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New England Law Review

Summer, 1992

26 New Eng.L. Rev. 1221

LENGTH: 33571 words

FOR MARY JOE FRUG: A SYMPOSIUM ON FEMINIST CRITICAL LEGAL STUDIES AND POSTMODERNISM:
PART TWO: THE POLITICS OF GENDER INDENTITY: Publicity Rights and Political Aspiration: Mass
Culture, Gender Identity, and Democracy

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SUMMARY:

... In societies characterized by mass production, consumer capitalism, and mass media communications, the celebrity image holds both seductive power and significant economic and cultural value. ... THE VALUE OF THE CELEBRITY IMAGE ... But even if we *had* determined that an exclusive property right was a necessary incentive to have a celebrity bestow his fame upon us, the logic of intellectual property rationales would demand that he give us something in return. ... Neither the common law nor trademark legislation recognizes a property right "in gross" in a trademark. ... However, the doctrine of publicity rights extends to celebrities a property right to their name and likeness before any marketing use of the celebrity image has necessarily been made and whether or not the public has come to recognize the image as distinguishing a group of goods or services. ... By recognizing the ability to exploit one's persona as an exclusive property right, the law has created a significant source of economic value. ... These changes, I would suggest, are integrally related to the cultural value of the celebrity image in contemporary social life. ... Power may produce resistance in the sense that Michel Foucault suggests, but it does not determine the form or the content of the practices that transgress its strictures. ...

TEXT:

[*1222] I. INTRODUCTION

The white kids had the counter-culture, rock stars and mysticism. The blacks had a slogan which said they were beautiful, and a party demanding power. Middle America had what it always had: Middle America. The hawks had Vietnam, and the doves the Peace Movement. The students had campus politics, and the New Left had Cuba and the Third World. And women had a voice. I had rejection from all of them. I also had Judy Garland. n1

The social construction of gendered subjectivity is one of the central premises of an anti-essentialist feminism that understands sexual difference to be "a complex, ever-shifting social practice." n2 If sexual identities are culturally constructed, then we need to explore how specific gendered subjectivities are produced in local social practice. n3 Here I explore contemporary domains of popular culture -- gay camp, lesbian "hermaphroditism," and *Star Trek* fanzine writing -- to consider the emergent gendered subjectivities created within these local subcultural practices. Mary Joe and I shared the sense that aspects of mass culture provided enabling resources for the construction of gendered identities, and regretted that commercial culture was so quickly dismissed or denigrated in academic circles. I will take up where our discussions left off, focusing upon the construction of the celebrity persona in consumer cultures to consider both how the celebrity functions in the expression and realization of popular aspirations, and how the law simultaneously enables and constrains popular cultural practice. I suggest that the law both engenders and endangers the production of alternatively gendered subjectivities. Fortunately, it can never fully contain or control the direction of this cultural energy.

As scholars concerned with the construction of identity, we cannot afford to maintain an elitist distaste for mass culture. We must begin to address popular cultural practices with the respect due to a cultural politics -- practices of appropriation and innovation of mass media disseminated cultural forms in improvisations that affirm emergent identities [*1223] and communities for those in subordinate social groups. n4 In societies characterized by mass production, consumer capitalism, and mass media communications, the celebrity image n5 holds both seductive power and significant economic and cultural value. Legal regimes simultaneously create, legitimize, and enable the realization of this value through doctrines of personality or publicity rights (and, less directly, through trademark and copyright laws). Celebrity names and images, however, are not simply marks of identity or simple commodities; they are also cultural texts -- floating signifiers that are continually invested with libidinal energies, social longings, and, I will argue, political aspirations. The names and likenesses of the famous are constitutive of our cultural heritage and resonate with meanings that exceed the intentions or the interests of those they identify or resemble.

Focusing on a number of cultural practices that engage, reproduce, ironize, and sometimes transform the meaning of celebrity personas in order to produce and assert alternative gender identities for those who are socially marginalized, I will argue that the definition of celebrity images as personalized property fails to address their social and cultural significance. In so doing, it reinforces an impoverished understanding of freedom of expression, and, consequently, of democracy.

The article will develop these ideas in turn. n6 First, I will very briefly summarize the legal doctrine of publicity rights n7 as it has developed in [*1224] North America. Next, the trend towards increasing the scope and duration of these rights will be explored and the social policy rationales for their instantiation and extension examined. I will argue that the rationales traditionally offered for

recognizing and protecting rights to the celebrity persona cannot be empirically supported and do not justify the extent of the protections legally afforded celebrities, their estates, or their assignees. n8 The social and cultural value of the celebrity image will then be situated in the larger historical, political, and economic context that is increasingly referred to as that of postmodernity, and the related cultural conditions that social theorists have addressed under the rubric of postmodernism. In the cultural conditions of postmodernism, the commodification of cultural forms creates both generative conditions and prohibitive obstacles for the formation of alternative subjectivities. Celebrity images, for example, are commodified cultural forms that provide signifying resources for the construction of identity and community. n9 The law commodifies the celebrity subject and provides the means through which the celebrity may attempt to fix the identity and meaning of her persona. But in so doing, the law produces the possibility of the celebrity's polyvalence.

Popular cultural practices that engage celebrity images in innovative fashions will then be presented to demonstrate the vibrant role played by these cultural icons in the self-fashionings of minority or subaltern social groups. Gay male appropriations of female stars in camp subculture, lesbian refashionings of James Dean and sixties pop singers, and middle class women's use of the *Star Trek* characters in the creation of fanzines are practices that recode pervasive images in a subversive but politically expressive manner. Investing celebrity personas with new and often oppositional meanings, these subordinate groups assert alternative gender identities and social aspirations. They thereby affirm both community solidarity and the legitimacy of their social difference by empowering themselves with resources afforded by the mass media, which are nearly always the properties of others.

The difficulties that face liberal legal discourse in attempting to characterize or even comprehend these practices are then addressed. n10 The conflict between personality rights and the assertion of identity that is (often literally) embodied in these practices might be seen as a tension between liberal economic rights and democratic rights to freedom of speech or expression. As activities that are simultaneously a violation of individual property rights that liberalism protects, and political expressions of identity and self-determination that democracy encourages, these practices illuminate a central tension that both defenders of liberalism and its critics have identified.

[*1225] The legal discourse of intellectual property and the traditional liberal understanding of freedom of speech cannot do justice to this tension socially or conceptually because these discourses are defined by an entrenched but untenable dichotomy between subjectivity and objectivity. This dichotomy denies the cultural constitution of self and world, and the creative cultural activity involved in their production. Left critiques of the public/private dichotomy that undergirds liberal theories of freedom of expression go some direction in providing a means to escape this impasse, but I contend that their reformulations of the issue are unduly materialist in orientation and fail to adequately address the ramifications of cultural commodification for democratic dialogue.

II. LEGAL DOCTRINES OF PERSONALITY RIGHTS

Anglo-American legal jurisdictions recognize the right of individuals to protect publicly identifiable attributes from unauthorized and unremunerated appropriation by others for commercial purposes or other benefit. In Canada and Britain this right developed at common law into a distinct cause of action known as the tort of appropriation of personality. Some Canadian provinces also recognize the right in privacy statutes. n11 In the United States, the right of publicity arose as a category of the right of privacy which protects the individual against misappropriations of her name or likeness, and is recognized as a common law tort. n12 Various states have also incorporated these rights in privacy

statutes and state constitutional provisions. In both Canada and the United States, federal trademark legislation provides additional protections. n13 The literature detailing the origins and developing scope of these rights is so voluminous that a 255 page bibliography of relevant American literature was published in 1987. n14 Today the literature is even more extensive, and I make no effort to summarize the whole field here. n15

Originally developed primarily to deal with an unauthorized use of a person's name or picture in advertising that suggested the individual's endorsement of a product, the right of publicity has been greatly expanded [*1226] in the twentieth century. It is no longer limited to the name or likeness of an individual, but now extends to a person's nickname, n16 signature, n17 physical pose, n18 characterizations, n19 singing style, n20 vocal characteristics, n21 body parts, n22 frequently used phrases, n23 car, n24 performance style, n25 mannerisms and gestures, n26 provided that these are distinctive and publicly identified with the person claiming the right. Although most cases still involve the unauthorized advertising of commodities, rights of publicity have been evoked to prohibit the distribution [*1227] of memorial posters, novelty souvenirs, magazine parodies, and the presentation of nostalgic musical reviews, television docudramas, and satirical theatrical performances. Increasingly, it seems that any publicly recognizable characteristic will be legally legitimated as having a commercial value that is likely to be diminished by its unauthorized or unremunerated appropriation or imitation by others. As other scholars have suggested, n27 the right of publicity has grown massively in scope in the late twentieth century without clearly articulated grounds that would provide reasonable limitations for its scope and duration.

The right has been recognized as proprietary in nature n28 and may therefore be assigned and the various components of an individual's persona may be independently licensed. A celebrity could, theoretically at least, license her signature for use on fashion scarves, grant exclusive rights to reproduce her face to a perfume manufacturer, her voice to a charitable organization, her legs to a pantyhose company, particular publicity stills for distribution as posters or postcards, and continue to market her services as a singer, actor, and composer. The human persona is capable of almost infinite commodification, because both exclusive and non-exclusive licenses, as well as temporally, spatially, and functionally limited licenses may be granted for use of any valuable aspect of the celebrity's public presence. Furthermore, the right of publicity has been extended beyond the celebrity, her licensees and assignees, so as to protect her descendants or heirs. n29

Although constitutional protections under the First Amendment [*1228] privilege certain uses of celebrity names and likenesses, n30 the definition of free speech that has developed in right of publicity cases is both narrow and inconsistently applied. n31 Focusing almost exclusively upon the newsworthiness of the alleged appropriation and its ability to disseminate truthful information, courts have failed to consider other values that underlie our commitments to freedom of speech. Freedom of expression is generally understood as essential to democratic self-government and as an integral part of the self-realization and self-expression constitutive of freedom in liberal societies. I will later argue, and demonstrate by example, that the recognition of exclusive proprietary interests in celebrities' personas may impose real limits to the self-realization of those in subaltern groups.

III. THE VALUE OF THE CELEBRITY IMAGE

A. *Economic Value*

It is impossible to deny the potential value of the celebrity persona in an age of mass production and communications technologies. The aura of the celebrity is a potent force in an era in which

standardization, rationalization and the controlled programming of production characterize the creation and distribution of goods and the capacity of mass media communications to convey imagery and information across vast distances can be harnessed to ensure consumer demand. As mass market products become functionally indistinguishable, manufacturers must increasingly sell them by symbolically associating them with the aura of the celebrity -- which may be the quickest way to establish a share of the market. n32 It takes years to establish a brand name, but only months to capitalize on celebrity. It is suggested that "fame has become the most valuable . . . and the most perishable of commodities" n33 and that "celebrity will undoubtedly be the greatest growth industry [*1229] of the 1990s." n34 "With its alchemical power to turn the least promising of raw material into alluring and desirable artefacts [-- designer jeans, sunglasses, deodorants, architect's teakettles and coffee mugs --] . . . fame's economic applications are limitless." n35 Originally a by-product of a successful film or athletic career, we now have celebrities famous simply for being famous (Gloria Vanderbilt, Paloma Picasso and Vanna White come to mind). The value that a famous name adds to a product may be astronomical. London outworkers knit pullovers for £ 6, which sell for £ 245 in New York with a Ralph Lauren tag; but Lauren does have a \$ 17 million annual advertising budget to cover. n36

Celebrities, then, have an interest in policing the use of their names and likenesses to insure that they do not become tainted with associations that would prematurely tarnish the patina they might license to diverse enterprises. This potential commercial value is generally offered as reason in itself to protect the star's control over his identity through the allocation of exclusive property rights. Most commentators have defended the recognition and enforceability of exclusive property rights on the grounds of exigent economic necessity; because such interests have market value, they deserve protection. n37 Others, like myself, see this as "a massive exercise in question begging." n38 Market values arise only after property rights are established and enforced; the decision of whether to allocate particular property rights is a prior question of social policy that requires philosophical and moral deliberations n39 and a consideration of social costs and benefits:

It is sometimes said that the right of publicity rests on the commercial value of the interest itself, but that explanation is nonsense without something more. A claim of this sort will have commercial value only if it also has the protection of the law. In a sense, the value of this property stems from the fact that the law recognizes it and protects it. Perhaps the question to be considered, then, is really two questions: first, whether there is a sensible basis upon which a claim can be made to rest beyond the value which protection undoubtedly will confer, and second, whether there is any offsetting consideration which might lead one to conclude that protection ought not be granted even though [*1230] there is some legitimacy in the claim. n40

B. Property Justifications and Cultural Considerations

In determining whether there is a sensible basis for granting a property right in a celebrity's persona, we might consider traditional liberal justifications in support of private property. The idea that people are entitled to the fruits of their own labor, and that property rights in one's body and its labor entail property rights in the products of that labor, derives from John Locke n41 and is persuasive as a point of departure. It does not, however, advance the argument in favor of exclusive property rights very far. As Edwin Hettinger remarked, "assuming that labor's fruits are valuable, and that laboring gives the laborer a property right in this value, this would entitle the laborer only to the value she added, and not to the *total* value of the resulting product." n42

Publicity rights are often justified on the basis of the celebrity's investment of time, effort, skill, and money in the development of their persona. n43 Such claims, however rhetorically persuasive, are rarely supported by any empirical data. How much of a star's celebrity and its value is due to the individual's own efforts and investments? Clearly individual labor is necessary if the persona is to have value and we could not appreciate stars without their expenditure of effort. But, as Hettinger argued with regard to intellectual properties generally, "it does not follow from this that all of their value is attributable to that labor." n44

Star images must be made, and, like other cultural products, their creation occurs in social contexts and draws upon other resources, institutions, and technologies. Star images are produced by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, [*1231] teachers, screenwriters, ghostwriters, directors, lawyers and doctors. Even if we only look at the production and dissemination of the star image, and see its value as solely the result of human labor, this value cannot be entirely attributed to the efforts of a single person.

Moreover, as Richard Dyer explicates, the star image is given value by its consumers as well as its producers; the audience makes the celebrity image the unique phenomena that it is. n45 Selecting from the complexities of the images and texts they encounter, the audience produces new meanings for the celebrity and finds in stars significant values that speak to their own experiences. These new meanings and significations are freely mined by the media producers of the star's image to further enhance its market value. As Marilyn Monroe said, in her last recorded public words, "I want to say that the people -- if I am a star -- the people made me a star, no studio, no person, but the people did." n46

As Hettinger remarks, "simply identifying the value a laborer's labor adds to the world with the market value of the resulting product ignores the vast contributions of others." n47 The star image is constructed by multitudes of persons engaged in diverse activities. Moreover, the star and her fame are never manufactured from whole cloth -- the successful image is frequently a form of cultural bricolage that draws upon a social history of symbolic forms. For example, consider the Marx Brothers. Clearly, the construction of their characters involved creative activity and their characters were successful in the market:

But what we cannot know in fact, and what I suspect strongly could not be proven now if one set out to do so with the best will in the world, is how much the characters created by the Marx Brothers owe to the work of tens, scores, perhaps hundreds of other vaudeville and burlesque performers with whom they came into contact during their early years in the business. What we do not know, in short, is how much of these characters the Marx Brothers themselves appropriated from others. All that is certain is that they created themselves, individually and collectively, as a kind of living derivative work. That much Groucho himself has told us, but even without his candid admissions, it would be foolish and indeed ignorant of the history of burlesque and vaudeville to doubt that they took what they wanted from what they observed among the performers they grew up with, perhaps adding, in the process important new material of their own. To be sure, the Marx Brothers became celebrities as most vaudevillians did not. But surely we are not rewarding them on that ground alone. Even in an age as celebrity-haunted as this, we cannot mean to establish dynasties on the memory [*1232] of fame. n48

But we are in the process of establishing "dynasties on the memory of fame," n49 as Lange himself

knows and fears. In *Groucho Marx Productions, Inc. v. Day and Night Co.*,⁵⁰ the successors to rights in the names and likenesses of the Marx Brothers made a successful publicity rights claim against the production company, producers, and authors of the Broadway play, *A Day in Hollywood, A Night in the Ukraine*. The authors of that play intended to satirize the excesses of Hollywood in the thirties and evoked the Marx Brothers as characters playfully imagined as interpreting a Chekhov play.⁵¹ The defendants were found liable for appropriating the Marx Brothers personalities, or violating their publicity rights, and their first amendment privilege claim was dismissed on the ground that the play was an imitative work.⁵²

However, the Marx Brothers *themselves* might be seen as imitative or derivative works, whose creation and success as icons in popular culture derives from their own creative reworkings of the signifying repertoire of the vaudeville community. Contemporary stars are constructed in a similar fashion. How much does Elvis Costello owe to Buddy Holly, Prince to Jimi Hendrix, or Michael Jackson to Diana Ross? Take the image of Madonna, an icon whose meaning and value lies partially in her evocation and ironic reconfiguration of several twentieth-century sex-goddesses and ice-queens (Marilyn Monroe obviously, but also Jean Harlow, Greta Garbo, Marlene Dietrich, Gina Lollobrigida, and perhaps, a touch of Grace Kelly) that speaks with multiple tongues to diverse audiences. Academic descriptions of the Madonna image as semiotic montage abound,⁵³ but the following somewhat hyperbolic extract from a recent *Village Voice* article indicates that this recognition is widespread: What Madonna served up in the name of sexuality was not liberation as [*1233] I'd known it, but a strange brew of fetishism and feminism. Only later would I understand that the source of her power is precisely this ambiguity. It's a mistake to think of any pop icon as an individual Madonna is a cluster of signs, and what they add up to is precisely the state of sex in the culture now: torn between need and rage and unable to express one without the other.

. . . .

Madonna raids the image bank of American femininity, melding every fantasy ever thrown onto the silver screen and implanting them in the body and voice of every-babe.⁵⁴

In an era characterized by nostalgia for the golden age of the silver screen and an aging baby boom generation's fascination with the television culture of its youth, successful texts and images are often those which mine media history for evocative signifiers from our past. This is not to deny that such appropriations and reconstructions are creative productions; it is to stress emphatically that they *are*, and to assert that such creative processes ought not to be frozen, limited, or circumscribed by the whims of celebrities or the commercial caprice of their estates or assignees.

The Marx Brothers scenario illustrates the danger well. The producers of *A Day in Hollywood* used the Marx Brothers characters to speak to our relation to Hollywood in its heyday much as the Marx Brothers brought the spirit and forms of vaudeville to speak to Depression America. As Lange sees it:

What they sought to do, by their own account "was to write a satiric comment on Hollywood movies using a parody of the Marx Brothers movies as one of the literary devices." The work they produced earned substantial public acceptance and, despite the court's opinion, has at least some claim to acceptance as a creative success as well. Yet the result of this litigation is that the work no longer can be performed as written without accommodating the plaintiffs in some fashion. In a case like this, then, what society loses is a right of access amounting to an easement. In at least a preliminary sense, this is always the result of upholding a claim to a right of publicity.⁵⁵

Lange argued quite forcefully that the proliferation of successful publicity rights claims has occurred at the expense of individual rights in the public domain. We have an inadequate understanding of the concept of public domain; no one represents the public domain in intellectual property litigation or acts as its guardian, and rules of civil procedure currently prohibit the participation of third parties who will ultimately be affected (other artists, writers, and performers of current and future generations). As a consequence, access to the public domain [*1234] is choked, or closed off, and the public "loses the rich heritage of its culture, the rich presence of new works derived from that culture, and the rich promise of works to come." n56

If the Madonna image appropriates the likenesses of earlier screen goddesses, religious symbolism, feminist rhetoric, and sadomasochistic fantasy to speak to sexual aspirations and anxieties in the 1980s and 1990s, then the value of her image derives as much, perhaps, from the collective cultural heritage on which she draws as to her individual efforts. But if we grant Madonna exclusive property rights in her image, we simultaneously make it difficult for others to appropriate those same resources for new ends, and we freeze the Madonna constellation itself. Future artists, writers, and performers will be unable to creatively draw upon the cultural and historical significance of the Madonna montage without seeking the consent of the celebrity, her estate, or its assigns, who may well deny such consent or demand exorbitant royalties.

We might consider whether certain celebrity images are so deeply embedded in the North American psyche and cultural subconscious that they constitute parts of a collective cultural heritage that should not be subject to control by the parochial interests of the celebrity's estate and assigns. Elvis Presley provides an apt example. In the recent film *Mystery Train*, n57 director and producer Jim Jarmusch explored the cultural and psychological significance of Presley in the depressed economy of Memphis, Tennessee and in the consciousness of those who live on its social margins. The film also addressed his charisma for those in other countries whose fascination with American media images manifests itself in pilgrimages that have turned Memphis into a late twentieth century mecca. Even the possibility that Elvis Presley's estate *might* seek to prohibit the production and/or distribution of a film such as this, n58 while simultaneously arranging to market cologne designed "for all the King's men," n59 indicates the parameters of the problem. [*1235] The opportunity for the celebrity's heirs or assigns to behave in such a manner has in fact, been seized in similar circumstances. When the City of Memphis decided to erect a bronze statue to memorialize Elvis as part of a city redevelopment scheme, and a nonprofit city corporation offered pewter replicas of the King in return for donations to finance the monument, owners of rights to commercially exploit the Presley likeness were quick to seek and obtain an injunction. n60

It should now be clear that a Lockean labor theory justifying property rights in the celebrity image is inadequate to establish a right to receive the full market value of the star persona or to establish exclusive rights to control its circulation and reproduction in society. Although a moral right to the fruits of one's labor must encompass a right to possess and personally use what one develops for one's own benefit, and, perhaps, to exchange it on the market, this right need not necessarily be exclusive or require that one should receive the entire market value that such exclusive rights would yield. n61 Liberal values protecting individual freedom guarantee the possession and personal use of the product of one's labors only insofar as the exercise of this right does not harm the rights of others. Moreover, rights to possess and personally use the fruits of one's labor do not necessarily entail the rights to perpetually garner the full profits that such a product would yield in the market. "This liberty is largely a socially created phenomenon. The 'right' to receive what the market will bear is a socially

created privilege, and not a natural right at all." n62

C. *Intellectual Property Analogies*

If traditional liberal philosophy appears inadequate to encompass the range of social and cultural considerations that need to be addressed [*1236] when defining the scope of personality rights, other fields of intellectual property protection might seem to afford more guidance. If we examine traditional rationales for extending property rights to other forms of intellectual property, we see that the extension of property rights in cultural works is recognized as a socially bestowed privilege. In both copyright law and patent law, the grant of a property right is part of a socially beneficial bargain between the creator of the work and the public. Because we deem progress in the arts and sciences socially beneficial, we wish to encourage creative efforts and innovations in these areas. In order to induce individuals to invest their efforts in these areas, we grant such individuals exclusive property rights in their works and inventions for a limited period of time in order to recoup their investment costs. In exchange, the creator is obliged to disseminate these works and make them available to the public by way of compulsory license while the patent or copyright is in force; and, after the monopoly expires, the creator is obligated to bequeath the work to the public domain.

The reasons we bestow property rights in literary, artistic, and scientific works, and the reasons we put limitations upon those rights, emerge from a history of social deliberation that is manifestly absent in our creation of publicity and personality rights. For example, if we extend property rights in the products of intellectual labor as an incentive to encourage socially desirable activities, then we need to address three questions. Is fame or celebrity a socially desirable product whose cultivation we wish to encourage? Are incentives necessary to encourage this activity? Does the necessity for incentives require the granting of exclusive property rights? The first question is the most difficult to answer; the celebrity phenomenon does appear to serve certain social needs and desires. However, to the extent that the celebrity aura is harnessed to develop wholly symbolic market distinctions between functionally indistinguishable goods (and may, therefore, concomitantly decrease incentives to improve product quality or encourage innovative product research and design) its social utility may be doubted. Such a qualification, however, already presupposes the answers to the second and third questions; only when exclusive rights to the image are granted will licenses of such rights have value in the market.

If we decide that the development of celebrity is socially desirable, then we need to determine if incentives are necessary to encourage these creative endeavors. n63 Clearly, the potential for financial reward [*1237] afforded by the commercial exploitation of one's persona must glimmer on the horizon as a tantalizing possibility for some celebrities, especially those, like sports stars, whose professional lives are temporally limited. But again, this begs the question. Those stars most likely and able to exploit their personas are those with successful careers in acting, singing, athletics, or politics who receive media recognition for their achievements, positive or negative. In the course of their careers, they have been compensated with large salaries, lucrative bonuses, valuable perks, fees for public appearances, and fame itself. Arguably, they are already so well compensated (some would say over-compensated) for their activities that no additional incentives are necessary. Legal recognition of an exclusive right of publicity does not serve to induce, protect, or compensate the celebrity's achievements, but serves instead to give an additional and collateral economic value to the benefit of fame itself.

It seems doubtful that any further economic incentive is required to encourage the achievements of media and sport stars, and even more dubitable that such incentives should take the form of exclusive

property rights. If required, such incentives might just as well take the form of higher salaries, public subsidies, reduced taxes, or free housing. n64 But even if we *had* determined that an exclusive property right was a necessary incentive to have a celebrity bestow his fame upon us, the logic of intellectual property rationales would demand that he give us something in return. Copyright and patent laws insist that the work be made publicly available, whereas celebrities may insist upon seclusion and refuse to let their image circulate or price its use on the market so highly that no one else can possibly have access to it.

Moreover, copyright laws enable fair uses to be made of a work, whereas we have no criteria or legislation enabling appropriators of a celebrity's image to claim that their use was a fair one. n65 Copyright laws also enable and protect derivative works, recognizing that new creative works must often build upon previous works of art and literature. Publicity rights are so extensive in scope that derivative works may be prohibited. Furthermore, copyright protection is limited to works of [*1238] authorship fixed in a tangible medium of expression on the policy grounds that, although expressions can be owned, ideas should be freely accessible to promote further creative endeavors. Many of the attributes protected by the right of publicity are intangible attributes of an individual that have become associated with that individual in the public mind. n66 These associations are ideas in the public realm. By deeming these public ideational associations the private property of individuals, we create individual monopolies in ever more ephemeral attributes and preclude these ideas from contributing to new creative works and the social goal of progress in the arts. Similarly, not all aspects of a copyrightable work are protected by copyright. Many components of the work are deemed to be in the public domain. Use of standard plot lines, stock characters, scenes en fares is not considered copyright infringement because such devices are considered part of the public domain, necessarily available to future creators of artistic works. n67

Moreover, copyright and patent laws grant a limited term of exclusive rights on the basis that a temporarily limited monopoly satisfies the need for economic incentive and that the fruits of humanity's intellectual labors thereafter fall into the public domain and become the collective resources of humankind. The descendibility of publicity rights, however, raises the specter of human creative works owned and controlled in perpetuity by avaricious assignees ever more distant from the original creator, concerned only with a continuing stream of royalties and license fees. n68

[*1239] Some have argued that a right of publicity is more akin to a trademark than to copyright and patent, and to a limited degree, the analogy holds. Few, however, have pushed the analogy to its logical conclusions. For trademark law, too, has social purposes, grants limited rights, and affords reasonable defenses, all of which serve to contain the property right in a manner that contrasts with the absolute nature of proprietary publicity rights.

Trademark law is concerned with the protection of words and symbols as indicators of the source or sponsorship of commercial goods and services. Trademark rights arise through the extensive and continuous use of a brand name, image, or symbol in marketing particular goods or services. Once the trademark serves to distinguish a group of goods or services from other goods or services, the holder of the mark is given exclusive rights to use that mark in conjunction with that particular class of wares. She can then prevent others from using the mark on the same or similar goods on the basis that potential customers are likely to be confused as to the source of those goods, and the reputation of the trademark owner may be diminished by the use of the mark on inferior goods.

The value of a trademark is integrally related to the goods and services it represents. Rights to trademarks are never absolute property rights but rather are exclusive rights to use the sign or

symbol in conjunction with a particular class of goods or services. Thus it is not a violation to use a mark in association with unrelated goods or services where there is no competition between the parties because there is no likelihood of customer confusion, and no suggestion in the public mind that the original trademark owner endorses the second group of goods. Trademark rights are linked to a certain line of goods and services; they cannot, for example, be assigned except in conjunction with the good-will of the goods or services to which they pertain. Hence, the rule that it is the trade and not the mark that trademark law serves to protect. Neither the common law nor trademark legislation recognizes a property right "in gross" in a trademark. Even when trademarks are licensed the licensor is obliged to maintain control over the quality of the goods and services being rendered under the mark, because trademarks [*1240] are intended to prevent the deceit of the public as to the source and quality of goods. Where there is no likelihood of confusion of sponsorship, and hence no possibility of public deception, the use of a mark will not be enjoined.

Trademark rights, then, are limited rights, designed to serve social purposes, not absolute or exclusive property rights in a sign or symbol that can be evoked by a trademark "owner" in any context. n69 Some aspects of publicity rights might be justified by analogy to trademark law. n70 A celebrity might well use his name or likeness to market a particular class of goods or services. If the name or likeness came to identify and distinguish particular wares to consumers, a trademark right [*1241] would be justified. However, the doctrine of publicity rights extends to celebrities a property right to their name and likeness before any marketing use of the celebrity image has necessarily been made and whether or not the public has come to recognize the image as distinguishing a group of goods or services. Moreover, a celebrity may attempt to prevent the use of her image even where there is no competition between the parties, no evidence that the defendant intended to pass off his goods as those endorsed by the celebrity, and no evidence that the public was in any way confused by the use of the persona.

Indeed, whereas trademark law allegedly attempts to prevent deceit in the marketplace, publicity rights may be exercised in a manner that contributes to consumer confusion. Whereas a trademark cannot be assigned except in conjunction with the goods or services with which it has a historical connection and cannot be licensed without the ongoing maintenance of quality controls, a celebrity can assign and license the attributes of her persona without having any relationship to the manufacture, production or distribution of the merchandise to which she has linked her image; and she assumes no responsibility to the public for the quality of those goods. A well known architect can license his name for use in the marketing of tea kettles, and the estate of an artist may collect royalties for the use of his name on perfume. If the public comes to associate certain attributes of quality with goods bearing these names, it may well be confused and disappointed when the architect or the artist's estate later licenses these names to totally unrelated manufacturers who use them to market shoddy merchandise of inferior quality.

Celebrities may do nothing more than make a few carefully orchestrated public appearances every year to command a steady return of royalties from the licensing of their merchandising rights. They need invest no money of their own, or have any involvement in the design, production, or dissemination of the products that bear their names. Once a famous designer, Pierre Cardin now earns a small fortune merely by capitalizing upon his name. In 1987, he made \$ 125 million from selling licenses to 800 licensees in ninety-three countries who then sell merchandise worth more than \$ 1 billion a year, from which he earns royalties of about \$ 75 million. n71 The Cardin name adorns products as diverse as cigarettes, clocks and deodorants, but neither Cardin nor his company maintain much involvement in their design or production; Cardin's director of licensing admitted that "even we don't know all the products we license." n72 Consumers are given no guarantee of source or quality;

the goods bearing the Cardin name may come from a Filipino factory or the Soviet Union's Ministry of Light Industry (one of [*1242] the hundreds of Cardin licensees), but still legitimately carry the celebrity's name.

Moreover, trademark law contains a recognition that no sign or symbol may be taken out of public discourse except insofar as it actually continues to distinguish a particular range of goods. If a mark ceases to distinguish particular goods, a trademark owner may lose his exclusive rights to the mark unless he can show evidence of behavior indicating an intent not to abandon it. If the mark ceases to be used in connection with the goods with which it was acquired, or ceases to be distinctive in that it becomes a name in common parlance used to designate all goods of a particular class, then the owner of a mark ceases to have exclusive rights to it and the mark is consigned to the public domain. A trademark owner is therefore obliged to "police" his mark in order to retain his rights to it. A celebrity or his estate is under no such obligation. A deceased star's assignee's for example, might decide to use the star's likeness to market shoes years after his death, even though the likeness does not distinguish the shoes from others in the public mind, the celebrity's image has never been used to distinguish goods before, and the celebrity's image has become part of the popular culture used for a variety of entertainment and/or commercial purposes. Assignees may have done nothing to "police" the use of the likeness in the past, and suddenly claim exclusive rights to an image commonly understood to be part of a cultural heritage available to us all.

Publicity rights, then, may be analogized to rights granted by copyright, patent, and trademark laws, but it is evident that none of these doctrines provide a degree of protection against unauthorized appropriation equal to that afforded by the right of publicity. Intellectual property protections provide limited rights designed to serve specific community goals and purposes; they make the exercise of individual property rights contingent upon the fulfillment of social responsibilities. Neither traditional liberal theory, nor our rationales for recognizing limited property rights in artistic, literary, commercial, and scientific expressions justify the extent of contemporary publicity rights. Moreover, as I have already suggested, enabling celebrities, their estates, and their assigns to exercise absolute rights to control the celebrity image may have adverse consequences, both for the preservation of our collective cultural heritage and for our future cultural development. I now wish to turn to some concrete cultural practices to indicate some of the political dimensions of commodifying the celebrity persona.

IV. "DOING GENDER": A POSTMODERN POLITICS

A. *The Celebrity Form*

Systems of mass production and mass media communications have afforded opportunities for talented, beautiful, and/or charismatic individuals [*1243] to achieve renown across unprecedented distances and to have their fame survive for generations. These opportunities have been seized by individuals who seek to maximize their economic return. By recognizing the ability to exploit one's persona as an exclusive property right, the law has created a significant source of economic value. In the process of recognizing individual economic rights, I have suggested that the law may deprive us of collective cultural resources. The social value and cultural meaning of the celebrity image has its genesis in the same historical conditions that created the possibility of its having economic value. I will address the cultural significance of the celebrity image generally, and then explore the specific significance that particular celebrities have to select social groups. The article will at that point become more ethnographic, and I will submerge the reader in unfamiliar realms of subculture before returning to the legal dilemma.

In his illuminating essay, *The Work of Art in the Age of Mechanical Reproduction*,ⁿ⁷³ Walter Benjamin suggested that technologies of mechanical reproduction and systems of mass production changed modes of human perception and evaluation, fundamentally altering our aesthetic responses. These changes, I would suggest, are integrally related to the cultural value of the celebrity image in contemporary social life.

Benjamin argued that our experience of cultural imagery changed dramatically with lithography and photography.ⁿ⁷⁴ The work of art traditionally had a tangible individuated presence in time and space, a singular history, and a situation in a cultural tradition. This notion of the original, necessary to the idea of authenticity and to the work's authority, was maintained during the era of manual reproduction, but increasingly became irrelevant in an age of technical reproduction.ⁿ⁷⁵ Mass reproduction creates copies that possess an independence from the original; they can transcend the spatial and visual limitations of the original's physical tangibility and susceptibility to temporal and material processes of age and deterioration. As the art work's substantive duration ceases to matter, the art object loses its authority or its *aura*, the "unique phenomenon of a distance, however close it may be."ⁿ⁷⁶ The aura embodies the work's value by engaging the beholder's affective, reflexive relationship to the cultural tradition in which the work is situated. The art work is unapproachable; both in its physically unique embodiment, and in its tangible history in a cultural tradition, it resists too intimate an appropriation by the beholder into his own physical and cultural lifeworlds.

The work of art's aura is lost in the age of mechanical reproduction [*1244] because "the technique of reproduction detaches the reproduced object from the domain of tradition."ⁿ⁷⁷ By substituting a plurality of copies for a unique existence, it enables the consumer to position the reproduction in her own domestic, social, and historical domain without any necessary cognizance of an original or its historical situation. The photograph and the film, for Benjamin, represent the culmination of the destruction of the aura because they are designed for reproducibility. "From a photographic negative, for example, one can make any number of prints; to ask for the 'authentic' print makes no sense The criterion of authenticity ceases to be applicable to artistic reproduction."ⁿ⁷⁸

The uniqueness of a work of art was due to the work's situation in a traditional ritual context, whether the context was magical, religious, or secular. "The contextual integration of art in tradition found its expression in the cult" that defined its use value.ⁿ⁷⁹ Technologies of mass reproduction enabled copies to transcend the work's historical use value in social cults of ritual and become pure objects of exchange value or commodities.

Benjamin's reflections on the historical development of the work of art and the decline of its aura may help us to understand the cultural significance and seductive powers of the celebrity image. Here I want to go beyond Benjamin's own disjointed observations of the screen actor as one who has his performance fragmented by the camera, is alienated from his audience, deprived of his corporeality and dissolved into flickering images and disembodied sounds.ⁿ⁸⁰ He sees the effect of film as engaging the whole living person but destroying its aura and replacing the actor's aura with an artificially produced "personality" that is only the "phony spell of the commodity."ⁿ⁸¹ Benjamin alludes to the possibility of another, alternative understanding of the celebrity, however, when he refers to "the cult of the movie star,"ⁿ⁸² which suggests that celebrities may represent residual vestiges of the "auratic" in contemporary mass culture.

If the work of art's aura derived from its unique, embodied or tangible presence in time and space, an individual history, and a situation in a cultural tradition, then it is difficult to deny the aura of the

celebrity. However often a celebrity's likeness is reproduced, there remains a social knowledge of the celebrity as an individual human being with an unapproachable or distant existence elsewhere, a life history, and a mortal susceptibility to the processes of heartache, injury, illness, aging, [*1245] and ultimately, death. For example, it is difficult to envision Elvis Presley without conjuring up images of health, vibrancy, and sexual energy followed by self inflicted injury, gluttony, corpulence, and decay. Arguably, the celebrity evokes the fascination she does because however endlessly her image is reproduced, her substantive duration, that is, her life, never becomes wholly irrelevant. She never loses her autonomy from the objects that circulate in her likeness.

Moreover, the star is historically situated and lives her life in historical and social conditions that give her image its meaning and resonance. The celebrity image's value might also be seen to reside in its character as a particular human embodiment of a connection to a social history that provokes its beholder to reflect upon her own relationship to the cultural tradition in which the star's popularity is embedded. We all consider celebrities from different social positions; as a feminist and social democrat, for example, I cannot perceive Marilyn Monroe without reflecting upon my own troubled relationship to male definitions of female sexuality, the femininity of sexual innocence, the Playboy tradition, the Cold War and Monroe's own left wing politics. n83 Celebrity images, I would contend, always maintain their aura because they bind subjects in affective and historically mediated relationships that preclude their appropriation as pure objects. n84

Stewart Ewen sees the power of the celebrity image as rooted in photography's simultaneous affinity to reality and fantasy:

As Oliver Wendell Holmes had observed, the power of the disembodied image is that it can free itself from the encumbrances posed by material reality and still lay claim to that reality. At the same time that the image appeals to transcendent desires, it locates those desires within a visual grammar which is palpable, which *looks real*, which invites identification by the spectator, and which people tend to trust. According to John Everard, one of the pioneers of commercial photography, it is this trust that makes photography so forceful as an advertising medium. n85

"The personal lives of celebrities, closely monitored and continually represented in . . . the mass media, perform a function similar to that of commercial photography" and similarly emerged with the image making machinery stoked to maintain the perpetuation of "contemporary [*1246] consumer culture." n86 Ewen also sees the celebrity as a cultural response to modern social experiences of alienation, and anomie -- an icon of the significance of the personal and the individual in a world of standardization and conformity and the embodiment of the possibility of upward mobility from the mass. "Celebrity forms a symbolic pathway, connecting each aspiring individual to a universal image of fulfillment: to be someone, when 'being no one' is the norm." n87

The social potency of celebrity auras and the ubiquity of their presence in contemporary North American society make the celebrity persona a compelling and powerful set of signifiers in our cultural fields of representation. Simultaneously embodying the fantastic and the real, utopian ideals and quotidian practices, and the realization of popular aspirations for recognition and legitimacy, the celebrity form attracts the attention and energies of those for whom identity is a salient issue and community an ongoing dilemma.

B. *The Politics of Postmodernism*

I now want to shift attention to the meaning that particular celebrities have in the daily lives of

specific social groups in North American society. Focusing upon a range of practices, engaged in by marginal social groups in nascent constructions of alternative identities, I will attempt to make socially concrete the philosophical arguments I asserted earlier about the cultural losses contingent upon the commodification of the celebrity image. Moreover, I will demonstrate how this foreclosure on the use of cultural resources has a political dimension. To do so, we must first understand the nature of what has been defined as the condition of postmodernity, n88 and the politics it engenders.

The practices I will examine are those of gay male camp subculture in the pre-liberation era, lesbian refashionings of pop icons, and finally, middle class women's engagement in the reading, writing, and circulation of *Star Trek* fan magazines ("fanzines"). These practices involve the redeployment of celebrity images -- an aspect of that rearticulation of commodified media texts that has been defined as the essence of popular culture. n89 Many of the people I will describe here are "fans" and fandom is often "a vehicle for marginalized subcultural groups . . . to pry open space for their cultural concerns within dominant representations; it is a way of appropriating media texts and rereading them in a fashion that serves different interests" n90 and makes those texts responsive [*1247] to the fan group's social experience.

By discussing these practices in an academic context, I intend to position myself in an attitude of sympathy and respect, both with the practitioners of these mass media appropriations, and with cultural theorists of the postmodern who insist on blurring or contesting the boundaries between high art and mass culture, the aesthetic and the political, and treating popular cultural practices with the same degree of theoretical sophistication we accord to our studies of art and social movements. Like other theorists of the postmodern condition, I believe that it is no longer possible or desirable to analytically distinguish the cultural from the social and the political. n91 I am convinced that we need to take these practices seriously as cultural politics -- expressions of solidarity and legitimate social difference arising in the nascent struggles of subaltern groups to construct alternative (if not oppositional) social identities.

Theorists of the postmodern identify the term both with a socioeconomic condition (often understood as an historical period in the development of capitalism), and with particular forms of representational practice that characterize it. For the sake of clarity and simplicity, I will refer to the characteristics of the historical period as the condition of postmodernity, and its cultural qualities as postmodernism, using the term postmodernist as an adjective to describe practices situated in both the socioeconomic and cultural milieus. n92

When describing postmodernity, theorists point to the dramatic restructuring of capitalism in the postwar period, the development of a multinational global economy, the displacement of production relations to off-shore and third world locations, and the consolidation of corporate controlled mass communications systems and electronic media and information technologies. These processes, they argue, have created consumer oriented societies in the Western world characterized by an immense proliferation of cultural signs and signifiers divorced from traditional fields of reference that were rooted in local social communities and traditions. n93

[*1248] Theorists of postmodernism recognize that contemporary cultural theory must come to terms with "the textual thickness and the visual density of everyday life" n94 in societies characterized by pervasive media imagery and commodified forms of cultural representation. Moreover, such representations may no longer be approached as autonomous self sufficient texts or systems of meaning, precisely because they so pervasively permeate quotidian dimensions of lived experience. A socially conscious and politically responsible theory of contemporary culture must explore both the

production and the consumption of cultural images, and the manner in which they shape and express our preferences, desires and aspirations -- our experience of self and community, our sense of the present and hopes for the future.

A central dimension of the study of postmodernism has therefore been a concern with the ways in which people "live and negotiate the everyday life of consumer capitalism" n95 and the manner in which people use mass culture in their quotidian practices. Cultural consumption is increasingly understood as an active use rather than a passive dependence upon dominant forms of signification. As Michel de Certeau n96 and Paul Willis n97 argue, consumption is always a form of production and people continually engage in cultural practices of *bricolage* -- resignifying media meanings, consumer objects, urban spaces, and cultural texts in order to adapt them to their own interests and make them fulfil their own purposes. Hal Foster, n98 for example, views these practices of appropriating or "recoding" contemporary cultural forms as the essence of popular culture -- central to the political practices of those in marginal or subordinated social groups, who forge "subcultures" with resources foraged from the mediascape. n99 Steven Connor n100 sees [*1249] postmodernism as (amongst other things) manifestations of "the central paradox of contemporary mass culture." n101 On the one hand, mass culture has enormous influence due to its global reach and penetration into the daily lives of millions of people, thus posing the possibility (or specter) of cultural unification and homogeneity. On the other hand, it provides resources for the "tolerance and engendering of pluralities of styles, media and ethnic identities." n102

Cultural studies theorists have defined subcultural practices as those which involve practices of appropriation and innovation of existing cultural forms in improvisations that provide opportunities for the affirmation of emergent cultural identities for those in subordinated social groups. n103 Dick Hebdige, for example, describes the manner in which music styles like rap and hip hop deploy existing cultural forms using principles of parody, pastiche, and irony to articulate and negotiate mixed, plural, or transitional identities for social groups at the margins of national or dominant cultures. n104 Angela McRobbie makes a similar case for optimism about the penetration of media imagery and communications into our psychic and social lives, arguing that the frenzied expansion of mass media enables new alliances and solidarities across traditional spatial, racial, and cultural boundaries and the resources for producing new meanings and new identities. n105

The constitution of provisional identities through the invocation of mass media images, texts, and symbols is made possible when an audience is both absorbed and simultaneously capable of ironic detachment. n106 Linda Hutcheon feels that this attitude defines postmodernism -- "the name given to cultural practices which acknowledge their inevitable implication in capitalism, without relinquishing the power or will to intervene critically in it." n107 This was an attitude Susan Sontag earlier described as the essence of camp, but one that McRobbie sees as shared by many consumers of mass culture in the condition of postmodernity:

[*1250] Sontag's linking pastiche with its favoured audience, gay men, is instructive because she shows how a relationship evolved around a social minority making a bid for a cultural form in which they felt they could stake some of their fragmented and sexually deviant identity. The insistence, on the way, on both style and pleasure made the product attractive to those outside as well as inside Sontag's approach is useful because she is talking not such much about pure or original 'artistic' invention. Rather she is describing how forms can be taken over, and re-assembled so as to suit the requirements of the group in question. This often means outstripping their ostensible meaning and ostensible function

. . . .

And, if media forms are so inescapable . . . then there is no reason to assume that the consumption of pastiche, parody or high camp is, by definition, without subversive or critical potential. Glamour, glitter, and gloss, should not so easily be relegated to the sphere of the insistently apolitical. n108

Ours is a world in which spatial and temporary distances can be easily bridged through instantaneous communications. Ethnic, racial, class, and cultural boundaries are becoming less easily defined. This is a consequence of mass migration, immigration, transnational flows of labor and capital and the emergence of mass markets. In this context, allegiances and identities are being reconstructed. The breakdown of traditional communities has not resulted in social homogenization, however, but in a proliferation of differences organized along nontraditional lines. As Paul Willis suggests, organic communities and organic communications are breaking down in the late twentieth century, and 'proto-communities' are emergent. n109 Proto-communities "start and form not from intentioned purposes, political or other, but from contingency, from fun, from shared desires . . . they form from and out of the unplanned and unorganized precipitations and spontaneous patterns of shared symbolic work and creativity." n110 Such communities often evolve around a "consuming interest" in cultural commodities, like the products of the communications media, with which they construct new meanings. n111

Mass media imagery encourages people who share similar social experiences to simultaneously express their similarity by emotionally investing in a range of cultural referents that media communications have afforded them shared access and encourages them to express their difference by practices of appropriation that improvise with these images in order to make the images relevant to the aspirations of the subordinate group. These images also serve to present these emergent [*1251] identities to the wider world in a manner which may be both aesthetically appealing and politically charged. We are culturally drawn to the image because of its presence in our own lifeworlds and, arguably, are therefore more likely to be sympathetic to the legitimacy of the forms of difference and aspirations expressed in its re-narrativization by subaltern groups.

C. "Doing Gender"

Let us turn to specific examples of the cultural politics of constructing social identities through the improvisational use of celebrity images. The phenomena of projecting new meanings upon celebrity images is no doubt widespread, because, as I suggested earlier, the celebrity is an image that is both fantastic and real, embodying the realization of popular aspirations for recognition and legitimacy. The celebrity image is especially likely to attract the energies of those in subordinate or marginal groups for whom social recognition, legitimacy, and a positively evaluated identity are compelling issues. Although the "recoding" of celebrity images is in no way limited to a concern with gender identity, I will focus upon practices which question traditional formulations of gender and express desires to construct alternative gender identities. I do so because the political dimensions of these postmodern practices have been clarified by the efforts of feminist poststructuralists.

The concept of alternative gender identities is borrowed from Judith Butler's pathbreaking work, *Gender Trouble*, n112 in which she suggests that a feminist politics requires an inquiry into the political construction and regulation of gendered identities, a radical critique of the limitations of existing categories of identity, and an exploration of practices in which alternatively gendered worlds are imagined.

The practices I will be exploring are active performances of gender "that disrupt the categories of the body, sex, gender, and sexuality and occasion their subversive resignification and proliferation beyond the binary frame." n113 Before we delve into these, however, it will be instructive to consider why Butler believes such practices to be politically significant. She begins her philosophical inquiry with a problem that has plagued feminist theory: the effort to locate a common identity for a feminist politics. Feminist theory traditionally presupposed "some existing identity, understood through the category of women, who not only initiates feminist interests and goals within discourse, but also constitutes the subject for whom political representation is pursued." n114 This presupposition, however, has come under challenge, both by post-structuralist [*1252] theorists who are suspicious of the category of the subject, and by those (women) who refuse the category (woman) because it is insufficient to represent the complexity of their political identities.

Theoretically, Butler accepts the Foucaultian claim n115 that juridical systems of power *produce* the subjects they supposedly represent, and they do so through political practices of domination and exclusion. n116 "The feminist subject . . . [may] be discursively constituted by the very political system that is supposed to facilitate its emancipation" n117 and may, then, be defined, limited, and restrained by the requirements of these structures of power. Empirically, the insistence upon a stable subject of feminism "generates multiple refusals to accept the category" n118 and "feminism thus opens itself to charges of gross misrepresentation." n119 Butler suggests that "it may be time to entertain a radical critique that seeks to free feminist theory from the necessity of having to construct a single or abiding ground which is invariably contested by those identity positions or anti-identity positions that it invariably excludes." n120 She herself engages in a genealogical critique that exposes the foundational categories of sex, gender, and desire as the artifacts of a patriarchal, heterosexist system of power, invested in the maintenance of an exclusively, or primarily reproductive sexuality.

Feminist theory has long recognized a distinction between sex and gender, asserting "that whatever biological intractability sex appears to have, gender is culturally constructed." n121 As Butler suggests, the unity of sex, gender, desire, and sexual practice is already potentially contested by the idea of gender as an undetermined interpretation of sex. Even "assuming . . . the stability of binary sex, it does not follow that the construction of 'men' will accrue exclusively to the bodies of males or that 'women' will interpret only 'female' bodies." n122

The recognition of gender as cultural construct enables the possibility of a multiplicity of genders, and also raises the question of whether sex itself may not be produced through the limitations that restrict the performance of gender to a binary economy. In other words, if gender is a cultural or discursive construction, it is perhaps this very act of production [*1253] that establishes sex as a "natural" fact, and provides the means by which it could be established differently. For Butler, identity is *articulated* from within existing cultural forms; regimes of power institute, maintain and stabilize naturalistic and causal relations of coherence among and between sex, gender, sexual desire, and sexual practice, but such correspondences are neither "natural" nor inevitable. n123 Other identities that express discontinuous relations between biological sex, cultural gender, and the "expression" or "effect" of these in sexual desire and practice are persistent; their proliferation provides critical opportunities for subverting and denaturalizing the cultural matrix that supports heterosexual and medicojuridical hegemonies. n124

Gender, then, is performative, a doing and constituting of the identity it is purported to be; "there is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results." n125 These performances must of necessity draw

upon existing cultural forms; sexuality and gender are always constructed within the terms of discourse and power, and thus engage heterosexual cultural conventions: n126

If sexuality is culturally constructed within existing power relations, then the postulation of a normative sexuality that is "before," "outside," or "beyond" power is a cultural impossibility and a politically impracticable dream, one that postpones the concrete and contemporary task of rethinking subversive possibilities for sexuality and identity within the terms of power itself. n127

Butler is interested in modes of "doing" gender that evoke but do not constitute simple imitations, reproductions, and consolidations of the terms of power but displace, subvert, and confuse the very constructs they mobilize, "displacing those naturalized and reified notions of gender that support masculine hegemony and heterosexist power." n128 The constructed character of sex and gender itself provides the conditions of possibility for their deconstruction or disruption; as ongoing discursive practices, they are open to intervention and resignification. n129 For example, "numerous lesbian and gay discourses [*1254] . . . understand lesbian and gay culture as embedded in the larger structures of heterosexuality even as they are positioned in subversive or resignificatory relationships to heterosexual cultural configurations." n130 This repetition of heterosexual cultural forms may also be the site of their denaturalization, bringing "into relief the utterly constructed status of the so-called heterosexual original." n131 As we shall see, celebrity images provide important cultural resources for practices of "doing" gender that subvert and reconstruct dominant forms of gender identity.

1. Gay camp

The denaturalization of heterosexual cultural forms is readily apparent in gay camp subculture, a phenomenon previously alluded to as involving an engagement with media disseminated celebrity images. n132 Andrew Ross argues that gay camp has had a significant influence on changing social definitions of masculinity and femininity from the late fifties, working "to destabilize, reshape, and transform the existing balance of accepted sexual roles and sexual identities." n133 Whatever its ultimate cultural effects, however, its origins must be understood in the context of gay urban life in the pre-liberation period.

In the nineteen-fifties and sixties a sophisticated gay male subculture evolved around a fascination with classical Hollywood film stars like Judy Garland, Bette Davis, Mae West, Greta Garbo, and Marlene Dietrich. n134 As Richard Jackson recently put it, "in an age when their ability to be open about the fact that they were gay was circumscribed, gay men's 'use' of certain star images constituted a kind of 'going public' or 'coming out.'" n135 Camp contained a kind of commentary on the ongoing feat "of *survival* in a world dominated by the taste, interests, and definitions of others." n136

In its pre-Stonewall heyday (before "gay" was self-affirming), [camp] was part of a survivalist culture which found, in certain fantasmatic elements of film culture, a way of imaginatively communicating its common [*1255] conquest of everyday oppression. In the gay camp subculture, glamorous images culled from straight Hollywoodiana were appropriated and used to express a different relation to the experience of alienation and exclusion in a world socially polarized by fixed sexual labels. Here, a tailored fantasy, which never "fits" the real, is worn in order to suggest an imaginary control over circumstances. n137

This is explicated by Esther Newton, whose ethnographic study of drag queens and urban camp subculture in the late sixties indicates that camp humor grew out of the incongruities of living gay and

male in a patriarchal and heterosexist society during a period when the stigma of being gay was largely accepted and internalized rather than rejected as illegitimate. n138 Drag queens were homosexual men performing the social character of "women" (that is, the signs and symbols of a socially defined American category) by artificially creating the image of glamorous women (most often celebrities whose images were publicly affirmed as glamorous). Drag queens were often pre-eminent "camps," engaging the opposition between inner (subjective) self and outer (social) self in an assertive, theatrical, humorous, and stylized manner that defined a creative strategy for dealing with the homosexual situation. n139 As a practice, drag performs a subtle social critique: The effect of the drag system is to wrench the sex roles loose from that which supposedly determines them, that is, genital sex. Gay people know that sex-typed behavior can be achieved, contrary to what is popularly believed. They know that the possession of one type of genital equipment by no means guarantees the "naturally appropriate" behavior

. . . .

[One of the symbolic statements of drag is to question] the "naturalness" of the sex-role system *in toto*; if sex-role behavior can be achieved by the "wrong" sex, it logically follows that it is in reality also achieved, not inherited, by the "right" sex [It] says that sex-role behavior is an appearance [or performance]. n140

Stars who were most popular in the camp pantheon, and the subject of most frequent impersonation, were "glamorous" in highly mannered ways that indicated an awareness of the artifice in which they were engaged -- Bette Davis, Mae West, Greta Garbo, Marlene Dietrich, and, to a lesser extent, Marilyn Monroe. The most popular stars were those who acted in subtle ways "against the grain of the sexually circumscribed stereotypes which they were contracted to dramatize." n141 This celebration of the personas of those "whose screen identities could [*1256] not be fixed by the studio machine" n142 who often "fought for their own roles" n143 and subtly mocked the "'corny flamboyance of femaleness'" n144 and "defetishized the erotic scenario of woman-as-spectacle." n145 Thus, they explored the relation between artifice and nature in the construction of sexuality and gender long before these issues were recognized as part of the political agenda.

To non-essentialist feminism and to the gay camp tradition alike, the significance of particular film stars lies in their various challenges to the assumed naturalness of gender roles Each demonstrates how to *perform* a particular representation of womanliness, and the effect of these performances is to demonstrate, in turn, why there is no "authentic" femininity, why there are only representations of femininity, socially redefined from moment to moment. n146

Greta Garbo, for example, was (and perhaps still is) regarded in the gay community as "high camp" according to Newton; as Parker Tyler put it, "'Garbo "got in drag" whenever she took some heavy glamour part, whenever she melted in or out of a man's arms, whenever she simply let that heavenly-flexed neck . . . bear the weight of her thrown-back head It is all *impersonation*, whether the sex underneath is true or not.'" n147 Just as the covert homosexual must impersonate a "man" (or that social role as defined by the straight world), Garbo playing a "woman" was in drag, and life was the constant theater of role playing.

Judy Garland had a special place in gay culture as the symbol gay men used in the pre-Stonewall period to speak to each other about themselves. n148 She also symbolizes an important historical era. The period of camp's heyday is punctuated by Garland's repeated suicide attempts (between 1950 and

1969) and the Stonewall riots (which inaugurated a new gay political praxis and a rejection of camp) which took place on the night of Garland's funeral. Moreover, Garland occupies a unique role as "expressing camp attitudes" because of her repeated shows of resilience in the face of oppression, her strength in the face of suffering, her determination to carry on with the performance no matter how exhausting and debilitating, and the disparity between her ordinariness in film roles and her extraordinary private life. n149 All of this resonated deeply with gay men living on the edge between a stigmatized gay identity and the daily fragile performance of passing for [*1257] straight. n150 Her failure at femininity and the hints of gender androgyny in her film performances also served to make the Garland image a compelling one that gay men could use as a means of going public or coming out before less heavily coded assertions of identity became possible. n151

Camp lost its appeal with the arrival of a militant gay politics that asserted the "natural" quality of homosexuality, revived "masculine" styles, and sought to undermine the "effeminacy" of the stereotypical gay image. The finale of Michel Tremblay's acclaimed play *Hosanna* n152 well illustrates the new attitude towards camp. *Hosanna*, an aging drag queen who identifies with, and projects her identity upon Elizabeth Taylor, is humiliated and forced to renounce her attachment to the star, and disarm herself of her Taylor impersonation. Stripped naked, he declares "I'm a man," and, at long last it is implied, allows his lover to embrace his "true" "masculine" self. n153 Camp has, however, enjoyed something of a resurgence in the nineteen eighties n154 confluent, perhaps with the influence of Foucault, poststructuralism, and a revival of the credibility of the notion of the socially constructed subject and the historical contingency of sexual identities.

2. Lesbian hermaphroditism

Lesbian engagement with celebrity images is a less documented and more recent phenomena. Just as gays dignified and reclaimed Garland from the clutches of the star making machinery that victimized her, there is some indication of a lesbian identification with and resurrection of sixties female pop stars and "girl groups." In Toronto, a band called the Nancy Sinatras reworks her songs; and in a recent Queer Culture skit gave Sinatra a lesbian identity and the opportunity to strike back at the patriarchal figures who had controlled, contained, and ultimately, they suggest, crushed her in the sixties. n155

A more radical lesbian challenge to the "truth" of sex, gender, and desire and the restrictions of a binary sexual economy is given voice and celebrated by Sue Golding, n156 in her discussion of a performative [*1258] gender identity she calls lesbian hermaphroditism. This "erotic sensibility," n157 worn, felt, and enacted by a number of lesbians is a "fictionalized sexuality" n158 that finds its performative significations in mass media icons which it replicates in ironic, playful, and assertive reconfigurations:

I know you've seen the type: no tits, no cock, oozing with a kind of vulnerable "masculinity," and sheathed in a 50s style black leather motorcycle jacket. Or to put it slightly differently, it's James Dean, with a clit.

. . . .

. . . What emerges is the "virile girl," the butch baby, full of attitude but not of scorn, lots of street smarts and a bit of muscle. This new hermaphrodite embodies forever the image of the destructive adolescent dramatically and in one being, teeming with a creative, raw energy, and beckoning with the possibility of a new era. She's the Peter Pan who reaches puberty and survives -- her boyhood and her cunt intact, and ready. Most of all, she's public.

But she's public in quite a different sense than meaning simply "out of the closet." For she is the orphan of a people's imaginary; a peculiar offspring of the avant-garde art world, the butch 50s "diesel dyke," and that kind of feminism which knew above all that sexual difference was ever only a *political* and not biological category. She is public in the most profound sense of the term: a composite copy of a mass invention, a replica of our own societal icons, which are themselves never anything other than a public fiction. She is James Dean over and over again: James Dean with his arrogant hair, James Dean with his tight black denims, James Dean with the bitter brat look, James Dean with the morbid leather boots, James Dean against the whole boring suburban middle class, James Dean deader than a door nail wedged into antihero. n159

As Golding makes clear, this is an erotic sensibility or sexual identity that rejects the truth of anatomical sex and goes well beyond the idea of gender as a cultural construction built upon a prediscursive or naturally sexed body that provides a politically neutral surface for multiple significations. As Butler put it:

The cultural matrix through which gender identity has become intelligible requires that certain kinds of "identities" cannot "exist" -- that is, those in which gender does not follow from sex and those in which the practices of desire do not "follow" from either sex or gender Indeed, precisely because certain kinds of "gender identities" fail to conform to those norms of cultural intelligibility, they appear only as developmental failures or logical impossibilities from within that domain. Their persistence and proliferation, however, provide critical opportunities to expose the limits and regulatory aims of that domain [*1259] of intelligibility and, hence, to open up within the very terms of that matrix of intelligibility rival and subversive matrices of gender disorder. n160

Demonstrating that gender identity (construed as a causal or natural relationship among sex, gender, sexual practice, and desire) is the effect of a regulatory practice that reproduces a medical and juridical hegemony, this gender rebel without a cause also rejects those prior forms of "gender trouble" that accepted and worked within the terms of the natural sex/cultural gender dichotomy. This hermaphroditism bears no relation to a biological hermaphroditism "connected to some formulaic equation of the x and y chromosomes scientifically tested in relation to the size and shape of the breast and clitoris" n161 (except insofar as nineteenth century science labelled *all* women whose sexual orientation was non-heterosexual, insufficiently submissive, or masturbatory, "hermaphroditic"). Furthermore, Golding makes it clear that we are not speaking of a sixties "androgyny" that built a sexual aesthetic around an "absence" or "sameness" of the sexual organs. Nor is it a seventies sexual aesthetic "born out of an acknowledged irony of the ways in which society enforces gender-specific clothing." n162 Rather, this gender rebel performs with her body an erotic identity that is an embodied performative:

a fiction as 'real' as the specific body parts of her hermaphroditic predecessor. Only this time, her 'truth,' the clues to her sexual transgression will never be found in the physical attributes of her body *per se*, but only in their 'look.' Only in the defiant aesthetic of the erotic masculine shot through with the voluptuousness of the female sexual organs n163

and "the celebration of female genitalia . . . [that refuses to be defined as] a 'bleeding wound' of castrated cock." n164

The lesbian hermaphrodite exemplifies the sex/gender/desire/practice matrix as a performatively enacted signification that parodies, proliferates, and subverts gendered meanings; an "erotic mutant," "a fractured playfulness of social icons [like the Dean image, although Elvis Presley offers other

possibilities] copied over and over again." n165

"Doing gender," however, is not the exclusive preserve of gays and lesbians, however more likely the social conditions of their existence are to incline them to contest hegemonic norms of gender identity. This will be clarified by an examination of the activities of certain groups of North American science fiction fans who articulate new gender identities and construct communities by literally rewriting their favorite [*1260] television series characters into narratives that express their fears and aspirations.

3. *Star Trek* fanzines

The science fiction fan world structures itself around a series of conventions. Media fans constitute a distinct fan world within the convention circuit and *Star Trek* is one of a number of television and movie series around which a fan community has emerged. *Star Trek* fans constitute a social and cultural network that is international in scope. Within this community itself, there are distinct groups of fans that organize around the production, circulation, and consumption of fan magazines (fanzines). n166 The fanzine community is almost exclusively female and predominantly heterosexual. It involves middle class women who work as housewives, nurses, teachers, and in clerical and service occupations. n167

Fans exchange letters, distribute newsletters, create artworks, make videotapes, and produce and circulate fanzines. These fanzines contain original fiction, poetry, and illustrations written by women across North America, Britain, and Australia. I will focus here on the *Star Trek* fanzine community in North America, a subculture explored with great sensitivity by Camille Bacon-Smith in her sparkling ethnography *Enterprising Women*. n168 As well as attending conventions, fanzine community members may belong to clubs that distribute newsletters, and see themselves as members of a larger fan community (250-500 participants) and its constituent parts -- local circles (of ten to thirty women) who gather at weekend house parties where they talk, watch videos, read fanzines, work out stories, and establish interpretive norms for their reading and writing activities. n169

Usually produced out of women's homes, fanzines are generally mimeographed or photocopied productions but some have become more sophisticated with the introduction of computerized desktop publication technology; few issues are less than a hundred pages long. n170 In 1988, it was estimated that there were 300 publications that enabled fans to explore aspects of television series, 120 of them centered on [*1261] *Star Trek*, n171 a number which no doubt *underestimates* the production of fan literature because it does not include literature circulated only in photocopy circuits or the more covertly circulated publications. n172 These publications are sold at cost, relying upon subscriptions and often pre-payment n173 to finance production and distribution costs. Producers are motivated more by the desire to express identity and establish community than any monetary interest and fanzines often operate at a loss. n174

In their writing and drawing, contributors to the fanzine employ images, themes, and characters from a canonized set of mass culture texts (the *Star Trek* television series episodes, films, and commercially produced novels), to explore their own subordinate status, voice frustration and anger with existing social conditions, envision and construct alternatives, share new understandings, and express utopian aspirations. n175 In so doing, they force media texts to accommodate their interests, to become relevant to their needs, and thereby empower themselves with mass culture images.

In their creative reworking of *Star Trek* imagery, fanzines create new female communities, new personal identities, and, I will argue, alternative gender identities. As Bacon-Smith shows, these

activities create new relationships between those who contribute to fanzines and the larger world, n176 they forge a sense of community and extensive social networks, and provide new possibilities for individual expression. n177 Above all, contributing to a fanzine is shared *social* activity:

Elaine Showalter picks up the metaphor of quiltmaking when she describes women writing commercially, and her analysis applies equally to fanwriters. Using well-known communal patterns, the craftsperson [*1262] creates a work like a quilt top, unique in the way it combines the familiar elements with the distinctly personal statement she makes through her selection of elements Women fanwriters, like the women who wrote gothic romances in the 1850s, value their workmanship in the community but place little or no emphasis on the concept of 'auteur' as solitary creator of an aesthetically unique piece of art.

In the fan community, fiction creates the community. Many writers contribute their work out of social obligation, to add to the discourse, to communicate with others. Creativity lies not in how a writer breaks with the tradition of the community's work but in how she uses the language of the group to shed a brighter light on the truth they work to communicate. Commercial television fits uniquely into this scheme of women's culture

. . . Television is a readily available source of infinitely combinable but specifically not unique elements. They borrow wholesale from the television sources [to construct fictional 'universes' with which they organize their own social worlds]. n178

Star Trek fans characterize their entry into fandom as a movement from the "social and cultural isolation imposed on them (both as women in patriarchal society occupying low paid jobs, and as seekers of pleasure within media representations), toward more active participation in a community where cultural creativity is encouraged and appreciated." n179 *Star Trek* episodes and characters are revised and reworked and new texts are constructed to reclaim female interests, experiences, and feelings from a set of common references that women separated by great distances can share. Issues of gender roles, sexuality, and the tension between family obligations and professional ambition are explored. The *Star Trek* future world holds out the promise of opportunities for nontraditional female pleasures, active involvement in central decision making roles, and a state of sexual equality in which emotional needs and professional responsibilities are taken seriously by men and women alike. n180

Many early stories featured a young, well educated woman who was desirable, competent, and moral, simultaneously winning the love and respect of the Enterprise crew, and ultimately the romantic interest of one of the major male characters. These "Mary Sue" stories, however, produced great discomfort and ambivalence in the community, although most fan writers have written at least one, usually early in their careers. n181 Contemporary fanzine editors now refuse to publish them. Bacon-Smith suggests that in this writing, women are engaged in re-creating adolescent selves that they may now feel shame or pain in recalling:

[*1263] Fans often recount the scorn they experience for their "masculine" interest in science fiction and action-adventure. These readers grew up in a period during which active, even aggressive, behavior was acceptable for prepubescent girls who were expected to put away their grubby corduroys and baseballs, their books that chronicled the male fantasies of exploration and adventure, when they entered adolescence. With the teen years, girls were expected to turn to makeup, curlers, . . . and high-heeled shoes to attract the attention of boys

The teenaged girl had to be not just seductive but nonthreatening; she could not challenge the supremacy of the male on the playing field or in the classroom. n182

Many women in fandom could not successfully make this transition -- too tall, too "serious," wearing glasses, unable or unwilling to mask their intelligence -- and "Mary Sue" reconciles the felt anomalies of their identity. Combining the characteristics of "active agent with the culturally approved traits of beauty, sacrifice, and self-effacement, she wins the love of the hero." n183

We can easily see that Mary Sue is a fantasy of the perfect woman created within the masculine American culture. Men are served by Mary Sue, who ideally minimizes her own value while applying her skills, and even offering her life, for the continued safety and ease of men. Even in her superiority Mary Sue must efface her talents with giggles and sophomoric humor. She must deny that her solutions to problems are the result of a valid way of thinking, modestly chalking up successes to intuition n184

"The writer, become reader, recognizes Mary Sue's childish behavior as a coping mechanism she has herself used or observed in her friends to mask the threat that intelligence and competence poses to men." n185 But once in fandom, women encourage each other to leave such camouflage behind and construct alternative roles:

Women in the fan community have rejected Mary Sue, the cultural role of precocious child, and in many cases have replaced her with the matriarch in the genre referred to as "lay" stories, so named because the alter-ego heroine develops a sexual relationship with the hero. Her adventures are an adjunct to his world; her demeanor is one of matriarchal dignity outside of the bedroom and politically correct sensuality within it. n186

In "Lay" stories, however, women appear to be more engaged in rewriting the masculine gender than in imagining alternative feminine ones. In particular, the stories teach women how to deal with male sexuality -- an uncontrolled or unpredictable internal physical urge coupled [*1264] with a controlled, emotionless exterior. The female heroine is an intelligent supportive woman who (often after a period of subjugation and oppression) helps her partner to accept his emotions and recognize that true love and sexual satisfaction grow out of mutual respect and trust. Even these women, however, are increasingly dismissed as falling into the contemptuous category of Mary-Sue, n187 and the lack of strong female characters in most fanzines "signals a continuing dissatisfaction with the options available to women characters and to women in society." n188

Stories focusing on women represent very few of the stories fanziners read and many more stories involve male friendships. Two significant genres of fanzine fiction are "Slash" (or homoerotic) and "Hurt-Comfort" stories, both of which center on relationships between the male characters in the series. In all of these stories, the links between anatomy, gender, desire and sexual practice are sundered. In the male friendship stories, the male characters are alternatively engendered; stripping them of a rationalist, ego-centered individualism, the fans imbue them with emotionality and empathy, knitting them into close family and community relationships as well as intimate caring friendships which nurture and support them in their adventures. n189

In "Slash" fiction, women write erotic stories and draw illustrations depicting a love relationship between Kirk and Spock (erotic fiction is also written about the *Starsky and Hutch*, *Blake 7*, and *The Professionals* characters). n190 Fearing social ridicule, loss of employment, and possibly legal repercussions, n191 fanzine writers often write such stories under pseudonyms, although within the community most of the authors' identities are known. Some of this literature circulates only through

complex subterranean photocopying networks in order to evade exposure outside of the group. n192 So well hidden is the circuit that only the most experienced readers and writers have access to it. Within this realm of secrecy and risk, women explore and express personally painful and significant themes:

Homoerotic fiction addresses some of the most risk-laden questions in the community [It protects the questioner] from direct exposure of some of her deepest anxieties, but conserves the risk with a [level of] metaphor that [offers the greatest distance but which itself] poses the [*1265] greatest danger . . . from within and without the community. n193

Some fans oppose these stories on religious or moral grounds; others find them "untrue" to the source or canon, some find them too explicit, and others worry about exposing the original actors to ridicule. n194 Both outside and within the community, writing "Slash" fiction is risky business. Similarly, in the relationships depicted, "romantic love is fraught with risk -- of trust broken, of exposure or even loss of the self, of society's disapproval, or of misinterpretation of the intent of the partner -- and the prize for risking all is perfect physical and psychic fulfillment," n195 represented by the mind meld or telepathic union.

Bacon-Smith describes a number of tasks performed by the homoerotic romance in the communication of personal needs and experiences and rejects the idea that the male characters are surrogate women -- an idea popularized by Joanna Russ when she argued that because of the overriding importance of touch, the slow thoroughness and sensitization of the whole body, the sexuality expressed was female. n196 For Russ "the penis is a sign, literally, behind which the woman can express femaleness free of male domination." n197 Bacon-Smith, however, asserts that these women are "writing consciously and deliberately about men," n198 exploring who men are and reconstructing them into people with whom it might be more comfortable to share life, love, and sexual relationships. n199 Certainly, "sexual experiences with men as they are presently enculturated can seem intimidating even to heterosexual women." n200 In fact, a number of fans "openly express a need for more satisfying sexual relationships." n201 These women also want to explore relationships between powerful equals while "tearing down the very institution of hierarchical power that constructs men as individuals" -- reconstructing power itself as an integrated union of mutuality with full and open communication. n202

In both "Slash" fiction and "Hurt/Comfort" stories, n203 as well as in the friendship stories described earlier, the "male" characters are given a combination of gender traits, Kirk's "feminine" traits are matched to Spock's "masculine" ones and vice-versa. n204 Each shares aspects of [*1266] traditional gender roles. In this way, new genders are inscribed on "male" bodies; thus new desires, experiences, feelings and practices may proliferate. n205 Men's suffering, rage, and need for comfort along with male violence, can thus be acknowledged, as can the need that women feel to be the recipients as well as the bestowers of comfort. n206

In addition to being alternatively engendered, the male characters are freshly embodied; their bodies are inscribed with ranges of sensitivity, zones of erogeneity and a heightened receptivity to tactile pleasures and physical comfort:

Women in the fan community prefer images that reclaim the sensuality of the whole body Hands are perceived as sensual, and faces as vulnerable. Hands touching a face in an environment of trust symbolize sensuality as protective

. . . Kisses to the neck, the wrists, the inner arm elicit at least as strong a reaction as mouth-to-mouth osculation; women viewers seem to value the rediscovery of some of these more neglected erogenous zones. n207

Their heroes' pain, decontextualized in the mass media, is re-united with both physical and psychological suffering by fanzine writers. The male characters, then, are reconstructed as fully emotional and sentient beings. Perhaps the fanzine writers perform the most thorough practices of "doing gender" that we have examined. Constructing new connections between novel (male?) bodies, new masculinities, erotic desires, and sexual practices, they simultaneously situate these newly engendered creatures in personal and social relationships, empowering themselves and their communities as they do so.

D. *Engendering and Endangering Alternative Identities*

These subcultural practices at first seem distant, if not divorced, from legal regimes of publicity rights. However, they occupy cultural spaces in the social fabric intersected and influenced by a multiplicity of relations between law, commodification, and cultural form. We need to think about law, not simply as a set of prohibitions, but as an authoritative and pervasive discourse that defines, shapes and is imbricated within the everyday life of cultural practice. n208

[*1267] The risks these people run under legal regimes of prohibition are certainly significant ones. So are the ethical risks of writing about their practices. Bacon-Smith, Jenkins, and Penley have been very careful not to reveal details about or examples of particular fanzine writing, filming, and drawing practices or the identities of practitioners. I respect their circumspection and similarly will not, as a matter of ethical principle, delineate the precise ways in which fanzine writers or performers in gay and lesbian subcultures could be held to violate publicity rights (as well as the copyright and trademark rights held by the commercial producers of the media products on which they draw). To do so would be to provide the legal resources with which to prosecute them, or with which they might once again be threatened with the prospect of legal action. n209

It is important, however, to recognize that juridical power is productive as well as prohibitive; the law, as discursive cultural practice, is generative of categories, distinctions, and valuations -- of knowledges, spaces, identities, and subjectivities. n210 The law of publicity rights, by prohibiting reproductions of the celebrity image for another's advantage, promotes the mass circulation of celebrity signifiers by ensuring that they will have a market value; if the image were freely available for mass reproduction, there would, presumably, be less of an incentive to engage in the investments necessary to disseminate it through media channels. Ironically, then, the law creates the cultural spaces of postmodernism in which mass media images become available for signifying practice. It produces fixed, stable identities authored by the celebrity subject, while simultaneously creating the possibility of places of transgression in which the signifier's fixity and the celebrity's authority may be contested and resisted. Authorized and unauthorized identities [*1268] are both, therefore, engendered in relation to this juridical regime. The law, however, lends its authority only to those meanings that the celebrity wishes to appropriate, attributing these to her own efforts, and denies that legitimate cultural value may be produced elsewhere.

Power may produce resistance in the sense that Michel Foucault suggests, but it does not determine the form or the content of the practices that transgress its strictures. Through its prohibitions the law may produce the means by which unauthorized identities are both engendered and endangered, but these practices are not simply effects or consequences of juridical regimes. People's interests and inclinations to engage in the construction of alternative gender identities are shaped by multiple hegemonies. Performative enactments of erotic identity are unlikely to be univocal direct statements of opposition to any singular structure of power; more often they may engage multiple forms of cultural "resistance" to multiple instances of power. Through irony, mockery, parody, pastiche and

even alternative modes of appreciation, activities of creative appropriation enable fans to comment indirectly not only on gender ideology, but on law, culture, authorship, authority, and the commodity form.

Such commentary is especially cogent in the fanzine context. Fans do not see *Star Trek* as something that *can* be reread but something that can and *must* be rewritten in order to make it more responsive to female needs and to render it a better producer of personal meanings and pleasures. n211 According to Henry Jenkins, fans expressly reject the idea that the *Star Trek* texts or the Kirk/Spock characters are a privileged form of exclusive property; but at the same time, they have developed a complex moral economy n212 in which they legitimize their unorthodox appropriation of the texts, characters, and personas drawn from the television series. Despite the potential for legal prosecution, they see themselves as loyalists, fulfilling the inherent promise and potential of the series -- a potential unrealized or betrayed by those who "own" the intellectual property rights in it. Fans respect the original texts, and regularly police each other for abuses of interpretive license, but they also see themselves as the legitimate guardians of these materials, which have too often been manhandled by the producers and their licensees for easy profits. n213 As one fan wrote: "I think we have made [*Star Trek*] uniquely our own, so we have all the right in the world . . . to try to change it for the better when the gang at Paramount starts worshipping the almighty dollar as they are wont to do." n214 Fan writers exercise an ethic of care with regard to the characters, a care they fear [*1269] that more commercially motivated parties frequently do not share. n215

In *Enterprising Women*, Bacon-Smith also illuminates the complexities of the attitudes fanwriters hold with regard to the legal status of the source product. On the one hand, they are aware that the characters, stories, films, television episodes, music, logos, and dialogues with which they work are the properties of others. On the other hand, they take quite seriously the philosophy of "IDIC" (Infinite Diversity in Infinite Combination), propagated by Gene Roddenberry, the originator of *Star Trek*. They respect the legal prohibition against selling their writings, videotapes, and artworks for profit, but the possibility that many of their activities might still be enjoined on copyright, trademark, or publicity rights grounds does not appear to operate as a serious deterrent. These women know they assume risks of legal prosecution; but the legal risks are merely a few and possibly the most distant of the risks they face. Indeed, Bacon-Smith implies that the assumption, management, and shared exploration of risk is the central ethos of the community, and constitutive of the construction and reconstruction of the culture in which they engage.

Bacon-Smith also discusses the moral economy in which fans operate (although she does not expressly employ this term). She suggests that fans have a respect for the characters and relationships as they are presented in the source product devised by the commercial producers which serves as the "source of infinitely combinable but specifically not unique elements." n216 A fan "does not change the status of the characters by adding permanent wives or children, or by killing or maiming one of the main characters. The writer works hard to create in her stories characters that speak like the ones on television, and whose personalities match the screen product." n217 Consonant with the science fiction assumption that any change from the known history splits off a timeline, or universe ongoing simultaneous to all others, writers who do permanently change the status of a character or characters are said to create new universes [Creating] their own universes, with characters and relationships that exist only in the stories their creators write. n218

There *are* aspects of the original story and episodes that fans reject, however. For example, fans insist upon seeing characters grow and evolve and engage in relationships which change them as people.

They reject linear narratives, aperspectivity, and closure. They do not see either the original episodes or their own stories as a self sufficient work but as an expression of a continuing experience. n219 At the end of the [*1270] story, characters go on living and changing. Later in their lives, they may recall the events of the original story differently; or perhaps the events, told from the perspective of another character, tell a different story.

There is, then, no final or authoritative account of an event or experience; stories can and must be rewritten according to new perspectives.

The linear story with a single narrative perspective per scene is so alien to this group that they use their fiction to 'correct' the error of linearity in the source products. The fanwriters see life as a sea of potentialities, many of which can be realized simultaneously, many of which spread out like ripples across the lives of others, and all of which must somehow be encompassed in the literature if it is to express any kind of truth [A] worldview that sees every interaction as a multilayered experience out of which reality is negotiated. n220

Fans clearly engage in moral deliberation and dialogue when considering the legitimacy of particular activities. These amateur writers and the professional science fiction writers on whose works they have drawn have had to consider the vexed question of what distinguishes the activities of "a community in dialogue" from simple copyright infringement. n221

Many writers who express concern about the loss of autonomous control of their creations actually embrace the idea of sharing their worlds with their friends -- we are not speaking of two groups of professional writers at odds but of battles being waged within the heart and mind of each individual. n222

Moreover, the fan community does have a relationship with the stars of the various series from which they borrow. Although I know of no publicity rights proceedings to date, it is clear that celebrities regard these fan activities with some ambivalence. Stars are often asked to appear at conventions and many of them feel a sense of obligation to the fans for their support. Often they become aware of the fanzines and may well feel flattered by the attention. Robin Curtis (Saavik in the two *Star Trek* movies) said:

"I really had no idea that this all existed I don't know that I'll ever stop being amazed Really, the care and the time which people devote to something It is really quite an honor to be the receiver of that kind of appreciation . . . [but] I haven't read it, to be honest with you." n223

Other celebrities *have* read the literature and responses seem mixed. Constance Penley notes that Shatner and Nimoy have commented appreciatively [*1271] on fanzines generally and found the homoerotic texts surprising but not inconceivable given what they now see as the "campiness" of some of the old episodes. n224 Other stars have viewed these texts less benignly. One actor in *Blake's 7* encouraged fanzine writing but upon discovering his fictive presence in homoerotic fiction, withdrew his support and attempted to blackball the writers within the fan community itself. n225 *Starsky and Hutch* fans worry that public exposure of 'Slash' literature will hurt the reputations of stars they regard with respect and affection. They insist upon keeping the product underground to protect their heroes. n226

Although fanziners, gay camps, and lesbian hermaphrodites are not necessarily engaged in practices directly opposing the law (however often they may unintentionally violate it), the law of publicity

rights informs their performative activities. The knowledge that the cultural icons with which they express themselves do not belong to them, however affectionately they are adopted, is constitutive of these practices. The relationship of fans to the commodification of the texts and images whose meanings they simultaneously interpret and create may be one of admiration or antagonism, irony or parody, fear or nurturing, or even complicitous critique. n227 In any case, the law generates spaces for a proliferation of politics as well as identities, interpretive communities as well as authorities, in which people forge their own ethical distinctions between expression and theft and collectively negotiate community norms.

V. INFINITE DIVERSITY IN INFINITE COMBINATION: DEMOCRACY AS DIALOGIC PRACTICE

The cultural politics of constructing alternative gender identities through improvisations upon the celebrity image, are not, I fear, readily appreciated using current juridical concepts or easily encompassed by the liberal premises upon which legal categories are grounded. The reasons for these difficulties, I believe, can be located within the contradictions, instabilities, and ambiguities of liberal legal discourse itself -- contradictions that are becoming increasingly apparent in the condition of postmodernity.

The practices we have examined raise a number of categorical quandaries. It would seem at first glance that the ability to speak about self, identity, community, solidarity, and difference and to express social aspirations is a matter of freedom of speech or expression. Indeed, one of the chief historical justifications for freedom of expression in modern [*1272] political philosophy is an argument based upon the self-fulfillment of the individual, n228 now understood to include the fulfillment of the aspirations of social groups in furtherance of collective self-determination. Freedom of expression, however, is an area of legal doctrine that is increasingly ill-prepared to cope with the condition of postmodernity.

A. *Free Speech in the Condition of Postmodernity*

Critics assert that the tradition of free speech is based upon Enlightenment premises and assumptions that are increasingly anachronistic and ill-equipped to address late capitalist realities. As Owen Fiss notes, the constitutional tradition of freedom of expression is unable to effectively grasp the salient characteristics or challenges of capitalist mass communications systems. As a consequence, American free speech decisions of the last two decades have "impoverished rather than enriched public debate and thus threatened one of the essential preconditions for an effective democracy." n229

Fiss suggests that freedom of speech doctrine increasingly confronts a conflict between economic and political liberties. One person's right to political speech increasingly encroaches upon another's right to enjoy her exclusive rights of property, and as Fiss and others recognize, the property owner's "No Trespassing" sign generally prevails. n230 For Fiss, the freedom of speech tradition enables these consequences because of its historical presuppositions. The tradition is built around the concept of protecting the individual "street corner speaker" from silencing by the state. n231 This concept is wholly inadequate in conditions of late capitalism. Mass media, electronic telecommunications, instantaneous communications, and the corporate restructuring and commodification of urban space have made street corners and their speakers invisible, inaudible, and obsolete as forums and agents of political dialogue. It is no longer clear that protecting an individual's autonomy to speak will guarantee rich public debate when the forums for speaking and the circuits of communication are privately owned, and those who control them have an inordinate capacity to influence [*1273] the terms of that debate. n232 This influence is exercised not only when the media speaks expressly

about political affairs but also in the way in which our options and choices are shaped by visions of the world propagated in entertainment. n233 In conditions of scarcity of access, the protection of a certain agent's autonomy to speak may well impoverish public debate, because the opportunities for effective communication are limited:

I think it is fair to say that in a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful. The market -- even one that operates smoothly and efficiently -- does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise. n234

Furthermore, the free speech tradition presupposes that the state is the primary threat to freedom of expression, and like the classical liberal tradition of which it is a part, presupposes a dichotomy between state and citizen that equates liberty with limited government. n235 The autonomy to speak is reduced to mean freedom from government interference. n236 As Fiss argues, however, the public and private are not hermetically sealed spheres and purportedly private actors (especially media conglomerates) receive numerous benefits from the state and play public functions. Threats to the autonomy of speech and to public debate are just as likely to come from so called "private" actors as public officials.

Fiss believes the state has a duty to preserve the integrity of public debate and that state intervention may be necessary and desirable to promote any effective speaker's autonomy. n237 Such intervention may involve regulation of the exercise of private property -- limits to the rights of shopping mall owners to control access to their properties, and regulations limiting campaign expenditures, for example. n238

Critics on the left agree with Fiss' definition of the problem, and support his recommendations for an energized state role in engendering public debate. They argue, however, that the basic liberal tenets with which he operates disenable him from developing any constructive program. According to Alan Hutchinson, for example, Fiss' continued liberal commitments to the state/citizen and public/private dichotomies [*1274] preclude the realization of a truly democratic polity n239 or a successful resolution of the free speech dilemma. n240

For Hutchinson, the public/private distinction is not so much blurred or amorphous as it is untenable or simply "false": n241

because government is implicated in all activity that occurs within its territorial jurisdiction. As sovereign, the government is as responsible for its active decisions not to intervene and regulate as it is for its decisions to act affirmatively The retention of an existing situation is also due to the efforts and actions of the state The protection of private property and the enforcement of private contracts by the government attests to the strong and necessary presence of government in private transactions Property, and contract are creatures of the state and support for these allocative regimes is neither more or less politically neutral or activist than opposition to them. The question is not whether government should intervene, but when and how n242

When "public" speech interests come up against "private" interests, the latter almost invariably triumph, ensuring that "the law insulates vast sectors of the social hierarchy from official scrutiny and public accountability." n243 Those who hold "private" property are not required to consider the "public" interest in free speech in the exercise of their exclusive property rights. Once we break down

this untenable distinction, however, and recognize the state's role in creating and enforcing property rights, "the question of whose entitlements are to be protected from whose interference becomes a contested matter of political choice rather than the correct application of abstract principle." n244

For Hutchinson, the basic premises on which the liberal theory of free speech is built are fundamentally flawed. In most respects, I agree with his position. It reinforces assertions I make elsewhere about the inadequacies of liberal understandings of subjectivity and objectivity. n245 However, I want to argue here that Hutchinson ignores many of the implications of his own critique, implications that cast new light upon consideration of publicity rights claims in contemporary societies.

Hutchinson asserts that contemporary free speech doctrine is based upon inadequate understandings "of human personality and language and, most importantly, the crucial relation between the two." n246 It is necessary to rethink both "freedom" and "speech" in light of contemporary knowledge about human life and expressive activity. The individual [*1275] is constituted within and constitutes herself through social systems of signification (for brevity, I will refer to these as "language" but they include auditory impulses, visual images, and modes of tactility as well as oral and written codes of communication). n247

Like other liberal legal discourses, the liberal theory of free speech "is premised on a social world comprising an aggregation of distinct individuals with a set of pre-social preferences and values." n248 These are then expressed through language: "language is understood as a neutral medium that is available to all and that stands independently of the ideas and world [and values] it is intended to convey or depict." n249 The liberal objective is to facilitate the "free" exchange of information, values, and knowledge that pre-exist the medium of their circulation. As Hutchinson puts it, "the pillars of liberal free speech are the private individual with 'different and indeed incommensurable and irreconcilable conceptions of the good' and the transparency of language as a public medium through which to communicate them." n250

A large body of legal scholarship now contests these understandings of freedom, language, and human communication. n251 Drawing upon scholarly developments in anthropology, cognitive psychology, linguistics, continental philosophy and American pragmatism, many legal theorists reject the liberal notion of language as an instrument with which humans express their pre-linguistic selves and describe a pre-social objective world. Instead, they assert the constitutive, world and self-creating nature of language use. Individual identity and social action are dialectically created and related through signifying activities:

There is no form of pure communication that merely represents instead of creating. Language is a social medium: it shapes society and its individuals as they work to reshape it. No one is free to describe the [*1276] world as they wish; they are always already constrained by the prevailing ways of speaking, by the package of foundational beliefs and assumptions about reality and the individual's place within it. The world, and our ideas about it, take on meaning within historically specific modes of communication. A society's resources for conversation determine not only the knowledge at its disposal, but also its very ways of knowing

. . . Discourse constitutes and creates reality, . . . as much as it is constituted by society. Social reality is constantly being negotiated and constructed Language is not a system of static symbols, but is a form of social action and history-making. n252

As the earlier examination of subcultural practices illustrated, humans speak within historically specific

modes of representation. The symbolic resources available for communicative activity shape our ways of knowing even as we use them to express identity and aspiration. We create social realities discursively, through systems of signification we deploy in activities that are simultaneously a politics and a poetics. Recognizing this means acknowledging that dialogue -- discursive social interactions and the opportunities for imaginative meaning-making they yield -- is paramount to human life and crucial to historical change. Speech is not a means to an end of self-expression or an instrument to convey information, but the marrow both of social life and its potential for transformation. Dialogue or critical conversation is the activity wherein people create their selves and their communities; their texts and contexts. Postmodern legal scholars, therefore, assert the central importance of dialogue in social life and insist that principles of dialogue should serve as "a powerful regulative ideal" that gives "practical orientation to our lives." n253 The interactive conditions for dialogue should be fostered to give tangible meaning to democracy. n254

A dialogic theory of human social life, Hutchinson suggests, provides a means to re-conceptualize and re-orient the law of free speech or freedom of expression so that it focuses more on the conditions of interaction than on the interacting individuals, freedom not as a lack of all constraints but as an ability to participate in engaged conversations. n255 The autonomy of the speaker from all social constraint is seen as illusory, because social situatedness is the very pre-condition for human speech. Instead, the conditions for the maximum participation of all people in the ongoing negotiation of the social good must be promoted. For Hutchinson, this implies an expanded role for the state: In order to promote the equality between participants necessary for an effective dialogue, the state will have to intervene, and the intervention will be based on the value of dialogue itself

[*1277] . . . [A] concern with the formal conditions for conversational encounters embodies a substantive relationship between speakers that is important in and for itself In place of the traditional liberal reliance on individual rights to free speech, a dialogic community would rely on . . . social entitlements to open discourse. n256

In this scenario, "private" property rights are not understood either as pre-existing or as standing in isolation from or in opposition to "public" rights to speech. For, "democratic conversation requires an abandonment of the public-private distinction" n257 as a point of departure and a recognition that we must collectively negotiate the appropriate combination of state involvement and abstention necessary to facilitate dialogue in all circumstances:

This dialogic theory eschews sweeping statements about whether collectively sanctioned interference of the state in media activities is desirable. While a mandated entitlement of public access to large-scale media might be necessary, the universal availability of access to fringe publications would be self-defeating. Access by the powerful to the small presses of the relatively powerless threatens to replicate the existing imbalance and stymie the development of a diversely democratic culture. A concern for dialogue obliges us to reconsider the meaning and operation of 'censorship'. It forces an acknowledgment that harm results not simply from the silencing of certain voices, but also in allowing certain voices to dominate and operate a virtual monologue. A fully developed 'right to dialogue' would combine active steps to bring in previously stilled voices and positive moves to diminish the stentorian voices that presently dominate. n258

In this vision, the state would constructively affirm the responsibility of all social actors to engage themselves "in providing a positive and empowering freedom" for others. n259 This responsibility would necessarily entail that a differential bundle of rights and obligations would define the attributes

of certain property holdings. No longer a domain of absolute "private" rights to exclusive enjoyment in which one is "free" from government "interference," property would have to be recognized as a diverse package of privileges and responsibilities that serve social aspirations for democratic experience.

Commercial speech, according to Hutchinson, "is thoroughly undeserving of constitutional protection and should be democratically regulated. By according it a privileged status in the public discourse of democratic society, courts jeopardize the likelihood of informed choice and the enhancement of individual identity and encourage the dilution of language as a form of social action." n260 Hutchinson, like too many [*1278] others on the left, holds a pessimistic, and, I would argue, unduly fatalistic attitude towards mass media, advertising, and commercial culture. The conditions of postmodernity are viewed as essentially totalitarian -- "the effect of such a commercially saturated atmosphere is to trivialize and impoverish democratic politics." n261 All "public discourse becomes hostage to economics" n262 and the commercial interests of major corporate actors. Constitutional protection of commercial speech "frustrates rather than enhances democratic dialogue, individual freedom and social enrichment. It threatens to realize a state of affairs in which corporate 'tyrants indulge in monologues over millions of solitudes.'" n263 Such is Hutchinson's dark prognosis of the state of free speech in the historical conditions of postmodernity -- a view that fails to consider what people actually *do* with the media products which saturate their environment and effectively constitute their culture. In other words, Hutchinson ignores the cultural practices of postmodernism.

B. *Dialogue in the Context of Postmodernism*

It must be evident that I do not share Hutchinson's pessimism about the state of human expression in our current cultural situation. Rather than seeing social life and discourse as determined by or merely reflective of the interests of those who disseminate mass media circulated representations, I have suggested that we consider the complex, culturally creative manner in which those in subordinate groups interpret, "recode" or rework media signifiers to express their own identities and aspirations. n264 As gay camps, lesbian hermaphrodites, and *Star Trek* fanzine writers remind us, signs do not necessarily retain their original meanings when they circulate in social life. The very polysemy of signification -- the excess of meaning that signifiers always potentially contain -- provides the conditions of possibility for social agents to deploy texts, symbols, and images in unforeseen ways in the service of unanticipated agendas.

Whereas Hutchinson's pessimism about commercial communication leads him to advocate state regulation to limit or mitigate "the disproportionate impact of corporate speech on social life," n265 my own guarded optimism about human cultural creativity inclines me in a slightly different direction. In a capitalist society in which mass media communications systems circulate and disseminate the largest proportion and most compelling forms of cultural signification, the signs of the economically powerful will always be pervasive, regardless of how [*1279] closely they are monitored, how assiduously they are regulated, or how much we subsidize non-profit communications.

Commercial speech and public discourse cannot be maintained as pristine categories in the late twentieth century and the desire to do so bespeaks a seductive but ultimately untenable nostalgia. If dialogue is "the activity *par excellence* through which people constitute and re-constitute themselves" n266 and "an integral part of the democratic good life," n267 then perhaps we should stop trying to preserve the integrity of a mythic public domain untainted by the stigma of commercial speech, and acknowledge the cultural conditions of postmodernism: an historical situation in which identity, tradition, and community are themselves constituted in and through, diverse relations to

commodification and its discourses and practices. Democratic dialogue will require more than equal access to the forums and channels of communication -- the material conditions for conversation. It will require opportunities for access to the symbolic means of communication -- the cultural conditions for conversation. If the most powerful signifiers and those most widely disseminated are the private properties of an elite -- if their meanings are controlled and their polysemy exclusively possessed -- then it will be impossible to engage in dialogic interaction with the historical lifeworld in which we are situated. n268 The social systems of signification through which a dialogic democracy constitutes itself must be available, not merely to convey information -- an unduly reductivist understanding of human communication -- but to express identity, community, and social aspiration in the service of imagining and constructing alternative social universes.

If we recognize that the essence of democratic politics is a dialogic process whereby social identities are politically articulated from cultural or discursive resources, n269 then we must be sensitive to the critical [*1280] role that mass culture plays in shaping politically salient forms of difference. The subjects produced in popular cultural practice populate the social world with utopian and aspirational articulations. They pose the promise of an "alternatively gendered world" n270 that displaces heterosexist cultural conventions even as it ironically evokes their forms. It is this world that I imaginatively shared with Mary Joe, and that we both attempted to performatively embody. Her spirit will continue to engender these possibilities in us all.

FOOTNOTES:

n1 RICHARD DYER, *HEAVENLY BODIES: FILM STARS AND SOCIETY* 141 (1986) (quoting the character Drag Queen in the play *As Time Goes By*).

n2 Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 *NEW ENG. L. REV.* 665, 686 (1992).

n3 In an earlier article I suggested that as legal scholars we need to reconceptualize subjectivity in a manner that avoids both liberalism and essentialism and recognizes the discursive constitution of subjectivity in specific historical contexts. This is particularly important for feminists, for the recognition that the personal is political requires a consideration of the relations between the social and the subjective, language and consciousness, discourse and experience. The parameters of subjectivity relate to the range of cultural meanings available for creative construction of gendered identity. See Rosemary J. Coombe, *Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies*, 14 *LAW & SOC. INQUIRY* 69 (1989).

n4 STEVEN CONNOR, *POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* 186-87 (1989).

n5 Throughout this article I will use the term "celebrity image" to designate, not singularly or exclusively a celebrity's visual likeness but rather all elements of the complex constellation of visual, verbal, and aural signs that circulate in society and constitute the celebrity's recognition value. The term "persona" will also refer to this configuration of significations. I will also use the terms "celebrity" and "star" interchangeably.

n6 This article may be read in numerous ways. Readers concerned with acquiring new perspectives on publicity rights and intellectual property may wish to jump over part IV, which is predominantly ethnographic and speaks in a less conventional "voice," whereas those interested in gender identity, postmodernism, and popular culture may omit parts II and III. I point out these options only because

anonymous readers (for another journal) suggested that those people interested in intellectual property are not concerned with feminist politics and postmodernism (and vice versa), and that the "tone" of the article has a tendency to shift. It should be clear that I have a commitment to combining a multiplicity of perspectives, fracturing the alleged unity of the authorial voice, and promoting heteroglossia in legal literature. I hope that discerning readers will recognize the diversity of (gendered) voices adopted here to be a strategic and reflexive evocation of the (less than fully dialogic) cultural conditions in which we live.

n7 I use the umbrella term "publicity rights" to encompass the tort of appropriation of personality as it has developed at common law, the proprietary right of publicity that has developed in American law, and rights to prevent the appropriation of (inter alia) names and likenesses that have been enacted in provincial and state statutes as well as federal trademark legislation. See *infra* part II.

n8 See *infra* part III.

n9 See *infra* part IV.

n10 See *infra* part V.

n11 David Vaver, *What's Mine is Not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia, Manitoba and Saskatchewan*, 15 U. BRIT. COLUM. L. REV. 241 (1981).

n12 See RESTATEMENT (SECOND) OF TORTS §§ 652A-652I (1977).

n13 Trademarks Act, R.S.C. ch. T-13, § 9 (1985), Lanham Trademark Act, 15 U.S.C.A. § 1052a-b (1946).

n14 Lisa A. Lawrence, *The Right of Publicity: A Research Guide*, 10 HASTINGS COMM. & ENT. L.J. 143 (1987).

n15 For good overviews of the state of American law, see J. THOMAS McCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (1991). For good summaries of the Canadian, British and Australian positions, see Robert G. Howell, *The Common Law Appropriation of Personality Tort*, 15 INTELL. PROP. J. 149 (1986); SAMUEL K. MURUMBA, *COMMERCIAL EXPLOITATION OF PERSONALITY* (1986).

n16 *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W.2d 129 (Wis. 1979) (holding athlete has right of publicity in his nickname "Crazylegs" and could sustain action against shaving gel manufacturer).

n17 *Cepeda v. Swift & Co.*, 291 F. Supp. 242 (E.D. Mo. 1968), *aff'd*, 415 F.2d 1205 (8th Cir. 1969) (denying athlete's claim for damages from unauthorized use of his signature because athlete had granted this right to baseball manufacturer without restricting method of resale); *United States Life Ins. Co. v. Hamilton*, 238 S.W.2d 289 (Tex. Civ. App. 1951) (granting plaintiff nominal damages for the unauthorized use of his signature).

n18 *Athans v. Canadian Adventure Camps Ltd.*, 34 C.P.R.2d 126 (Ontario High Ct. 1977).

n19 *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (holding that the right to exploit name and likeness is personal to the artist and must be exercised by the artist during his or her lifetime). *Cf.* *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836 (S.D.N.Y. 1975) (holding that actors have rights in

their names and likenesses which descend to their heirs).

n20 *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (awarding damages to singer for television commercial's use of a "sound alike" to imitate her voice and singing style).

n21 *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (holding that anonymous imitation of performer's unique style of vocal delivery is sufficient injury to performer's reputation to sustain a cause of action). The court noted that Lahr had achieved stardom due to his "'style of vocal delivery which, by reason of its distinctive and original combination of pitch, inflection, accent and comic sounds' has caused him to become 'widely known and readily recognized.'" *Id.* at 257 (quoting Plaintiff's complaint). A television commercial using a similar voice was "stealing [the] thunder" of the performer. *Id.* at 259 (quoting Plaintiff's complaint).

n22 *Joseph v. Daniels*, 11 C.P.R.3d 544 (B.C. Sup. Ct. 1986).

n23 *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) (holding that portable toilet manufacturer violated Johnny Carson's right of publicity by using phrase "Here's Johnny" with the slogan "The World's Foremost Comedian"); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, (S.D.N.Y. 1978) (holding that illustration depicting nude black male with caption "The Greatest" violated plaintiff's right of publicity because the phrase was known to be a common reference to the plaintiff).

n24 *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (holding that plaintiff race car driver had identifiable attributes appropriated because unique and distinctive decorations on his car were recognizable in cigarette commercial).

n25 *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (protecting comic delivery style).

n26 *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 396 N.Y.S.2d 661 (N.Y. App. Div. 1977).

n27 Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983); Todd F. Simon, *Right of Publicity Reified: Fame As Business Asset*, 30 N.Y.L. SCH. L. REV. 699 (1985).

n28 Canadian and British courts have not yet recognized the right as proprietary and continue to deal with it as a tort. This has not prevented celebrities from entering into licensing contracts and conveying merchandising rights, however. *Vaver*, *supra* note 11; *Howell*, *supra* note 15; Gordon Kirke, *Sports and Entertainment Law Materials* (Univ. of Toronto Faculty of Law 1991).

n29 American courts are divided on the issue of whether a right of publicity survives the individual's death and in what circumstances. Some courts have refused recovery for the relatives or assignees of a decedent where the name or likeness has been appropriated for commercial purposes on the grounds that an individual's personal right of privacy does not survive his death. Others have allowed recovery for invasion of privacy in similar circumstances. Decisions predicated upon rights of publicity range from those that hold that the right survives death in all circumstances, those that require the celebrity to have engaged in some form of commercial exploitation during her life before the right will be descendible, and those which unconditionally oppose descendibility in any circumstances. The tendency, however, has been towards greater recognition of the descendibility of publicity rights, and state legislatures have also inclined towards statutory recognition of the descendibility of such rights. The issue has yet to be determined or even seriously addressed in Canadian or British courts. See

Lawrence, *supra* note 14.

n30 Canadian and British courts have yet to address this issue.

n31 See discussion and cases cited in Joan Gross, *The Right of Publicity Revisited: Reconciling Fame, Fortune, and Constitutional Rights*, 62 B.U. L. REV. 965 (1982); Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781 (1988). In the case of celebrity images employed in commercial advertising, there are conflicting lines of authority. Historically, American law accorded commercial advertising little or no value when it conflicted with an individual's privacy or publicity rights. Before 1976, this was consistent with the low constitutional value placed on commercial speech. However, Theodore F. Haas argued that the extension of limited First Amendment protection to commercial speech suggests that many of the cases involving appropriations of name and likeness in commercial advertising would now have to be decided differently. Theodore F. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. DAVIS L. REV. 539 (1986).

n32 DEYAN SUDJIC, *CULT HEROES: HOW TO BE FAMOUS FOR MORE THAN FIFTEEN MINUTES* 11 (1989).

n33 *Id.* at 10.

n34 *Id.* at 15.

N35 *Id.* at 19.

n36 *Id.* at 83.

n37 Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW. U. L. REV. 553, 555-57 (1960); Raymond H. Goetsch, Comment, *The Right of Publicity: Premature Burial for California Property Rights in the Wake of Lugosi*, 12 PAC. L.J. 987, 995-97 (1981).

n38 David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 156 (1981).

n39 See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990) (discussing the factors which need to be weighed in determining whether commodification is an appropriate mode of valuation).

n40 Lange, *supra* note 38, at 160 (footnotes omitted) (citing Steven J. Hoffman, *Limitations on the Right of Publicity*, 28 BULL. COPYRIGHT SOC'Y 111, 116-33 (1990) (asking similar question); Alisa M. Weisman, Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 S. CAL. L. REV. 727, 729-51 (1982); Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1128 (1980)).

n41 JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 25-31 (1980).

n42 Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 37 (1989).

n43 For example:

the celebrity has invested time, money, and effort to develop a high level of public recognition. Therefore, the unauthorized use of the celebrity's persona . . . deprives the celebrity or successors of the economic gain he or she deserves, unjustly enriches the user and reduces the celebrity's ability to control his or her public image.

Armand Cifelli & Walter McMurray, *The Right of Publicity -- A Trademark Model for Its Temporal Scope*, 66 J. PAT. OFF. SOC'Y 455, 462 (1984).

n44 Hettinger, *supra* note 42, at 37.

n45 DYER, *supra* note 1, at 10-22; RICHARD DYER, STARS (1979).

n46 Dean MacCannell, *Marilyn Monroe Was Not a Man*, 17 DIACRITICS 114, 115 (1987) (quoting Marilyn Monroe).

n47 Hettinger, *supra* note 42, at 38.

n48 Lange, *supra* note 38, at 161-62 (footnotes omitted).

n49 *Id.*

n50 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 317 (2d Cir. 1982).

n51 Groucho Marx Prods., Inc. v. Day & Night Co., 689 F.2d 317, 318-19 (2d Cir. 1982).

n52 *Groucho Marx Prods.*, 523 F. Supp. at 492-94.

n53 For one example, see Teresa Podlesney, *Blondes*, in THE HYSTERICAL MALE: NEW FEMINIST THEORY 82 (Arthur & Marilouise Kroker eds., 1991) who argued that "the blonde" is the perfect post-WWII product and the ultimate sign of U.S. global supremacy, white patriarchy and the triumph of American mass media and mass production. Madonna, she suggested, is the blondest blonde ever, "with forty years of the blonde phenomenon informing her every move." *Id.* As Podlesney notes, Madonna has frequently been "heralded for (mis)(re)appropriating the iconography of the blonde bombshell in a cynical defiance of the rules of sexuality codified by patriarchy." *Id.* at 84. On January 16, 1991, the Washington Post reported that Florida State University Professor Chip Wells was writing a doctoral dissertation on Madonna as a "postmodern social construct." Chuck Conconi, *Personalities*, WASH. POST, Jan. 16, 1991, at C3.

n54 Richard Goldstein, *We So Horny: Sado Studs and Super Sluts: America's New Sex 'Tude*, VILLAGE VOICE, Oct. 16, 1990, at 35, 36.

n55 Lange, *supra* note 38, at 163 (quoting *Groucho Marx Prods.*, 523 F. Supp. at 493).

n56 *Id.* at 165.

n57 MYSTERY TRAIN (JVC 1989).

n58 I have no idea whether Jarmusch sought the consent of the Presley estate or the corporate owners of his publicity rights and, if so, what royalties he agreed to pay. Nor do I know whether the Presley estate ever sought to enjoin the film's production or to demand royalties. The very possibility

of such an injunction and its desirability is what is at issue here. Celebrities or their estates are not obliged to grant licenses for the use of their image regardless of the artistic or social merit of the work in which they are employed, and may withhold consent on any pretext. In this hypothetical scenario, *Mystery Train* might be privileged under the First Amendment but then again, it might not. For a discussion of First Amendment privileges, see *infra* notes 229-63 and accompanying text.

n59 A party launching the Elvis Presley cologne was held at the New York club Hot Rod in early October of 1990. Michael Musto, *La Dolca Musto*, VILLAGE VOICE, Oct. 26, 1990, at 44. Wine is now marketed as "Marilyn Merlot" with the actress' likeness on the label and of course "Rebel" cologne marketed with James Dean's face which, in Canada at least, is now registered as a trademark.

n60 *Memphis Dev. Found. v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977), *rev'd*, 616 F.2d 956 (6th Cir. 1980). On appeal, the Sixth Circuit reversed and remanded, holding that the right of publicity was not descendible under Tennessee law. The Tennessee legislature responded by statutorily recognizing a descendible exclusive property right in an individual's name or likeness, terminable only upon two years of commercial non-use. TENN. CODE ANN. § 47-25-1101-1108 (1988). The Tennessee Court of Appeals has since determined that Presley's right of publicity survived his death in 1977 and expressly rejected the Sixth Circuit's opinion on Tennessee law. *Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987). The Sixth Circuit then declared itself bound by the Court of Appeal's ruling in *Elvis Presley Enters. v. Elvisly Yours*, 817 F.2d 104 (6th Cir. 1987). Presley's relatives, however, are not necessarily realizing the profit or controlling the uses to which the image is put. Prior to his death, Presley had conveyed the exclusive right to exploit his name and likeness to a corporation controlled by Colonel Tom Parker, his manager, in exchange for royalties. Factors Etc., Inc. is an assignee corporation controlled by Parker who is free to exploit the Presley image in any manner. Once rights have been assigned, the sentiments and sensibilities of heirs are not necessarily regarded.

n61 Hettinger, *supra* note 42, at 39-40.

n62 *Id.* at 40.

n63 The United States Supreme Court apparently has accepted the career incentive rationale for recognizing the right of publicity as a proprietary right. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court emphasized that the protection of an individual's right of publicity "provides an economic incentive for him to make the investment required to produce a performance of interest to the public" and analogized this protection to that which is afforded by the patent and copyright laws. *Id.* at 573. As I will later discuss, commentators seem eager to extend the right based on analogies to copyright, patent, and trademark law, but rarely seem prepared to carry the analogy through to the point of imposing temporal limits on the right or permitting defense analogous to those afforded in other areas of intellectual property law.

n64 Of course I have my tongue in cheek here, as well I might, because we have made a social decision to allocate celebrities a property right in their famous attributes without addressing any of these issues of social policy.

n65 See Kenneth E. Kulzick & Amy D. Hogue, *Chilled Bird: Freedom of Expression in the Eighties*, 14 LOY. L.A. L. REV. 57 (1980), Kevin S. Marks, *An Assessment of the Copyright Model in Right of Publicity Cases*, 70 CAL. L. REV. 786 (1982), Roberta R. Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C. DAVIS L. REV. 191 (1984), Hoffman, *supra* note 40, Simon, *supra* note 27,

and Coyne, *supra* note 31, for arguments in favor of a fair use defense in publicity cases.

n66 The precise parameters of persona are impossible to ascertain or constrain, and commentators have suggested that it should encompass such things as "acts, traits, walk, habits, style," and so on. See Hoffman, *supra* note 40, at 3-4. Entertainment law specialist Leonard Marks has suggested that the sound of a horn or drum player could be considered part of the persona. See Stan Soocher, *License to Sample*, NAT'L L.J., Feb. 13, 1989, at 1, 26. A quality of voice has been accepted recently as an identifiable attribute with a value that can be unfairly appropriated simply by imitation. See discussions of the \$ 2.475 million jury verdict against Frito-Lay and its advertising agency for mimicking Tom Wait's distinctive voice in an advertisement. *\$ 2.4 Million for Singer Imitated in Ad*, CHICAGO TRIBUNE, May 9, 1990, at 5. Arguably, those celebrities who receive the largest awards are those who refuse to allow their likenesses to be appropriated for commercial endorsement purposes. If so, an action in defamation or privacy is perhaps more appropriate.

Those who argue on behalf of publicity rights believe that copyright is inadequate *precisely because* it cannot fully protect the persona, "since the myriad of quirks and nuances that comprise the persona are not capable of being fixed in a tangible medium of expression," as suggested by Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?*, 10 CARDOZO ARTS & ENT. L.J. 1, 46 (1991).

n67 Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

n68 See Simon, *supra* note 27, for a discussion of how analogies to the protection provided by copyright are both accurate and inadequate. In particular, he suggested that a right of publicity could not adequately be modeled upon copyright because there are fundamentally different bases for respecting the existence of the right and the duration of its useful life. The life plus fifty year term of copyright represents an attempt to balance the public's interest in the work with the interests of compensating the author, and the public gains access to the work after the copyright term regardless of its continuing economic value. With respect to a persona, the value of the "work" and its ability to endure is entirely speculative. Years of public deliberation went into the decision to allocate a particular duration of exclusive rights with regard to copyright works; "by contrast, there has been no attempt to study the economic or social uses of celebrity personae." *Id.* at 722. A persona must be related to current fame to provide the basis for a legal right. The length of copyright protection might be either too short or too long, depending upon the endurance of the celebrity's fame and market value. *Id.* at 720-24.

n69 This must be qualified by a discussion of state anti-dilution statutes which increasingly give trademark owners something akin to property rights in a sign in many jurisdictions. Section 12 of the Model State Trademark Bill is typical:

Likelihood of injury to business reputation or of dilution of the distinctive qualities of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

Model State Trademark Bill § 12 (1964), *reprinted in* 2 J. THOMAS McCARTHY, TRADEMARKS AND UNION COMPETITION § 22.4, 26-27 (1984 & 1990 Supp).

To maintain a dilution action, however, the symbol must serve the function of a trade mark or trade name. Not all celebrity images serve distinguishing roles in commodity markets, however. Many courts have been loathe to apply anti-dilution statutes and still insist upon evidence of customer confusion before they will prohibit the use of a mark on noncompeting goods. For a critical discussion of the

concept of dilution and its political implications, see Rosemary J. Coombe, *Objects of Property and Subject of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

n70 Simon, *supra* note 27, at 713:

The right of publicity protects an existing persona, not mere expectations, and only insofar as the persona carries symbolic weight. [Thus,] the personae exploited by the famous more closely resemble trademarks or trade names than tangible personal property. [However,] these forms of intellectual property are not automatically descendible either to natural heirs or to successors in interest. The viability of trademarks or trade names largely depends on their visibility and continued link to a product or service.

Id. (footnotes omitted).

Simon argued that for a right of publicity to be considered by analogy to trademark law, it would "be necessary to revise its scope to include valuable symbols that are neither attached to specific products on a regular basis nor indicative of origin." *Id.* at 734. He suggested that trademarks or service marks can provide celebrities with a degree of protection insofar as the personae is actually *used* as a trademark or servicemark, but argued against extending such protection on an ad hoc, post facto basis to any publicly recognizable characteristic of the celebrity. *Id.* at 736-37. Moreover, to obtain injunctive relief in such contexts, a plaintiff must demonstrate a likelihood of confusion about source or endorsement resulting from defendant's use. *Id.* at 737. "Trademark law has never extended protection for symbols no longer attached to the entity responsible for their meaning and no convincing argument has been made that the famous should be an exception." *Id.* at 739.

n71 SUDJIC, *supra* note 32, at 61.

n72 *Id.*

n73 Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217 (Hannah Arendt ed., 1969).

n74 *Id.* at 219.

n75 *Id.* at 220-21.

n76 *Id.* at 222.

n77 *Id.* at 221.

n78 *Id.* at 224.

n79 *Id.* at 223.

n80 *Id.* at 228-29.

n81 *Id.* at 231.

n82 *Id.*

n83 See GRAHAM McCANN, MARILYN MONROE (1988) for an extended elaboration of a male feminist's

reflections on his relationship to her image; see also DYER, *supra* note 1, for an insightful discussion of Monroe's position in newly emergent discourses of sexuality in the 1950s. Monroe's ongoing dynamic presence in contemporary sexual politics is addressed by MacCannell, *supra* note 46, in a perceptive and scathing review of biographies written by Norman Mailer, Gloria Steinem, Anthony Summers, and Roger G. Taylor.

n84 I am grateful to Kathleen Pirrie Adams for clarifying this point (Telephone conversation, Oct. 1990).

n85 STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* 90 (1988).

n86 *Id.* at 91.

n87 *Id.* at 95-96.

n88 See DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989).

n89 HAL FOSTER, *RECODINGS: ART, SPECTACLE, CULTURAL POLITICS* (1985).

n90 Henry Jenkins III, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, 5 *CRITICAL STUD. MASS COMM.* 85, 87 (1988).

n91 For more detail, see Rosemary J. Coombe, *Postmodernity and the Rumour: Late Capitalism and the Fetishism of the Commodity/Sign*, in JEAN BAUDRILLARD: *THE DISAPPEARANCE OF ART AND POLITICS* 98 (William Chaloupka & William Stearns eds., 1991); Rosemary J. Coombe, *Encountering the Postmodern: New Directions in Cultural Anthropology*, 28 *CANADIAN REV. SOC. & ANTHROPOLOGY* 188 (1991); Rosemary J. Coombe, *Beyond Modernity's Meanings: Engaging the Postmodern in Cultural Anthropology*, 11 *CULTURE* 111 (1991); see also CONNOR, *supra* note 4; FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991); *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* (Hal Foster ed., 1983); FOSTER, *supra* note 89; LINDA HUTCHEON, *THE POLITICS OF POSTMODERNISM* (1989).

n92 See MIKE FEATHERSTONE, *Modern and Postmodern: Definitions and Interpretations*, in *CONSUMER CULTURE AND POSTMODERNISM* 1 (Mike Featherstone ed., 1991); HUTCHEON, *supra* note 91, at 23-29.

n93 This statement synthesizes an enormous amount of literature. For examples of this literature, see JEAN BAUDRILLARD, *THE MIRROR OF PRODUCTION* (Mark Poster trans., 1975); JEAN BAUDRILLARD, *FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN* (Charles Levin trans., 1981); JEAN BAUDRILLARD, *IN THE SHADOWS OF SILENT MAJORITIES, OR, THE END OF THE SOCIAL* (Paul Foss et al. trans., 1983); JEAN BAUDRILLARD: *SELECTED WRITINGS* (Mark Poster ed., 1988); HARVEY, *supra* note 88; JAMESON, *supra* note 91; JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984); see also the following good secondary accounts: ANDREW ROSS, *THE POLITICS OF POSTMODERNISM* (1988); CONNOR, *supra* note 4; HUTCHEON, *supra* note 91; Special Issue on Postmodernism, 5 *THEORY, CULTURE & SOC'Y* 195 (1988).

n94 Angela McRobbie, *Postmodernism and Popular Culture*, in POSTMODERNISM: ICA DOCUMENTS 165, 165 (Lisa Appignanesi ed., 1989) (emphasis omitted).

n95 Ross, *supra* note 93, at xv.

n96 MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Randall trans., 1984).

n97 PAUL E. WILLIS, *COMMON CULTURE: SYMBOLIC WORK AT PLAY IN THE EVERYDAY CULTURES OF THE YOUNG* (1990).

n98 FOSTER, *supra* note 89.

n99 The concept of the mediascape is borrowed from Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, in Special Issue, *Global Culture: Nationalism, Globalization, and Modernity*, 7 THEORY, CULTURE & SOC'Y 295 (1990) (asserting that we need to consider the complexity of the global flow of cultural imagery as producing new fields he defines as ethnoscapas, technoscapas, finanscapas, mediascapas, and ideascapas).

n100 See generally CONNOR, *supra* note 4.

n101 *Id.* at 186.

n102 *Id.*

n103 *Id.*

n104 See DICK HEBDIGE, *CUT 'N' MIX: CULTURE, IDENTITY, AND CARIBBEAN MUSIC* (1987). For a discussion of the politics of rap music and the opposition between postmodernist forms of aesthetic practice and the modernist assumptions of legal regimes of copyright, see ROSEMARY J. COOMBE, *CULTURAL APPROPRIATIONS: INTELLECTUAL PROPERTY LAWS, POSTMODERN CULTURE AND LATE MODERN POLITICS* (forthcoming 1993).

n105 McRobbie, *supra* note 94.

n106 *Id.*

n107 HUTCHEON, *supra* note 91, at 26.

n108 McRobbie, *supra* note 94, at 174-75.

n109 WILLIS, *supra* note 97, at 141.

n110 *Id.*

n111 *Id.* at 141-42.

n112 JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

n113 *Id.* at xii.

n114 *Id.* at 1.

n115 This argument is elaborated in MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., 1980).

n116 In other works, I attempt to demonstrate how juridical systems of power produce the subjects they claim to represent. For an historical discussion and elaboration of the juridical production of gender and class subjectivities through exclusionary practices in the adjudication of defamation trials, see Rosemary J. Coombe, *Contesting the Self: Negotiating Subjectivities in Nineteenth-Century Ontario Defamation Trials*, 11 *STUD. L. POL. & SOC'Y* 3 (1991).

n117 BUTLER, *supra* note 112, at 2.

n118 *Id.* at 4.

n119 *Id.* at 5.

n120 *Id.*

n121 *Id.* at 6.

n122 *Id.*

n123 *Id.* at 17.

n124 *Id.* at 17-23.

n125 *Id.* at 25.

n126 *Id.* at 25-30. Butler's position here is congruent with my stance in Coombe, *supra* note 3, where I argue that subjectivity is always constructed within the discursive forms of prevailing structures of power, through the creative process of bricolage -- cultural practices that deploy existing cultural forms in ever emergent new fashions that may transform structures of power even as they evoke its significations.

n127 BUTLER, *supra* note 112, at 30.

n128 *Id.* at 33-34.

n129 I explore the manner in which cultural discourses contain the possibilities for their own transformation and examples of creative challenges and reconstructions from within structures of oppression in Coombe, *supra* note 3, at 88-89 (arguing that all discourses of power contain ambiguities and contradictions that provide opportunities for symbolic improvisation and subversion). Like Butler, I reject a liberal understanding of freedom and agency and see power relations as both constraining and constituting the possibilities for volition conceived as a reworking of cultural forms.

n130 BUTLER, *supra* note 112, at 121.

n131 *Id.* at 31.

n132 *See supra* notes 107-08 and accompanying text.

n133 ANDREW ROSS, *NO RESPECT: INTELLECTUALS & POPULAR CULTURE* 159 (1989).

n134 *Id.* at 159-60.

n135 Richard Jackson, *Modernist and Postmodernist Inscriptions of Camp*, Paper Presented at the Popular Culture Association Meetings in Toronto (Mar. 7-10, 1990).

n136 Ross, *supra* note 133, at 144.

n137 *Id.* at 157-58.

n138 ESTHER NEWTON, *MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA* 3 (1972).

n139 *Id.* at 110.

n140 *Id.* at 103.

n141 Ross, *supra* note 133, at 159.

n142 *Id.* at 160.

n143 *Id.* at 159.

n144 *Id.* at 161 (quoting Interview with Susan Sontag (1975)).

n145 *Id.* at 161.

n146 *Id.*

n147 NEWTON, *supra* note 138, at 108 (quoting Parker Tyler, *The Garbo Image, in THE FILMS OF GRETA GARBO* 28 (Michael Conway ed.)).

n148 DYER, *supra* note 1, at 144-46.

n149 *Id.* at 148-54.

n150 *Id.* at 154.

n151 *Id.* at 145.

n152 MICHEL TREMBLAY, *HOSANNA* (John Van Burek & Bill Glassco trans., 1974).

n153 *Id.* at 102.

n154 *See* Jackson, *supra* note 135.

n155 Lesbian identification with Sinatra does not appear to be limited to Toronto as the recent New York "Lookout" Downtown Community Television's second annual Gay and Lesbian Video Festival suggests. There, a video titled *Cruisin' the Rubyfruit Jungle* contained "a tribute to Nancy Sinatra that would make Irving Klaw blush." Manohla Dargis, *Scanners: Being on the 'Lookout,'* VILLAGE VOICE, Oct. 16, 1990, at 51.

n156 Sue Golding, *James Dean: The Almost-Perfect Lesbian Hermaphrodite*, in SIGHT SPECIFIC: LESBIANS AND REPRESENTATION (Dionne Brand ed., 1988).

n157 *Id.* at 49.

n158 *Id.* at 50.

n159 *Id.* at 50-52.

n160 BUTLER, *supra* note 112, at 17.

n161 Golding, *supra* note 156, at 50.

n162 *Id.*

n163 *Id.* at 52.

n164 *Id.*

n165 *Id.*

n166 For a discussion of the social and institutional structures of fan communities, see CAMILLE BACON-SMITH, ENTERPRISING WOMEN: TELEVISION FANDOM AND THE CREATION OF POPULAR MYTH (1992).

n167 *Id.* at 322; Jenkins, *supra* note 90; Constance Penley, *Feminism, Psychoanalysis, and the Study of Popular Culture*, in CULTURAL STUDIES 479 (Lawrence Grossberg et al. eds., 1991); Constance Penley, *Brownian Motion: Women, Tactics, and Technology*, in TECHNOCULTURE 135 (Constance Penley & Andrew Ross eds., 1991) [hereinafter Penley, *Brownian Motion*].

n168 BACON-SMITH, *supra* note 166.

n169 *Id.* at 16-31.

n170 *Id.* at 45.

n171 Jenkins, *supra* note 90, at 89.

n172 See Constance Penley, *To Boldly Go Where No Woman Has Gone Before: Feminism, Psychoanalysis, and Popular Culture*, Lecture delivered at the Public Access series "Capital/Culture," in Toronto (Apr. 24, 1990) (on file with author), where it is estimated that there are three to five hundred publishers of homoerotic fanzines alone (which would include those featuring characters from

Miami Vice, Simon and Simon, Starsky and Hutch, as well as the Star Trek characters).

n173 BACON-SMITH, *supra* note 166, at 4.

n174 Fans are aware of the copyright status of the source products upon which they draw, and know that neither writers nor publishers may legally profit from their work. *Id.* at 45. For a discussion of attitudes towards law, see *infra* notes 208-15 and accompanying text.

n175 Jenkins, *supra* note 90, at 104.

n176 Fanzine writers face ridicule and hostility both in "mainstream" society and among other (predominantly male) science fiction fans who see them as less than intelligent and as an embarrassment to fandom. BACON-SMITH, *supra* note 166, at 39, 77. *Newsweek* described them as "a lot of overweight women, a lot of divorced and single women," and the press, if it bothers to remark upon them, sees them as socially deviant. Jenkins, *supra* note 90, at 86 (quoting Charles Leerhsen et al., *Star Trek's Nine Lives*, NEWSWEEK, Dec. 22, 1986, at 66).

n177 BACON-SMITH, *supra* note 166, at 7-43.

n178 *Id.* at 56-57 (footnotes omitted).

n179 Jenkins, *supra* note 90, at 88.

n180 *Id.* at 93-97.

n181 BACON-SMITH, *supra* note 166, at 94-98.

n182 *Id.* at 100.

n183 *Id.* at 101.

n184 *Id.* at 102.

n185 *Id.*

n186 *Id.* at 102-03.

n187 *Id.* at 141.

n188 *Id.* at 143.

n189 *Id.* at 145-47.

n190 *Id.* at 233-54.

n191 Lucasfilm threatened legal action (most likely an injunction on copyright grounds) when they discovered that fanzine writers had depicted Luke Skywalker and Han Solo in an erotic relationship. (Conversation with Constance Penley, Apr. 24, 1990). Bacon-Smith also notes that the fandom has had an uneasy relationship with Lucasfilm but does not elaborate. BACON-SMITH, *supra* note 166, at

171 n.5.

n192 BACON-SMITH, *supra* note 166, at 209-16.

n193 *Id.* at 222.

n194 *Id.*

n195 *Id.* at 230.

n196 Joanna Russ, *Another Addict Raves About K/S*, 8 NOME 8 (1985), *cited in* BACON-SMITH, *supra* note 166, at 242.

n197 BACON-SMITH, *supra* note 166, at 245.

n198 *Id.* at 247.

n199 *Id.* at 246-49.

n200 *Id.* at 246.

n201 *Id.*

n202 *Id.* at 249-50.

n203 Hurt/Comfort stories are those in which one male character is hurt and suffers and the other character comforts and nurses him. See *id.* at 255-81.

n204 *Id.* at 250.

n205 This would help to explain why fans do not necessarily see the sexual relationship between Kirk and Spock as a homosexual one. See the discussion in Penley, *supra* note 172, at 486-88 n.3. As some fans see it, there are forms of love that defy description; the sexual orientation of Kirk and Spock is irrelevant because their love is a matter of cosmic destiny. *Id.* at 487. For similar reasons, fans do not see even the most sexually graphic material as pornographic. BACON-SMITH, *supra* note 166, at 243. Such categories are simply inappropriate in these alternative universes.

n206 BACON-SMITH, *supra* note 166, at 270-77.

n207 *Id.* at 195-96.

n208 For longer discussions of this perspective on the relation between law and society, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Coombe, *supra* note 3.

n209 It will undoubtedly be argued that if the individuals engaged in these subcultural practices were to be threatened with legal action they could claim a defense under the First Amendment. Few of these individuals have the resources to affirm their constitutional rights. In any case, First Amendment defenses in this area are rarely upheld and often dismissed out of hand. Moreover, the case law in this area is extremely confusing and often contradictory. For a discussion of inadequacies of the way

freedom of speech is conceptualized in this area, see Coombe, *supra* note *.

n210 This insight finds its clearest articulation in FOUCAULT, *supra* note 116. He argued that juridical regimes are productive rather than merely prohibitive; they produce what they purport merely to represent. These same observations are made in CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983). These ideas are developed in Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985), and elaborated in Christine B. Harrington & Barbara Yngvesson, *Interpretive Social Research*, 15 LAW & SOC. INQUIRY 135 (1990). For a discussion of the juridical production of class and gender subjectivities in the transition to industrial capitalism, see Coombe, *supra* note 116. For a feminist perspective, see BUTLER, *supra* note 112.

n211 Jenkins, *supra* note 90, at 100-01.

n212 This concept is developed in Edward P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76 (1971).

n213 Jenkins, *supra* note 90, at 100.

n214 *Id.*

n215 *Id.*

n216 BACON-SMITH, *supra* note 166, at 57.

n217 *Id.* at 58.

n218 *Id.*

n219 *Id.* at 63-64.

n220 *Id.* at 66.

n221 *Id.* at 40.

n222 *Id.*

n223 *Id.* at 33 (quoting Robin Curtis, Taped Interview with Robin Curtis & George Takei, in Boston (Nov. 1987)).

n224 See Penley, *Brownian Motion*, *supra* note 167, at 135.

n225 BACON-SMITH, *supra* note 166, at 35.

n226 *Id.* at 223.

n227 For a discussion of complicitous critique as an attitude symptomatic of postmodernism, see HUTCHEON, *supra* note 91.

n228 PAUL CHEVIGNY, *MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY* (1988) (citing

FREDRICK F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982)). Increasingly, it seems that arguments in favor of the preservation of democracy are preferred. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409-10 (1986).

n229 Fiss, *supra* note 228, at 1407.

n230 *Id.* at 1407-08; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Richard Moon, *The Scope of Freedom of Expression*, 23 OSGOOD HALL L.J. 331 (1985); Richard Moon, *Lifestyle Advertising and Classical Freedom of Expression Doctrine*, 36 MCGILL L.J. 76 (1990); Allan C. Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIB. 17 (1989).

n231 Fiss, *supra* note 228, at 1408.

n232 *Id.* at 1410-11; Fiss, *supra* note 230, at 786.

n233 Fiss, *supra* note 228, at 1411.

n234 *Id.* at 1412-13.

n235 *Id.* at 1413.

n236 *Id.* at 1414.

n237 *Id.* at 1415-17.

n238 *Id.* at 1417-18.

n239 Hutchinson, *supra* note 230, at 19-20.

n240 *Id.*

n241 *Id.* at 21.

n242 *Id.* (citations omitted).

n243 *Id.* at 22.

n244 *Id.*

n245 See Coombe, *supra* note 3.

n246 Hutchinson, *supra* note 230, at 23.

n247 For longer discussions, see Rosemary J. Coombe, *Same As It Ever Was: Rethinking the Politics of Legal Interpretation*, 34 MCGILL L.J. 603 (1989).

n248 Hutchinson, *supra* note 230, at 23.

n249 *Id.*

n250 *Id.* (quoting Rawls, *The Basic Liberties and Their Priority*, in LIBERTY, EQUALITY AND LAW 17 (McMurrin ed., 1987)).

n251 See CHEVIGNY, *supra* note 228; STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991); James Boyle, *Is Subjectivity Possible: The Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991); Coombe, *supra* note 3; Coombe, *supra* note 247; Coombe, *supra* note 69; Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985) [hereinafter Cornell, *Reconstruction of Ethics*]; Drucilla Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988); Peller, *supra* note 210; Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991). This list is by no means exhaustive.

n252 Hutchinson, *supra* note 230, at 24.

n253 Cornell, *Reconstruction of Ethics*, *supra* note 251, at 364-65.

n254 Hutchinson, *supra* note 230, at 24-25.

n255 *Id.*

n256 *Id.* at 25-26.

n257 *Id.* at 26.

n258 *Id.*

n259 *Id.*

n260 *Id.* at 27.

n261 *Id.* at 27-28.

n262 *Id.* at 28.

n263 *Id.* at 29 (quoting ALBERT CAMUS, RESISTANCE, REBELLION AND DEATH 104 (1961)).

n264 See *supra* text accompanying notes 93-207.

n265 Hutchinson, *supra* note 230, at 28.

n266 *Id.* at 30.

n267 *Id.*

n268 For a longer discussion of this phenomenon that focuses on trademark law and the political implications of anti-dilution, see Coombe, *supra* note 70. For a discussion of trademarks controlled by public authorities, see Rosemary J. Coombe, *Cultural Proprietorship and the Politics of Recognition in Late Modern Democracies*, 21 POL. THEORY (forthcoming 1993).

n269 This idea is elaborated upon in the work of Ernesto Laclau and Chantal Mouffe. See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARD A RADICAL DEMOCRATIC POLITICS* (Winston Moore & Paul Cammack trans., 1985); Ernesto Laclau & Chantal Mouffe, *Post-Marxism Without Apologies*, 166 NEW LEFT REV. 79 (1987); Strategies Collective, *Building a New Left: An Interview with Ernesto Laclau*, 1 STRATEGIES: J. THEORY, CULTURE & POL. 10, 18-21 (1988); see also Chantal Mouffe, *Radical Democracy: Modern or Postmodern?*, in UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM (Andrew Ross ed. & Paul Holdengraber trans., 1988); Fred R. Dallmayr, *Hegemony and Democracy: On Laclau and Mouffe*, 1 STRATEGIES: J. THEORY, CULTURE & POL. 29 (1988); Bradley J. MacDonald, *Towards a Redemption of Politics: An Introduction to the Political Theory of Ernesto Laclau*, 1 STRATEGIES: J. THEORY, CULTURE & POL. 5 (1988); Ken Hirschkop, *Bakhtin, Discourse and Democracy*, 160 NEW LEFT REV. 92 (1986).

n270 BUTLER, *supra* note 112, *passim*.