

# Anat Rosenberg–Advertising, Non-rationalism, and the Legal Archives

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## Anat Rosenberg

**Anat Rosenberg** is a faculty member at the Harry Radzyner Law School, Reichman University, Israel, and a Fellow of the Royal Historical Society. She writes on the history of capitalism, consumption, and liberalism, and methodologies of law, culture and the humanities. While working on *The Rise of Mass Advertising* she was a visitor at the Faculty of History, the University of Cambridge (2017–20) and the Institute of Advanced Legal Studies, the University of London (2017–19).

This symposium gathers scholars whose expertise and creativity in legal, cultural, British, and consumer history has been indispensable for my work, who all generously invite further expansion on the methods and findings of *The Rise of Mass Advertising*. To do some justice to their comments, a very quick recap: the book deploys a multidisciplinary methodology, drawing on a wide variety of cultural and legal sources, to ground two interrelated historical processes. One is the legal boundary work that differentiated advertising from other fields when it was perceived as a threat to their authority. Among these fields were news, art, science, and religious morality. Boundary work legitimized advertising while ensuring its differentiation and inferiorization vis-à-vis fields that it threatened. The other process is the legal disavowal of enchantment manifest in the course of boundary work, which repeatedly focused on rationalist values (including their failure). Legal disavowal protected a vision of modernity-as-disenchantment in the face of a powerful system of capitalism that operated by spreading experiences based in nonrational ontologies and a play of mystery. These experiences were left without legal conceptualization, a remarkably persistent phenomenon across sites of law and legality.

What follows addresses what I see as the central themes raised by the symposium, which I have broken down to digestible bites:

- High and low in legal history
- Advertising and Empire
- Liberal law and the persistence of the nonrational
- Legal logic and enchantment disavowal
- How to study enchantment, or accumulation as historical form
- The cohabitation of enchantment and reason

- Enchantment, structural and individual

### **High and Low in Legal History**

The legal history of popular culture and everyday life inhabits tensions between high and low, not least the high grounds of scholarship itself – including its aesthetics, and the allegedly low ground of its topic, which Rachel Bowlby prompts us to consider. *The Rise of Mass Advertising* takes these tensions as a critical opportunity. In form, it aims to inhabit them through a combined visual and intellectual examination, which moves with historical subjects along different modes of experience: fast and slow, superficial and deep, cheap and dear, funny and serious, ephemeral and enduring. These historical moves reveal the cultural earthquake that attended the rise of mass advertising. In content, the goal is to denaturalize tensions and clarify their historical work. The book shows them to be historically-constructed frameworks that shaped the experience, status, and power of advertising. The organizing contrasts that the book examines are between objective and biased, beautiful and vulgar, restrained and exaggerated, elite and popular. These all have legal histories that *The Rise of Mass Advertising* unpacks. All were organized with legal power, and all are essential for understanding how advertising shaped modern life.

It bears noting that the dialectical nature of the paired constructs means that they depended on each other to exist. For this reason, they were never stable, as every debate about advertising revealed. Moreover, they should often be reversed for analytical purposes. For example, at different points the book addresses the seriousness of laughter (say, the normative meaning of a laughing audience in court), and the funny side of seriousness (say, newspapers on a search for “disguised” adverts). Similarly, I examine the enduring character of the ephemeral (for example, when posters became a permanent feature of outdoor life), but also the capacity of enduring things to become unsteady with the advent of advertising (Nature itself, Victorians felt). As tensions between high and low become unsettled, the profound impact of the seemingly least profound field of all, that of advertising, comes into view, as does law’s entanglement in its history.

### **Advertising and Empire**

Erika Rappaport emphasizes the resistance to capitalism that *The Rise of Mass Advertising* finds in legal responses. She proposes to take this framework to histories of the British empire and to consider anticolonialism in relation critiques of capitalism, a point exemplified in Gandhi’s critique of consumption.

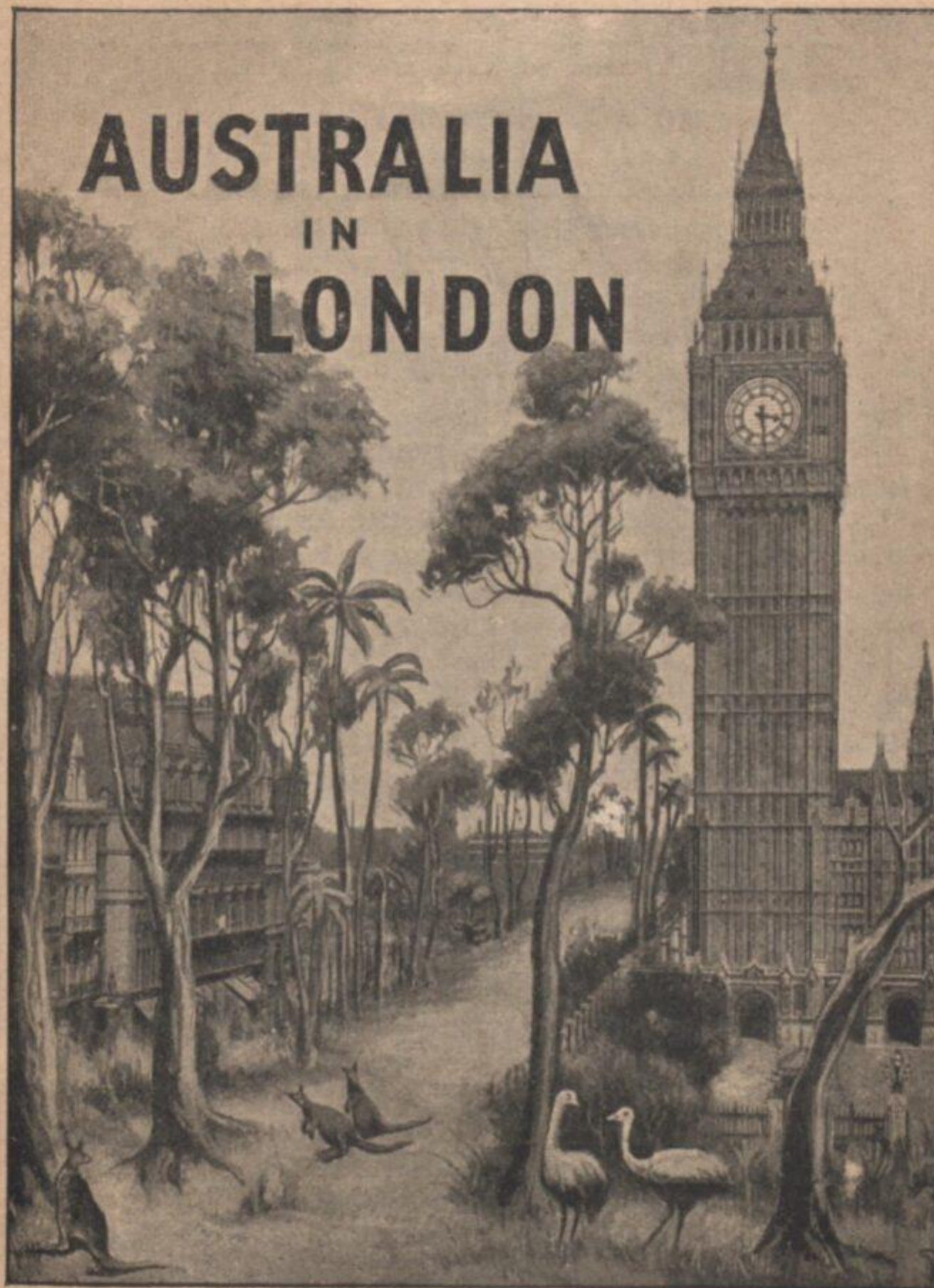
Rappaport’s argument invites us to pursue the connections between histories of capitalism and histories of nationalism with legal archives. A perspective on advertising can be an important intervention, because if anti-consumerism was part of anti-colonialism, we need to explain advertising’s popularity and ask whether its expansion was strictly imperial or also locally nurtured. One possibility is to examine whether the duality that typified Britain was relevant in colonial and post-colonial

settings. *The Rise of Mass Advertising* shows a conceptual duality whereby support for advertising advanced with attacks on it. The picture was as follows: laws treated advertising as a legitimate and even indispensable system of the economy, and created the frameworks to sustain it. At the same time, and in fact inseparably, laws criticized advertising and treated it as suspect in both epistemological and aesthetic terms. This process mainstreamed advertising while also differentiating it from the era's authoritative cultural fields. Advertising became the unavoidable presence you could freely disparage. In essence, a scapegoating process. Whether and how the duality played out in colonies and post-colonies will shed light on the history of nation-building. If emergent nationalist projects mainstreamed advertising under protest as it were, this is revealing of a paradoxical process of imagined political independence modeled on the contradictions of British life.<sup>[1]</sup> As Rappaport suggests, legal archives will surely prove productive to studies of the connections between nationalist and economic registers.

The problem of enchantment will also likely take a productive twist as we turn to the empire, because it marked the dividing line between civilized and uncivilized.<sup>[2]</sup> Claims to modern disenchantment were fashioned vis-à-vis visions of colonial otherness, the placeholder of unmodernized ontologies of magic and animism. The imagined exoticism of colonies was attractive to British advertisers who wanted to sell magic, but was also treated with suspicion. For example, real and wannabe colonial remedies had a huge British market, yet their advertising was denigrated as quackery.

One famous example was the story of the Bile Bean Company, established by Charles Edward Fulford and Ernest Albert Gilbert. Fulford was impressed with the American quack medicine brand "Pink Pills for Pale People," and began the new venture by seeking a catchy literature. Inspiration struck him at 4 am one morning: "Bile Beans for Biliousness." The partners invented a formula and had it manufactured in Detroit. They operated from Leeds from 1899 and expanded through agencies across the British Empire, marketing millions of pills for biliousness and other conditions. The British advertising campaign alone cost a prodigious £300,000. When they discovered that a chemist in Edinburgh was selling his own brand of "Bile Beans," they took him to court. However, two courts refused to help, because they saw the Bile Bean Company as a fraudulent trader. According to the courts, the "foundation stone" of Bile Bean's success was a fictional story of colonial origins. In this fiction, the pills were made from a secret Australian herb, which had been long known to natives whose robust health was attested by none other than Captain Cook; the herb was allegedly discovered by an eminent scientist named Charles Forde, who did not exist.<sup>[3]</sup> Some adverts indeed marketed colonial exoticism, as here:

# AUSTRALIA IN LONDON



Bile Bean Manufacturing Co., pamphlet advertisement 1900s, read in court by Ardwall J. 1900s © Bodleian Library, University of Oxford: John Johnson Collection: Patent Medicines 8 (24) © 2008 Proquest.

The courts' reaction exemplifies widespread attacks on exotic advertising, which were rooted in contrasts between the modern and the colonial. The premise of these attacks was dual: first, adverts selling colonial knowledge were very powerful (as Fulford and Gilbert knew), but second, they were inherently suspect and more likely than not based on lies or ignorance. While this was true for Bile Beans, it was not so for every case.<sup>[4]</sup>

Now, what happens if we view this advertising from the colonial end? How was it received? How did visions of modern medical science and its relationship to the market for colonial knowledge look from the other direction and its legal archives? As Rappaport proposes, these will be critical perspectives.

### **Liberal Law and the Persistence of the Nonrational**

Peter Mandler observes this theme across my work. In my previous book, *Liberalizing Contracts*, I addressed the legal accommodation of the nonrational *other* of contractual liberalism – in that case, gender and class hierarchies – within or alongside rationalist contractual paradigms.<sup>[5]</sup> In *The Rise of Mass Advertising* I trace a legal disavowal of the nonrational – in this case, enchantment. Both books probe the persistence of ideologies, ontologies, practices, and structures that undermine the nineteenth century's rationalist aspirations, and the role of law in this persistence. I have been deeply unsatisfied with the dominant explanations for it. Both liberal accounts of slow progress, and critical accounts that view the commitment to rationalist ideals as chimerical (masking social power), do not explain enough about the historical picture. I have therefore been studying the structures of persistence very closely.

As Mandler observes, disavowal bespoke a refusal to give the nonrational a role in the socioeconomic order, unlike the accommodation of status hierarchies. However, he points to potential convergences of these frameworks, particularly as women and the working classes, often described as the main “victims” of enchantment, entered the consumer economy. To see why disavowal persisted even then, we should remember that enchantment was irreducible to identifiable social groups. It is true that women and the lower classes were often accused of being less rational, but the presence of enchantment could not be so easily circumscribed. In fact, the threat of enchantment as a mode of economic and social organization was widely felt *because* enchantment cut across social divides. Advertising was a reminder that everyone was a consumer, and no gender or class was immune to its appeals. Everyone was also an advertiser or stood to profit from advertising, at least in potential.

Medical advertising, to continue the previous example, revealed a cross-class and cross-gender picture of health consumers and market providers. As cases reached courts, it became clear that this was not a scene in which women or the lower classes were not yet socialized into rationalist paradigms, but in which the market was

running on something other than rationality. The response was to treat the consumer market as a whole as a realm of failure vis-a-vis the ideals of rational medicine, in which unrestrained advertisers and consumers circulated and responded to unwarranted exaggerations. The concept of exaggeration signaled the failure of scientific ideals, an absence of restraint and hence the distortion of truths about the human body. In speaking the language of rationalist failure, the concept disavowed the enchanting appeals of adverts. The broad application of the concept of exaggeration reflects the fact that nonrationalism could not be hung on defined social groups. This is also the reason that the gender resonances in *Carlill v Carbolic Smoke Ball*, while inescapable, do not explain enough. The case's position on market exaggeration (in the context of puffery doctrine) was part of a broader pattern of enchantment disavowal, which exceeded Louisa Carlill's gender.<sup>[6]</sup>

### Legal Logic and Enchantment Disavowal

While gender and class structures do not map onto enchantment and were not the central drivers of its disavowal, neither were legal path dependencies or law's internal logic. In *The Rise of Mass Advertising* "law" refers to a diffuse mode of activity, not to a discipline, a profession, a professional discourse, or defined institutions. Indeed, there is no "The Law" in this book. I have written this history with a cultural theory that examines not only courts and legislatures, with their products of legislation and doctrine, and not only trained legal professionals, but also citizens, consumers, local organizations, practices, and material environments that were part of daily pursuits, market relationships, and substate structures. Multiple actors created, adapted, and performed normativity in these environments, and attempted to formalize it within distinct constraints and opportunities. From this perspective, law is emergent and dispersed rather than predetermined and unified.

This theoretical and methodological position allows us to see that disavowal was not a product of law. Rather, it was a normative choice of multiple groups, organizations, and individuals, who mobilized law(s) to do so. They recognized the legal capacity and propensity to emphasize rationality and to treat anything beyond it as a failure or absence, and they deployed it. But they could have done otherwise, and occasionally did. For example, in the legal theory of obscenity we see a conceptualization of the nonrational, specifically in the 1868 *Hicklin* idea of object-subject dialectics.<sup>[7]</sup> The reason that this remained unusual was not a limitation of law as such, but a testament to the historical refusal of British culture to tell itself that its modern economy was something other than a victory of reason. Indeed, if only legal institutions or the legal profession had been committed to disavowing enchantment, they would have failed. This was a much broader cultural effort.

Because there is no "The Law" in this book, the disavowal of enchantment is not a story about things remaining beyond law's remit. Likewise, it is not about the masses versus elites, as Roy Kreitner also suggests, or the masses versus the experts that Mandler emphasizes. Social differentiation, even in these forms, explains various parts, sometimes significant parts, but not the full picture. Non-experts, non-elites,

lower classes and women (to say nothing of intersections) were also participants in legal disavowals.

So, what drove disavowal? Why would a culture mobilize law to disavow the common experience of enchantment by advertising? The explanation lies in the difference between consciously reflecting on the socioeconomic order, and living with the complexities of everyday life. When historical actors of all classes, genders, and professions, perfectly at ease with enchantment in their daily lives as Kreitner observes, mobilized legal ideas and powers, they reflected on the implications of advertising as an ordering principle for their economy and culture. In this context they refused to acknowledge a structural dependence on enchantment. On the level of ordering, rather than private experience, enchantment undermined understandings of modernity as a process of progressive disenchantment, and of the market economy specifically as a victory of reason. Then the response was disavowal.

### **How to Study Enchantment. Or, Accumulation as Historical Form.**

The classified ad, Rachel Bowlby writes, does not enchant. But in the first era of mass advertising it did; as *Jane Eyre* had it, it was magic. The reason was that classifieds were not an isolated scene. Advertising in the long nineteenth century advertised the market, or more precisely life as a market. Large corporate manufacturers featured alongside a huge circulation of smaller as well as non-business advertisers. Commodities and second-hand goods circulated alongside entertainments, services, financial and labour opportunities, and with less separation than we find in later periods. Classifieds were part of the scene, as were political adverts. These hefty mixtures gave shape, feeling, and meaning to abstract ideas about market society. Adverts were experienced as openings into invisible worlds of unknown persons, things, activities, logics, and lives, and pulled readers into expansive scenes beyond their sensual surroundings. When Bowlby queries the classifieds, she raises a central methodological and theoretical concern in this book: the over-familiar argument that advertising enchants us requires historical studies that trace what precisely that means in specific historical moments. To achieve this the analytic lens should turn from adverts to readers, and from isolated adverts to their accumulation, as encountered by readers.

With Britain's population surge, urbanization, and systems of transportation built between 1830 and 1880, contemporaries were learning to live among strangers, as James Vernon observes, yet advertising extended and shaped this modern experience in distinct ways.<sup>[8]</sup> Vernon emphasizes print culture's functions of standardization and trust-creation, but advertising, which he does not address, was not a system serving rationally to abstract and disseminate information over social and geographical distance. It facilitated imaginative living as a matter of daily practicalities. Advertising was giving images, colours, rhythms, styles, and contents to unknown worlds so as to facilitate a strange familiarity as it were, with things one encountered sensually only in adverts. In Walter Benjamin's terms, adverts were thresholds, transitory experiences between different states of being.

The important implication did not come from single adverts but from their accumulation, which was a historical form in its own right. The personalized advertising of our present raises similar questions. To argue for informational isolation – or alternatively for imaginative enhancement as Bowlby terms it – depends on the interplay of digital, physical and conceptual environments we inhabit, which likely exceed the content and goals of a particular advert, as they did in the long nineteenth century.

### **The Cohabitation of Enchantment and Reason**

A related question about enchantment is its relationship to reason. Bowlby notes that obscure languages in adverts for abortion drugs may have reflected equally obscure knowledges about the human body, and therefore cannot be assumed to exceed factuality and to mystify readers. Before addressing abortion, the general relationship of knowledge, factuality, and rationality to enchantment bears discussion. It cannot be emphasized enough that these were not mutually exclusive. In fact, enchantment can be fruitfully studied as a dialogue with knowledge. When knowledge was available, advert readers sometimes rejected it in order to keep dreaming. When it was lacking, they nonetheless often explained their positions as rational, and justified dreams by claiming to compensate for lack of knowledge with their capacities of reason, and with their sophisticated abilities to navigate advertising. When it came to scientific knowledge, the celebration of the progress of science was more important than any particular discovery. Embracing scientific progress opened dreamworlds because the potential was more inviting than any actuality.

In the context of abortion, although scientific imaging was not yet available, women knew their bodies and sought terminations of unwanted pregnancies. Legal prohibitions made this difficult. Legal parlance included the terminology of “miscarriage,” “abortion,” and being “with child,” and so motivated advertisers of abortion drugs to work around these languages with texts that created what Rebecca Mitchell calls in another context plausible deniability.<sup>[9]</sup> For women as drug consumers, the space of uncertainty was thus huge. They had to make decisions in conditions of illegality, legal license to lie to them, and creative copywriting, all of which joined gaps in scientific knowledge. For this reason, abortion adverts provide an extreme case of the role of imagination and magical thinking in engagements with advertising. Women embraced them for lack of choice and arguably rationally, yet their responses were not simply a reflection of missing scientific knowledge. Instead, they revealed how suggestion and leaps of faith operated in the advertising environment and underwrote the big business of abortion drugs.

### **Enchantment, Structural and Individual**

Kreitner argues that the theory of the market as a mechanism for turning individual self-regarding action into social welfare is an enchanted vision, because modern profit seeking is a matter of fighting over market share among similar products, which does not itself produce social benefit but rather detracts from it. Advertising is key: it is an



unproductive avenue that participates in the creation of goodwill, serving profit by monopoly while diserving the public. If so, the focus on consumer enchantment was a way of overlooking, or disavowing, this problem. This is an important point even if only some advertising serves market share jockeying rather than other values (information driving product improvement in particular), and even if only some people, like Thorstein Veblen, would view that as a problem. The question that Kreitner raises is what held this enchantment in place.

Did attention to consumer rationality in legal and advertising discourses necessarily shift it away from the nonrationality of the economy, as Kreitner suggests? Was all this discussion of consumer rationality a disavowal of the more serious nonrationalism at stake? Perhaps, but there was also the opposite potential: worrying about consumers could also promote awareness of other elements of nonrationality. The reason is that consumer wants – the era’s ambiguous term indicating needs and desires – are no more given than the market share of sellers. Therefore, advertising dedicated to shifting market share was inseparable from the creation of consumer desires. Brand advertising clearly did both. This means that concerns about consumer rationality, which essentially addressed the process of wants creation, were not a way of forgetting other structural elements.

However, Kreitner is surely correct that the nonproductive nature of an advertising-based economy was not at the center of discussion, and we should ask why not. He implies that discussions of consumers individualized structural problems. This could be the explanation for cultural and legal sites that were premised on individualization. For example, both advertisers and courts discussed individual adverts and individual consumers, rather than advertising accumulation and the cultural grip of enchantment. In courts in particular, the legal logic and procedure was not geared to dealing with structural phenomena. However, other areas of legal effort, such as legislation or self-regulation, were not so limited. The disavowal that Kreitner addresses therefore remains to be studied: where and when did alternative stories of the market appear, and how was their disavowal achieved, if neither attention to consumer enchantment nor individualization fully explains it? *The Rise of Mass Advertising* observes some arguments about the economics of advertising that Kreitner notes, but for the most part this is a question yet to be studied. When I was nearing the book’s end, I established with colleagues a research network on enchantment in the history of capitalism.<sup>[10]</sup> These histories are only beginning to be told.

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[1] Current research indicates some of the complexities. For example, Douglas Haynes finds that European and American advertisers worked in colonial India by adapting marketing content to local conjugal ideologies in cooperation with local experts, but also points to the difficulties and failures of their efforts. Douglas E.

Haynes, *The Emergence of Brand-Name Capitalism in Late Colonial India: Advertising and the Making of Modern Conjugality* (New York: Bloomsbury Academic, 2022).

[2] Or what Rappaport describes as fantasies of imperial conquest. On the civilizing mission of advertising in the colonies see for example Erika Rappaport, *A Thirst for Empire: How Tea Shaped the Modern World* (Princeton, NJ: Princeton University Press, 2017) (tea planters' view of advertising as a gospel spreading the blessings of tea among the heathen); Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (Routledge, 1995) (soap advertising created a commodity racism in which the values of domesticity were marketed as a civilizing mission); Anandi Ramamurthy, *Imperial Persuaders: Images of Africa and Asia in British Advertising* (Manchester: Manchester University Press, 2003) (colonial traders promoted an image of African underdevelopment and willing subordination).

[3] *Bile Bean Manufacturing Co. v Davidson* (1906) 23 RPC 725 (Inner House); *Bile Bean Manufacturing Co. v Davidson* (1906), 22 RPC 553 (Outer House).

[4] *Rise of Mass Advertising*, chs. 4-5.

[5] Anat Rosenberg, *Liberalizing Contracts: Nineteenth Century Promises Through Literature, Law and History* (London; New York: Routledge, 2018).

[6] *Carlill v Carbolic Smoke Ball Co* [1891-4] All ER 127 (CA); *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484.

[7] *R. v. Hicklin* (1868) LR 3 QB 360.

[8] James Vernon, *Distant Strangers: How Britain Became Modern* (University of California Press, 2014).

[9] Offences Against the Person Act, 1861, 24 and 25 Vict. c. 100. Rebecca Mitchell, paper given at the Interdisciplinary Nineteenth Century Studies conference, 2023.

[10] <https://economic-enchantments.net/>