072.

78. *See id.* at 1071-72.

Critics of caps are now beginning to assess the negative gender impact of such tort reform. An empirical study by Thomas Koenig and Michael Rustad[79] showed that women stand to lose more when "nonprivileged" types of damages are curtailed. Their study revealed that two out of three plaintiffs receiving punitive damages in medical malpractice litigation are women, often in gender-linked cases involving mismanaged childbirth, cosmetic surgery, sexual abuse and neglect in nursing homes.[80] In general, noneconomic damages are particularly significant to women because they serve to offset the disproportionately low value placed on women's claims when those measures of value are solely economic and market-based.[81]

The mechanisms that maintain the hierarchies of value in tort law in this gender-neutral age are cognitive processes that influence the thinking of even people who sincerely believe they are unbiased. The hierarchies of value not only set up a ranking of different types of injuries and types of damages, they also establish pairs of opposites or dualisms. Embedded within the hierarchies are three contrasting categories: physical/emotional, property/relational and economic/noneconomic. These categories are themselves "gendered," meaning that if we were asked to link each type of damage or harm with the adjective "male" or "female" there would be widespread agreement that the left side of the pair (physical, property, economic) should be labeled "male," while the right side of the pair (emotional, relational, noneconomic) should be labeled "female."

At work here is a perceptual process which categorizes injury sustained by women as emotional, relational, or noneconomic, even when the same injury could, as a matter of logic, be characterized as physical, property-like or economic. The basic point is that in deciding how to categorize a loss, we consider not only the nature of the injury, but also *who* we believe suffers the loss. The gender of the prototypical plaintiff affects the way we categorize the nature of the harm.

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79. *See* Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 Wash. L. Rev. 1, 1 (1995).

80. *See id.*

81. *See* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 Fordham L. Rev. 73, 81-89 (1994) (discussing gender bias in calculation of lost earning capacity).

This perceptual process is akin to the process that occurs when people interpret ambiguous behavior. Consider the psychological experiments measuring human perception, when subjects are asked to describe an interaction between two people involving a poke or a shove.[82] The action is ambiguous, in the sense that it could possibly be classified as benign (dramatizes, gives information, plays around) or threatening (aggressive, violent, mean). The studies indicated that the race of the actor is important in determining how the action will be interpreted or categorized.[83] Thus, whites tend to interpret the ambiguous behavior of black actors as being more threatening and more hostile than the same behavior undertaken by white actors. The identity of the actor affects how we perceive the nature of the action.

This perceptual process is at work in the social construction of tort categories, affecting where the line is drawn between physical and mental injuries and economic and noneconomic loss. For example, in a study of fright-based injuries, historian Linda K. Kerber and I analyzed the classic "mental distress" cases involving female plaintiffs who suffered miscarriages and stillbirths as a result of emotional trauma.[84] In a very real sense, these plaintiffs suffered physical injuries and, as many early commentators pointed out, their cases could easily have been judged by the principles applied to negligence litigation generally.[85] Instead, their claims were categorized as "emotional harm" cases.[86] In this one class of litigation, the law fixed on fright, the mechanism of the injury, rather than on the ultimate physical consequences of the

82. *See* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of the Stereotyping of Blacks*, 34 Personality & Soc. Psychol. 590, 595-97 (1976), *discussed in* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Stereotyping Habit*, 83 Cal. L. Rev. 733, 752-54 (1995); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. Personality & Soc. Psychol. 590, 593-95 (1980), *discussed in* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1204-07 (1995).

83. *See* Duncan, *supra* note 82, at 595-98.

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

85. *See* Francis Bohlen, *Right to Recover for Injury from Negligence Without Impact*, 50 Am. L. Rev. 141, 172 (1902); Herbert Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 495, 503 (1922).

86. *See* Chamallas & Kerber, *supra* note 84, at 834.

defendant's actions.[87] Once classified as emotional harm, moreover, the various restrictive doctrines came into play to reduce the chances of recovery.[88] When faced with a choice–a choice that is always present when we construct categories–the law matched the type of injury (emotional) to the prototypical plaintiff (a pregnant woman). Cognitive bias thus operated in the construction of the deep structures of tort law to eclipse and downgrade certain injuries and interests, while maintaining a framework that looked gender-neutral and universal.

POSTSCRIPT

A variant of the cognitive bias that has functioned to marginalize emotional, relational and noneconomic injuries in tort law is at work in the law's treatment of consumer interests. At least in the law school curriculum, nonphysical injuries of consumers are not given a high priority and are separated from the more extended discussion of manufacturer liability for unsafe products. This decoupling of consumers' interests makes it less likely that the issues and themes that organized consumer groups historically have placed on the agenda will surface and will receive sustained analysis. It also permits business-oriented models of the rational consumer to be accepted uncritically by a new generation of lawyers. The disappearance of the consumer from the mainstream of legal inquiry subtly pushes women's perspectives and injuries that disproportionately harm women to the sidelines. Ironically, although women are regarded as the prototypical consumers, their voices are not often heard in legal debates about products liability and related consumer issues. The dominant discourse is saturated with economic analysis, without much of a sense of history or politics.

I suspect that the low status of consumer law and consumer issues will not change unless and until the consumer movement reemerges in the larger culture. It is interesting to note that in the last year, Nader-connected groups[89] joined forces with grass-roots

87. *See id.* at 826-32 (discussing the reasoning of the courts in cases involving miscarriages due to fright).

88. *See id.* at 832-33.

89. Nader's group, Public Citizen, played a critical role in uniting the disparate groups to oppose what they have dubbed the "corporate-managed" trade fostered by the World Trade organization. *See* Dori Jones Yang, *Hell, No. We Won't*

environmental and pro-union forces to launch protests against the World Trade Organization (WTO) in Seattle and later against the World Bank in Washington, D.C.[90] One of the prime targets of the groups–protesting the use by multinational corporations of sweatshops and child labor in Latin America and other Third World countries–is reminiscent of the campaign of the National Consumers League at the turn of the 20th century,[91] although this time with a global rather than national focus. The strategy of attacking international bureaucracies like the WTO and the World Bank also resembles Nader's move of scrutinizing federal agencies in the 1970s,[92] a move that puts pressure on the regulators to take more account of the interests of workers and low-income consumers. It is far too soon to tell whether this new globally-focused "corporate accountability movement"[93] will become the fourth wave of the consumers movement in the United States. It is just possible, however, that consumers will make their next appearance in the law school curriculum in courses on International Trade and International Human Rights.

Trade: How an Obscure Trade Organization Became a Lightning Rod for Protest, U.S. News, Nov. 11, 1999.

90. *See* Margaret Graham Tebo, *Power Back to the People*, 86 ABA Journal 52 (July 2000).

91. *See supra* text accompanying notes 18-25.

92. *See supra* text accompanying notes 48-50.

93. *See* Margot Hornblower, *The Politics of Coffee*, Time Mag., Apr. 17, 2000 (describing protests in Seattle as part of the "corporate accountability movement").