HEINONLINE

Citation:
Anat Rosenberg, Rational Households: Consumption between Love and Hate, 19 Geo. J. Gender & L. 499 (2018)

Content downloaded/printed from *HeinOnline*

Sun Jun 24 03:27:13 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

Copyright Information

Use QR Code reader to send PDF to your smartphone or tablet device

RATIONAL HOUSEHOLDS: CONSUMPTION BETWEEN LOVE AND HATE

ANAT ROSENBERG*

"You can be clever and like clothes." Such was British Prime Minister Theresa May's reproachful-cum-apologetic response to comments on her fashionable style. Western culture is both attached to consumption and suspects its own pursuits. This Article suggests that law has had an important role in shaping this contradictory experience. It offers a case study of the modernization of consumption through law, focusing on the common law doctrine of necessaries which regulated the consumer credit of married women, and by implication, household consumption. The doctrine was modernized in England in the late nineteenth century, with the rise of a new logic of rational household management, which displaced on older rationality centered on the luxuriousness of commodities.

The analysis traces doctrinal modernization. Looking at its driving forces, it shows that the paradigm of rational household management, while liberating in the sense of abandoning luxury critique, was driven by fears of new consumers joining markets: women and the working classes. The new paradigm was not wholly liberating: it sought to discipline, and, by turning inwards, enacted a mistrust of consumption. The discussion reveals a contradictory development, at once enabling and undermining consumer pursuits.

---

* Assistant Professor, Interdisciplinary Center (IDC) Herzliya, Radzyner Law School. arosenberg@idc.ac.il.

For thoughtful comments and discussions of earlier versions, I am grateful to participants in the fifth annual Berg conference, The Arts in Legal History, especially my commentator Michael Zakim; participants in the 2015 Junior Scholar Law & Humanities Workshop at Columbia University, especially my commentators Robin West and Amanda Claybaugh; to participants at the Haifa University Law Faculty Seminar 2015, to Elizabeth Blackmar, Richard Brooks, David Ibbetson, Rami Kaplan, Roy Kreitner, Eliav Lieblich, Assaf Likhovski, Noam Magor, Moran Ofir, Uriel Procaccia, Galia Schneebaum, Yoram Shachar, Adam Shinar, Simon Stern, Noel Thompson, Irene Tucker, and Noam Yuran. For able research assistance I am thankful to Elad Erdan and Kovi Yosef. © 2018, Anat Rosenberg.

INTRODUCTION

The doctrine of necessaries regulated the consumer credit of married women, and by implication household consumption, by setting the terms of enforceability of consumer transactions on credit. It provided a common law solution to a common law problem: since married women had limited property and contractual capacity, yet were in charge of households and expected to obtain household goods for their families, the doctrine allowed them to shop on their husbands' credit. It provided that a man was liable for his wife's purchases of consumer goods defined as "necessaries," as opposed to luxuries.

This Article begins by tracing historical legal developments in England in the later decades of the nineteenth century to show how a budgetary logic of domestic routines was introduced into the doctrinal determination of liability and came to dominate over an older assessment which focused on the luxuriousness of commodities. It then examines the implications of the rise of budget rationality as part of the history of consumer capitalism. Viewed within the history of the doctrine, the turn to budgets signaled a shift of legal attention away from questions of luxuriousness; in consequence, the moral critique of luxury lost some of its bite. From this perspective, the law of necessaries was a cultural force which removed restraints on consumption. However, the budgetary logic in the doctrine of necessaries had a disciplinary side. The shift of the legal gaze away from commodities was not strictly neutral and thus liberating; not only was the budget itself a delimiting idea, it was also entangled with a demeaning view of all appearances as superficial. The budgetary turn was about capturing a reality which was *not apparent*. Consumers were essentially made to understand that they could consume as they pleased, but the efforts to create social meaning involved in their consumption would be ineffective. Here was a novel historical way to contain consumption and control its subversive potential. To comprehend legal change and read it within the history of consumption, its liberating and disciplining implications should both be kept in view.

Methodologically, this Article draws on a wide array of sources, from case law through newspapers to parliamentary debates. The analysis moves between high-

court precedents—where formal doctrinal change occurred—and a social history immersed in debates about consumer credit provided by the drapery trade. It will not be my purpose to weave these into a seamless whole, but rather to bring them into dialogue which is significant enough to expose the historical shift in legal treatments of consumption, for while nineteenth century developments in the doctrine of necessaries have received scholarly attention before, the rise of a budgetary logic applied to household routines, and the decline of luxury critique it involved, have not.

Part 1 introduces the doctrine of necessaries and its historical approach to consumption, described as *the order of appearances*. Part 2 examines the changing terrain of consumption in the latter part of the nineteenth century, and the fears of female- and working-class consumption in that context. Those fears implicated the credit drapery trade which relied on the doctrine for its business. Part 3 discusses the change in the doctrine, which took place in those same decades and involved two moves. The first move was an assault on the older logic of the doctrine and its dilution through budget management, celebrated as the paradigmatic rationality of consumption on credit. The second move was a reconfiguration of married women's agency within the new setting, in terms of daily household routines. After engaging in a close analysis of case precedents, in Part 4 I explore the gender and class intersections within which legal change gains meaning as a form of containment. Part 4 ends by showing the force of the new paradigm in early twentieth century discussions of consumer credit. I conclude in Part 5 by reflecting on the cultural role of law in the development of mass consumption, particularly the enactment of an equivocal approach toward consumer pursuits.

1. THE ORDER OF APPEARANCES

1.1. DOCTRINE: FUNCTION AND CULTURE

Managing domestic consumption in nineteenth century England was a tricky business. Women were often placed in charge of consumption while their husbands worked away from home, yet with limited property and even more limited contractual capacity.[1] Various practices allowed women to obtain consumer

1. These limitations emerged from the doctrine of coverture, which subsumed a married woman's legal personality within that of her husband's. While in equity, women could contract to the extent of their separate property (that property itself a limited possibility), until the Married Women's Property Acts they could not do so at common law. Limitations on contract were actually made stricter in early century. TIM STRETTON & KRISTA KESSELRING, MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 11 (2013); James Oldham, *Creditors and the Feme Covert*, *in* LAW AND LEGAL PROCESS 217 (Matthew Dyson & David Ibbetson eds., 2013), *available at* http://ssrn.com/abstract=2197268; HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 360–65 (2005). This should be read within a broader hardening of Victorian middle-class domestic ideology, prompted by political transformations, not least the American War of Independence and the French Revolution, as well as an evangelical revival. *See* BEN GRIFFIN, THE POLITICS OF GENDER IN VICTORIAN BRITAIN: MASCULINITY, POLITICAL CULTURE AND THE STRUGGLE FOR WOMEN'S RIGHTS, ch. 1 (2012). Exceptions are less crucial here.

goods for themselves and their families without property or capacity. The formal private law mechanism was the common law doctrine of necessaries; it provided that women had a presumed authority to contract for commodities qualifying as necessaries—as opposed to luxuries—by pledging their husbands' credit. Focused on credit trading in this manner, the legal framework inextricably tied women's contracts and domestic credit with the trade in consumer goods.[2]

1.2. NECESSARIES, LUXURIES AND SOCIAL HIERARCHIES

The doctrine of necessaries, as its name implied, invoked the age-old distinction between necessaries and luxuries.[3] "Luxuries" and "necessaries" were acknowledged as socially relative concepts, graded according to class and gender hierarchies; I consider these hierarchies in turn.

In the early nineteenth century, two ideas were broadly agreed. One was the presumptive responsibility of a husband for credit given to his wife while they were living together, for necessaries defined as *goods suitable for the husband's degree and estate*. This liability was habitually located in the seventeenth century case *Manby v. Scott*.[4] The early grounding in assumpsit evolved into a concept of agency in which the wife was an agent for her husband. Consent, originally based on a man's government over his wife according to laws of God and nature, turned into more abstract ideas of express and implied consent. Yet, the basic logic carried through from *Manby* was that commodities fitting for one's class were

2. Married women were barred from obtaining loans in other forms, with some exceptions in equity. Women could also pawn goods, a standard strategy for working classes. Paul Johnson, *Credit and Thrift and the British Working Class, 1870–1939*, *in* THE WORKING CLASS IN MODERN BRITISH HISTORY 147 (Jay Winter ed., 1983); M. R. EMANUEL, THE LAW OF MARRIED WOMEN'S CONTRACTS 2 (1907). Credit trading was not institutionalized and so impossible to quantify, yet researchers estimate that it was the most important form of working classes credit. Johnson, *supra*, at 147, 151.

The doctrine of necessaries has an interesting history in relation to minors ("infants" as they were called) which is beyond my scope here. A credit contract for necessaries was binding on an infant directly. Developments do not appear to have taken the same route recounted in this article (for instance, in the leading case of Ryder v. Wombwell (1868) 4 L.R. Exch. 32, Justice Willes expressly rejected a budgetary formulation for one premised on the order of appearances). *See also* FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 47–48 (1876). If this impression is correct, one reason might be that the incapacity of infants was temporary (they would become adults), and did not implicate the entire household.

3. It is hard to exaggerate the role of luxury critique in late-modern thought on consumption. The literature is formidable. *See generally* CHRISTOPHER BERRY, THE IDEA OF LUXURY (1994).

4. Though acknowledged to have had earlier authorities. *See* Smith's reproduction of *Manby*, 3 JOHN WILLIAM SMITH, A SELECTION OF LEADING CASES ON VARIOUS BRANCHES OF THE LAW 1718–42 (1888–89). Katherine Scott left her husband; when she wanted to return (after twelve years(!)), he refused, and prohibited traders from supplying her goods on his credit. The plaintiffs sold her silk and velvet nonetheless. The case was decided in 1662 "before all the judges of England," who agreed that husbands were liable in assumpsit in law for their wives' necessaries; what necessaries were depended on the husband's degree and estate. *Id.* The plaintiffs lost because a husband could prohibit *specific* traders from extending credit to his wife, as Scott did with the plaintiffs.

Important discussions in *Manby* concerned remedies available in ecclesiastical courts. These issues were largely lost on a nineteenth century audience. My aim is merely to locate the set of concepts that would inform later discussions of married women's credit.

obviously appropriate objects of consumption. This obviousness carved conceptual spaces for *symbolic consumption*, that is, consumption undetermined by perceived subsistence needs, which courts would enforce even *contra* the express wishes of heads of households.

Another idea was an extension of the necessaries' construction to a woman's appearance in society. If a woman assumed the appearance of a "station" beyond her husband's, he would be liable for goods matching the false appearance. As Chitty's treatise explained, this liability did not depend "strictly on the real circumstances of the husband."[5] The accepted reference was *Waithman v. Wakefield* of 1807.[6] Mrs. Wakefield appeared at a linen-drapers shop accompanied by a man dressed as a livery servant, and talked of her husband's new house about to be fit up in a "style of elegance."[7] Having left with drapery on credit, her husband was soon asked to pay the bill. He demanded that she return the goods, but she refused with "very violent language."[8] Lord Ellenborough was of two minds. He stated that "[w]hatever may be the husband's degree, he sends his wife out into the world with a credit corresponding to the rank in life in which, by his sanction, she affects to be placed."[9] At the same time, he was inclined to lay the risk on the trader who failed to inquire into Mrs. Wakefield's trustworthiness, possibly perceiving that she was not one to be sent out or called back by anyone, least of all her husband. But, to no avail: the jury made the husband pay, and Ellenborough's abstract statement, holding a husband liable for his wife's appearance on an assumption of control, was more consequential than his actual inclination. In cases which followed, courts uncomfortable with wives riding in borrowed fancy carriages to buy dresses beyond their husbands' degrees, managed to get around Ellenborough's ruling without, however, contradicting its logic.[10] The sphere of consumption falling within the doctrine of necessaries was expanded through assumptions about men's control over their wives.

In the first decades of the nineteenth century, courts consolidated various issues arising in the doctrine's litigation through a focus on the commodities obtained for credit and their appropriateness, commenting on wardrobes and living rooms to allocate risks and liabilities, and tying the inference of consent—that is, of a woman's agency on behalf of her husband—with the qualities of the commodities.[11]

---

5. JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 133 (1850).

6. (1807) 1 Campbell 120, 170 Eng. Rep. 898.

7. *Id.* at 898.

8. *Id.*

9. *Id.* at 899.

10. Often by finding that traders gave credit to the wife, not her husband. *See, e.g.*, Bentley v. Griffin (1814) 128 Eng. Rep. 727. Another exception was carved for a disloyal wife whose husband was away from England. Dennys v. Sargeant (1834) 172 Eng. Rep. 1302.

11. *See generally* the often-cited cases, Montague v. Benedict (1825) 107 Eng. Rep. 867; Seaton v. Benedict (1828) 130 Eng. Rep. 969; Atkins v. Curwood (1837) 173 Eng. Rep. 330.

The emergent picture is one we might think of as *an order of appearances*,[12] reliant on social visibility. The animating assumption behind the analysis of necessaries was that commodities and consumers could be matched. "Degrees" and "estates" (the latter meaning actual assets and income, not just ranks), or a person's "condition"—another favorite term in the nineteenth century, were knowable in a way which could be associated with appropriate quantities and qualities of goods, from meats to dresses. The point moves beyond the observation that consumer credit was socially embedded, as historians often argue.[13] There was an external quality to all of this which was not just about face-to-face transactions in non-anonymous markets, but about an imagery and perception of a social order at large.[14] The external quality of gender and class informed and was reinforced by the necessaries/luxuries analysis which channeled an increasingly confusing flow of goods.

2. GENDER, CLASS, AND THE TERRAIN OF CONSUMPTION

2.1. CONSUMPTION POLITICIZED

In the second half of the nineteenth century, the order of appearances was decentered by a logic of domestic expense management. The budget was the domain of men, as heads of households; meanwhile, women's consumer agency, too, was revised in the doctrine. Women's role as vicarious consumers within the order of appearances was turned into the technical role of the guardian of domestic routines.[15] This two-layered reconceptualization changed the evaluation of consumer activity.

Doctrinal change, more details on which soon follow, both reflected and shaped the shifting historical terrain of consumer capitalism. The late nineteenth

---

12. I borrow and adapt the term from ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS 42 (1996).

13. *See* MARGOT FINN, THE CHARACTER OF CREDIT: PERSONAL DEBT IN ENGLISH CULTURE, 1740–1914, ch. 2 (2003); *see generally* ERIKA RAPPAPORT, SHOPPING FOR PLEASURE: WOMEN IN THE MAKING OF LONDON'S WEST END (2000).

14. Dror Wahrman's account of regimes of identity in England is both helpful and intriguing in considering the order of appearances. Wahrman describes the "ancien' regime," dominant until the late eighteenth century, as outwardly turned, lacking the modern sense of essential innateness. The outward leaning of identity meant that surfaces, or appearances, were not of secondary importance, but rather constitutive; not something to "see through," but the thing itself. Wahrman argues that by the end of the eighteenth century, the modern regime, of innate selfhood, had captured the cultural imagination; in that context, class and gender categories underwent processes of essentialization. *See generally* DROR WAHRMAN, THE MAKING OF THE MODERN SELF (2004). The order of appearances was a complex phenomenon in relation to Wahrman's account: while it treated class and gender in rigid terms which Wahrman would link with the modern cult of innateness, social visibility was inextricably bound with these identities in a manner more readily explicable in terms of his ancien' regime. The transformation at stake in this Article was a further development in which, as we shall see, the instability of class and gender perceptions led to a move away from appearances altogether, which were cast away as shallow.

15. In vicarious consumption I refer to the Veblenian sense of expanding male valor in the public sphere. *See generally* THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (1899).

century can be described as the rise of mass consumption in economic and cultural terms. From midcentury to World War II, the British enjoyed the highest standard of living in Europe. In the final three decades of the nineteenth century, average real wages rose by eighty-four percent, while population increased from 22.7 million to 32.5 million.[16] Significant parts of society attained means exceeding subsistence needs. Producers, meanwhile, collectively offered unprecedented ranges of consumer goods.[17] The rising purchasing power of the lower economic strata was itself entangled with processes of democratization which were reaching the upper echelons of the working classes and making the implications of their expanding economic power culturally salient.[18] As lower classes gained potential economic standing, the economic role of lower class women as managers of household consumption also became conspicuous. This intersection of gender with class converged with a cross-class gender anxiety: women's agency beyond the working classes was a source of cultural drama as they gained visible leeway in struggles for autonomy; this was the era of expanding rights to property and contract—a story to which I return later, of advancing divorce reform, and of suffragist struggles. Overall, processes in the late nineteenth century made the (huge) social margins of an evolving commercial society—working classes and women[19]—seem less constrained by traditional social expectations. It should come as no surprise that consumption was politicized, its trivialization by political economists challenged as it emerged as a social force rather than epiphenomenon.[20]

The doctrine of necessaries was one area of law subjected to social and political debate within these broader transformations. To get a close grasp on debates, I turn to the history of the credit-drapery trade, which was a dominant site of lower class domestic consumption largely reliant on the doctrine of necessaries.

16. *See* NOEL THOMPSON, SOCIAL OPULENCE AND PRIVATE RESTRAINT: THE CONSUMER IN BRITISH SOCIALIST THOUGHT SINCE 1800, ch. 2 (2015).

17. As Thompson says, the figures support a compelling argument about a "consumer revolution" in this period. *Id.* For a review of debates about the implications of these changes (relief or misery), *see* JAN DE VRIES, THE INDUSTRIOUS REVOLUTION 37–39 (2008).

18. *Cultural* salience should be emphasized here. While the causal relation between rising income levels and consumption remains contested given the pervasive reach of consumer credit, the sense of disorder generated by these processes is the point to note for my purposes.

19. These terms overlap as just explained. I use both for analytic purposes. My focus later will be on two social issues, the economic agency of workmen—wage- and salary-earning working class husbands, and that of women—from working classes as well as upper ones. I therefore emphasize separately the question of working classes and that of gender. The intersection of these categories in the doctrine of necessaries was crucial.

20. MATTHEW HILTON, CONSUMERISM IN TWENTIETH CENTURY BRITAIN 33 (2003).

2.2. THE CREDIT DRAPERS

Credit drapers, also known as tallymen, packmen, or Scotchmen[21] called at houses of the working classes[22] to supply textiles: dress, bedding, curtains, linen and other materials, and an assortment of household goods, which they offered on credit. Payments were usually made weekly in small installments, collected by the draper and his agents during travelling rounds. Visiting homes during the day, credit drapers dealt primarily with women while their husbands were at work; as one county court registrar described it, "as she cannot go to market, the market has contracted the habit of coming to her."[23] Coming to women, credit drapers depended on the doctrine of necessaries; they therefore figured prominently in legal discussions focused on working class and female consumption.[24]

---

21. For the history and contestation over these and other terms, see Gerry Rubin, *From Packmen, Tallymen and 'Perambulating Scotchmen' to Credit Drapers' Association, c. 1840–1914*, 28 BUSINESS HISTORY 206 (1986). For ethnic aspects of debates about the trade, see Margot Finn, *Scotch Drapers and the Politics of Modernity: Gender, Class and National Identity in the Victorian Tally Trade*, *in* THE POLITICS OF CONSUMPTION 89 (Martin Daunton & Matthew Hilton eds., 2001); *see also* SEAN O'CONNELL, CREDIT AND COMMUNITY: WORKING-CLASS DEBT IN THE UK SINCE 1880, ch. 1 (2009) (tracing the history into the 1980s).

22. Not only, but mainly.

23. SELECT COMMITTEE ON IMPRISONMENT FOR DEBT, REPORT, HC 1873-348, q. 2464 (UK) [hereinafter "Report 1873(348)"].

24. Nothing better than something from this poem, published in the trade's gazette, to get a sense of a draper's half winking self-imagery:

> He went on his round with a hop, skip, and bound,
> Feeling fresh from his rest on the Sunday,
> Keeping time with the clock, and kind words he spoke,
> As he "tickled the knocker" on the Monday.
>
> "How do you do?" Said A, "I've the shilling, sir, to-day,"
> Mrs. B had two "bob" and an order–
> Then dear old Mrs. C took a half-pound of tea
> But D was much engaged with the Recorder.
>
> "How are you Mrs. E? delighted I shall be
> To shew you of my patterns one or two;"
> But she hissed out, "Never more will I deal, sir, at the door
> With such run-about take-ins, sir, as you."
>
> Tho' rudely thus denied, quite calmly he replied,
> "I really thank you, ma'am, for the scorning;
> I mistook you, ma'am just now–tho' I really can't think how-
> For a lady; so I wish you a good morning."
> . . .
>
> With excuses G and H his soft side articleed to reach,
> 'Twas "job work" or "dull times" or else the weather;
> Their worry was so big, they would have to kill the pig,
> And then next time they'd pay up all together.
> . . .

The drapers' trade was rapidly changing with the advent of modern consumer markets and new forms of competition—both new forms of credit and anonymous cash sales, most famously in department stores; Rubin described the process as the trade's "modernization program."[25] Scotch drapers were indeed a particularly modern type of peddlers, distinguishable from the historical type by their sale method of industrial products on credit collected in cash installments.[26] Despite new challenges, the credit drapers' business was expanding in the late decades of the nineteenth century, especially in urban areas,[27] yet they were facing a legitimacy challenge throughout those decades.

Drapers were denounced for preying on female acquisitive foolishness, forcing credit "on ignorant women by pandering to their vanity"[28] behind the backs of heads of households; this in turn ruined working class families, with wages spent unreasonably and husbands imprisoned for debt. The drapers' public visibility peaked as they activated two important legal institutions to collect consumer debt: the county courts[29] and the debtors' prison, both occupied in significant volumes by so-called tally business.[30] The link between the county courts, debtors'

An old adage good to use is "Mind the P's and the Q's;"
But 'tis too late, I sorry to say,
They are gone to the West, well togged in all their best,
At the expense of the young Scotchman, so they say.
. . .

Then said R, "Bring a dress, like the one you sold S"-
(Mrs. S left the shilling with friend T),
At the temperance hotel where he dined he could sell
Table linens and sheetings very free
. . .

He sticks to his trade, calls on X and Y and Z,
In rough weather or fine I will be bound;
And he keeps better time than this sadly jumbled rhyme,
And will have soon a rare good paying round.

G. Double-U, CREDIT DRAPERS' GAZETTE [hereinafter "CDG"], Oct. 22, 1888, at 281. The full poem goes from A to Z.

25. Rubin, *supra* note 21.

26. NEIL MCKENDRIK ET AL., THE BIRTH OF A CONSUMER SOCIETY 88 (1983).

27. FINN, *supra* note 21, at 89. From 1831 to 1911, itinerant traders reported in the census rose from 9,459 to 69,347—an increase in the ratio of peddlers to population from 1:1,470 to 1:520. *Id.* at 90. Working class expenditure on clothing increased from six percent of total household expenditure in 1845, to twelve percent in 1904. *Id.* at 92. For further data, see O'CONNELL, *supra* note 21, at 28–29.

28. LLOYD'S WEEKLY, June 12, 1864. Curiously, these ideas echoed socialist complaints about proletariat acquisitive desires. *E.g.*, THOMPSON, *supra* note 16, at ch. 2. However, while socialists worried about the corruption of agents of revolution, discussions of women were detached from utopias of collective consumption.

29. For the courts' history, see generally PATRICK POLDEN, A HISTORY OF THE COUNTY COURT, 1846–1971 (1999).

30. Liberal M.P. Michael Bass argued that since the county courts' establishment, 183,000 persons were sent to prison for tallymen debts. *Common Sitting*, (Apr. 14, 1874). He may have exaggerated, but numbers were in tens of thousands. Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 353 (2014); FINN, *supra* note 21, at 96.

prison, and credit drapers loomed so large in popular imagination that it often colored the debates about these institutions in general.

While the sense of crisis was often expressed as a concern about the impoverishment of the working classes themselves, it was in fact equally driven by fears that they were exceeding their appropriate limits; the class-crossing potential of symbolic consumption which the drapery trade represented could achieve for low-class consumers middle-class and gender normativity. The order of appearances, it was feared, was no order at all; the ability of "luxury's shadow" as Hilton calls it[31]—the hierarchic morality implicit in the necessaries/luxuries discourse—to discipline domestic consumption was doubtful. As is often the case, opposing ideological camps argued while conceding common grounds: luxury distribution was up for grabs. Conservative complaints that "[t]he working classes have by a course of combination and agitation obtained . . . the means of enjoying considerable leisure and the sensual gratification which springs from what is called 'good living' . . . whilst the middle-classes are suffering from a positive reduction in the comforts of life,"[32] were met by a waring socialist demand which likewise assumed that luxury was stirring: comforts for all instead of luxuries for the few was the outcry.[33] Whatever one's political inclinations, the language of luxury and necessary failed to offer a sense of order. Women were the immediate agents here, driving these processes: "There never was such a rage for dress and finery amongst English women as there is now."[34] Drapers found themselves at the center of disorder, accused of selling "comparatively useless and extravagant" goods.[35] They too conceded the disorder, and played into the incoherence of the necessaries/luxuries distinction by framing themselves as those who made it possible for the masses to obtain "clothing and other necessaries" that they would not otherwise have.[36]

A century earlier, this kind of anxiety infected urban centers and was driven by fears of rising commercial classes.[37] In the late nineteenth century, however, the lower classes and women were the locus of attention as a just-established commercial society faced its own margins. In the doctrine of necessaries, this was manifest in an assault on the order of appearances. The next Part examines the assault.

---

31. HILTON, *supra* note 20.

32. *The Moral Effects of High Wages*, THE DERBY MERCURY, Apr. 23, 1873.

33. *E.g.*, James Leatham, *The New Sociology*, PROGRESS, Feb. 1887, 38; *What Constitutes Real Wealth*, ENGLISH CHARTIST CIRCULAR n.d., 59. *See generally* THOMPSON, *supra* note 16, at ch. 1.

34. SAMUEL SMILES, THRIFT 116, 259–60 (1875). For a detailed account of fears of women consumers, see RAPPAPORT, *supra* note 13; *see infra* Part 4.

35. CDG, Feb. 1, 1887, at 62–64. Examples of this critique are numerous.

36. *Id.*

37. WAHRMAN, *supra* note 14, at ch. 5.

3. DOCTRINE REFIGURED

3.1. APPEARANCES SUBDUED, BUDGET ON THE RISE

Mrs. Rees was shopping. She bought drapery and millinery goods for herself and her daughters. Mr. Rees, however, refused to pay. He had given his wife sufficient allowance, and, he said, "distinctly told her not to pledge my credit" but rather come to him if she wanted anything necessary.[38] The sellers knew nothing about the prohibition and took Rees to court; this was the case of *Jolly v. Rees*. Since no one disputed that the goods were necessaries, the main question became whether a "private prohibition" could rebut the presumption of a husband's assent to his wife's contract for necessaries. Or, as Justice Erle put it, the question was "whether the wife had authority to make a contract binding on her husband for necessaries suitable to his estate and degree, against his will and contrary to his order to her, although without notice of such order to the tradesman."[39] The answer, a precedential one, was no, and in reasoning Erle pulled the rug from under the order of appearances. Husbands, Erle explained, should have the power to regulate domestic expenditure by their own discretion. A wife who could act against her husband's will would make his liability depend on the estimate by a jury of his estate and degree, hence "the law would practically compel him *to regulate his expenses* by a standard to be set up by that jury"; the problem was not simply that the standard was not the husband's, but that it was "a *standard depending on appearance*, perhaps assumed for a temporary purpose."[40]

Observe the two sides of Erle's reasoning: appearances were recast as mere shallowness, a superficial layer, and were contrasted with expense-management—or the household budget—as an inner-turned practice. This logic was not an isolated occurrence, but rather one with resonance in popular political economy. Readers might recognize it from one of the era's better known self-appointed economic educators of the masses, Samuel Smiles.[41] Smiles offered a way to think about consumption through the idea of budget management, which he associated with intrinsic moral worth.

For readers familiar with Smiles, it might seem unlikely that his line of thought was significant for modernizing paradigms of consumer credit, because Smiles opposed credit, foremost for working classes. In his 1875 *Thrift*, he argued that the English workman was industrious, but "improvidence is unhappily the defect

38. *See generally* Jolly v. Rees (1864) 143 Eng. Rep. 931.

39. *Id.* at 936.

40. *Id.* at 937.

41. His main appeal was a direct one to the working classes through the medium of the Sunday-school prize and the guidebook of the self-taught man. ASA BRIGGS, VICTORIAN PEOPLE 131 (3d ed. 1955).

of the class,"[42] and identified debt as the ultimate evil. Credit drapers were particularly weary of these arguments, which threatened their business. There was no end to their frustration when one of their own accepted the same logic, and declared that their trade was truly catering "for the national defects of the people with whom they were identified."[43] Drapers were repeatedly accused of being among "[t]hose who derive most benefit" from the unsaved wages of working classes.[44] However, if thrift was simply the opposite of credit, or of spending, the history of expanding consumption tells us that it failed. The deeper point about Smilean thought, which is not often acknowledged, was the *logic of spending* it inculcated; the crucial question was not whether, but *how* to spend.

Smiles set out to educate the English about the uses and abuses of money. The problem, as Chapter 12 of *Thrift* had it, was "Living Beyond the Means." Smiles' principles of economy urged keeping a regular account of all that you earn and all that you expend.[45] His imagery was itself a balancing act in which you could abuse money by spending as much as by over-attachment. People had to learn arithmetic. Ignorance of arithmetic, which could end up in imbalanced budgets, was intimately tied with the "pervading sin of modern society": extravagance.[46] The failure, according to Smiles, lay in the pursuit of appearances: "They put on appearances, live a life of sham, and endeavour to look something superior to what they really are."[47] Modern respectability, he continued, "consists of external appearances. It means wearing fine cloths, dwelling in fine houses, and living in fine style. It looks to the outside—to sound, show, externals."[48] The important contrast Smiles posed was thus between external and internal determinants of consumption; this contrast allowed him to relate arithmetic with an intrinsic moral sense.

When Erle wrote the majority *Jolly* opinion and rejected the regulation of expenses through a standard based on appearances, he effectively reconceived degree and estate. Degree and estate had been observable by courts under the order of appearances, but were now framed as somehow innate and so not prone to external observance; therefore, the only person who could control credit orders

---

42. SMILES, *supra* note 34, at 49.

43. CDG, Jan. 17, 1889, at 20. Heated responses followed.

In such debates, some drapers argued that consumption on credit was a form of saving which encouraged "punctuality and abstinence," COUNTY COURT CHRONICLE [hereinafter "CCC"], June 1, 1869, 430. Though critics ridiculed the thought, the disciplining effect of installment credit systems which require long-term commitments should not be discounted. *See generally* LENDOL CALDER, FINANCING THE AMERICAN DREAM (1999). William Leach argues that Simon Patten, America's influential economist of consumption, adopted a similar ideological framing and advocated ever increasing consumption, which would force people to budget and thus lead to high social morality. *See* WILLIAM LEACH, LAND OF DESIRE, ch. 8 (1993). In the Smilean version, the emphasis was on the budget which determined consumption, rather than vice versa.

44. 1893–94 [C.6894-XIV], Royal Commission on Labour, 136 s. 52–53.

45. SMILES, *supra* note 34, ch. 12.

46. *Id.* at 252.

47. *Id.* at 255.

48. *Id.*

was the head of household who knew the numbers and could manage expenditures. These ideas resonated in lower courts as well: "The fault of the debtor," one county court judge explained, "was simply *not living within his income* . . . he can still live on something less than he actually receives, and it is his duty to do that if he is in debt . . . it is for breach of that duty that he is really imprisoned."[49] Smiles' economic logic that had been circulating for some time was legalized in *Jolly* and adopted as the regulative logic of domestic consumption on credit in a decision which turned out to be a dramatic shift in focus.[50]

The credit drapers were incredulous of the new precedent. They saw legal developments as an unreasonable shift of risks which benefited husbands. Their situation, they insisted from *Jolly* onwards, was deteriorating: "[T]he present state of the law places all the protection on the husband and all the risk on the vendor. Some method of a more equitable adjustment of the risk might surely be discovered."[51] In courts, too, *Jolly* was contested. Justice Cockburn provocatively doubted it in 1865, in a decision which clarifies the emergent shift that *Jolly* represented. *Morgan v. Chetwynd*[52] dealt with a debt for "ordinary cloths" as well as riding articles for Mrs. Chetwyd, who, as Cockburn repeated to the jury, "hunted, she went to the balls, she visited in the best society," and to these merriments, which her husband suffered her to indulge in, "there must be dresses fit and becoming."[53] Cockburn insisted that appearances must be relied on, and highlighted the traditional basis of the doctrine.[54] He hoped that *Jolly* would turn out incorrect, and the order of appearances reinstated; it was not.

Appearances in the formal doctrinal sense were magnificently undermined in 1870, in *Phillipson v. Hayter*.[55] At stake was a debt for stationary items, from a gold pen to "music."[56] Mrs. Hayter used to come to the shop alone, but on one occasion she came with a gentleman appearing to be of a status above her husband's degree as a clerk. The question of Mr. Hayter's liability was troubling because his wife eventually eloped with the useful gentleman, while he was asked to pay the bill. The jury returned a verdict for the trader despite proof of private prohibition, a decision which led to another round. Mr. Hayter then prevailed in the Court of Common Pleas.

Justice Bovill insisted that wifely authority is always subject to the condition that the goods are suitable "to the position which the husband allows his wife to assume,"[57] and here there was no evidence of *express* authorization. Observe the

49. Report 1873(348), at q. 1736.

50. Smiles' bestseller was *Self Help* of 1859, which contained many of the same themes. I focus on *Thrift* for its illuminating power *vis-à-vis* legal developments.

51. CDG, Jan. 1, 1887, at 4.

52. *See generally* (1865) 176 Eng. Rep. 641.

53. *Id.* at 644.

54. *Id.*

55. (1870) L.R. 6, C.P. 38.

56. *Id.* at 39.

57. *Id.* at 42.

flip Bovill performed: the "position which the husband allows his wife to assume" had been, since the 1807 *Waithman v. Wakefield*, a way of exposing husbands to extended liability for appearances on an assumption of control.[58] Here, however, Bovill turned the vocabulary on its head by interpreting "allows" as express authorization. In *Debenham*, which I soon turn to discuss, Thesiger made the move complete by arguing that it was contrary to principles of justice to "cast upon a husband the burden of debts which he has no power to control at all."[59]

Justice Willes thickened Bovill's stand: a wife, he thought, has authority to contract for things in the domestic department "that are *really* necessary and suitable to the style in which the husband *chooses* to live."[60] What, then, made the jury decide for *Phillipson* when no evidence supported the authority of Mrs. Hayter? Willes offered two hypotheses, both problematizing the order of appearances in contrast to notions of innateness and their association with budget management. One option was that the jury mistakenly "chose to take upon themselves to judge *what ought to be the expenditure* of a person living in the manner the defendant did;" another was "the general luxury and degeneracy of the age, which induces men to *keep up appearances* which are *not warranted by their means*."[61] Here was the Smilean spirit: the important thing was for consumers to match means and ends, and not fall for appearances. Montague Smith was less certain than his fellows that the jury was wrong, but yielded to "the greater experience"—or new mood—of his Lord and his Brother.[62]

3.2. ROUTINES WITHIN BUDGETS

The *Jolly* precedent was a first stage in the shift in the doctrine of necessaries. To the drapers' distress, the new emphasis on budget rationality strengthened throughout the period.[63] However, Byles gave a minority opinion in *Jolly* for the disappointed trader which acknowledged the consumer agency of Rees' wife. He thought that Mrs. Rees was entitled to buy her drapery on credit. Relying on the logic of classical contract,[64] Byles suggested a change of terms: the expression "presumed authority" was the source of difficulty, he thought; the point was "apparent authority."[65] Mr. Rees was responsible in a manner reconcilable with the law of agency because cohabitation invested his wife with an apparent

58. *See supra* note 6 and accompanying text.

59. Debenham v. Mellon (1880) 5 Q.B.D. 394, 404.

60. *See supra* note 55, at 42.

61. *Id.* at 43.

62. *Id.*

63. *See also* Shoolbred v. Baker (1867) 16 L.T.R. 369, 360 ("The husband has a right to be master in his own house, and *to determine what the expenses are to be*. A man may have 10,000l. a year and yet his wife may not be entitled to live in a manner proportionate to that income.") (Willes, J.).

Another way in which the same trend was strengthened emerged from the many cases in which husbands gave allowances to their wives. Courts came to conceive allowances as prohibitions to pledge husbands' credit. *See, e.g.*, Remmington v. Broadwood (1902) 18 T.L.R. 270.

64. *See* further discussion of that logic below, *infra* notes 87–91 and accompanying text.

65. Jolly v. Rees (1864) 143 E.R. 931, 938.

authority on which tradesmen could rely and which could not be secretly revoked. Byles's fellows did not concur, but that would soon change. Wives could no longer be seen as controlled subordinates, an impossibility candidly admitted in the assault on appearances.[66] New grounds for female consumer agency were needed and found in the technical role of the guardian of domestic routine.

Judicial discourse in doctrine of necessaries analyses began to emphasize the wife's sphere: "The domestic arrangements of the family being usually left to the control of the wife, *her authority extends to all those matters which fall within her department*."[67] The role of women in household management has been established in the cultural history of earlier eras.[68] In legal contexts too, these kinds of statements were hardly new. However, the conceptual centrality of this role in the regulation of consumption through the doctrine of necessaries *was* new, a point which became clear with the 1880 *Debenham v. Mellon*.[69]

Mrs. Mellon was a hotel manageress, and lived in the hotel with her husband "in the ordinary way."[70] She bought clothes from William and Frank Debenham, which were conceded by all sides to be necessaries. Mr. Mellon, however, gave her an allowance and forbade her to pledge his credit. This seemed a case perfectly set for the application of *Jolly*, and the Debenhams indeed lost in the first round.[71] In the appeal, their counsels argued that *Jolly* was incorrect. This was backed by the drapery trade, which hoped to overturn *Jolly*.[72]

While the Court of Appeal struggled somewhat incoherently to let Mellon off while acknowledging that wives may be entitled to support, the House of Lords managed to impose conceptual order on conflicting intuitions. The court made much of the fact that the Mellons *did not run a regular household*—the hotel supplied their food and shelter. Seizing on this point was an opportunity to make more sense of Byles' minority opinion in *Jolly*, which continued to trouble courts. The House offered a separation of issues in two moves.

First, the court set the context in the everyday of married life, rather than dramatic moments of breakdown. The question of urgent necessity of a wife, in the sense of survival, which may merit a right to pledge her husband's credit despite his wishes, was beside the point in the ordinary case of marriage. This framing of the context was suggestive: while the court acknowledged that "necessaries" were about social convention, or symbolism, rather than subsistence needs, being a social creature was hardly about the excitements of dressing up, showing off, and appearing in public; it was a matter of the banalities of the everyday.

---

66. *See supra* note 59 and accompanying text.

67. Phillipson v. Hayter (1870–71) L.R. 6, C.P. 38, 41 (Bovill, J.).

68. *E.g.*, KAREN HARVEY, THE LITTLE REPUBLIC: MASCULINITY AND DOMESTIC AUTHORITY IN EIGHTEENTH CENTURY BRITAIN (2012).

69. I refer to review by two courts: Debenham v. Mellon (1880) 5 Q.B.D. 394; (1880) House of Lords 24.

70. *Id.* at 24, 25.

71. *See* Debenham v. Mellon (1880) 5 Q.B.D. 394.

72. RAPPAPORT, *supra* note 13, at 59–60.

Then came the question of consent: Mr. Mellon forbade his wife to buy commodities on credit, so the credit contract had no basis according to *Jolly*. The court, however, went on to deal with Byles' question of representation: there remained the possibility that Mr. Mellon created a representation of authority ("holding out") for which he was responsible, and which could not be secretly revoked. Lords Selborne and Blackburn, in a majority opinion, both conceded the point despite their embrace of *Jolly*.[73] Yet they marked a difference from older attributions of liability: cohabitation would not in itself sustain a presumption of authority, except perhaps, said Selborne, in the usual case in which the wife is charged with the household management, and the husband therefore habitually consents to acts which hold the wife out as his agent.[74] This idea could make sense of Pollock's insistence on agency as a basis for holding a husband liable in 1858 despite a private arrangement to the contrary.[75] What Pollock meant, said Selborne in an anachronistic rereading, was that the husband was liable for an appearance of authority created by his letting his wife manage the establishment. In the Mellons' case, however, with no household management there was no basis for a tradesman to assume that Mrs. Mellon had authority.[76]

With contractual representation, the court newly contextualized the locus of liability: liability lay in the pragmatics of household management, and wives had authorities, too. As another judge later described it, the age-old statement that there was a "presumption of law" that a wife had her husband's authority to pledge his credit was simply wrong; it was "quite clear that there is . . . at most a presumption of fact."[77] With Blackburn's similar analysis, the House of Lords was able to pull together the conflicting ideas emerging from the classical contract of agency—both the idea of autonomous decision by male budget managers, and liability for representation in which women were the main players, into a doctrine hinging on the routines of domestic life.

The change in emphasis toward household routines was also visible in differences between treatises dealing with married women's contracts. Chitty, for instance, was a text reproduced and updated from the early century, and for a long time oriented toward the order of appearances. In the 1876 edition the editor still repeated the presumed authority of a married woman to enter contracts for necessaries.[78] Leake's 1867 treatise, by contrast, was not committed to the early tradition and discussed "necessaries" as a form of necessity arising from neglect. A wife's presumed authority in regular married life, meanwhile, applied to "all

73. Thus, *Debenham* was not simply an upholding of *Jolly*. For the claim see FINN, *supra* note 13, at 266.

74. *Supra* note 70, at 32–33.

75. See my discussion of the case and its pre-classical logic in terms of contract theory, *infra* note 90 and accompanying text.

76. *Supra* note 70, at 31–35.

77. CCC, June 1, 1882, at 432 (citing to Weston v. Smith). This was also acknowledged in the 1892 bill.

78. JOSEPH CHITTY, A TREATISE ON THE LAW OF CONTRACTS 164 (10th ed. 1876).

matters which are usually entrusted to a wife, as for the supply of goods for the use of herself and household suitable to the condition in which they live."[79] By 1892, Leake was even more careful, and discussed "*reasonable* supply of goods ... for the use of the husband, his wife, children and household ... suitable in kind, sufficient in quantity, and *necessary in fact* according to the condition in which they live."[80] Chitty's editors began to change terms after a lag. In the 1890 edition, under a new arrangement of issues, the general authority to contract for socially-determined necessaries was replaced by reference to "goods supplied and consumed by the joint household."[81]

Observe the turn inwards: just as budget management became an innate morality contrasted with shallow respectable appearances, so the routines of household management became an innate truth, literally hidden inside the domestic walls, contrasted with the appearance of a functioning marriage. As in budget management, here, too, the turn inwards seized on the objectivity of minute "facts" knowable to those who had access to the inside. The new legal form made the *County Courts Chronicle* celebrate *Debenham* for placing "the law with regard to the power of a wife to pledge her husband's credit on a very firm footing."[82] That firm footing had particular gender and class dimensions which require explanation *vis-á-vis* more familiar accounts of private law history.

4. EXPLAINING BUDGETED ROUTINES

4.1. POSSIBLE INTERPRETATIONS

In accounting for developments in the doctrine of necessaries a few options seem pertinent. This could be a story of a broader revision of caretaking responsibilities in families, to be read in the context of the family's wider social and legal history, and particularly advancing divorce reforms. It could also be part of trade history: legal change may have represented a changing equilibrium between creditors and debtors, possibly in response to new trading and finance practices. A third option could be a broader revision of the law of agency under the pressures of classical contract, to be read within the history of contract law. These more familiar accounts of nineteenth century private law carry explanatory power. However, they leave us with partial understandings at best because they disregard the theme of domestic consumption and the budgeting of routines in particular. Indeed, the turn to budgets and routines in the doctrine of necessaries has been completely overlooked. In consequence of the oversight, such accounts would also tend to imply that doctrinal change represented a transfer of power to the

79. STEPHEN MARTIN LEAKE, THE ELEMENTS OF THE LAW OF CONTRACTS 243 (1867).

80. STEPHEN MARTIN LEAKE, A DIGEST OF PRINCIPLES OF THE LAW OF CONTRACTS 493 (3d ed. 1892) (emphasis added).

81. JOSEPH CHITTY, A TREATISE ON THE LAW OF CONTRACTS 233 (12th ed. 1890). Elsewhere in the chapter, the editors returned to the language of necessaries, apparently reproducing older versions without subjecting them to a new interpretation.

82. CCC, Dec. 1, 1880, at 445.

husband, whether as head of the family household, as debtor, or as autonomous contractor. From this perspective, the accounts are not just partial, but misleading.

The account which follows offers a corrective. I begin by clarifying where and how familiar perspectives leave us wanting. I pay particular attention to two cultural historians, Margot Finn and Erika Rappaport, who have both focused on the conjunctions which interest me here: consumption, gender, class, and late nineteenth century shifts in the doctrine of necessaries. I then offer an alternative reading which emphasizes two elements of this history. First, the conceptual shift in rationalizations of consumption to budgeted routines. Second, legal change was as much about social control—of gender *and* class—as about consumer freedom or power, possibly more.

4.2. THE LIMITS OF EXISTING PERSPECTIVES ON LEGAL CHANGE

Judges were not revising family caretaking as a whole, they were revising the logic of domestic commodity consumption specifically. This was clear in Erle's solidification of his *Jolly* position in 1865.[83] Caretaking, while preserved within the doctrine, did arguably become less central: the background of women's increasing economic independence made the historical basis of the doctrine in caretaking *vis-á-vis* abusive husbands (relatively) less important than its role in channeling routine consumption. Recall that the question of necessity was increasingly set apart from the question of necessaries.[84] In consequence, a typical necessaries analysis would not be about urgent needs, but about routines, which were the focus of doctrinal revision.

In terms of trade relations and household finance, legal change indeed reshuffled risks by giving effect to "private prohibitions" of husbands. However, with the new framing of women's agency found in *Debenham*, the final doctrinal structure did not clearly alter traders' position in functional terms, for all their complaints. Furthermore, focusing on trade practices which may have driven a change in risk allocations, such as market anonymity, does not fully account for the rise of budget rationality (as opposed to simple verification requirements of the husband's consent), and fails to examine the specific formulation of women's agency within domestic routines. Rappaport argues that *Jolly* represented a commitment to protect husbands, and resonated with suspicions toward women shoppers, exacerbated as opportunities to shop anonymously and far from home

83. Harrison v. Grady (1865) All ER 663. Erle discussed necessaries within the notion of "*fixing the standard of living* of the family." He repeated that the husband could fix his standards, "and no tradesman . . . ought to be able to go to a jury to ask if that is a proper standard." *Id.* This discourse could almost make one forget what was so central before: the relation of particular commodities to particular classes. Nonetheless, Erle denied that Grady's actual notice to the creditor that his wife could not pledge his credit could assist him. His puzzling position emerged from the fact that the creditor was a doctor who provided needed care to Mrs. Grady, not a supplier of goods. Erle's logic had to do with domestic commodities, rather than a broader revision of family caretaking.

84. *Supra* text accompanying notes 69–77.

expanded, and that *Debenham* essentially followed suit.[85] As my discussion below suggests, fears of women consumers were crucial here, but they do not alone account for legal change. The question of workmen must be added to this account, not as protected husbands but rather as suspicious economic players, whose containment, furthermore, effected a dual containment of women—their wives. Another focus currently missing is on alternative conceptual approaches to consumption embedded in legal decisions. Rappaport, focused on the middle classes and the shift of risks, accepts the Smilean budgetary logic as a pervasive middle class ideal and does not consider the conceptual break from the logic of luxury that it represented.[86] The deep rationalization of domestic consumer contracts changed in a manner exceeding the dislocations caused by new trade practices.

The rise of budget rationality was also cast in the language of contractual consent and its celebration of autonomy; it was encouraged by classical contract theory, which struggled with the law of agency more broadly. Classical theory made it hard for lawyers to reconcile contract—conceived as the *par excellence* locus of individual freedom, with state-imposed liability.[87] If a husband had no power to countermand his wife's authority, it began to be argued, how could a wife's credit be his *contract* of agency? In an age seeking to rationalize the body of private law around the ideal of willed obligations, agency historically premised on the order of appearances could not be called a contract without rationalizing the dissonance.[88] This point was, until midcentury, still unclear. Until then, judges could analyze women's credit contracts for necessaries—which could bind a husband despite his wishes and luxuries—which required a husband's actual consent, both in terms of consent.[89] Around midcentury, using the same vocabulary as before, courts began to separate the question of necessaries from the question of consent.[90] The freedom of the individual (male) will thus seemed

85. *See generally* RAPPAPORT, *supra* note 13.

86. *See generally id.*

87. For a review, see ANAT ROSENBERG, LIBERALIZING CONTRACTS: NINETEENTH CENTURY PROMISES THROUGH LITERATURE, LAW, AND HISTORY, 19–55 (2018).

88. P.S ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 296–501 (1979).

89. For example, Freestone v. Butcher (1840) 173 Eng. Rep. 992. Lord Abinger used a contractual logic which moved with little concern between policy-based implications of consent arising from wifely needs, and a search for indications of actual consent. Abinger's decision was then challenged in Lane v. Ironmonger (1844) 153 Eng. Rep. 152. The discussion moved toward objective signs of actual consent and away from the question of securing necessaries for wives, yet the classical problematic of differentiating these two routes to implying consent was not confronted.

90. The separation of questions was visible in Reid v. Teakle (1853) 138 Eng. Rep. 1346. Mr. Teakle was asked to pay for his wife's debt for "musical publications." The jury decided that they were a quantity of music necessary for a person in Mrs. Teakle's station. The judges at the Court of Common Pleas, however, accepted the husband's appeal on the grounds of misdirection: even if the music was necessary, they said, it is possible that Teakle repudiated his wife's agency. The possibility of rebuttal must be examined if a decision for the tradesman is to have any legitimate basis. This possibility was present at least since the seventeenth-century *Manby*; *Reid* marked a shift in setting apart the question of assent from the question of identifying necessaries.

to undermine the order of appearances and to encourage deference to the consenting contractor. Indeed, Finn argues that with divorce and property reforms on the one hand, and doctrinal changes in the law of necessaries expanding husbands' discretion on the other, the picture offered by formal law was that of increasing individual autonomy and cultural purchase of individualist constructions of the market, in a dramatic break from socially-embedded views of contractors.[91] However, when we observe the peculiar logic of legal change, which was not about abstract ideals of consent or reliance, its association with autonomy even for male heads of households becomes doubtful. The opposite sentiment—that of containing consumer autonomy—was implicated in legal change.[92]

4.3. GENDER AND CLASS CONTAINMENT[93]

To account for doctrinal developments, I return again to fears of the consumer autonomy of women and working classes. The doctrine of necessaries implicated concerns with both groups, as was repeatedly revealed in the turbulent realities of county court litigation, debtors' prison, parliamentary investigations, and popular debates. This gender and class convergence gives us a first direction for reading the doctrine's history as an attempted containment of expanding mass consumption. The discussion which follows seeks to deepen our comprehension of delimiting impulses involved in the new rationality of budgets and routines in the doctrine of necessaries, by highlighting not only obvious structures of subordination, but also moments of contradictory meanings which defy one-dimensional interpretations, and reveal hierarchy in efforts to overcome or deny it.

4.3.1. Containing Women's Agency

A claim of containment is perhaps most easy to comprehend from the perspective of women consumers. I begin thus with women's containment through

---

For a short while judges could still insist, in a pre-classical way, that the principle of agency underlay the doctrine, but that a private agreement between husband and wife would not make a difference for she had "all usual authorities of a wife." Johnston v. Sumner (1858) 157 Eng. Rep. 469, 472 (Pollock, J.). The resonant analysis for classicists came with *Jolly*. Erle's attack on appearances in *Jolly* was premised on classical contract: if the basis of a wife's authority was agency, he explained, then "it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife created the authority against his will, by a *presumptio juris et de jure* from marriage." Jolly v. Rees (1864) 143 Eng. Rep. 931, 936.

91. FINN, *supra* note 13, at 264–67.

92. Finn argues that lower courts were not observing the precedents and so resisted the picture of the autonomous individual. On complications in this claim see *infra* note 109. In any event, even if Finn is correct, once the delimiting elements in precedents are appreciated, continuities between low and high court in terms of visions of social individuals, become apparent.

93. Containment is a concept developed in cultural theory to counter the manner in which forms of power employ their own terms to license threatening elements in culture, which end up subverting them. It is thus useful in order to grasp the interplay of hierarchic and progressive elements, and in this case, attempts to discipline the masses which also aided their passage into modern consumer culture. The classic text is Stephen Greenblatt, *Invisible Bullets: Renaissance Authority and Its Subversion*, *in* 8 GLYPH 40, 40–61 (Walter Benn Michaels ed., 1981).

doctrinal change and then move on to consider also that of workmen's, which is much less obvious, but no less crucial.

To put the first claim simply, the shift to budget rationality in routines was a move to contain female consumption and establish its limits on new grounds once the construction of husband control under the order of appearances faltered. Doctrinal developments decentered luxury policing and relied much less on assumptions of control emerging from the marital relation as such, yet these changes, far from embodying progressive intuitions, should be read as rationally-framed forms of discipline.

It is easy to see that women's subjection to their husbands' budgetary discretion following *Jolly* was ridden with gender control. Rappaport has carefully examined this aspect of legal change. While she does not discuss the budget as an alternative discipline, she brilliantly traces suspicions of women consumers implicated in the new deference to husbands' "private prohibitions."[94] The domestic budget, one might add, is a familiar site of gender oppression, current and historical, though infrequently examined by legal historians.[95] As the locus of male discretion, the budget's delimiting meaning for women thus seems clear; I will return to discuss it again below from the perspective of workmen.[96] What requires more attention when we focus on women's containment is not *Jolly*, but *Debenham*. Decided after *Jolly*, *Debenham* might seem like a removal of at least some limitations imposed by *Jolly's* majority opinion; it did, after all, articulate women's agency within the new logic of deference to their husbands. I therefore flesh out some of the resonance in *Debenham* of discourses worried about women's consumer agency. The emphasis on household routines—the province of female agency according to *Debenham*—was, I argue, part of a broader delimiting impulse.

Women's consumption was threatening to a sense of social order, both the class order and patriarchy, at the intersections of which they were often caught. As we have seen, fears were frequently channeled through accusations about reckless credit extended to feeble minds.[97] The wife, critics of symbolic domestic consumption worried throughout the period, was "often the greatest sinner."[98] The credit drapers had to contend with these arguments. Their goal was of course to preserve women's formal agency, fundamental for their business; their dominant discursive tactic, however, was to accept the conceptual grounds of their critics.

---

94. RAPPAPORT, *supra* note 13.

95. The budget as a form of gender oppression is mostly familiar in contexts of welfare studies (one classic is Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990)) and of home economics, for instance, Jan Pahl, *Patterns of Money Management Within Marriage*, 9 J. SOC. POL'Y 313 (1980).

96. *See infra* Part 4.3.2.

97. *See supra* Part 2.

98. SELECT COMMITTEE ON DEBTORS (IMPRISONMENT), REPORT, 1909, HC 239, 130 (UK) (Bray, J.) [hereinafter "Report 1909(239)"].

When accused of relying on women, drapers agreed that women were a problem. They denied, however, that they preyed on women, and tread a fine line between their refusal to ask husbands for approval and an insistence that they only proceeded when husbands knew about the credit.[99] Drapers also claimed that as much as three-quarters of their supplies were for men's clothes.[100] These positions expose the delimiting elements embedded in efforts to articulate women's agency while conceding to views that their consumption was dangerous. Drapers' representations framed women's consumer agency as a limited idea: women were their husbands' long arms in almost technical terms, shopping for specified quantities at their direction. The technical framing of household routine management became central for doctrinal developments; technicality was an appealing route which acknowledged some form of female consumer agency while maintaining discipline on terms no longer speaking the language of the order of appearances.

Emphasis on routine and technicality resonates with the broader history housework rationalization, which issued primarily from the middle classes. Nineteenth century rationalization was manifest everywhere, from the breakdown of household routines to small units of time detached from the agricultural calendar, through demands of cleanliness and tidiness, of different uses of household rooms and of goods, to book keeping which encompassed both visitors and accounts, and finally the specialization of domestic labor which was broken down into minutely specified spheres. The everyday of such a household was demanding on women both symbolically and technically. While this was a particular way to administer consumption, Leonore Davidoff observes that a formative element was boundary maintenance, which subordinated women.[101]

That household routine implied limitations on married women can be seen from yet another perspective. From midcentury, and especially from the Second Reform Bill of 1867, debates about the franchise used the language of household suffrage.[102] The logic was that voting rights could be extended to householders because of the moral virtue implied in running a functioning household. I will return to this soon from the perspective of workmen. From the perspective of wives, however, the notion of the householder excluded them as subordinates. Ben Griffin concludes that the shift in political discourse from a focus on potential voters' political education to their moral virtues as householders excluded women.[103] A broader discourse, in other words, offered a delimiting resonance for the wife's role in the home.

With emphasis on routine management on the rise, the centrality of fashion attracted scrutiny. Victorian gender anxiety was often channeled through discourses on female fashion consumption as an inherently risky

99. *E.g.*, CDG, Mar. 29. 1890, at 91–92.
100. Report 1873(348), at 183, 193, 208; Rubin, *supra* note 21, at 214.
101. *See* LENORE DAVIDOFF, WORLDS BETWEEN, ch. 3 (1995).
102. *See* GRIFFIN, *supra* note 1, at ch. 9.
103. *Id.*

and sexualized activity. Female dressing up was the reason that consumer credit provided by drapers attracted so much fire; in the 1873 discussion of imprisonment for debt, "dresses and shawls" served as a double trope which signaled both female frivolousness and the despised drapers themselves.[104] Fashion invoked the complexity of mobility and social hierarchy.[105] This was the deeper conceptual context of statements like those we find in *Debenham*, where Blackburn talked of domestic management involving "*butcher's and baker's bills and such things.*"[106] This discourse made fashion consumption—and in particular women's orders of dresses—seem odd, and so the widely-held assumption that husbands grant authority to their wives to buy dresses on credit was questioned. Manchester County Court Justice Heywood made much of this language: he was not at all sure, he said, that the presumption of women's authority extended to dress.[107] Or again: "it might have been bread, or butcher's meat, or anything necessary for the household."[108]

Paradoxically, the credit drapers were unable to comprehend their own implication in the delimiting elements of the new framing of women's consumer agency. They were vocally disappointed with *Debenham*.[109]

To the drapers' dismay, some groups were not satisfied that wives were disciplined enough through doctrinal developments, and attempted to delimit wifely agency through Parliament. These efforts too relied on suspicions of female fashion consumption. The memorandum to the Married Women's Bill[110] explained its intention "to prevent any implied power of the wife to pledge her husband's credit for articles that are not strictly necessaries." The tallyman, who got "judgment by default" after summons are served to a woman without her husband's

104. *E.g.*, Report 1873(348), at qq. 1226, 1525, 2139, 3462, 4747. Drink was the curse of men, dresses of women, it was suggested. *Id.* at q. 5431. For a similar analogy, see THE NEWCASTLE COURANT, Jan. 31, 1845. The analogy drew on debates about the evils of alcoholism, and made the drapers' case all the harder. Drink and dresses were close also because of claims that women pawned dresses obtained on credit and used the money for drink (which could not be obtained on credit). *E.g.*, CDG, Jan. 1, 1887, at 3–4; DAILY NEWS, Sept. 24, 1855.

105. Georg Simmel, *Fashion*, 62 AM. J. SOC. 541 (1957).

106. *See supra* note 70, at 24, 36.

107. CCC, June 1, 1892, at 432. While county courts sometimes disregarded higher courts, they were not detached from them, as mixed reports testify. For example, a *Law Times* article recommended judge Hugh's "admirable course" of refusing drapers' suits if they did not obtain the husband's consent, to judge Ingham who tended to allow suits against husbands. CDG, Oct. 22, 1888, at 276. A *Northern Echo* commentator complained that "nearly every County Court Judge has a law of his own" *Id.* at 292. Historians' assessments are similarly mixed. For example, Rappaport argues that county courts were unsympathetic to drapers as were higher courts, while Finn argues that they did not observe precedents. *See* RAPPAPORT, *supra* note 13, at ch. 2; FINN, *supra* note 13, at 265–72.

108. Paquin, Ltd. v. Beauclerk (1906) AC 148, 151 (Collins, J.); *see also* Rappaport's detailed account of the national discussion of the nature of women's shopping sparked by *Debenham*. RAPPAPORT, *supra* note 13, at 59–65.

109. *E.g.*, CDG, June 21, 1888, at 182.

110. A Bill to Amend the Law by Limiting the Power of a Married Woman to Bind Her Husband by Contract in Certain Cases, and to Further Limit the Time of the Recovery of Small Debts and Demands 1892, 55 Vict., Bill 81, Memorandum para. 2.

knowledge, was the bill's chief target.[111] Section 1 stated: "[N]o authority shall be implied that a married woman living with her husband ... has authority to bind him by any contract for the purchase of any articles of *dress, millinery, jewellery, furniture, ornaments, books, pictures, or any article of luxury* which may be hereafter made by any such married woman whose husband is an artisan ... in the name or on behalf of her husband unless made with his express assent."[112] Legal moves of this kind were explicit about their effort to estrange women's fashion shopping, particularly when those women came from the laboring classes. They should help us see the same sentiment in more abstract doctrinal formulations.

The paradoxes in treatments of married women's agency are most obvious when we look at the relation of the doctrine of necessaries to the Married Women's Property Acts. *Debenham*, which centralized household routines, was decided at the height of legislative developments which occurred between the 1870s and 1890s.

The Married Women's Property Acts extended property rights to women, and an ability to contract with respect to that property.[113] The 1882 and 1893 expansions in particular encouraged traders' attempts to sue women when the prospects of recovering from their separate estates[114] seemed better than those of recovering from their husbands. These attempts involved a double inversion: a woman, not a man, was now sued; in response, she could attempt to obtain a decision for what had been the claim of traders: that she *had* acted as agent for her husband (therefore her property was not liable).

For a while the default position for a woman buying consumer goods on credit was unclear: was she, or her husband, responsible? One county-court judge declared that after the 1882 Act he would not enforce debts against husbands unless he had instructions from higher quarters,[115] and he soon did. The default position for domestic consumption made the husband liable. This was solidified in the interpretation of Section 1 of the 1893 Act which explicitly noted exceptions to women's independent liability: "Every contract hereafter entered into by a married woman, *otherwise than as agent*, ... shall be deemed to be a contract

111. The Committee on County Court Procedure indeed concluded that judgment by default ending in imprisonment was the frequent case, and recommended a change in rules of procedure to avoid it. COMMITTEE APPOINTED BY THE LORD CHANCELLOR TO INQUIRE INTO CERTAIN MATTERS OF COUNTY COURT PROCEDURE, REPORT, 1909 HC 71-E, at 33.

112. A Bill to Amend the Law by Limiting the Power of a Married Woman to Bind Her Husband by Contract in Certain Cases, and to Further Limit the Time of the Recovery of Small Debts and Demands 1892, 55 Vict., Bill 81, § 1.

113. *See, e.g.*, Married Women's Property Act 1870; Married Women's Property Act 1874; Married Women's Property Act 1882; Married Women's Property Act 1893. The reform was motivated by claims that trusts, which protected women's property in equity, were available only to rich women. Ben Griffin, *Class, Gender and Liberalism in Parliament, 1868-1882: The Case of the Married Women's Property Acts*, 46 HIST. J. 59, 62 (2003).

114. Married women were not personally liable—they could not be imprisoned like men. *See* Scott v. Morley (1887) 20 QBD 120, 121–22.

115. CDG, Nov. 1, 1886, at 282.

entered into by her with respect to and to bind her separate property."[116] Household consumption on credit was deemed a case of agency excepted from Section 1, and was subjected to a doctrine of necessaries analysis.[117] The logic, however, was present even earlier. As Chitty's 1890 edition explained, credit for household consumer goods was usually given to the husband (a statement which was descriptively correct, obviously); therefore, the fact that the goods were of that kind was "strong evidence that she [the wife] did not intend to bind her separate property."[118]

The doctrine of necessaries, which was an exception to married women's general *in*ability to consume on credit, now became an exception to their ability to do so. Daily household management, in turn, was the central imaginative paradigm used to navigate the paradoxical process.[119] The gendered implications were debatable: one could argue that they were protective of women's new property—as the drapers indeed complained. A discontented county court judge agreed: he was "surprised at the extent to which the decisions reported have freed married women from liability." He went on, "The Married Women's Property Acts were notoriously passed for the purpose of protecting the property of married women on the one hand and of making them liable for their engagements on the other . . . It seems to me that a construction has been put upon the Act which defeats its intention."[120] But one could also argue that the implications were symbolically and morally destructive, for arguably they represented a refusal to articulate women's economic agency.[121] The paradoxes expose how the reading of doctrinal developments as containment was already embedded in the terms of debate, and raised its head precisely at moments which seemed progressive from the perspective of women.

---

116. Married Women's Property Act 1893, 56 & 57 Vict., c. 63, §1.

117. *See generally* Paquin, Ltd. v. Beauclerk (1906) AC 148. Milliners tried their luck suing a bankrupt's wife for her purchases on credit. The majority in the Court of Appeal decided that the contracts were prima facie "a sale to a lady acting in the ordinary capacity of a married lady living with her husband." The House of Lords divided equally and thus left the decision in place. For an application see, e.g., CCC, May 1, 1907, at 111–12 (citing to Brighton & Hove Supply Ass. Ltd. v. Butcher).

118. CHITTY, *supra* note 81, at 233.

119. Household management agency was far from the only possibility, particularly when women gained separate capacity. For instance, as Jill Hasday suggests regarding late twentieth century United States, the doctrine could be construed gender-neutrally as a view of the family as a single unit of wealth, or as an indirect enforcement of economic exchange. The latter view sees household management as a service exchanged for the payment of debt; neither view focuses on consumption. Jill Hadsay, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 503 (2005).

120. CCC, June 1, 1889 at 130, reporting the cases of Leake v. Mrs. Driffield; Winspear v. Winspear. *See also* Rappaport's account of dissatisfaction, RAPPAPORT, *supra* note 13, at ch. 2; FINN, *supra* note 13, at 265–72.

121. Another difficulty from the perspective of doctrine of necessaries analyses was that upper-class women often received property restrained from anticipation, for which they could not obtain credit. This is beyond my scope.

4.3.2. Containing Workmen's Agency

Containment of female consumption was important for legal developments. Yet, men too, and workmen specifically, were targeted for discipline through containment. This point is less obvious for two reasons. First, men did not directly engage in the consumption debated under the doctrine of necessaries: women were the shoppers here, therefore it is not obvious that workmen's consumption was at stake. Second, viewed from the perspective of husbands—whether in their role as heads of families, as debtors, or as contracting parties—developments since *Jolly* could seem power-conferring.

To the first concern, women were indeed the direct consumers in these cases, while husbands were formally and culturally (if not always in fact) distanced from domestic shopping.[122] In popular discourse, too, women were framed as the immediate drivers of economic ruin. As Rappaport argues, both husbands and shopkeepers looked to the legal system to protect their economic wellbeing from female consumption.[123] Women were also framed as drivers of social disorder (with little attention to how both of these trajectories, signifying downward and upward mobility, could coexist systematically rather than anecdotally). The anxieties involved questions of class boundaries. This was true between the middle classes and the aristocracy, but more crucially here, between lower and middle classes. As working-class women acted in their capacity as spouses within the marital division of labor, their consumer agency implicated that of their husbands, and tapped into the broader concern about workmen's place in the expanding consumer economy. Despite the fact that high court precedents tended to deal with upper classes, lower class consumption had significant cultural impact on legal consciousness which should not be discounted. Lower class consumption was everywhere debated; in *Jolly* itself, though an upper class ("gentleman of small fortune"[124]) case, Justice Erle's budgetary reasoning turned on its urgent importance for laborers who needed discretion *vis-à-vis* their shopping wives while working away from home.[125] Put simply, the legal attention to *workmen's* consumer agency as the basis of their wives' actions is an inseparable part of this legal history. Their containment is important on the class axis, on which I elaborate below, but also because within the structure of the doctrine it effected an amplified, two layered containment of their wives, whose agency was framed by the parameters of husband discretion.

To the second point, that legal developments empowered men, this tends to be the impression of historians, and appeared to have been the case in the eyes of many contemporary observers as well, as this little anecdote suggests:

122. RAPPAPORT, *supra* note 13, at 52.
123. *Id.* at 49.
124. Jolly v. Rees (1864) 143 Eng. Rep. 931, 932.
125. *Id.* at 937.

> Only a few weeks ago a most respectably-dressed lady . . . called . . . at night, and asked to be supplied with a silk dress. She chose one and paid a deposit of 20s, and said she would always bring the money to my shop and that my traveler need not call. I informed her that we could not send the parcel to her home at that late hour, but would attend to it in the morning. By that night's post my clerk wrote the lady's husband a private note enquiring if it was all right. What his reply was you may more easily imagine than I care to explain; but, afterwards, the husband personally thanked me for not giving credit to his wife, and requested me not to supply her with goods without his written consent.[126]

This was the heroic tale the draper Renwick told his fellows for their education. Renwick declined the appearance of respectability and turned, with good legal authorities, to husband approval. The advice was hard to follow: no plan, declared a worried commentator on the continually debated suggestion that traders should ask husbands, "would more rapidly reduce a list of customers."[127] Drapers, recall, indeed framed legal changes as problematic shift of risks from husbands to themselves.[128]

However, the apparent empowerment is easily overstated. The change in the doctrine of necessaries did not rely on ideas of choice and consent in the abstract; instead, as we have seen, consent language supported the emergent notion of budget management of routines. There are two perspectives from which the budget is a form of limitation. First, abstractly, at stake was an acceptance of consumer agency conditioned on a particular vision of virtuousness. As already mentioned, the language of householder virtue enjoyed dominance in political discourse as a way of justifying political rights to workmen on the basis of their role as householders. This was an effort which David Wayne Thomas describes as a "cultivation" of agency among working classes.[129] Household virtue was a matter of "habits of life" and "settled character,"[130] in line with middleclass ideals of normative masculinity. From this perspective, budget rationality for householders of the working classes was a disciplining imperative.

Second, more concretely, the discourse of budget rationality represented a form of economic discipline of working class consumption which needed no explicit reference to class as the order of appearances did: workmen were a social group whose negligent budgets meant that freedom framed through budget rationality was often a mockery. History and critical theory have long expressed

126. CDG, Jan. 17, 1889, at 21.

127. CDG, Aug. 15, 1887, at 237 (reproducing, apparently, an opinion from *Sale and Exchange*).

128. *See supra* note 51 and accompanying text.

129. *See supra* note 104 and accompanying text. The dominance was waning by the 1890s. DAVID WAYNE THOMAS, CULTIVATING VICTORIANS: LIBERAL CULTURE AND THE AESTHETIC XIII–XIV (2004).

130. GRIFFIN, *supra* note 1, at 281 (quoting Gladstone in 1866).

concerns about capitalistic paradigms of social ordering premised on freedom of contract within a structural background of inequality. In the doctrine of necessaries, however, one needed little imagination to see this issue: the budget was brought to the foreground by judges and social commentators as they developed the morality of consumption decisions.

The drapers' own discourse here, too, was implicated in developments, and here too they paradoxically failed to appreciate the resonance and could not recognize themselves in the legal structures they disliked. To see the drapers' implication in disciplinary sentiments, return again to the anxiety with class crossing. Critiques of drapers' credit in this context took two forms: complaints cast in terms of the order of appearances about the supply of redundant luxuries; and complaints set in terms of the liberal ideology of equality, concerned with the harsh financial and legal terms offered to low-class consumers. The first curious point to note is that the drapers took on most accusations but evaded the critique of luxury.[131] Uncomfortable with the implications of the necessaries/luxuries distinction for their business, they preferred to argue about class equality. In their silently evading the distinction, the drapers encouraged and reinforced the turn away from the order of appearances with its focus on commodities, and toward budget rationality.

The vocal side of debates exposed how the apparent empowerment of the husband-debtor-contractor could turn on itself. How do you conceptualize equality for the lower classes, assuming you even wanted to? Many attacks on the drapers were framed as a search for equality; proponents of legal measures like abolition of imprisonment for debt, or protection of property from seizure, argued that protection from such measures was practically available to the upper classes, and should be extended to working classes.[132] Opponents, drapers among them, accepted that equality was required. While rejecting outright claims that their financial terms were unfair, the credit drapers could not deny class difference in legal enforcement.[133] Instead, they argued for equality in access to credit, not in exposure to enforcement. Protecting the lower classes as you protect the upper ones would leave the former with nothing to offer as security—for they could only offer their bodies, their future wages, or what little domestic goods they managed to get with those—hence credit would become an upper-class

131. *E.g.*, CDG, Feb. 1, 1887, at 62–64. Again, examples are numerous.

132. From 1887 to 1906 a few attempts were made in parliament to protect working classes from seizure to the same amount available to insolvent middle classes. A Bill to Protect (to a Limited Value) from Seizure and Sale Under Legal Process the Necessary Furniture, Books, Tools, Wearing Apparel, and Bedding of a Householder and His Family 1886-2, HC Bill 43. Commentators from the "Homestead Law Association" readily admitted that despite the generalized language the bill was aimed at the drapers whose use of the county courts for the "selling up of homes" was iniquitous. *E.g.*, CDG, Sept. 15. 1886, at 238.

133. On differences, see Paul Johnson, *Creditors, Debtors, and the Law in Victorian and Edwardian England*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE 485 (Willibald Steinmetz ed., 2000).

privilege.[134] This point, in itself, called attention to the delimiting prospects involved in evaluating consumption according to budget constraints: with small wages, the body itself was actually and symbolically at risk. Replacing luxury policing with consumer sovereignty embedded a reversal for persons with small means.

With this complexity within debates about equality in mind, zoom back out to the broader debates about consumer credit, where not all voices were committed to equality. Consumer credit was contentious. While cast as equality and agency by drapers, it was viewed as oppression by others, or for those who were less liberally minded, as a disastrous liberality toward workmen—"men of no principle, unthrifty, extravagant, drunken . . . ."[135] The change in the doctrine of necessaries assumed its meaning within this space of opinions. No side to these debates was pleased with its practical outcomes. Proponents of bills intended to limit the drapers' business and encroach on their ability to rely on the doctrine of necessaries, found that their efforts failed; reactionaries were sad to see working class credit expanding despite their outcry. The drapers, meanwhile, found that their rationalizations of credit on the basis of wages were accepted—the budget management paradigm fit them perfectly—but backfired in practice as judges declined to enforce contracts under the new construction of the doctrine. These confusing outcomes exposed that claims which based consumer agency on budget rationality made headways without, necessarily, the attendant ideological framing of consent, freedom or equality. From both paternalistic and prejudiced perspectives, it looked like a danger to workmen, imposed without conferring obvious benefits on those who could argue otherwise. The overall picture looked bleak from all established positions in debates.

Overall, I have argued, legal change in the doctrine of necessaries was a way of containing the agency of masses of consumers within a new paradigm. When the discourse of consent is read as a history of containing the working classes within the broader context of concerns with their consumption, the account ceases to be about male empowerment. Crucially for the history of consumer capitalism and law's role in it, the account is much less forward-looking in its mood than contract's association with the rise of liberal ideology and middle-class hegemony. This doctrinal shift was as much about who the hegemony did not include, as about the hegemony itself. Its mood was one of concern, not celebration.

4.3.3. Deserved Consumer Credit

Legal attention shifted away from questions of luxuriousness, appearances, and social display, towards budget management of household routines conceived in technical terms. As Earl of Halsbury said in a 1904 decision applying the new logic of the doctrine, "I prefer keeping to those terms [agent and principal]

134. *E.g.*, CDG, Mar. 1, 1887, at 83–84; SELECT COMMITTEE ON COUNTY COURTS JURISDICTION, REPORTS, HC 1878–267, qq. 711–716, 1190–1191, 4197–4199 (Stonor, J.).

135. LEEDS MERCURY, May 14, 1864.

because it gets rid of the confusion which arises from the peculiar relation of these parties [husband and wife] to each other."[136] I have argued that the change was motivated by fears of consumption and involved an embedded critique of consumers' pursuits. Yet, at the same time doctrinal change also decentered luxury policing. This is another element in the history of the doctrine of necessaries that historians have overlooked. Efforts to directly moralize consumption were decentered, unleashing new permissibilities.[137] The overall picture I am arguing for was thus inherently equivocal: at once permissive, yet undermining the ability of new permissions to make social realties, by treating appearances as shallow. This equivocality in the meaning of consumption remains potent still, as social theory continues to debate whether consumers exercise significant agency, and as consumers themselves continue to experience a need to consume, and a looming threat of emptiness.[138]

Pollock's decision in 1897, which held a husband liable for expensive wifely orders of flowers, exemplified the full span that had taken place: "[T]he word 'necessaries' was not now generally used to decide whether a wife had power to pledge her husband's credit," he said, and continued:

> The question was, whatever might be her domestic position, whether she was wife, sister, mistress, or housekeeper—was her position such, and was the character of the articles supplied such, that a jury ought fairly to assume that she was entitled to pledge the credit of the person with whom she was living . . . . The couple . . . gave sumptuous entertainments, but a man was entitled to do that if he liked.[139]

A decision which, a few decades earlier, would have been premised directly on the order of appearances, was now navigated through a laborious discourse about what a man might do within his budget and what a woman's domestic role is, only to release restraints on consumption at last.

The reach of this shift could be glimpsed when yet another parliamentary committee considered imprisonment for debt in 1909. Dresses and shawls largely

---

136. *See* Morel Brothers & Co., Ltd. v. Earl of Westmoreland, (1904) AC 11, 14 (Eng.). Or again, Valpy v. Dayrell (1890) Brompton County Court (Stonor, J.) ("I regard this case a one of mere agency, irrespective of the marital relations . . . ."); *see also* CCC, Apr. 1, 1890, at 356.

137. For the culture which then emerged to guide the "bewildered housewife . . . through the plethora of commodities on offer," *see* Judy Giles, *Class, Gender and Domestic Consumption in Britain 1920–1950*, *in* GENDER AND CONSUMPTION 15 (Emma Casey & Lydia Martens eds., 2007).

138. This is apparent in the literature on consumption. *E.g.*, FRANK TRENTMANN, EMPIRE OF THINGS: HOW WE BECAME A WORLD OF CONSUMERS, FROM THE FIFTEENTH CENTURY TO THE TWENTY-FIRST (2017); PETER GURNEY, THE MAKING OF CONSUMER CULTURE IN MODERN BRITAIN (2017); Jean-Cristophe Agnew, *Coming Up for Air*, *in* CONSUMER SOCIETY IN AMERICAN HISTORY: A READER 373 (Lawrence B. Glickman ed., 1993); Ulrich Wyrwa, *Consumption and Consumer Society: A Contribution to the History of Ideas*, *in* GETTING AND SPENDING 431 (Susan Strasser, Charles McGovern & Matthias Judt eds., 1998); Viviana Zelizer, *Culture and Consumption*, *in* HANDBOOK OF ECONOMIC SOCIOLOGY 331 (Neil Smelser & Richard Swedberg eds., 2d ed. 2005).

139. Goodyear v. Part [1897] 13 TLR 395, 386 (Eng.).

gave way to watches and jewelry, foolish wives starred alongside their husbands, and the drapers' credit was in competition with new forms of finance which made headways, like hire-purchase.[140] Yet, the committee's approach to consumer credit was in close dialogue with those beginnings.

The committee adopted the proposal of William Selfe, a county court judge whose plan for abolishing "classes of business which are of no benefit to the working man"—money lenders, and "firms who send out agents all over England, inducing working men and others to buy jewellery, watches, Bibles . . . ."[141]—was to rekindle the luxuries/necessaries distinction, and bring it to bear on working class consumer debts at large. He proposed that a creditor seeking imprisonment would need a court-issued certificate that the debt was for necessaries.[142] Presumably, only credit for necessaries would be offered, and other credit would be gone.

The committee asked its witnesses whether a distinction could be made between necessaries and luxuries. Witness after witness, the majority of men summoned argued against the small group of supporters that, for various reasons, it was impossible. One judge figured that the committee did not understand the terminology:

> You see the word "necessaries" in a court of law does not mean merely those things which are absolutely necessaries for existence, a sufficient amount of food to sustain life, and a sufficient amount of clothing to be decent, but it has always been held to mean such things as are suitable having regard to the position and means of the person in question.[143]

The committee shifted grounds: it began to ask about necessaries vs. non-necessaries, rather than necessaries vs. luxuries, and for a reason. Its final recommendations described two possible venues for working class consumer credit. In the extreme case character—the basis of credit—failed.[144] The committee thought these were "probably not nearly 5 per cent of the total number of credit transactions which come before the courts."[145] The debate about necessaries targeted those cases. The whole necessaries discussion, in other words, was marginalized. Then, because marginal, "necessaries" were reduced to an almost

140. *See* Report 1909(239), at 278.

141. *Id.* at 375 (App'x 19).

142. *Id.*

143. *Id.* at 309.

144. According to the report, character failure was the only case in which imprisonment was used. See O'CONNELL, *supra* note 21, at 14–15 for a discussion of complexities in this factual picture. This argument was rejected by the 1873 committee, and was contentious in 1909; the report passed six-to-five, with three members absent. The minority supported full abolition of imprisonment and was less enthusiastic about credit. My interest is less the factual than the conceptual picture which was now available and dominant.

145. Report 1909(239) at v.

naturalized idea of bare necessities "for the support or maintenance of the debtor or his family,"[146] while luxuries were altogether beside the point. This move fell in line with the conceptual investment in daily routines, far from appearances.

The more important case of credit, which the report pronounced emphatically, was the rest of life: Workmen required credit habitually, and, when at work, were "justified in obtaining goods on credit."[147] Everything depended on budget restraints: "[a] workman is as justified in obtaining reasonable credit in proportion to his wages as a trader is justified in giving such credit, if the one gets and the other gives credit *with due regard to the future potential ability of the workman to earn wages.*"[148] Working classes, whose credit had been deeply unsettling, now fit into a "national life ... based almost entirely on a system of credit."[149] Budget-rationality and household routines gained an undeniable claim to account for the imaginative universe of consumer credit, far from the order of appearances.

5. LAW AND CONSUMER CAPITALISM

This Article has traced the history of the doctrine of necessaries within the changing terrain of consumption in England in the second half of the nineteenth century, highlighting the intersections of gender and class. It has examined how and why the old logic of the order of appearances, which made sense of household consumption, was marginalized by a new one, of budget rationality in routines.

The history of the doctrine of necessaries is part of a still ongoing process, in law as in other arenas of social action, to shape the directions and meanings of consumption. Western consumption is an economic and cultural system which pervades every level of experience, yet many of us are unsure that "you can be clever and like clothes." We can begin to make sense of the equivocality by relying on legal history to recover processes which created it and made it part of everyday experience.

The turn to budget rationality in routines in the doctrine of necessaries eroded luxury critique, but questioned the meaningfulness of freedoms to consume. Far from embracing expanding consumption and turning it into a virtue, as historians often describe the rise of mass consumption, this legal framework attempted to tame it, and offered a supportive cultural construct for consumer capitalism virtually despite itself. Early paradigms of rationality, usually associated with hopeful accounts of consumption as emancipatory,[150] were in fact deeply entangled with

146. *Id.* at v, ix. The minority opinion too naturalized necessaries, but thought that they represented the majority of cases. *Id.* at xix.

147. *Id.* at iv.

148. *Id.*

149. *Id.*

150. For accounts of the debate on whether consumption in late capitalism is manipulated and dangerous, or rational and emancipatory, see *supra* note 138.

its dangers, and reflected despair more than conviction. The cultural framework which gave rise to change was not all celebratory.

Consumers expected to adjust to wages and household routines had to navigate the world of goods with care, and to acknowledge that any appearances they achieved were mere superficialities. But, within those confines, their whims were now freer from the critique of luxury. Commentators who view today's acquisitive consumerism as removed from the prudence implied in budgeting prescriptions[151] might be correct, but miss the fact that historically such prudence also offered a release. "The rationalization of life," argue Carruthers and Espeland, "has been more than an overall increase in the 'calculability' or rationality of decisions. It has also been a change in the rhetoric used to represent decisions;" rhetorical frames, in turn, are ways to "establish the *legitimacy* of action."[152] It is within that complexity that we should understand the shift in legal analyses from the perspective of the history of consumer capitalism. This Article traced one route which formed a new cultural channeling of consumption with unleashing effects, yet accompanied them by a new diminution of consumer pursuits, making for profound equivocality.

George Gissing was one of the era's better-known commentators on economic upheaval and its entanglements with gender and class. Observant of new cultural currents, Gissing made poignant use of the equivocal meaning of consumption, and can serve to remind us, in conclusion, what the legal logic of the doctrine of necessaries accomplished. In 1895, Gissing published *Eve's Ransom*, a novel narrating the consumption spree of a workman and a low-class woman. At the opening of the novel, the protagonist is given formally unrestrained money on these terms: "Four hundred and thirty-six. You'll go to the devil with it, but that's no business of mine."[153]

---

151. *E.g.*, Stephen Walker & Sue Llewellyn, *Accounting at Home: Some Interdisciplinary Perspectives*, 13 ACCOUNTING, AUDITING & ACCOUNTABILITY J. 425 (2000). The question of prudence is related to discussions of the calculative spirit of capitalism. Accounting history is directly important here. *See generally*, THE ROUTLEDGE COMPANION TO ACCOUNTING HISTORY (John R. Edwards & Stephen P. Walker eds., 2008). The discussion usually starts with Sombart and Weber. Accounting history centered on the home, which is even more closely related to the concerns of this article, is a recently burgeoning field.

152. Frames, moreover, retain their symbolic import even if decoupled from technique. Bruce Carruthers & Wendy Espeland, *Accounting for Rationality: Double-Entry Bookkeeping and the Rhetoric of Economic Rationality*, 97 AM. J. SOC. 31, 35 (1991) (emphasis in original).

153. *See* GEORGE GISSING, EVE'S RANSOM ch. 1 (1895).