

AUTHOR/IZING THE CELEBRITY: PUBLICITY RIGHTS, POSTMODERN POLITICS, AND UNAUTHORIZED GENDERS

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Who authors the celebrity? Where does identity receive its authorization? I shall argue that the law constructs and maintains fixed, stable identities authorized by the celebrity subject. In so doing, however, the law also produces the possibility of the celebrity signifier's polysemy. The celebrity image¹ is a cultural lode of multiple meanings, mined for its symbolic resonances and, simultaneously, a floating signifier, invested with libidinal energies, social longings, and political aspirations.

Focusing upon cultural practices that engage, reproduce, ironize and transform the meaning and value of celebrity personas to assert alternative gender identities, I shall argue that the celebrity is authored in a multiplicity of sites of discursive practice, and that in the process, unauthorized identities are produced, both for the celebrity and for her diverse authors. Through its prohibitions, the law produces the means by which unauthorized identities are both engendered and endangered.

I will very briefly summarize the legal doctrine of personality rights² and argue that the rationales traditionally offered for recognizing and protecting rights to the celebrity persona cannot be supported and do not justify the extent of the protections legally afforded celebrities, their estates, or their assignees. The social

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¹ I will use the term "celebrity image" to designate not only the 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.

² I use the umbrella term, "personality 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.

and cultural value of the celebrity image will then be situated in the larger historical context of late capitalism and the related cultural conditions of postmodernism.

Popular cultural practices that engage celebrity images in innovative fashions will then be explored to demonstrate the vibrant role played by these cultural icons in the self-authorings of subaltern social groups. Gay male appropriations of female stars in camp subculture, lesbian reworkings of James Dean, and middle class women's use of the *Star Trek* characters in the creation of fan magazines (fanzines) are practices that rewrite media imagery in subversive but politically expressive fashions. Investing celebrity personas with new and often oppositional meanings, these subordinate groups assert unauthorized gender identities. They thereby affirm both community solidarity and the legitimacy of their social difference by empowering themselves with cultural resources that the law deems the properties of others.

Liberal notions of freedom of expression fail to grasp the nature of contemporary cultural politics of postmodernism, I suggest, because they are held hostage by the philosophical conceits of the Enlightenment. In conclusion, I propose that we situate these practices in an enlarged vision of contemporary democracy that recognizes—as political practice—dialogic cultural activities of articulating the social world and authoring politically salient forms of difference. In this context, we can begin to consider the political costs of granting the celebrity exclusive rights to authorize her (own) image.

I. THE LEGAL PROTECTION OF THE CELEBRITY PERSONA

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 economic benefit.³ Originally developed primarily to deal with an unauthorized use of a person's name or picture in advertising that suggested the individual's en-

³ In Canada and Britain this right developed at common law into a distinct cause of action known as the tort of appropriation of personality. 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. Various states have also incorporated these rights in privacy statutes and state constitutional provisions. The literature detailing the origins and developing scope of these rights is so voluminous that a 256 page bibliography of relevant American literature was published in 1987. See Lisa Lawrence, *The Right of Publicity: A Research Guide*, 10 *HASTINGS COMM. & ENT. L.J.* 143 (1987). Today the literature is even more extensive, and I make no effort to summarize all the nuances of the field here.

dorsement of a product, the right of publicity has been greatly expanded 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, signature, physical pose, characterizations, singing style, vocal characteristics, body parts, frequently used phrases, car, performance style, mannerisms, and gestures, 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 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 recognized as having a commercial value that is likely to be diminished by its unauthorized or unremunerated appropriation by others.

The right is recognized as proprietary in nature 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 exclusive, non-exclusive, and temporally, spatially, and functionally limited licenses may be granted for the use of any aspect of the celebrity's public presence. Furthermore, the right of publicity has been extended beyond the celebrity, her licensees, and assignees, to protect the celebrity's descendants and their assignees and licensees.⁴

⁴ 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 because the right is still considered a personal rather than a proprietary one.

II. THE VALUE OF THE CELEBRITY IMAGE

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 is 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. It is suggested that fame has become the most valuable (and also the most perishable) of commodities and that celebrity will be the greatest growth industry in the nineties.⁵ “With its alchemical power to turn the least promising of raw material[s] into alluring and desirable artefacts” such as designer jeans, sunglasses, deodorants, architect’s tea kettles, and coffee mugs, “[f]ame’s economic applications are limitless.”⁶ The value that a famous name adds to a product may be astronomical; London outworkers knit pullovers for £6—with a Ralph Lauren tag they sell for \$245 in New York—but Lauren does have a \$17 million annual advertising budget to cover.⁷

Celebrities, then, have an interest in policing the use of their personas 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; because such interests have market value, they deserve protection. Others, like myself, see this as “a massive exercise in question-begging.”⁸ Market values arise only after property rights have been established and enforced; the decision to allocate particular property rights is a prior question of social policy that requires philosophical and moral deliberations⁹ and a consideration of social costs and benefits.

⁵ DEYAN SUDJIC, *CULT HEROES: HOW TO BE FAMOUS FOR MORE THAN FIFTEEN MINUTES* (1989).

⁶ *Id.* at 19.

⁷ *Id.* at 83.

⁸ David Lange, *Recognizing the Public Domain*, 44 *LAW & CONTEMP. PROBS.* 147, 156 (1981).

⁹ See Margaret Radin, *Market Inalienability*, 100 *HARV. L. REV.* 1859 (1987) and Elizabeth S. Anderson, *Is Women’s Labor a Commodity?* 19 *PHIL. & PUB. AFF.* 71 (1990) for

In determining whether to grant 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 Locke¹⁰ 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 remarks, "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."¹¹

Publicity rights are justified on the basis of the celebrity's authorship—her investment of time, effort, skill, and money in the development of the image. 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. However, as Hettinger argues, "it does not follow from this that all of their value is attributable to that labor."¹²

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 authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors. Even if we only consider 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 author.

Moreover, as Richard Dyer shows, the star image is authored by its consumers as well as its producers; the audience makes the celebrity image the unique phenomenon that it is.¹³ Selecting from the complexities of the images and texts they encounter,

philosophical discussions of the factors we need to weigh in determining if commodification is an appropriate mode of valuation.

¹⁰ JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, ch. 5 (Wm. B. Eerdmans Publishing Co. 1978) (1690).

¹¹ Edwin Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 37 (1989).

¹² *Id.*

¹³ See RICHARD DYER, *HEAVENLY BODIES: FILM STARS AND SOCIETY* (1986); RICHARD DYER, *STARS* (1979).

they produce new values for the celebrity and find in stars sources of significance that speak to their own experience. These new meanings of the star's image are freely mined by media producers to further enhance its market value. As Marilyn Monroe said in her last recorded words in public, "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."¹⁴

The star image is authored by multitudes of persons engaged in diverse activities. Moreover, stars and their fame are never manufactured from whole cloth—the successful image is frequently a form of cultural *bricolage* that improvises with a social history of symbolic forms. Consider the Marx Brothers. Clearly their characterizations involved creative activity, but, as David Lange points out,

what we cannot know in fact . . . 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 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 To be sure, the Marx Brothers became celebrities as most vaudevillians did not. But surely we are not rewarding them on that ground alone.¹⁵

Publicity rights enable stars to "establish dynasties on the memory of fame."¹⁶ In *Groucho Marx Productions, Inc. v. Day and Night Co.*,¹⁷ those who held rights in the Marx Brothers made a successful publicity rights claim against the creators of the play *A Day in Hollywood, A Night in the Ukraine*. The play's authors intended to satirize the excesses of Hollywood in the thirties and invoked the Marx Brothers as characters playfully imagined interpreting a Chekhov drama. The defendants were found liable, and their First Amendment claim was dismissed on the ground that the play was an imitative work.

The Marx Brothers themselves might be seen as imitative or derivative works, whose creation and success as icons in popular culture derive from their own creative reworkings of the signifying repertoire of the vaudeville community. Contemporary stars

¹⁴ Dean MacCannell, *Marilyn Monroe Was Not a Man*, 17 *DIACRITICS* 114, 115 (1987).

¹⁵ Lange, *supra* note 8, at 161-62.

¹⁶ *Id.* at 162.

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

are authored 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 lie partially in its evocation and ironic reconfiguration of several twentieth-century sex-goddesses and ice-queens (Marilyn Monroe obviously, but also Jean Harlow, Greta Garbo, and Marlene Dietrich) that speaks with multiple tongues to diverse audiences. Descriptions of the Madonna image as semiotic montage abound,¹⁸ but this extract from the *Village Voice* is my favorite:

What Madonna served up in the name of sexuality was not liberation as I'd known it, but a strange brew of fetishism and femininism. 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.¹⁹

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 images are often those which mine media history for evocative signifiers from our past. This is not to deny that such appropriations are creative endeavours; it is to stress emphatically that they are and to assert that such authorial processes ought not to be frozen, limited, or circumscribed by the whims of celebrities or the commercial caprice of their assignees.

If the Madonna image appropriates the likenesses of earlier screen goddesses, religious symbolism, feminist rhetoric, and sado-masochistic fantasy to speak to contemporary sexual aspira-

¹⁸ For one example, see Teresa Podlesney, *Blondes*, in *THE HYSTERICAL MALE: NEW FEMINIST THEORY* 82 (Arthur & Marilouise Kroger eds., 1991), where the author argues 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 suggests, is the "blondest blonde ever . . . with forty years of the blonde phenomenon informing her every move." As Podlesney also 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.

¹⁹ Richard Goldstein, *We So Horny: Sado Studs and Super Sluts: America's New Sex'Tude*, *VILLAGE VOICE*, Oct. 16, 1990, at 36.

tions and anxieties, then the value of the image derives as much, perhaps, from the collective cultural heritage on which she draws as from 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 draw creatively 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. As Lange argues, the proliferation of successful publicity rights claims occurs at the expense of our rights to the public domain.²⁰ Consequentially, access to the public domain 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.”²¹

Some celebrity images seem significant to the North American social imagination that they might be said to constitute parts of a collective cultural heritage. Such images should not be subject to control by the parochial interests of celebrity’s estates. Elvis Presley provides an apt example. In the recent film *Mystery Train*, director and producer Jim Jarmusch explores 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 addresses 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. The possibility that Elvis Presley’s estate might seek to prohibit the production and/or distribution of a film such as this,²² while simultaneously arranging to market cologne designed “for all the King’s men,”²³

²⁰ Lange, *supra* note 8, at 163.

²¹ *Id.* at 165.

²² 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 some of the problems with the concept of freedom of speech in the postmodern era, see *infra* at Part V. See also my extended discussion in *Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy* 26 NEW ENG. L. REV. (forthcoming 1992) [hereinafter *Publicity Rights*].

²³ A party launching the Elvis Presley cologne was held at the New York club Hot

indicates the parameters of the problem. The opportunity for the celebrity's assignees to behave this way has, in fact, been seized. When the City of Memphis decided to erect a bronze statue to memorialize Elvis as part of a city redevelopment scheme, 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.²⁴

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 support exclusive rights to control its circulation and reproduction in society. Liberal values protecting individual freedom guarantee the possession and use only of the product of one's personal labors and only insofar as the exercise of this right does not harm the rights of others. Enabling celebrities and their estates and assigns to exercise absolute rights to authorize the circulation of the celebrity image may have adverse consequences, both for the preservation of our collective cultural heritage and for our future cultural development.

The social value and cultural meaning of the celebrity image has its genesis in the same historical conditions that created the possibility of its economic value. In his illuminating essay "The Work of Art in the Age of Mechanical Reproduction," Walter Benjamin suggests 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 argue, are integrally related to the cultural value of the celebrity image in contemporary social life.

To reiterate Benjamin's central argument—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, increasingly becomes irrelevant in an age of technical reproduction. Mass reproduction creates copies that possess an independence from the original; they can tran-

Rod in early October 1990. Michael Musto, *La Dolce Musto*, VILLAGE VOICE, Oct. 26, 1990, at 44.

²⁴ *Memphis Dev. Found. v. Factors Etc., Inc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977). 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 presumably free to exploit the Presley image in any manner. Once exclusive rights to attributes of the persona are assigned, they may be utilized without regard for the sentiments and sensibilities of heirs.

scend the limitations of the original's physical tangibility and susceptibility to 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."²⁵ 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 artwork 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 because "the technique of reproduction detaches the reproduced object from the domain of tradition."²⁶ By substituting a plurality of copies for a unique existence, it enables the consumer to position the reproduction in his own lifeworld without any necessary awareness of an original or its historical situation. The photograph and the film 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."²⁷ The criterion of authenticity ceases to be applicable to artistic reproduction. The uniqueness of a work of art was due to the work's situation in a traditional ritual context that defined its use value. 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 work of art and the decline of its aura may help us to understand the cultural significance 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.²⁸ 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 "personal-

²⁵ Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 243 n.5 (Hannah Arendt ed. & Harry Zohn trans., 1968).

²⁶ *Id.* at 221.

²⁷ *Id.* at 224.

²⁸ *Id.* at 228-29.

ity" that is only the "phony spell of [the] commodity."²⁹ Benjamin alludes to the possibility of another, alternative understanding of the celebrity with his reference to "the cult of the movie star"³⁰—one that suggests that celebrities may represent residual vestiges of the "auratic" in contemporary mass culture.

If the work of art's aura derives 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, illness, aging, and ultimately, death. It is difficult to envisage Elvis Presley without conjuring up images of health, vibrancy, and sexual energy followed by 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, resonance, and authority. 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.³¹ Celebrity images, I would contend, always maintain their aura because they bind subjects in affective and

²⁹ *Id.* at 231.

³⁰ *Id.*

³¹ See GRAHAM McCANN, MARILYN MONROE (1988) for an extended elaboration of a male feminist's reflections on his relationship to the Monroe persona, and DYER, *supra* note 13, for an insightful discussion of her position in newly emergent discourses of sexuality in the 1950s. Monroe's ongoing dynamic presence in contemporary sexual politics is addressed in MacCannell, *supra* note 14, a perceptive and scathing review of biographies written by Norman Mailer, Gloria Steinem, Anthony Summers, and Roger G. Taylor.

historically mediated relationships that preclude their appropriation as pure objects.³²

Stewart Ewen sees the power of the celebrity image as rooted in photography's simultaneous affinity to reality and fantasy,³³ and as a cultural response to modern social experiences of alienation, and anomie. The celebrity is an icon of the significance of the personal and the individual in a world of standardization and conformity—embodying the possibility of upward mobility from the mass, “[c]elebrity forms a symbolic pathway, connecting each aspiring individual to a universal image of fulfillment: to be someone, when ‘being no one’ is the norm.”³⁴

The seductive power of celebrity auras and their ubiquity in contemporary social life 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 authorial energies of those for whom identity is a salient issue and community an ongoing dilemma.

III. “DOING GENDER”: THE CELEBRITY FORM AND THE POLITICS OF POSTMODERNISM

What meaning do particular celebrities have in people's own social experiences? It is necessary to make philosophical arguments about the cultural losses contingent upon the commodification of the celebrity image socially concrete. In so doing, the political dimensions of this foreclosure on the use of cultural resources comes into relief. Marginal social groups are continually engaged in nascent constructions of alternative identities. The celebrity image plays a central role in many of these cultural practices.

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* 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.³⁵ Theorists of postmodernism

³² I am grateful to Kathleen Robertson for clarifying this point.

³³ STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* 90 (1988).

³⁴ *Id.* at 95-96.

³⁵ HAL FOSTER, *RECODINGS: ART, SPECTACLE, CULTURAL POLITICS* (1985).

assert that contemporary cultural theory must come to terms with "the textual *thickness* and the visual *density* of everyday life . . ." ³⁶ in societies characterized by pervasive media imagery and commodified forms of cultural representation. 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" ³⁷ and 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 and Paul Willis argue, consumption is always a form of production and people continually engage in cultural practices of *bricolage*—resignifying media meanings, consumer objects, and cultural texts in order to adapt them to their own interests and make them fulfill their own purposes. ³⁸ These practices are central to the political practices of those in marginal or subordinated social groups who forge "subcultures" with resources foraged from the mediascape. ³⁹

Subcultural practices involve improvisational cultural appropriations that affirm emergent cultural identities for those in subordinate social groups. ⁴⁰ Angela McRobbie argues that the frenzied expansion of mass media enables new alliances and solidarities across traditional spatial, racial, and cultural boundaries and resources for producing new meanings and new identities:

Sontag's linking [of camp] with . . . gay men, is instructive because she shows how a relationship evolved around a social

³⁶ Angela McRobbie, *Postmodernism and Popular Culture*, in *POSTMODERNISM: ICA DOCUMENTS 165* (Lisa Appignanesi ed., 1989).

³⁷ Andrew Ross, *Introduction to UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM* at xv (1988). See also Rosemary J. Coombe, *Encountering the Postmodern: New Directions in Cultural Anthropology*, 28 *CANADIAN REV. OF SOC. & ANTHROPOLOGY* 188 (1991); Rosemary J. Coombe, *Beyond Modernity's Meanings: Engaging the Postmodern in Cultural Anthropology*, 11 *CULTURE* 111 (1991); Rosemary J. Coombe, *Postmodernity and the Rumor: Late Capitalism and the Fetishism of the Commodity/Sign*, in *JEAN BAUDRILLARD: THE DISAPPEARANCE OF ART AND POLITICS* (1991); LINDA HUTCHEON, *THE POLITICS OF POSTMODERNISM* (1989); PAUL WILLIS, *COMMON CULTURE* (1990).

³⁸ Ross, *supra* note 37, at xv; MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (1984).

³⁹ The concept of the mediascape is borrowed from Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, in *GLOBAL CULTURE: NATIONALISM, GLOBALIZATION, AND MODERNITY* 295 (Mike Featherstone ed., 1990). He asserts 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 ideascapes.

⁴⁰ STEVEN CONNOR, *POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* 186 (1989). 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. See DICK HEBDIGE, *CUT 'N' MIX: CULTURE, IDENTITY, AND CARIBBEAN MUSIC* (1987).

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 . . . she is describing how forms can be taken over, and re-assembled . . . [which] often means outstripping their ostensible meaning. . . . And if media forms are so inescapable . . . then there is no reason to assume that 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.⁴¹

Mass media imagery provides people who share similar social experiences with the opportunity to express their similarity by imbuing with emotional energy a range of cultural referents to which media communications have afforded them shared access. It also enables them to author/ize their difference by improvising with those images to make them relevant to their social experiences and aspirations.

If the celebrity is an image that is both fantastic and real, embodying the realization of widespread aspirations for public affirmation, it is especially likely to attract the authorial energies of those in marginal groups for whom recognition, legitimacy, and 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 alternatives.

The concept of alternative gender identities is borrowed from Judith Butler's ovarian work, *Gender Trouble*, 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."⁴²

Feminist theory recognizes a distinction between sex and gender, asserting "that whatever biological intractability sex ap-

⁴¹ McRobbie, *supra* note 36, at 174-75.

⁴² JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* at xii (1990).

appears to have, gender is culturally constructed."⁴³ As Butler suggests, the inevitability or objective facticity of the relationship between sex, gender, desire, and sexual practice is potentially contested by the idea of gender as an undetermined interpretation of sex. The recognition of gender as a 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. Regimes of power institute, maintain, and try to 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.⁴⁴ 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 and provide critical opportunities for contesting the dominant sexual economy.⁴⁵

Identity is always a practice of articulation from within existing cultural forms; gender is performative, a doing and constituting of the identity it is purported to be. These performances are always constructed within the terms of discourse and power, and thus engage heterosexual cultural conventions.⁴⁶ Butler is interested in modes of "doing" gender that evoke, but do not constitute, simple reproductions of the terms of power that subvert the very constructs they mobilize, "displacing those naturalized and reified notions of gender that support masculine hegemony and heterosexist power."⁴⁷ For example, "numerous lesbian and gay discourses . . . [position themselves in] resignificatory relationships to heterosexual cultural configurations."⁴⁸ This repetition of heterosexual cultural forms may be the site of their denaturalization, bringing "into relief the utterly constructed status of the so-called heterosexual original."⁴⁹

Celebrity images provide important cultural resources for many practices of "doing" gender that subvert and reconstruct

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 17-23.

⁴⁶ *Id.* at 25-30. Butler's position here is congruent with my stance in Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 *LAW & SOC. INQUIRY* 69 (1989), 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.

⁴⁷ BUTLER, *supra* note 42, at 33-34.

⁴⁸ *Id.* at 121.

⁴⁹ *Id.* at 31.

dominant forms of gender identity. The denaturalization of heterosexual cultural forms is readily apparent in gay camp subculture, a phenomenon I have already alluded to as involving an engagement with media-disseminated celebrity images. 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."⁵⁰ 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 1950s and 1960s 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. 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." Camp contained a kind of commentary on the ongoing feat "of *survival* in a world dominated by the tastes, interests, and definitions of others."⁵¹

This is explicated by Esther Newton, whose ethnographic study of drag queens and urban camp subculture in the late 1960s 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.⁵² 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. 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 statement[s] of drag questions 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"

⁵⁰ ANDREW ROSS, NO RESPECT: INTELLECTUALS AND POPULAR CULTURE 159 (1989).

⁵¹ *Id.* at 144.

⁵² ESTHER NEWTON, MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA 3 (1979).

sex. . . . [It] says that sex-role behavior is an appearance [or performance].⁵³

The most popular stars in the camp pantheon, subject of most frequent impersonation, were "glamorous" in highly mannered ways that indicated an awareness of the artifice in which they were engaged. This celebration of the personas of those who subtly mocked the corny flamboyance of femaleness "defetishize[d] the erotic scenario of woman-as-spectacle."⁵⁴ 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.

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 1974 play *Hosanna*⁵⁵ 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. Camp has, however, enjoyed something of a resurgence in the 1980's, confluent, perhaps, with the influence of Foucault, poststructuralism, and a revival of the credibility of the notion of the socially constructed subject.

Lesbian engagement with celebrity images is a less documented and more recent phenomenon. One 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 in her discussion of a performative gender identity she calls lesbian hermaphroditism. This "erotic sensibility,"⁵⁶ worn, felt, and enacted by a number of lesbians, is a "fictionalized sexuality"⁵⁷ that finds its performative significations in mass media icons which it replicates in ironic, playful, and assertive reconfigurations:

⁵³ *Id.* at 103.

⁵⁴ Ross, *supra* note 50, at 159.

⁵⁵ MICHEL TREMBLAY, *HOSANNA* (John Van Burek & Bill Glassco trans., Vancouver 1974).

⁵⁶ Sue Golding, *James Dean: The Almost Perfect Lesbian Hermaphrodite*, in *SIGHT SPECIFIC: LESBIANS AND REPRESENTATION* 49 (Dionne Brand ed., 1988).

⁵⁷ *Id.* at 50.

I know you've seen the type: no tits, no cock, oozing with a kind of vulnerable "masculinity," 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. But she's public . . . [not] simply "out of the closet". . . . [S]he is the orphan of a people's imaginary . . . [including] 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.⁵⁸

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. Demonstrating that gender identity (construed as a causal or natural relationship among sex, gender, sexual practice, and desire) is the effect of a regime of power, 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 biological chromosome content, nor is it a '60s "androgyny" that built a sexual aesthetic around an "absence" of the sexual organs, or a '70s sexual aesthetic that ironized the ways in which society enforces gender specific clothing.⁵⁹ Rather, this gender rebel performs with her body an erotic identity that is an embodied performative—"the defiant aesthetic of the erotic masculine shot through with the voluptuousness of the female sexual organs."⁶⁰

An "erotic mutant," "a fractured playfulness of social icons (like the Dean image, although Elvis Presley offers other pos-

⁵⁸ *Id.* at 52.

⁵⁹ *Id.*

⁶⁰ *Id.*

sibilities) copied over and over,"⁶¹ by the lesbian hermaphrodite exemplifies the sex/gender/desire/practice matrix as a performatively enacted signification that parodies, proliferates, and subverts gendered meanings. "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 is illustrated by the authorial activities of *Star Trek* fanziners, who construct communities and articulate new gender identities by literally re-writing their favorite television series characters.

Star Trek fans constitute a social and cultural network that is international in scope. Within this community, there are distinct groups of fans that organize around the production, circulation, and consumption of fanzines.⁶² This subculture is explored with great sensitivity by Camille Bacon-Smith in her sparkling ethnography, *Enterprising Women*. The fanzine community is almost exclusively female and predominantly heterosexual. It involves middle class women who work as housewives and in nursing, teaching, clerical, and service occupations.⁶³ Fans exchange letters, distribute newsletters, create artwork, make videotapes, and produce and circulate fanzines that contain original fiction, poetry, and illustrations by women across North America, Britain, and Australia.⁶⁴ In 1988, it was estimated that there were 300 publications that enabled fans to explore aspects of television series; 120 of them centered on *Star Trek*,⁶⁵ a number which no doubt underestimates the production of fan literature because it does not include literature circulated only in photocopy circuits or more covertly circulated publications.⁶⁶

⁶¹ *Id.*

⁶² For a discussion of the social and institutional structures of fan communities see, CAMILLE BACON-SMITH, *ENTERPRISING WOMEN: TELEVISION, FOLKLORE, AND COMMUNITY* at ch. 2 (1992).

⁶³ *Id.*; Henry Jenkins, *Star Trek Rerun, Reread, Rewritten: Fan Writing as Textual Poaching*, 5 *CRITICAL STUD. IN MASS COMM.* 85 (1988); Constance Penley, *To Boldly Go Where No Woman Has Gone Before: Feminism, Psychoanalysis, and Popular Culture*, Public lecture delivered at the Public Access series "Capital/Culture," Toronto (Apr. 24, 1990) and at the conference, "Cultural Studies Now and in the Future" sponsored by the Unit for Criticism and Interpretive Theory, University of Illinois at Urbana-Champaign (Apr. 5-9, 1990).

⁶⁴ Usually produced out of women's homes, fanzines are generally mimeographed or photocopied reproductions, but some have become more sophisticated with the introduction of computerized desktop publication technology; few issues are less than a hundred pages long.

⁶⁵ Jenkins, *supra* note 63, at 89.

⁶⁶ Penley, *supra* note 63, estimates 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). These publications are sold at cost, relying upon subscriptions and often pre-payment to finance

In their creative endeavors, fanzine contributors 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. 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. Issues of gender roles, sexuality, and the tension between family obligations and professional ambition are explored in the *Star Trek* future world—one which 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.⁶⁷

In most stories, women are engaged in rewriting the masculine gender rather than in imagining alternative feminine ones.⁶⁸ Many stories involve male friendships: and two significant genres of fanzine fiction are “Slash” (or homoerotic) and “Hurt-Comfort”⁶⁹ stories, both of which center on relationships between the male characters. 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.⁷⁰

In “Slash” fiction, women write erotic stories and draw illustrations depicting a love relationship between Kirk and Spock.⁷¹ Fearing social ridicule, loss of employment, and possibly legal

production and distribution costs. BACON-SMITH, *supra* note 62, at 3; producers are motivated more by the desire to express identity and establish community than any monetary interest and often operate at a loss.

⁶⁷ Jenkins, *supra* note 63, at 93-97.

⁶⁸ It appears that stories focusing on women represent less than a quarter of the stories fanziners read, according to a 1990 survey reported in *Enterprising Women*. BACON-SMITH, *supra* note 62, at 157.

⁶⁹ Hurt/Comfort stories are those in which one male character is hurt and suffers and the other comforts and nurses him. For a more in depth discussion of Hurt/Comfort stories, see BACON-SMITH, *supra* note 62, at Chapter 10.

⁷⁰ *Id.* at 212-18.

⁷¹ Erotic fiction is also written about the characters in *Starsky and Hutch*, *Blake 7*, and *The Professionals*. For a longer discussion of Slash fiction writing, see Constance Penley, *Brownian Motion: Women, Tactics, and Technology?*, in *TECHNOCULTURE* 135 (1991) and

repercussions⁷² fanzine writers often write such stories under pseudonyms. Much of this literature circulates only through complex subterranean photocopying networks in order to evade exposure outside of the group.⁷³ So well-hidden is the circuit that only the most experienced readers and writers have access to it. Bacon-Smith describes a number of tasks performed by the homoerotic romance 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, to the slow thoroughness and sensitization of the whole body, the sexuality expressed is female.⁷⁴ Bacon-Smith, however, asserts that these women are writing consciously and deliberately about men, exploring who men are and reconstructing them into people with whom it might be more comfortable to share life, love, and sexual relationships. These women 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.⁷⁵

In all of these stories the “male” characters are given a combination of gender traits—Kirk’s “feminine” traits are matched to Spock’s “masculine” ones and vice-versa. Each shares aspects of traditional gender roles. In this way, new genders are inscribed on “male” bodies, and new desires, experiences, feelings, and practices may therefore proliferate.⁷⁶ As well as being alternatively engendered, the male characters are freshly embodied; their bodies are inscribed with ranges of sensitivity, expanded zones of erogeneity and a heightened receptivity to tactile

Constance Penley, *Feminism, Psychoanalysis and the Study of Popular Culture*, in CULTURAL STUDIES (1991).

⁷² Constance Penley told me in conversation that 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. BACON-SMITH, *supra* note 62, at 251 n. 6, also notes that the fandom has had an uneasy relationship with Lucasfilm but does not elaborate.

⁷³ *Id.* at 314. Not all *Star Trek* fans share the same attitudes about this fiction. 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. *Id.* at 334-37.

⁷⁴ See BACON-SMITH, *supra* note 62, at 371.

⁷⁵ *Id.* at 379-81.

⁷⁶ This would help to explain why fans do not necessarily see the sexual relationship between Kirk and Spock as a homosexual one. Penley, *supra* note 63. 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.* For similar reasons, fans don’t see even the most sexually graphic material as pornographic. BACON-SMITH, *supra* note 62, at 369. Such categories are simply inappropriate in these alternative universes.

pleasures and physical comfort. Their heroes' pain, decontextualized in the mass media, is re-united by fanzine writers with both physical and psychological suffering. The male characters then, are reconstructed as fully emotional and sentient beings. Arguably, the fanzine writers perform the most thorough practices of "doing gender" that have been 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 community as they do so.

IV. JURIDICAL PRODUCTIONS OF CULTURAL SPACE(S)

Superficially, these subcultural practices seem distant, if not utterly divorced from the legal regime of personality rights; but they occupy a space intersected by a multiplicity of relations between law and cultural form. I am concerned here, not simply with law as a set of prohibitions, but with law as it is imbricated in the everyday life of cultural practice.⁷⁷ The risks these people run under legal regimes of prohibition are real 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 fanzines or performers in gay and lesbian subcultures could be held to violate personality 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 be threatened with potential legal action.

Juridical powers, however, are productive as well as prohibitive; the law is generative of knowledges, spaces, categories, identities, and subjectivities.⁷⁸ The law of publicity rights, by

⁷⁷ For longer discussions of this approach to thinking about law, see Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) and Coombe, *supra* note 46.

⁷⁸ In *History of Sexuality Volume I: An Introduction*, Michel Foucault argued that juridical regimes must be understood as productive rather than merely prohibitive—producing what they purport merely to represent. MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION* (Robert Hurley trans., Vintage Books 1980)(1976). For a general discussion of the socially constitutive character of law, see Christine 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

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 practices. It produces fixed, stable identities authored by the celebrity subject, but simultaneously creates 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 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 implicitly denies that any cultural value is being produced elsewhere.

Power may produce resistance in the Foucauldian sense, 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 alternative modes of appreciation, activities of creative appropriation enable fans to comment indirectly on gender ideology, law, and the commodity form.

Such commentary is especially cogent in the fanzine context. Fans don't see *Star Trek* as something that can be reread, but as something that must be rewritten in order to make it more responsive to their needs and a better producer of personal and community meanings.⁷⁹ 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

to industrial capitalism, see Rosemary J. Coombe, *Contesting the Self: Negotiating Subjectivities in Nineteenth Century Ontario Defamation Trials*, 11 *STUD. L., POL. & SOC.* 3 (1991).

⁷⁹ Jenkins, *supra* note 63, at 87.

same time they have developed a complex moral economy⁸⁰ in which they legitimize their unorthodox appropriation of the media texts, characters, and personas. 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.⁸¹ As one fan writes: “[W]e have made [Star Trek] uniquely our own, so we do 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.”⁸² Fan writers exercise an ethic of care with regard to the characters—a care they fear commercially motivated parties frequently do not share.⁸³

Although fanziners, gay camps, and lesbian hermaphrodites are not engaged in practices in direct opposition to the law (however 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 signifiers whose meanings they create may be one of admiration or antagonism, irony, parody, fear, or complicitous critique.⁸⁴ In any case, the law generates the space for a proliferation of politics as well as identities, and polities as

⁸⁰ The term is borrowed from E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, PAST AND PRESENT, Feb. 1971, at 76.

⁸¹ Jenkins, *supra* note 63, at 100.

⁸² *Id.*

⁸³ 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, plots, films, television episodes, videos, 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 profiting from their writing, tape-making, and artistic activities, but the possibility that 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 legal risks are only very 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 culture in which they engage. BACON-SMITH, *supra* note 62, at 302-452.

⁸⁴ For a discussion of complicitous critique as an attitude symptomatic of postmodernism, see LINDA HUTCHEON, *THE POLITICS OF POSTMODERNISM* (1989).

well as genders, as people create their own ethical distinctions between expression and theft. Communication always involves borrowing the images of alterity. Only recently has it become a form of trespass.

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 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.⁸⁵

Liberal legal discourse addresses the expression of identity, community, and political aspiration under the rubric of free speech or freedom of expression, a field of doctrine that clings tenaciously to Enlightenment concepts in the face of late capitalist realities. As Owen Fiss notes, the constitutional protections of freedom of speech rest on increasingly anachronistic premises that do not address the salient characteristics or challenges of capitalist mass communications systems in North America.⁸⁶ Pre-supposing that the biggest threat to public discourse is the silencing of the individual speaker by the state, “the Free Speech Tradition can be understood as a protection of the street corner speaker.”⁸⁷ Assuming a natural division between public and private actors, free speech simply protects all “private” actors, regardless of their power, against the evils of state intervention, notwithstanding that in an age of mass media conglomerates, threats to the autonomy of speech and public debate are more likely to come from extremely powerful “private” actors who control the most influential circuits and contents of communication.⁸⁸ Increasingly, a person’s right to political speech may encroach upon another’s rights of property (the need to picket in shopping malls, for example) and property rights generally prevail unless the property holding citizen is understood to hold the

⁸⁵ I explore these contradictions in more detail in *Publicity Rights*, *supra* note 22.

⁸⁶ Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

⁸⁷ *Id.* at 1408.

⁸⁸ *Id.* at 1410-13.

property for public use (and thus to exercise a “governmental” function so that she must be treated like a state).

Critics on the left argue that the public/private and state/citizen dichotomies of freedom of speech law mystify and distort our understanding of contemporary political life

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. . . . [T]he 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 nor less politically neutral or activist than opposition to them. The question is not whether government should intervene, but when and how⁸⁹

When “public” speech interests come up against “private” property interests, the latter almost invariably triumph, ensuring that “the law insulates vast sectors of the social hierarchy from official scrutiny and public accountability.”⁹⁰ Those who hold “private” property are not required to consider the “public” interest in free speech in their exercise of 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.”⁹¹

Laws commodifying the celebrity image inevitably come up against concerns about freedom of expression, but they do so sporadically, yielding inconsistent and confused rationales that reveal the inadequacies of liberal discourse in the cultural conditions of postmodernism. It is generally accepted that rights of publicity must yield to social interests in freedom of expression, “when first amendment principles outweigh the celebrity’s interest in compensation.”⁹² But when will this be the case?

⁸⁹ Alan Hutchinson, *Talking the Good Life from Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIB. 17, 21 (1989).

⁹⁰ *Id.* at 22.

⁹¹ *Id.*

⁹² Lawrence, *supra* note 3, at 332.

Courts routinely assert that the First Amendment protects publication of news of a celebrity but does not protect commercial uses of celebrity images.⁹³ Often this is premised on a distinction between fact and fiction—factual accounts about celebrity behavior do not violate their publicity rights because celebrities are the subject of legitimate news.⁹⁴ Newspapers, films, and documentaries are not understood to be engaged in commercial purposes when they publish news, notwithstanding that their production, distribution, and exhibition is a large commercial enterprise carried on for private profit.⁹⁵ Distinctions between fact and fiction, publishing news about a celebrity and commercially exploiting her image, are notoriously difficult to maintain in the promotional culture⁹⁶ of postmodernity. The courts' efforts to employ and maintain such distinctions yield contradictory and sometimes ludicrous results, as the following cases, drawn from the same jurisdiction, illustrate.

Ann-Margret sued *High Society* magazine for a violation of publicity rights for the unauthorized use of a semi-nude photograph taken from one of her films. The court dismissed the action on the basis that the photograph was newsworthy and its use protected.⁹⁷ The same year, a model brought legal action for the unauthorized use of a nude photograph in the same magazine. The court rejected the defendant's claim that the First Amendment protected use of the photos because the model was not shown participating in a newsworthy event; the photographs, therefore, were not a matter of public interest.⁹⁸ When a couple found their nude photographs in a commercially distributed mass market guide to nude beaches, however, a court denied them relief and upheld the publisher's right to disseminate information of public interest; the photographs were not being used for commercial purposes.⁹⁹

⁹³ See, e.g., *Grant v. Esquire, Inc.*, 367 F. Supp. 876 (S.D.N.Y. 1973); *Rinaldi v. Village Voice*, 359 N.Y.S.2d 176 (Sup. Ct. 1974), *cert. denied*, 423 U.S. 883 (1975); *Garner v. Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951).

⁹⁴ *Garner*, 97 F. Supp. at 549.

⁹⁵ *University of Notre Dame du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301 (Sup. Ct.), *aff'd*, 259 N.Y.S.2d 832 (1965).

⁹⁶ The concept of promotional culture is developed by Andrew Wernick, *Promotional Culture*, 15 CAN. J. POL. & SOC. THEORY 260 (1991). He contends that North American culture has come to present itself at every level as an endless series of promotional messages. Advertising, besides having become a most powerful institution in its own right, has been effectively universalised as a signifying mode.

⁹⁷ *Ann-Margret v. High Soc'y Magazine*, 498 F. Supp. 401 (S.D.N.Y. 1980).

⁹⁸ *Hansen v. High Soc'y Magazine, Inc.*, 5 Media L. Rep. (BNA) 2398 (Sup. Ct.), *rev'd on other grounds*, 76 A.D.2d 812, 429 N.Y.S.2d 552 (1980).

⁹⁹ *Creel v. Crown Publishers*, 115 A.D.2d 414, 496 N.Y.S.2d 219 (1985).

Law students are trained to rationalize and distinguish such cases to show how categories like disseminating information in the public interest and commercial exploitation of another's name and likeness are rational, desirable, and necessary. Celebrities and the media industries reward them handsomely for their efforts. Even the most determined law student, however, might have difficulty supporting a decision which held that the unauthorized use of "before and after" photos of a girl in a teen magazine—replete with the brand names of the products used to effect the transformation—was a newsworthy use of her name and likeness rather than a commercial exploitation.¹⁰⁰

The underlying distinction between fact and fiction that must provide the scaffolding for this conceptual structure becomes increasingly fragile in postmodernity as societies become saturated with signification and the value of the "hyperreal" accelerates.¹⁰¹ Courts have found it increasingly difficult to distinguish truth from falsity, and fact from fiction, or to limit First Amendment protection to objective renderings that correspond to some knowable reality. They maintain, however, the philosophical edifice of "the mirror of nature"¹⁰² by developing ever more distinctions within distinctions to keep its structure intact.

A defendant is held to forfeit the privilege of disseminating newsworthy information if her use is materially and substantially false and she has recklessly disregarded its falsity.¹⁰³ When a comedian ran a mock campaign for President as a publicity stunt, however, he was unable to prevent an entrepreneur from distributing a poster bearing his photograph with the caption, "For President."¹⁰⁴ The court determined that the poster was newsworthy and thus that the defendant was engaged in spreading information rather than in commercial exploitation. It did not address the issue of whether the "information" defendant disseminated was to be characterized as materially false (the comedian was not running "For President") or factual information about a fictitious candidacy (a true account of a falsity). When Elvis Presley died, however, those who held his publicity rights

¹⁰⁰ *Lopez v. Triangle Communications, Inc.*, 421 N.Y.S.2d 57 (1979).

¹⁰¹ For discussions of "hyperreality," see UMBERTO ECO, *TRAVELS IN HYPERREALITY* (1989) and JEAN BAUDRILLARD, *SIMULATIONS* (1983). See also JEAN BAUDRILLARD, *SELECTED WRITINGS* 166-84 (Mark Poster ed., 1988); DOUGLAS KELLNER, *JEAN FROM MARXISM TO POSTMODERNISM AND BEYOND* 60-92 (1989).

¹⁰² The phrase, of course, is borrowed from RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

¹⁰³ *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir.), *cert. denied*, 471 U.S. 1054 (1984).

¹⁰⁴ *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501 (Sup. Ct. Spec. Term 1968).

successfully stopped an entrepreneur from marketing a picture of Presley "In Memorium."¹⁰⁵ Perhaps the New York courts, like the weekly tabloids, doubt that "the King" has truly departed.

Accommodating the immense potential value in fictionalizing the lifestyles of the rich and famous has provoked courts to articulate new distinctions within the fact and fiction dichotomy. A New York court held that a right of publicity will not be recognized where a fictionalized account of a public figure's life is depicted in such a way that the audience knows (truly?) that the events are falsely represented.¹⁰⁶ Another New York bench, however, decided that allowing the publication of a known fictional bibliography of a (factual) baseball player would take freedom of expression too far given the defendant's limited research efforts to verify his story.¹⁰⁷ The book was seen as a clear case of "a commercial exploitation."

The efforts of a film producer to verify his findings, however, were not investigated when he represented a deceased pilot's alleged reappearance as a ghost in his mass marketed movie. The pilot served as captain aboard an Eastern Airlines flight that crashed in 1972. After the crash, people reported that the captain and crew of the fated flight appeared as ghosts aboard other Eastern planes. Relatives of the deceased brought action for unauthorized commercial use of name and likeness against the maker of the film that reconstructed these events.¹⁰⁸ The filmmaker prevailed because of his right to disseminate information "of current and legitimate public interest" under the "newsworthiness" section of the Florida statute.¹⁰⁹ If the case were considered in New York, the following questions might have been addressed: Was the information "true"? Was it substantially "false"? Did the filmmaker recklessly disregard its falsity, or was he providing a fictionalized account of a real person's activities? Will a fictionalized version of a real person's activities, as imagined by other people, be protected? Perhaps it depends how carefully you've verified the falsity of your fabrication and how easily the audience can identify the activities as fictional. But what if most of them believe in ghosts? In any case, there is a

¹⁰⁵ *Factors Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977), *aff'd sub nom. Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir.), *cert. denied*, 440 U.S. 908 (1978).

¹⁰⁶ *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978).

¹⁰⁷ *Spahn v. Julian Messner, Inc.*, 250 N.Y.S.2d 529 (Sup. Ct. Spec. Term 1964), *vacated*, 387 U.S. 239 (1967).

¹⁰⁸ *Loft v. Fuller*, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981).

¹⁰⁹ FLA. STAT. ch. 540.08 (1990).

legitimate public interest in disseminating (true?) information about (actual) ghost sightings in the state of Florida.

Attempting to limit freedom of speech defenses in publicity rights claims to the dissemination of factual information in the name of newsworthiness is conceptually boggling, culturally untenable, and politically pernicious. We value freedom of expression not as a means of spreading verifiable information about a world of brute fact, but as the activity with which we culturally construct worlds, create social knowledges, forge ethics, and negotiate intersubjective moral truths whose credence is never established by a measurable correspondence to an objective reality. Self, society, and identity are realized only through the expressive cultural activity that reworks those cultural forms that occupy the space of the social imaginary.¹¹⁰

Political theorists of the postmodern condition point to the necessarily cultural character of contemporary politics. The social and political orders in which we live are contingent creations that we ourselves discursively construct. It is through creative cultural practices of articulation that the social world is given meaning, and, hence, it is always contestable and open to re-articulations. Ernesto Laclau and Chantal Mouffe, in particular, see practices of articulating social difference as central to democratic politics.¹¹¹

All knowledges of social identity are symbolic systems of difference, and representational structures of difference are, by their very nature, incapable of achieving closure. No structure of differential identity is ever final; new forms of difference are always emergent, and new social identities continually assert their legitimacy and presence. Indeed, advances in the democratization of Western societies are dependent upon "autonomous initiatives starting from different points within the social fabric,"¹¹² as new groups constitute themselves politically. Laclau and

¹¹⁰ The concept of the social imaginary is developed in CORNELIUS CASTORIADIS, *THE IMAGINARY INSTITUTION OF SOCIETY* (Kathleen Blamey trans., MIT Press 1987) (1975).

¹¹¹ See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (Winston Moore & Paul Cammack trans., 1985); Ernesto Laclau & Chantal Mouffe, *Post Marxism Without Apologies*, *NEW LEFT REV.*, Nov./Dec. 1987, at 79 [hereinafter *Post-Marxism*]; Chantal Mouffe, *Radical Democracy: Modern or Postmodern?*, in *UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM* 31 (Andrew Ross ed., 1988); see also, Fred Dallmayr, *Hegemony and Democracy: On Laclau and Mouffe*, 1 *STRATEGIES: J. THEORY, CULTURE, & POL.* 29 (1988); FRED DALLMAYR, *MARGINS OF POLITICAL DISCOURSE* (1989); Bradley Macdonald, *Towards a Redemption of Politics: An Introduction to the Political Theory of Ernesto Laclau*, 1 *STRATEGIES: J. THEORY, CULTURE, & POL.* 5 (1988).

¹¹² *Post-Marxism*, *supra* note 110, at 105.

Mouffe refuse to privilege any particular subject positions, seeing the contemporary political world as one of multifaceted struggles amongst peoples continually articulating new social identities from discursive resources. Democratic politics is essentially a dialogic process whereby social identities are continually emergent in political articulation. A radical and plural democracy must maintain optimal conditions for encouraging such articulations.

Articulations of identity are possible only in conditions of polysemy, symbolic ambiguity, and a surplus of meaning, where the necessary cultural resources for contesting meaning and asserting identity are freely accessible. In the condition of postmodernity, our cultural resources are increasingly the properties of others, and meaning is the monopoly of an elite who control the commodified texts that pervade our social lives.¹¹³ These are the cultural images with which politically salient forms of difference may increasingly be shaped. Whose identities will be authorized and whose authorship will be recognized? As the cultural cosmos in which we live becomes increasingly commodified, we will need to define and defend the cultural practices of articulation with which we author the social world and construct the identities we occupy within it.

¹¹³ An extended version of this argument that draws its examples from the fields of copyright and trademark law may be found in Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

