Cross Dressing and the Criminal

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INTRODUCTION

The beginning of all Wisdom is to look fixedly on Clothes, or even with armed eyesight, till they become transparent.
—Thomas Carlyle[1]

Without a doubt, feminism continues to require its own forms of serious play.
— Judith Butler[2]

Notwithstanding its title, this Article is only somewhat about transvestites who commit bone-chilling crimes. Those fictional characters we know so well—Norman Bates in *Psycho*,[3] who dons his dead mother's clothes before offing his female victims; Dr. Robert Elliott in *Dressed to Kill*,[4] who shares a split personality with a razor wielding transvestite; Buffalo Bill in *The Silence of the Lambs*,[5] who so desperately wants to inhabit a woman's body that he literally flays his female victims for their skin, "making himself a girl suit out of real girls"[6]—these characters make appearances in this Article, but play second stage. Ditto for real life stories of cross dressing murderers like Alice Mitchell who, in 1892, cross

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1. THOMAS CARLYLE, SARTOR RESARTUS 52 (Oxford Univ. Press 1987) (1830-31).
2. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY, at viii (1999).
3. PSYCHO (Paramount Pictures 1960).
4. DRESSED TO KILL (Filmways Pictures 1980).
5. THE SILENCE OF THE LAMBS (Orion Pictures 1991).
6. This quote comes from the novel on which the film was based. *See* THOMAS HARRIS, THE SILENCE OF THE LAMBS 149 (1988).

dressed as a man, proposed marriage to her beloved, and then proceeded to slit her beloved's throat.[7] These fictional and non-fictional cases raise interesting criminal law issues, such as the requirement of a voluntary act, and the defenses of extreme emotional disturbance and diminished capacity, to name a few. Those issues, however, are not the focus of this Article.

Similarly, this Article is only somewhat about Lord Cornbury, Governor of the Royal Provinces of New York and New Jersey from 1702 to 1708, who was not only a criminally corrupt politician (so they say), but also a very public cross dresser (so they say). As one observer put it, "His dressing himself in women's clothes was so unaccountable that if hundred[s] of spectators did not daily see him it would be incredible."[8] Another critic lodged a complaint with the Secretary of State, demanding that something be done about Lord Cornbury's "dressing publicly in woman's clothes every day."[9] Lord Cornbury is even said to have opened the Assembly in women's dress. When "some of those about him remonstrated, his reply was, 'You are very stupid not to see the propriety of it. In this place and particularly on this occasion I represent a woman [the Queen] and ought in all respects to represent her as faithfully as I can.'"[10] Whether he was dressed in women's clothes when he allegedly misappropriated funds from the state coffers is, alas, not known.

Only narrowly, too, is this Article about the trial of Joan of Arc, perhaps the most famous cross dresser of all time. Joan of Arc refused to marry the man her parents had chosen for her, and instead cut her hair, threw off her feminine clothes, cross dressed as a knight, and embarked on a religious crusade for which she became famous. It was her cross dressing that riled her inquisitors to no end, not her supposed heresy. It was her cross dressing that appeared repeatedly in the charges against her: "That said [Joan] put off and entirely abandoned woman's clothes, with her hair cropped short and round in the fashion of young men, she wore shirt, breeches, doublet, with hose joined together. . . ."[11]

And it was her persistence in cross dressing, even when bribed with the right to hear mass *if only she would dress like a woman*, that arguably led to her execution. Her obstinacy is clear in the final charge against her, the one filed after she recanted, agreed to don female clothing, but then re-

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7. *See* Lisa Duggin, *The Trial of Alice Mitchell*, 18 SIGNS 791 (1993).

8. *See* Letter from Robert Livingstone to Mr. Lowndes, *in* 3 CALENDAR OF TREASURY PAPERS, 1702-07, at 512 (Joseph Redington ed., 1874).

9. *See* Letter from Lewis Morris to the Secretary of State (Feb. 7, 1707/8) *in* 11 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 538 (E.B. O'Callaghan ed., 1855).

10. *See* 1 LORD SYLVESTER DOUGLAS GLENBERVIE, THE DIARIES OF SYLVESTER DOUGLAS (LORD GLENBERVIE) 77 (Francis Bickley ed., 1928).

11. THE TRIAL OF JEANNE D'ARC 152-53 (W.P. Barrett trans., 1931).

sumed male apparel as soon as she thought the inquisitors' backs were turned. That charge alleged, "she had worn them and still wears them . . . to such an extent that this woman had declared she would rather die than relinquish these clothes."[12] Joan of Arc, obstinate Joan, cross dressing Joan, was promptly executed. Only later, after her execution, would she be canonized, joining a surprisingly long list of other cross dressing saints.[13]

Finally, in only a narrow sense is this Article about the trial of Shi Pei Pu and former French diplomat M. Boursicot of *M. Butterfly* fame.[14] Or for that matter, about judges in drag, I mean robes,[15] or English barristers in wigs,[16] or the recent sentencing of two men requiring them to wear dresses down Main Street in Ohio.[17]

Discursively, this Article is informed by all of these things. However, its focus is at once more general, and more specific. In general, this Article is about the role of dress and appearance in criminal law. It is about attending to dress and appearance as sign systems with consequences in the criminal arena, from the bank robber who is identified by his ski mask or balaclava in summer, to the teenager who *raises* reasonable suspicion, and thus *becomes* suspect, because of his baggy jeans and hooded sweatshirt, to the rape victim who is doubted, and thus somehow raises reasonable doubt, because of how *she* was dressed. As such, the first part of this Article takes up Carlyle's injunction that we "look fixedly on Clothes." It examines the role the criminal law has played in regulating dress, from sumptuary laws to laws prohibiting cross dressing to judicially sanctioned assumptions about dress and appearance. And it examines how in regulating dress, these laws and assumptions also policed, and continue to police, boundaries of gender, class, and race.

Drawing upon feminist and literary theory, the second part of this Arti-

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12. *Id.* at 227-28.

13. As Marjorie Garber put it in her exploration of cross dressing, "transvestite female saints of the Middle Ages were legion as well as legend." MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 213 (1992).

14. Boursicot was accused of passing French government secrets to his lover Shi Pei Pu, a Chinese opera star whom he believed for twenty years to be female but in fact was a cross dressing male. The story became the basis for the play and subsequent film *M. Butterfly*. For more on this case, see Joyce Wadler, *The True Story of M. Butterfly: The Spy Who Fell in Love with a Shadow*, N.Y. TIMES, Aug. 15, 1993, at A30.

15. Of course, judges have appeared in actual drag. Chief Justice John Roberts, for example, performed in drag in his high school's production of *You're a Good Man, Charlie Brown*. Justice Roberts played Peppermint Patty. *See* http://www.courttv.com/news/supreme/091405_robertsfacts_ctv .html.

16. On this practice, which persists in England and many Commonwealth countries, including those in Africa and the Caribbean, see Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 WIS. L. REV. 1129.

17. *See* Tim Doulin, *Some Judges Fashion Punishment to Fit Crime*, COLUMBUS DISPATCH, Nov. 28, 2001, at C13 (describing shaming punishment of two men who had thrown beer bottles at a car and were rude to the woman driving the car).

cle narrows its focus to cross dressing.[18] It argues that, by definition, cross dressing troubles the assumed binary relation between "men" and "women" and shows that gender[19] is labile. Cross dressing plays with the very terms "man" and "woman," destabilizing them, and prompts the onlooker to question whether the terms are biological or constructed. In doing so, it problematizes the assumption that gender follows sex. Indeed, as literary theorist Marjorie Garber has observed, the figure of the cross dresser signals the instability of categories themselves, functioning as a "critique of binary thinking, whether particularized as male and female, black and white, yes and no, Republican and Democrat, self and other, or in any other way."[20] It does so by prompting the onlooker to rethink assumptions about categories. This is especially true when we extend cross dressing to encompass not only cross *gender* dressing, but also cross *class/status/race* dressing as well, a project I take up in this section. Cross dressing then, as a metaphor, as a sign, as a practice, has the potential to question not only expectations about gender, but also expectations about race, sexuality, class, status, and so on. The second part of this Article concludes by taking up Judith Butler's suggestion that feminism could benefit from serious play. But not just feminism. Serious play, I think, can do a lot for revealing and challenging racism, heterosexism, classism, whatever-ism one can name.

The third and final part of this Article offers a starting point for putting theory to work. It does this by proffering cross dressing, or more specifically the imaginative act of cross dressing others, as a practice to disrupt inappropriate biases in the criminal arena. Such imaginative acts, I argue, would not only have the salutary effect of foregrounding such biases. It would also allow decision makers to override them. To illustrate how such imaginative acts of cross dressing might work in practice, this part ends by using cross dressing to reexamine and re-imagine a range of criminal law cases, from the highly publicized prosecutions of Martha Stewart and O.J. Simpson, to sexual assault and death penalty cases.

When I was five or six, or maybe seven, while my older sister played dress-up in our mother's clothes and earrings, and my older brother ran

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18. The term "cross dressing," of course, suggests different things to different people. As Bullough and Bullough observed, cross dressing is "a simple term for a complex set of phenomena. It ranges from simply wearing one or two items of clothing to a full-scale burlesque, from a comic impersonation to a serious attempt to pass as the opposite gender, from an occasional desire to experiment with gender identity to attempting to live most of one's life as a member of the opposite sex." VERN L. BULLOUGH & BONNIE BULLOUGH, CROSS DRESSING, SEX, AND GENDER, at vii (1993). Here, I use the term to encompass all of these gender crossings, since they all challenge binary gender roles. I also extend the term to include other crossings of socio-cultural boundaries.

19. By gender, I am referring to socially constructed identities such as masculine or feminine. By contrast, sex refers to biological distinctions. Part of the task of my work has been to decouple gender from sex. *See, e.g.*, I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991).

20. GARBER, *supra* note 13, at 10-11.

about shouting "Bang! Bang!" in his cowboy outfit, I played with paper dolls, transfixed by the transformations I could create by merely substituting one paper outfit for another. It was similar to Cinderella's transformation from a poor stepsister to a princess through the magic of a gown to wear to the ball, or a wolf transforming himself into Little Red Riding Hood's grandmamma by donning a frilly nightcap, or perhaps even more insidious, dressing himself in sheep's clothing. Years later, maybe I was eight or nine, my sister and I spent days on end playing a board game called Mystery Date. The object was to choose the right guy. The thing is, there was only one guy in the game. He was just dressed differently depending on the role of the dice. The object was to get him in a tuxedo, because this established him as having a certain class, a certain status, a certain presence. Of course the guy in the game was white, blond and blue-eyed, but it would be years before I would reflect upon these racial, class, gender, and sexuality implications. Just as it would be years before I would wonder if Cinderella could have been prosecuted for violating sumptuary laws. Back then, it was only the magic of clothes I noted. Magic that could be subversive, like Bugs Bunny in drag to outwit Elmer Fudd, or like a Tellytubby brandishing a purse. Transvestic, transgressive, transformative. And then, just when I thought I was beginning to understand that magic, to see through clothes or, as Carlyle would say, render them transparent, just when I was beginning to see through these games, my parents impressed upon me that I should put away these childish things.

Now, I'm bringing them out again.

I. TO LOOK FIXEDLY ON CLOTHES

People are embarrassed and rather afraid to take seriously anything to do with dress and appearance.
—Colin McDowell[21]

What a strange power there is in clothing.
—I.B. Singer, "Yentl the Yeshiva Boy"[22]

As the first epigraph above suggests, dress and appearance are rarely taken seriously. They are consigned to low art, not high.[23] They are the stuff of fashion magazines, newspaper ads, billboards, and the occasional

21. COLIN MCDOWELL, DRESSED TO KILL: SEX POWER AND CLOTHES 8 (1992).

22. I.B. SINGER, YENTL THE YESHIVA BOY (Antonio Frasconi trans., 1983) (1962).

23. This is especially true of fashion. *See* Guy Trebay, *Admit It. You Love It. It Matters*, N.Y. TIMES, Sept. 1, 2007, at C1 (observing that for many, fashion is "bourgeois, girly, unfeminist, conformist, elitist, frivolous, anti-intellectual and a cultural stepchild barely worth the attention paid to even the most minor arts").

museum show, but rarely of scholarly journals, let alone journals devoted to the law.[24] As I hope to demonstrate below, it is well past time that we took clothes seriously.

Clothing, after all, is communication: something that can be said, something that can be understood, something that can be *read*. Or, as Roland Barthes observed in "The Disease of Costume," dress itself is a kind of writing.[25] No one has put this more succinctly, I think, or more clearly, than Alison Lurie in *The Language of Clothes*.[26]

For thousands of years human beings have communicated with one another first in the language of dress. Long before I am near enough to talk to you on the street, in a meeting, or at a party, you announce your sex, age and class to me through what you are wearing—and very possibly give me important information (or misinformation) as to your occupation, origin, personality, opinions, tastes, sexual desires, and current mood. I may not be able to put what I observe into words, but I register the information unconsciously; and you simultaneously do the same for me. By the time we meet and converse we have already spoken to each other in an older and more universal tongue.[27]

Moreover, like language, dress has its own syntax and grammar. Consider opposite buttoning to mark gender. Or the proscription against wearing white after Labor Day. Or that men should wear suits to court. Or blue for baby boys, and pink for baby girls. Or that red ties are de rigueur for male politicians. The semiotics of clothes is particularly evident when it comes to uniforms. From the black robes worn by members of the bench to the orange prison garb worn by inmates, from the work clothes of "blue collar" workers to the suits of "white collar" workers, from the polo shirts of preppies to the funereal black of goths, from the uniforms of blue worn by police officers to the bandannas of red and yellow worn by gang members, uniforms allow one, at a glance, to know the wearer's status, rank, grade, tribe, milieu, beliefs, values, etc. To know who has more power and who has less. To respond accordingly.

This is what I want to suggest: the law has played a significant role in policing the language of dress, at first with explicit laws, and now with implicit ones. And in doing so, the law has been anything but nonpartisan. To the contrary, by regulating clothes and appearance, the law

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24. The exception is in articles discussing dress and appearance in the context of employment discrimination. *See, e.g.*, KENJI YOSHINO, COVERING (2006); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467 (2007); Mary Whiner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73 (1982).

25. Roland Barthes, *The Disease of Costume*, PARTISAN REVIEW, Oct. 1967.

26. ALISON LURIE, THE LANGUAGE OF CLOTHES (1981).

27. *Id.* at 3; *see also* RUTH P. RUBINSTEIN, DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE 6-7 (1995) (using semiotics to decode the vocabulary of dress).

has also functioned to reify hierarchies of sex, class, race, and sexuality.

Consider our history of sumptuary laws. Throughout Europe during the medieval and early modern periods, cities, towns, and nation states routinely promulgated laws that regulated who wore what, and on what occasion. These sumptuary laws—the term sumptuary relating to consumption—were not limited to minimizing consumption or even conspicuous consumption. Rather, they "manifested an aspiration to construct an 'order of appearance' that allowed the relevant social facts, in particular about social and economic status, gender and occupation to be 'read' from the visible signs disclosed by the clothes on the wearer."[28] More importantly, many of these laws served to inscribe and police social boundaries. Consumption was monitored, but so was assumption. It was not only that those of a lower status should not adorn themselves with the clothes or accoutrements of their betters; it was also that, by so clothing themselves, those of the lower classes would not *assume* the status of their betters.[29]

This emphasis on clothing was especially true in England during the reign of Queen Elizabeth, who issued more royal brevets concerning dress than any prior monarch,[30] and who seemed particularly concerned with eradicating the "confusion of degree, where the meanest are as richly dressed as their betters."[31] Her proclamation of 1597 is illustrative. It proscribed not so much what people could wear, as what they could not, depending on their rank and station. Thus, the order proclaimed that "none shall wear cloth of gold, silver tissued, silk of purple color . . . except . . . earls and above that rank and Knights of the Garter in their purple mantles."[32] An accompanying edict applied to women: "none shall wear any cloth in silver in kirtles only . . . except knights' wives and all above that rank."[33] The proclamation continued with other dress prohibitions, from materials for headdresses, netherstocks, jerkins, hose, and doublets, depending on whether one was an earl or count or gentleman or had an annual income of 500 marks or more, or fell in some station in between.[34] This tradition of regulating status through clothing continued in colonial America. A 1651 Massachusetts law, for example, prohibited those with annual incomes of less than £200 from wearing gold, silver lace or buttons, silk hoods, or "great boots."[35]

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28. ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW 42 (1996).

29. GARBER, *supra* note 13, at 26.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. The Colonial Laws of Massachusetts, Reprinted from the Edition of 1660, at 123 (Boston, 1889).

Sumptuary laws even played a role in regulating race. A 1430 Venetian order, for example, mandated that all Jews identify themselves as Jewish by wearing on their chests yellow circles of cord; Rome required that male Jews wear red tabards and female Jews red overskirts.[36] In this country, sumptuary laws limited the type of clothing that could be worn by black slaves. South Carolina's slave code, for example, mandated that slaves could only wear "negro cloth, duffelds, coarse kearsies, osnabrigs, blue linen, checked linen or coarse garlix or calicoes, checked cottons, or scotch plaids, not exceeding ten shillings per yard for the said checked cottons, scotch plaids, garlix or calico."[37] It was not enough that their skin marked them subordinate in the eyes of whites; their clothing had to mark them as subordinate as well.[38]

But gender is what I keep coming back to. Even the Elizabethan brevets regulated gender to a degree—different proscriptions applied to the dress of women—and thus reified the notion that sex was hierarchical, that gender followed from sex, and that sex/gender should be apparent from clothes. Moreover, after we ceased, at least officially, to regulate class and race through apparel, we continued to regulate gender. We did so, at least in part, by passing laws prohibiting cross dressing.

Between 1850 and 1870, just as the abolitionist movement, then the Civil War, and then Reconstruction were disrupting the subordinate/superordinate balance between blacks and whites, just as middle class white women were demanding social and economic equality, agitating for the right to vote, and quite literally asserting their right to wear pants,[39] and just as lesbian and gay subcultures were emerging in large cities,[40] jurisdictions began passing sumptuary legislation which had the effect of reifying sex and gender distinctions.[41] Many ordinances explicitly prohibited cross dressing. In Chicago, for example, it became a crime to "appear in a public place in a state of nudity, or in a dress not belonging to his or her sex."[42] In Toledo, Ohio, it became a crime for any "perverted person" to appear in clothing belonging to the opposite sex.[43] Similar cross dressing prohibitions were adopted in Columbus, Houston, San Francisco, St.

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36. Diane Owen Hughes, *Distinguishing Signs: Ear-Rings, Jews and Franciscan Rhetoric in the Italian Renaissance City*, 112 PAST & PRESENT 3, 17-18, 47 (1986). These laws prefigured the yellow stars of David imposed on Jews under Nazi law.

37. ACT OF 1735, *reprinted in* 7 STATUTES AT LARGE OF SOUTH CAROLINA, at 396.

38. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 174 (1978).

39. For a discussion of the movement among early feminists to wear pants, see KARLYNE ANSPACH, THE WHY OF FASHION 329-30 (1967), describing the "Bloomerism" movement, championed in the feminist journal *The Lily* by Mrs. Dexter Bloomer.

40. *See generally* JONATHAN NED KATZ, GAY AMERICAN HISTORY (1976).

41. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 3, 20 (1999).

42. *Id.* at 27.

43. *Toledo's 'Pervert Drag' Law Voided*, THE ADVOCATE, Nov. 7, 1973, at 16.

Louis, Kansas City, and dozens of other cities.[44] Other jurisdictions passed ordinances that were less explicit in language in prohibiting cross dressing, but nonetheless explicit in effect. New York's law prohibited individuals from assembling "disguised" in public places; California passed a law that prohibited an individual from "masquerading" in another person's attire for unlawful purposes.[45] Both laws were used to target cross dressers.

And these laws, buttressed by catch-all vagrancy laws, were enforced. In *People v. Archibald*,[46] for example, Archibald was arrested and convicted of impersonation for wearing "a white evening dress, high heel shoes, blonde wig, female garments, and facial make up."[47] It did not help his case that he also winked at a male police officer. In *State v. William*,[48] Henrietta William was arrested when she was spotted "with a basket of splinters and a bottle of kerosene oil . . . and dressed in man's clothes." It was the men's clothing that angered the arresting officers. When she denied being a woman, the police threatened to strip her. These reported cases are just a fraction of the actual arrests. We know, for example, that in just one year, 1977, Houston police arrested and charged fifty-three people with dressing to disguise their sex.[49]

Nan Hunter has argued that the goal of these cross dressing prohibitions was to prohibit gender fraud, often by women posing as men to gain economic or social advantage.[50] Bill Eskridge, on the other hand, has posited that the purpose of these regulations was to stamp out gender deviance, and sexual deviance.[51] Whatever the goal, these laws had the effect of inscribing diamorphic gender divisions, enforcing a disciplinary production of gender. Being an adult male meant that one must dress like a man. Be a man. Being an adult female meant that one must dress like a woman. Be a woman. More importantly, it meant that these divisions had to be readily visible, and maintained. Let me try to put this in even clearer terms. Cross dressing prohibitions did not just impact cross dressers, or even "butch" women or "effeminate" men. The prohibitions signaled to everyone what dress, and what behavior, was appropriate. It was not enough that in every government form, in every government census, an answer was demanded: male or female. One had to act and appear it too.[52]

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44. ESKRIDGE, *supra* note 41, at 27.

45. *Id.*

46. 296 N.Y.S.2d 834, 836 (App. Term 1968).

47. *Id.* at 836.

48. 71 S.E. 832 (S.C. 1911).

49. Doe v. McCann, 489 F. Supp. 76 (S.D. Tex. 1980).

50. ESKRIDGE, *supra* note 41, at 27 (citing Nan D. Hunter, *Gender Disguise and the Law* (unpublished manuscript)).

51. *Id.*

52. An analogy can be drawn to prohibitions against same-sex marriage. Such prohibitions not only impact the behavior of lesbians and gays, but heterosexuals as well, by valorizing and privileging

Of course, official prohibitions against cross dressing have, for the most part,[53] gone the way of other sumptuary laws. Though in *Mayes v. Texas*,[54] the Supreme Court refused to hear an appeal from a decision upholding the constitutionality of a "disguise ordinance," lower courts had no such qualms. These courts began to invalidate such statutes relying not on *Mayes*, but on cases such as *Papachristou v. City of Jacksonville*,[55] in which the Court invalidated an ordinance that criminalized "vagrancy" as unconstitutionally vague.[56] In *City of Columbus v. Rogers*,[57] for example, the Ohio Supreme Court found an ordinance prohibiting "dress not belonging to his or her sex" to be too vague given current dress habits. Similar challenges resulted in ordinances being struck down in Chicago, Cincinnati, Detroit, Fort Worth, Miami Beach, St. Louis, and other jurisdictions.[58]

Still, the effect of these laws—like an imprint—is with us. As Alan Hunt has convincingly argued in his study of sumptuary law, the regulation of dress persists, but is now dispersed throughout a range of both public and private forms of governance.[59] This seems especially true in our requirement of gender specific clothes and appearance. In schools.[60] In the military.[61] In the workplace.[62] In the courtroom.[63] In legislative

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one type of love over another, and by giving a type of imprimatur to traditional sex roles.

53. Arrests still occur, as evidenced by the recent arrest of a bikini-wearing firefighter in Ohio. According to police, the firefighter was wearing a blonde wig, pink flip-flops, a striped bikini, and was seen driving, and then walking erratically. In addition to being charged with drunken driving, the firefighter was also charged with public indecency and disorderly conduct. *Firefighter's Jam Not Pretty*, CHI. SUN-TIMES, Apr. 6, 2007, at A1.

54. 416 U.S. 909 (1974) (denying certiorari). Mayes, who appeared in public in women's clothing, was convicted of violating an ordinance that prohibited cross dressing. He unsuccessfully sought to appeal his conviction on the grounds that his conviction was in violation of the eighth amendment and his right to privacy. *See* Respondent's Brief in Opposition, Mayes v. Texas, 94 S.Ct. 1617 (1974) (No. 73-627).

55. 405 U.S. 156 (1972).

56. *Id.* at 158-59.

57. 324 N.E.2d 563, 565 (Ohio 1975).

58. D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986); City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); City of Cincinnati v. Adams, 330 N.E.2d 463 (Ohio. Mun. 1974).

59. HUNT, *supra* note 28, at xviii.

60. Most recently, the issue has come up in terms of girls being prohibited from wearing tuxedoes, and boys being prohibited from wearing gowns, to prom. In one case, police escorted cross dressing students from the prom. A court rejected their claim that their equal protection rights were violated. Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1355 (S.D. Ohio 1987).

61. *See, e.g.*, United States v. Davis, 26 M.J. 445 (C.M.A. 1988) (affirming court martial of male officers for wearing women's clothing "to the prejudice of good order and discipline); United States v. Guerrero, 31 M.J. 692 (C.M.R. 1990) (affirming the court martial of an officer who "wrongfully dressed in women's clothing" to the prejudice of good order and discipline).

62. *E.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (upholding the casino's policy requiring women beverage servers to wear make-up and prohibiting male beverage servers from wearing make-up); Fountain v. Safeway Stores, Inc., 555 F.3d 753 (9th Cir. 1977) (upholding a policy requiring male employees to wear ties); Willingham v. Macon Tel. Publ'n Co., 507 F.2d 1084 (5th Cir. 1975) (en banc) (upholding policy imposing different hair lengths on males and females).

63. *E.g.*, Sandstrom v. Florida, 336 So. 2d 572 (Fla. 1976) (declining to hear appeal of male attor-

halls.[64] Even at the altar.[65]

Indeed, the imprint of our entire history of sumptuary laws still seems to be with us. Moreover, this imprint implicates troubling issues of class, race, sex, and sexuality. Consider the criminal arena. In too many jurisdictions, a black man driving a BMW or Lexus—that ultimate luxury item, that ultimate accessory, that ultimate item of conspicuous consumption—still seems to raise reasonable suspicion, justifying a stop, justifying questions.[66] Ditto for a black kid dressed in baggy pants and a hoodie,[67] or a group of Hispanics with an expensive camcorder.[68] A woman not dressed "like a lady" still seems to justify reasonable doubt in rape prosecutions.[69] A man not dressed "like a man" can still, in too many jurisdictions, be assaulted with impunity, especially if he is a man of color.[70] And notwithstanding official admonishments that law enforcement witnesses are entitled to no more weight than the testimony of lay witnesses,[71] we still tend to take officers in blue at their word, take their word as truth, even when there is evidence to the contrary.[72]

All of this, somehow, makes me think of cross dressing.

Maybe because of the irony of the linkage between the concept of the closet, which Eve Kosofsky Sedwick explored so eloquently in her ground-breaking *Epistemology of the Closet*, and the idea that the closet, before it was identified as a place where identities were concealed, was

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ney convicted of contempt for refusing to wear a tie in court); *In re* DeCarlo, 357 A.2d 273 (Sup. Ct. App. Div. 1976) (holding a female attorney wearing "wool gray slacks, a matching gray sweater, and a green shirt" in contempt for improper attire).

64. In 1986, the South Carolina Legislative Assembly passed a rule requiring male staff members to wear jackets and ties, and female staff members to wear skirts. *See* Valerie Steele, *Clothing and Sexuality*, *in* MEN AND WOMEN: DRESSING THE PART (Claudia Brush Kidwell & Valerie Steele eds., 1989).

65. Until 1976, women were required to wear skirts or dresses and men jackets to be married by the Clerk of the City of New York. The City ended this policy in response to a lawsuit. *See* Rappaport v. Katz, 380 F. Supp. 808 (S.D.N.Y. 1978); J. AREEN, FAMILY LAW 51-52 (1978).

66. *See, e.g.*, I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. (forthcoming 2008) (surveying "driving while black" statistics and literature).

67. *See, e.g.*, State v. Miglavs, 90 P.3d 607 (Or. 2004) (suggesting that officers based pat down, at least in part, on fact that individual was wearing untucked baggy clothing that officers associated with gang attire); *see also* Christopher Dunn, *Civil Rights and Civil Liberties*, N.Y. L.J. ONLINE, Feb. 27, 2007 (reporting that New York's stop and frisk data reveals many stops based on individuals' street attire).

68. Oliveira v. Mayer, 23 F.3d 642, 644 (2d Cir. 1994) (describing the arrest of three Hispanics after police received call that the men were handling an expensive video camera while driving a dilapidated station wagon through an affluent area of North Stamford, Connecticut).

69. *See* Theresa L. Lennon, Sharron J. Lennon, & Kim K.P. Johnson, *Is Clothing Probative of Attitude or Intent? Implications for Rape and Sexual Harassment Cases*, 11 LAW & INEQ. 391 (1993).

70. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Theory*, 29 CONN. L. REV. 561 (1997) (describing acts of violence against gay men of color). Sometimes, the perpetrators of such assaults are the police themselves. *See* Steve Rosen, *Police Harassment of Homosexual Women and Men*, 12 COLUM. HUM. RTS. L. REV. 159 (1980).

71. *See, e.g.*, LEONARD B. SAND ET AL., 1 MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL 7-16 (providing instructions for weighing the testimony of law enforcement witnesses).

72. *See* I. Bennett Capers, *Crime*, *supra* note 66.

already a place where identifying clothes were kept. Clothes that doubled as uniforms, costumes, outfits, masks. Clothes that spoke volumes. Speak volumes.

Maybe because I know that clothes are often associated with magical power. Revival Zionists, for example, wear gowns of different colors to perform ceremonies: a blue gown to summon an individual spirit, a white gown to work "in purity."[73] In obeah, priests and priestesses wear red flannel shirts or a crosspiece of red. They also occasionally wear gold earrings, which they believe allow them to see duppies, or what we would refer to as spirits.[74] Some followers of obeah also believe that burning a person's clothing can cause the owner's skin to burn; that sewing a button on a piece of clothing in a certain manner can bring about the owner's death; and that putting a red ribbon on a newborn will keep away evil spirits.[75] The Ashanti of Africa wear beads to ward off evil spirits.[76] Women in my family clutch rosary beads.

Maybe because I am thinking back to my earlier life as a federal prosecutor, those years when, by necessity, theory took a backseat to practice. Back then, before every trial, I would think about what I wanted to wear during jury selection, what I wanted to wear during my opening statement, what I wanted to wear during my summation. Part of me knowing that the outcome of the trial was not unrelated to what my clothes said, to whether I instructed my law enforcement officers to dress in uniform or in plain clothes, to how the defense lawyer instructed the defendant to dress. Race and gender mattered too. Clothes, though, could be changed.

Maybe because every time I think of the paper dolls I played with when I was six or seven, I also think of that more famous use of dolls: the "doll studies" that played such a role in *Brown v. Board of Education*.[77] In their studies, a pair of sociologists found that black children presented with otherwise identical black and white dolls tended to describe the white doll as "nice" and the black doll as looking "bad."[78] The Court in *Brown* relied on these studies to conclude that segregation was generating "a feeling of inferiority" in the children.[79] I also think about the fact that this study was just replicated, some fifty years after *Brown*, with the same results.[80]

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73. STEEVE O. BUCKRIDGE, THE LANGUAGE OF DRESS: RESISTANCE AND ACCOMMODATION IN JAMAICA, 1760-1890, at 8 (2004) (citing Joseph Graessle Moore, *Religion of Jamaican Negroes: A Study of Afro-Jamaican Acculturation* (1953) (unpublished Ph.D. dissertation, Northwestern University)).

74. MARTHA BECKWITH, BLACK ROADWAYS: A STUDY OF JAMAICAN FOLK LIFE 108 (1969).

75. *Id.*; *see also* BUCKRIDGE, *supra* note 73, at 9.

76. M.D. MCLEOD, THE ASANTE 145 (1981).

77. 347 U.S. 483 (1954).

78. *See* Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, *in* READINGS IN SOCIAL PSYCHOLOGY 602 (Eleanor E. Macoby et al. eds., 3d ed. 1958).

79. 347 U.S. at 494 n.11.

80. *See* Paul Butler, *Black and White Dolls: Kenneth Clark's Famous Experiment Updated*,

Somehow, I know this is all related.

Maybe because I know that appearance is not only language, but a language that can be manipulated, that can manipulate, that can be political, that can be transgressive. During the French Revolution, men and women signaled their resistance to the class system by wearing workingman's trousers instead of the knee breeches associated with the upper class.[81] In the 1960s, feminists "burned" bras to symbolize their rejection of culturally imposed gender restraints.[82] Such protests are even reflected in our jurisprudence. Consider *Tinker v. Des Moines Independent Community School District*,[83] holding that a student's decision to wear an armband to school to protest the Vietnam War was protected speech. What interests me beyond clothing's ability to be transgressive, however, is how manipulating clothing and appearance can ultimately be transformative. How it can turn the dismissed stepchild Cinderella into a beautiful princess.

Maybe because I know that there is something to cross dressing. That read broadly, read literally, cross dressing can incorporate not only the crossing, and blurring, of gender, but also of class, sexuality, status, even race. After all, read broadly, read literally, shouldn't cross dressing include any donning of apparel that crosses socio-cultural expectations? In other words, not just cross *gender* dressing, but also cross *class* dressing, cross *status* dressing, even cross *race* dressing. There is a rich history, for example, of black slaves donning clothes that crossed gender, race, class, and status in order to escape slavery and evade capture.[84] And if cross gender dressing can serve as a challenge to traditional assumptions about gender, can similar challenges be made by cross class/status/race dressing?

It's time for some serious play.

BLACKPROF.COM, Sept. 16, 2006, http://www.blackprof.com/archives/2006/09/white_and_black_dolls_kenneth.html.

81. Mary Louise Roberts, *Samson and Delilah Revisited: The Politics of Women's Fashion in 1920s France*, 98 AM. HIST. REV. 664 (1993).

82. At a Miss America pageant in 1968, a group of women protested the event by throwing their bras in the trash. This protest was then reported by the media as a bra burning event. The story of women burning their bras stuck. *See* J. FREEMAN, THE POLITICS OF WOMEN'S LIBERATION 112 (1975).

83. 393 U.S. 503 (1969).

84. Sometimes, this was just a simple act of crossing status, from slave to freeman. For example, slave women who managed to run away would sometimes cross dress in terms of status in order to frustrate efforts to recapture them. To facilitate escape and evade recapture then, slave women would disguise themselves as free or freed women by donning shoes, stockings, and clothes associated with free and freed blacks. *See* BUCKRIDGE, *supra* note 75, at 83. On other occasions, slaves would cross not only status, from slave to free, but cross gender as well. *See, e.g.*, Fisk v. Bergerot, 21 La. Ann. 111 (1869) (describing female slave who, "disguised in male attire," sailed on a ship owned by defendants). As historian Joan Cashin has observed, "women dressed as men and men as women; girls dressed as boys and vice versa, sometimes changing gender identities several times to evade slave-catchers." Joan E. Cashin, *Black Families in the Old Northwest*, 15 J. EARLY REPUBLIC 456 (1995). Slaves also used dress to change their race, from black to white, or at least "other." And on occasion, slaves did a combination of the above. For example, in one well-known case, a black man crossed genders by dressing in a woman's dress, and crossed races by powdering his face. *Id.* The male black slave thus became a free white woman.

II. SERIOUS PLAY

You're born naked, and the rest is drag.
—RuPaul[85]

I don't mind drag—women have been female impersonators for some time.
—Gloria Steinem[86]

Drag = Blackface
—Kelly Kleiman[87]

Thinking of cross dressing as play, even using my more expansive definition, is easy. What are Mardi Gras and masquerade balls if not play? Likewise Christmas mumming, in its traditional form in England with men dressing as women and women dressing as men, was play. Certainly when children play "dress-up," we consider this play. Female impersonators, often lionized in the gay world for their verbal ripostes and wit, for their embodiment of "camp," that sensibility Susan Sontag explored so well,[88] are at bottom engaging in play. Even minstrel shows, performances in which men used blackface to caricature blacks, involved play, however offensive that play was.

In fact, when we think of cross dressing in the narrow sense, cross *gender* dressing, it is not only play, but plays that come to mind. During the Middle Ages, the "women" in mystery plays (dramatizations of biblical stories), miracle plays (dramatizations of miracles of the saints), and passion plays (depicting the crucifixion and resurrection of Christ) were all played by either boys or men. Even during Shakespeare's time, male "actresses" were the norm. Except now the plays occasionally went beyond the practice of males impersonating women to include, in a grand gesture of self-referentialism, playful acts of cross dressing. After all, what is Shakespeare's *As You Like It* without the comedy of Rosalind in male apparel, or his *Twelfth Night* without Viola dressed as her brother? Males playing women playing men.

These days, cross *gender* dressing seems even more playful. *Saturday Night Live* has put a man in frocks on almost a weekly basis, a favorite being male comedian Dana Carvey's character, the self-righteous "Church Lady." The show has also featured as a recurring character "Pat," who

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85. ROGER BAKER, DRAG: A HISTORY OF FEMALE IMPERSONATION IN THE PERFORMING ARTS 258 (1994).

86. GARBER, *supra* note 13, at 65. Susan Brownmiller made a similar observation. *See* SUSAN BROWNMILLER, FEMININITY 175 (1984) ("Women are all female impersonators to some degree.").

87. Kelly Kleiman, *Drag = Blackface*, 75 CHI.-KENT L. REV. 669 (2000).

88. SUSAN SONTAG, AGAINST INTERPRETATION AND OTHER ESSAYS 275-92 (1990).

discombobulates everyone with her gender ambiguity, her genderless clothes, her very illegibility. Even guest hosts of the show have gotten into the cross dressing act—for laughs, of course—perhaps most famously, former New York City mayor Rudy Giuliani. This is to say nothing of the spate of movies featuring men in drag, from *Some Like It Hot*, to *Tootsie*, to *Mrs. Doubtfire*, to *Big Mama's House*, to *Hairspray*, first with Divine, more recently with John Travolta.

Each of these examples evidences cross dressing as play. What I want to argue, however, is that while it is useful to think of cross dressing as play, it is even more useful to think of it as serious play. Let me put this differently. On the surface, these examples may seem little more than light entertainment, inversions or reversals that provide comic relief to the normal order of things but do nothing to change the order. Probe deeper, I think, and many of these examples in fact do question the normal order of things.[89] Put differently, cross dressing does double duty. On one level, it reinforces by its very difference the comfort of the status quo. On another, less obvious level, however, cross dressing does the opposite: it undermines everything we know, or think we know, beginning with gender. As anthropologist Esther Newton noted in *Mother Camp: Female Impersonators in America*:

> At its most complex, [drag] is a double inversion that says, "appearance is an illusion." Drag says "my 'outside' appearance is feminine, but my essence 'inside' is masculine." At the same time it symbolizes the opposite inversion; "my appearance 'outside' is masculine but my essence 'inside' is feminine."[90]

Through this double inversion, cross dressing challenges the assumed binary relation between "men" and "women," destabilizes the very terms "man" and "woman," and in doing so, renders visible their very constructedness. It disrupts the assumption that gender is natural, that gender inevitably follows sex, that gender is anything other than performance.

Consider *As You Like It* again. The cross dressing Rosalind does more

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89. Barbara A. Babcock has observed:

> Clown or trickster or transvestite never demands that we reject totally the orders of our sociocultural worlds; but neither do these figures simply provide us with a cautionary note as to what would happen should the "real" world turn into a perpetual circus or festival. . . . Rather, they remind us of the arbitrary condition of imposing an order on our environment and experience, even while they enable us to see certain features of that order more clearly simply because they have turned inside out.

Barbara A. Babcock, *Introduction* to THE REVERSIBLE WORLD: SYMBOLIC INVERSION IN ART AND SOCIETY 29 (Barbara A. Babcock ed., 1978). The transvestite also recalls the grotesque in Mikhail Bakhtin's work on the carnivalesque. Bakhtin argues that the carnival grotesque functions as a safety valve in service of the dominant ideology, and at the same time exceeds and refuses that ideology. MIKHAIL BAKHTIN, RABELAIS AND HIS WORLD (Helene Iswolsky trans., 1984).

90. ESTHER NEWTON, MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA 103 (1972).

than play for laughs; she also plays with gender expectations, questioning them, challenging them. Rosalind, dressed in male apparel, is thus able to set Orlando straight, so to speak, about the limits he will have over a wife. Or consider Neil Jordan's much-lauded film *The Crying Game*,[91] in which Stephen Rea plays an IRA soldier on the lam in London where he falls in love with Dil, only to discover that Dil, ostensibly a "she," is biologically a "he." The scene of Dil's disrobing/unveiling might get a laugh, but it also gets something else. It challenges the viewer. That Dil works in a beauty salon where people are "made up"; that Stephen Rea, in an attempt to hide Dil from the IRA, temporarily remakes Dil into a boy by dressing Dil in boy's clothes; that the "other" woman in the film, Miranda Richardson, "remakes" herself twice to avoid detection (is she a blonde, is she a brunette, and who can forget the lingering shot of her in front of a three-way mirror, applying "make up"?), all serve to foreground the very constructedness of gender. One recalls Gloria Steinem's witty comment about drag: "I don't mind drag—women have been female impersonators for some time."[92]

The fact is that cross dressing, both in its narrow sense of cross gender dressing, and its broader sense of dressing in any manner that crosses socio-cultural barriers, is almost always engaged in serious play. Subversive play. I am not limiting myself here to overt forms of subversion, though I could. (The drag troupe known as the "Sisters of Perpetual Indulgence" is but one example. Wearing nuns' habits and outsized foam rubber breasts, the nuns once mocked the religious conservative Jerry Falwell by stripping the pants off an actor posing as Falwell and revealing fishnet stockings.[93] The Stonewall Riots, considered the watershed moment in the evolution of gay rights, is another example. In fact, the riots were set in motion by cross dressers.[94]) Rather, serious play also includes more subtle forms of subversion, such as drag queens using themselves to critique gender roles assigned to women and men.[95]

It has been said that cross gender dressing is a game of smoke and mirrors, now you see it, now you don't. Something akin to *Where's Waldo?*.

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91. THE CRYING GAME (Lions Gate 1992). The film was nominated for several Oscars, including best picture, best director, best actor, and best supporting actor.

92. GARBER, *supra* note 13, at 65.

93. Tony Bizjak, *The Sobering of Sister Boom Boom*, S.F. CHRONICLE, Oct. 24, 1989, at B3.

94. The story of the Stonewall Rebellion of June 1969 has been told often. What occasionally gets lost in the retelling, however, is the role cross dressers played in the rebellion. Stonewall Inn was not so much a lesbian and gay club as a club for lesbian and gay cross dressers. During the raid on June 27, it was a lesbian cross dresser who first struggled with the police, and galvanized other cross dressers to come to her aid. It was only after the confrontations spilled onto the street that non-cross dressing lesbians and gays joined the fray. Simply put, the gay rights movement was started by drag kings and queens.

95. This is not to suggest that drag is never misogynistic. What I do suggest, however, is that even misogynistic drag engages in gender subversion, gender disruption. I make a similar claim about minstrelsy, however offensive. *See supra* note 19 and accompanying text.

Something where "[a]ppearance is repeatedly unmasked as illusion when the male performer breaks the illusion of femininity by reinvoking the male body through a change in voice or the removal of a breast."[96] I am suggesting this and more. That the presence of the cross dresser, even without the one-liners or witty ripostes, just the presence of the cross dresser, still, silent, mute, as in Frida Kahlo's *Self-Portrait with Cropped Hair* or Romaine Brooks's *Una, Lady Troubridge*, throws into question assumptions about the naturalness of gender, and about the naturalness of gender following from sex, and about the naturalness of our expectations. It is the spectator who does a double-take, who becomes momentarily tongue-tied, wondering whether to say he or she, realizing that a dress does not always signify male, or that a tie does not always signify female. It is the spectator who reaches a crisis in which, to borrow from Robert Cover, interpretation and language itself break down.[97] It is the spectator, or at least the critical spectator, who is prompted to self-examine, to ask questions: "Is drag the imitation of gender, or does it dramatize the signifying gestures through which gender itself is established? Does being female constitute a 'natural fact' or a cultural performance, or is 'naturalness' constituted through discursively constrained performative acts that produce the body through and within the categories of sex?"[98] This is what drag does. Or as another commentator put it, "Drag is the theoretical and deconstructive social practice that analyzes these structures [gender] from within, by putting in question the 'naturalness' of gender roles through the discourse of clothing and body parts."[99]

But here's the thing. Cross dressing, when it is used as serious play, not only disrupts gender expectations; it also has the potential to disrupt expectations about class, status, even race. As Marjorie Garber has observed, the cross dresser functions not only as a "challenge to easy notions of binarity, putting into question the category of 'female' and 'male,' whether they are considered essential or constructed, biological or cultural, [but also as a challenge to other] binary thinking."[100] Garber elaborates that the cross dresser signals a "third" category that throws into question *all* binaries, revealing a "category crisis," which Garber defines as:

> [A] failure of definitional distinction, a borderline that becomes permeable, that permits of border crossings from one (apparently distinct) category to another: black/white, Jew/Christian, noble/bourgeois, mas-

96. Anne Herrmann, *"Passing" Women, Performing Men*, *in* THE FEMALE BODY: FIGURES, STYLES, SPECULATIONS 178-82 (L. Goldstein ed., 1991).

97. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602-03 (1986).

98. BUTLER, *supra* note 2, at vii.

99. GARBER, *supra* note 13, at 151.

100. GARBER, *supra* note 13, at 7.

> ter/servant, master/slave. The binarism male/female, one apparent ground of distinction (in contemporary eyes, at least) between "this" and "that," "Him" and "me," is itself put in question or under erasure in transvestism, and a transvestite figure, or a transvestite mode, will always function as a sign of overdetermination—a mechanism of displacement from one blurred boundary to another.[101]

Applying Garber's analysis, the Divine/John Travolta character in *Hairspray* plays not just for comedy—for that "Check out that dude in a dress!" moment—but also as a figure that foregrounds the artificiality of the division at the core of *Hairspray*—racially segregated dancing—to include other questionable divisions as well, such as those between male and female, fat and thin, rich and poor, straight and gay. Dil serves a similar function in *The Crying Game*. Dil, who after all is biracial, not only problematizes our assumptions about male/female, but also about black/white, about Irish/English, about victim/aggressor, about natural/unnatural, about nature/nurture.

Even the turn of the century minstrel shows, oddly enough, can be described as contestative of categories. After all, minstrel shows included not only males performing in blackface (crossing race), but those same performers often performing in drag as the white daughters of plantation owners, in drag *and* blackface as "plantation yellow girls," i.e., mulatto female slaves, and finally, as white northern women agitating for rights (crossing gender).[102] On the surface, minstrel shows clearly served to reify race-based and sex-based hierarchies. On another level, however, they too functioned to problematize binary categories since many of the performers were in fact ethnic immigrants who, as Michael Rogin has persuasively argued, used blackface and cross dress as a way of subtly challenging, and specifically broadening the definition of whiteness.[103] As a way of becoming white too.

So as Garber puts it, "One of the cultural functions of the transvestite is precisely to mark this kind of displacement, substitution, or slippage: from class to gender, gender to class; or, equally plausibly, from gender to race or religion. The transvestite is both a signifier and that which signifies the undecidability of signification."[104]

But this is what I want to suggest: It is not only the transvestite who sig-

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101. GARBER, *supra* note 13, at 16.

102. BULLOUGH & BULLOUGH, *supra* note 18, at 233; ROBERT C. TOLL, BLACKING UP: THE MINSTREL SHOW IN NINETEENTH CENTURY AMERICA 142 (1974).

103. MICHAEL ROGIN, BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE HOLLYWOOD MELTING POT (1996); Michael Rogin, *Making America Home: Racial Masquerade and Ethnic Assimilation in the Transition to Talking Pictures*, 79 J. AMER. HIST. 1050 (1992); Michael Rogin, *Blackface, White Noise: The Jewish Jazz Singer Finds His Voice*, 18 CRITICAL INQUIRY 420 (1992).

104. GARBER, *supra* note 13, at 37.

nals this category crisis, and in doing so problematizes the usefulness of the categories at issue. Rather, anyone who crosses in the broader sense, i.e., by adopting an appearance that crosses socio-cultural boundaries, can also signal a category crisis, and in doing so destabilize hierarchical assumptions.[105] Thus, when Cheryl Harris, in her seminal article "Whiteness as Property," describes her grandmother's daily transformation from black (at home) to white (at the department store where, in order to get a job, she passed as white),[106] or law professor Judy Scales-Trent describes her own repeated crossings as a black woman who looks white,[107] these crossings problematize the very usefulness of the categories black and white. When Paulette Caldwell describes the different reactions occasioned by her hairstyle, depending on whether her hair is braided, in an "Angela Davis" afro, or pulled back in a ponytail, it problematizes her status as a black woman professor.[108] When Kenji Yoshino describes adopting preppy clothes in order to "cover" as American at his New England prep school, "outprep[ping] the preps, dressing out of catalogues that featured no racial minorities," it calls into question the valence of the terms Asian-American and American.[109] When Margaret Montoya describes donning Catholic school uniforms as a "disguise which concealed" her working class status, and then later as an adult, using "dress to fade into the ideological, political cultural background rather than proclaim my difference," it throws into question the usefulness of class categories.[110]

So I'm back to clothes again. The power of clothes. Of appearances. I'm thinking of paper dolls again. Paper dolls, and Virginia Woolf's bildungsroman *Orlando*, her transmogrification of *As You Like It*. In Woolf's novel, Orlando, born male, awakes from a dream female, and thereafter changes genders by changing clothes. As Carroll Smith-Rosenberg has observed, Orlando "tricks us into abandoning all that we know: that sex is unchangeable, gender distinctions 'natural,' time confining, and patriarchy invincible. For a brief moment, as Orlando frees *us*,

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105. Although this Article focuses on cross dressers, other figures also have the potential to signal category crises. Barbara Babcock, for example, places clowns and tricksters alongside transvestites in this regard. *See* Babcock, *supra* note 89. A few years ago, I attended the opening of an exhibit at the New Museum of Contemporary Art in New York that examined depictions of muscular women. *See* PICTURING THE MODERN AMAZON (Joanna Frueh, Laurie Fierstein, & Judith Stein eds., 2000) (exhibition catalogue). At the show's opening, female body builders performed and circulated among the guests. This display of "female masculinity" also signaled a category crisis. The term "female masculinity" comes from Judith Halberstam. *See* JUDITH HALBERSTAM, FEMALE MASCULINITY (1998).

106. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1708-09 (1993).

107. JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN (1995).

108. Paulette M. Caldwell, *A Hairpiece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 367.

109. YOSHINO, *supra* note 24, at 120.

110. Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 187 (1994).

we revel in the headiness of what might be."[111] Paper dolls, *Orlando*, and that scene in *The Great Gatsby*, that great American novel, that novel of whiteness, in which three blacks—"two bucks and a girl"—outfitted in the accoutrements of whiteness drive past the narrator, Nick Carraway. The crossing here signals not only the ability to disrupt race and class, but the pleasure of new possibilities. Because the scene is brief, I quote it in full below:

> As we crossed Blackwell's Island a limousine passed us, driven by a white chauffeur, in which sat three modish negroes, two bucks and a girl. I laughed aloud as the yolks of their eyeballs rolled toward us in haughty rivalry.
>
> "Anything can happen now that we've slid over this bridge," I thought; "anything at all . . . ."
>
> Even Gatsby could happen, without any particular wonder.[112]

The scene is so brief it could be a throwaway, an aside, something tossed in for humor. But that would be to underestimate Fitzgerald. "[T]wo bucks and a girl," "modish" dress, a limousine, a white chauffer. Anything indeed.

In her highly influential *Gender Trouble*, Judith Butler asks, "What performance where will invert the inner/outer distinction and compel a radical rethinking of the psychological presuppositions of gender identity and sexuality? What performance where will enact and reveal the performativity of gender in a way that destabilizes the naturalized categories of identity and desire."[113] Allow me to re-ask these questions and then some. What happens when we disrupt gender assumptions by dressing a male in women's clothing and make-up, or a female in men's clothing? What happens when we disrupt gender/race/status assumptions by dressing a waitress as a social worker, or a police officer in civilian clothes, or a wealthy person in the clothes of a poor person, or a white person in "black" clothes or a black person in "white" clothes?[114] For that matter, what happens when we transpose white and black, male and female,

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111. CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 291 (1985) (emphasis added).

112. F. SCOTT FITZGERALD, THE GREAT GATSBY 69 (Scribner 2004) (1925).

113. BUTLER, *supra* note 2, at 177. Butler proposed drag as one such performance.

114. Many of these questions have already been raised, both directly and indirectly, by visual artists. For example, in her landmark body of work *Untitled Film Stills*, Cindy Sherman photographed herself dressed as specific female types from imagined black and white movies. In doing so, she mapped a typology of gender roles allowed women in postwar America. *See* PETER GALASSI & CINDY SHERMAN: THE COMPLETE UNITITLED FILM STILLS (2003). For his part, Yinka Shonibare has reimagined and collapsed the idea of race and national identity by creating sculpted tableaux of figures in clothing that is Victorian in style, but fashioned from Africanized fabrics. *See* YINKA SHONIBARE, YINKA SHONIBARE: DOUBLE DRESS (2002). For more on the exploration of the meanings of dress by contemporary visual artists, see Nina Felshin, *Clothing as Subject*, ART J., Spring 1995, at 20-29.

straight and gay, the police and the policed?[115] These questions seem particularly important at this time in the criminal arena, when racial profiling remains a fact of life,[116] when class profiling has been documented,[117] when even judges have been shown to engage in race-based and sex-based discriminatory sentencing,[118] when the law enforcement resources allocated to investigating crime often turn on the race, gender, and status of the victim,[119] and when whether a defendant is facing the death penalty still turns on the race and gender of his victim.[120] We all have implicit biases about gender, about race, about class, about sexuality.[121] Indeed, these implicit biases exist even in individuals who express strongly egalitarian views.[122] At this point in time, what does it mean to look at the new person we have created, this imaginary person who is both who he/she was and who she/he could be, who is both there and not there, and suddenly be cognizant of gender/race/status in a way we were not before? What does it mean to use the body as a palimpsest? What does it mean to first see, and then see through, the surface of things?[123] What does it

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115. To put this differently, and to again invoke the idea of paper dolls, what happens when, in lieu of switching the paper outfits, we instead switch dolls, a black doll for a white doll, a male doll for a female doll, and so on.

116. *See, e.g.*, Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

117. Studies suggests that police officers are significantly less likely to search vehicles driven by those with above average incomes than vehicles driven by those with below average incomes. *See, e.g.*, Patrick T. Kinkade & Mathew C. Leone, *The Effects of "Tough" Drunk Driving Laws on Policing: A Case Study*, 38 CRIME & DELINQ. 239 (1992).

118. *See* William T. Pizzi, Irene V. Blair, & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005).

119. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

120. *See* David C. Baldus, Charles A. Pulaski, Jr. & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983). *See also* Adam Liptak, *Death Penalty Found More Likely When Victim is White*, N.Y. TIMES, Jan. 8, 2003, at A12.

121. Using implicit association tests (IATs), which measure the speed with which an individual associates a categorical status with a characteristic, social cognition researchers have shown that implicit biases continue to be widespread. As one researcher has observed:

> By now almost a hundred studies have documented people's tendency to automatically associate positive characteristics with their ingroups more easily than outgroups (i.e., ingroup favoritism) as well as their tendency to associate negative characteristics with outgroups more readily than ingroups (i.e., outgroup derogation).

Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004).

122. *See, e.g.*, IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 427 (2001) (noting that even professed liberals can show significant implicit biases on implicit association tests). As Linda Krieger has noted, "even the well-intentioned will inexorably categorize along racial, gender, and ethnic lines." Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1217 (1995).

123. My prior work, I realize now, focused on what we see. *See, e.g.*, I. Bennett Capers, *On Andy Warhol's Electric Chair*, 94 CAL. L. REV. 243, 258 (2006) (suggesting that Warhol poses an important question about the death penalty, one that implicates race, gender, religion, disability, age, and comfort: "Who are we comfortable visualizing in the chair?"). This Article hopefully moves beyond that to focus on what we can see through.

mean to imagine, if just for a moment, an inverted world, a reversible world, like a Bruegel painting come to life?[124] What does it mean to ask, *what if*, and *why not?*

The narrator in *The Great Gatsby* suggests anything can happen. *Orlando* promises the headiness of what might be.

III. SERIOUS WORK

[L]et us pervert good sense and make thought play outside the ordered category of resemblances.

—Michel Foucault[125]

Love the drag, darling, but your purse is on fire.

—Tallulah Bankhead, addressing a robed thurifer swinging his incense vessel in an Anglican church.[126]

I ended the last section by suggesting that anything can happen when we engage in the imaginative act of cross dressing, of dressing one thing as another, of transposing one thing for another. I suggested the headiness of what might be. In fact, what I am proposing here is both ambitious and simple: just as cross *gender* dressing can prompt us to see and *see through* implicit biases about gender, cross dressing in its broader sense can prompt us to see and *see through* other category biases, including those about race, class, sexuality, and status. Like actual cross *gender* dressing, which prompts the viewer to see both what is there and what is not there—male, male and female, female—imaginative cross dressing permits the decision maker to see both the present and the imagined. And in doing so, it permits the decision maker to reexamine assumptions about both. After all, as social psychologist Nilanjana Dasgupta has observed, implicit biases do not inevitably result in biased conduct or biased decisions. "[E]ven when stereotypes and prejudices are automatically activated, whether or not they will bias behavior depends on how *aware* people are of the possibility of bias, how *motivated* they are to correct potential bias, and how much *control* they have over the specific behavior."[127] Cross dressing—as an imaginative act, as a metaphor, and as a practice—is a means of making decision makers *aware* of the possibility of bias. Furthermore, because I am suggesting state-sanctioned encouragement of imaginative acts of cross dressing, decision makers may also be *motivated*

124. For an excellent discussion of the power of symbolic inversion, see the essays, and especially the introduction, in THE REVERSIBLE WORLD: SYMBOLIC INVERSION IN ART AND SOCIETY (Barbara A. Babcock ed., 1978).

125. Michel Foucault, *Theatrum Philosophicum*, 28 CRITIQUE 898 (1970).

126. GARBER, *supra* note 13, at 210.

127. Dasgupta, *supra* note 121, at 157.

to correct potential biases so that they can override them. In this sense, imaginative acts of cross dressing others might function as something akin to John Rawls's "veil of ignorance."[128] Something akin to Rawls in drag.[129]

My claim is a bold one, but not entirely without precedent, especially when it comes to race. In a now famous experiment, a teacher in a small Iowa town divided her all-white third grade class into blue-eyed and brown-eyed groups, and in doing so, taught them about what it means to be discriminated against because of color.[130] More recently, the ACLU ran an ad to sensitize Americans to the harm caused by racial profiling. They accomplished this by contrasting photographs of two men, one white, one black, treated differently by the police. In fact, due to the magic of photographic manipulation, the two men where phenotypically identical but for their skin color.[131] In the film *A Time to Kill*,[132] the jury returns a just verdict in a racially charged case only after one of the jurors proposes transposing the race of the defendant and the victims. Indeed, one of the claims of the law-and-literature movement, at least the law-in-literature strain, is that imagining ourselves in the shoes of others allows an empathetic understanding crucial to justice.[133] Still more recently, Cynthia Lee, in her provocative book *Murder and the Reasonable Man*, suggested that in determining reasonableness in self-defense and provocation cases, jurors be instructed to engage in a switching exercise,[134] an instruction at least one court has given.[135] Lee argues that such switching would provide "a practical way to address problems with the reasonableness requirement, avoiding problems that arise from oversubjectivization of the reasonable person standard."[136] And arguably, such switching is implicit in analyzing employment discrimination cases.[137]

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128. *See* JOHN RAWLS, A THEORY OF JUSTICE 12, 136-42 (1972). In this seminal book, Rawls propounds a "thought experiment" in which citizens divest themselves of all self-interested knowledge, including knowledge of their gender, wealth, race, and other social circumstances, in order to reach legitimate principles of justice. The point of the "veil of ignorance" is "to represent equality between human beings as moral persons, and creatures having a conception of their good and capable of a sense of justice." *Id.* at 19.

129. I thank Markus Dubber for this turn of phrase.

130. *See* WILLIAM PETERS, A CLASS DIVIDED (1971).

131. ACLU, DRIVING WHILE BLACK 5 (1999).

132. A TIME TO KILL (Warner Brothers 1996).

133. *See, e.g.*, MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 58, 93 (1995).

134. CYNTHIA LEE, MURDER AND THE REASONABLE MAN 12 (2003); *see also* Cynthia Kwen Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996). Other scholars have also suggested a type of switching in addressing the reasonable person standard. *See, e.g.*, CAROLINE A. FORELL & DONNA M. MATHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN, at xvii (2000).

135. LEE, *supra* note 134, at 258 (citing Alaska v. Lockhart, No. 3AN-S96-2362).

136. *Id.* at 12.

137. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (when a plaintiff proves gender played a part in an employment decision, the defendant may avoid liability by proving, by a prepon-

My interest here is in exploring how the imaginative act of cross-dressing can both address and re-dress the effect of implicit biases in the criminal arena. Because our implicit biases manifest themselves not only in assessing reasonableness in self-defense or provocation cases, and not only in the jury deliberation room, what I am suggesting goes well beyond Cynthia Lee's proposal that jurors engage in switching exercises in self-defense and provocation cases. What I am suggesting—admittedly in broad strokes, admittedly in rough outline—is nothing less than the use of imaginative acts of cross dressing at all stages of a criminal case by all individuals involved in the criminal justice system.[138] Just consider what justice might look like if law enforcement officers, prosecutors, jurors, and even judges engaged in switching exercises—or imaginative acts of cross gender/race/class/status dressing—with respect to suspects, defendants, victims, witnesses.[139]

Imagine the implications for cases involving sexual assault. In a 1977 Wisconsin case, the trial judge sentenced a defendant who pleaded guilty to second-degree sexual assault to a one-year suspended sentence. The court made clear that it was imposing a light sentence because of the fifteen-year old complainant's dress at the time of the rape. The judge called for women to "stop teasing" and for a "restoration of modesty in dress," and intimated that the defendant, seeing the way the complainant was dressed, had reacted "normally."[140] In a 1989 Florida rape case, jurors acquitted a defendant charged with abducting a victim at knife-point outside of a restaurant, and repeatedly raping her over a five-hour period. In post-

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derance of the evidence, that it would have made the same decision if it had not taken gender into account).

138. My suggestion that decision makers engage in imaginative acts of cross dressing others is not entirely without antecedent in criminal law. Every time a decision maker is required to apply a reasonable person standard, or answer what is reasonable, that decision maker is engaging in an imaginative act, imagining what a fictional reasonable person in the defendant's situation would have done. For more on this imaginative process, see MARKUS DIRK DUBBER, THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT 128-32 (2006). Instructing jurors to imaginatively cross dress others in order to address and redress biases is also consistent with Alexis de Tocqueville's vision of the jury as a democratizing institution that educates jurors about the meaning of good citizenship. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed., Doubleday 1969) (1840).

139. First, this would prompt decision makers to conduct a self-evaluation to ascertain whether biases have played a role in their decision making. If the decision maker reaches the same decision when the suspect/victim/participant is switched, then it is unlikely that the decision is tainted by bias. On the other hand, if the decision maker finds that his or her decision is different when a characteristic of the suspect/victim/participant is crossed, then bias may be present. However, the presence of bias should not end the matter. Rather, if the decision maker determines that his or her decision is the product of bias, then the decision maker should next determine whether that bias is inappropriate, or appropriate. Inappropriate bias should prompt the decision maker to reconsider his or her decision. Even then, the decision maker would have the discretion to let his or her decision stand. What I hope, however, is that many decision makers, once aware of any inappropriate implicit biases, will be motivated to override those biases in their decision making. Such an instruction in the jury context, though novel, would be consistent with the court's obligation to insure a fair, impartial trial.

140. Simonson v. United Press Int'l, Inc., 654 F.2d 478 (7th Cir. 1981) (affirming summary judgment for press in subsequent defamation case brought by the judge); *Rape and Culture: Two Judges Raise the Question of the Victim's Responsibility*, TIME, Sept. 12, 1977, at 41.

trial interviews, jurors explained that they acquitted the defendant because they believed the complainant, who was dressed in a lace mini-skirt without underwear at the time of the attack, was the one at fault.[141] According to the jury foreperson: "We felt she asked for it for the way she was dressed."[142] Another juror added, "She was obviously dressed for a good time."[143] More recently, when professional basketball player Kobe Bryant was accused of rape, a tabloid newspaper ran a prom photo of his accuser raising her prom dress to reveal a garter belt. The accompanying headline read: "Kobe Bryant's Accuser: Did She Really Say No?"[144]

The fact is that too many of us, and that includes judges, prosecutors, and police officers, still believe that women who are raped dress or behave in a "seductive manner" and that rape could be reduced by "encouraging women to dress and behave less seductively."[145] In cases like these, decision makers are sometimes aware of their biases; other times they are not. Now imagine a cross dressing instruction that would direct decision makers to actually examine their biases and either determine that their biases are appropriate, or inappropriate. Some individuals, faced with the realization that they would not acquit a defendant where there was proof that he kidnapped a complainant from a parking lot, and repeatedly penetrated her over the course of five hours, had the complainant been, say, a mother of two dressed modestly, would examine their biases and nonetheless conclude, wrongly or rightly, that their biases are fine. These individuals would conclude that dress *should* matter, and that the complainant's dress, and hence status, is probative of her consent. Other individuals, however, engaging in the same cross dressing exercise, would conclude that their biases about dress and status are inappropriate, and would choose to override their biases and reexamine their decision. In short, such imaginative acts of cross dressing can mean the difference between a just verdict or an unjust one.

Nor need such imaginative acts of cross dressing be limited to actual dress. After all, imaginative acts of cross dressing can and should include cross gender dressing. In recent years, women convicted of molesting un-

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141. *See, e.g.*, *Jury Blames Woman's Clothing in Rape Case*, UPI, Oct. 5, 1989; *Rape Victim to Blame, Says Jury*, THE DAILY TELEGRAPH, Oct. 6, 1989, at 3.

142. *Jury: Woman in Rape Case "Asked For It"*, CHI. TRIB., Oct. 6, 1989, at 11.

143. *Id.*

144. *Kobe Bryant's Accuser: Did She Really Say No?*, GLOBE, Oct. 31, 2003, at 1; *see also* Rebecca Traister, *Did Bonnie Fuller Really Betray Women?: Female Editors Condemn the* Globe *for Running Tawdry Photos of Kobe Bryant's Accuser*, SALON, Oct. 31, 2003.

145. L.G. Calhoun, J.W. Selby, A. Cann, & G.T. Keller, *The Effects of Victim Physical Attractiveness and Sex of Respondent on Social Reactions to Victims of Rape*, 17 BRIT. J. SOC. & CLIN. PSYCHOL. 191 (1978); Shirley Feldman-Summers & Gayle C. Palmer, *Rape as Viewed by Judges, Prosecutors, and Police Officers*, 7 CRIM. JUST. & BEHAV. 19, 28 (1980). *See also* Elizabeth Snead, *Do Women's Clothes Invite Rape?*, USA TODAY, Apr. 19, 1990, at 6D (finding almost one in three people surveyed believed behavior and dress contribute to rape); Luginbuhl & Courtney Mullin, *Rape and Responsibility: How and How Much is the Victim Blamed?*, 7 SEX ROLES 547 (1981).

der-aged boys have received extraordinarily light sentences.[146] Imaginative cross dressing could direct decision makers—prosecutors, jurors, judges—to cross dress the defendant by imagining her male instead of female, and then to cross dress the victim by imagining him female instead of male. Imaginative cross dressing would prompt decision makers to examine what biases are present and whether those biases are legitimate (i.e., an adult woman molesting a young boy is not the same thing as an adult man molesting a young boy or a young girl) or illegitimate (i.e., an adult woman molesting a young boy is the same thing as an adult man molesting a young boy or a young girl).[147]

Or consider *United States v. Martha Stewart*.[148] In 2004, Martha Stewart, the self-made queen of domesticity, was convicted of conspiracy, obstruction of agency proceedings, and making false statements in connection with statements she made to the FBI. At the time, the FBI was conducting an insider trading investigation relating to her sale of 3,928 shares of ImClone common stock just one day before ImClone publicly announced that it had been denied regulatory approval of its lead product, the cancer drug Erbitux.[149] Stewart's selection for prosecution and subsequent conviction were met by a fusillade of complaints that she was being targeted not so much because of her statements to the FBI, but because of her status as "(1) a woman, (2) a member and financial supporter of the Democratic party, (3) a public figure, or (4) a combination of some or all of the foregoing."[150] The perception that she was cold, dismissive of her employees, and overly aggressive could also be added to this list.[151] Moreover, after the jury returned its guilty verdict, it was revealed that jurors had spent part of their deliberations discussing Stewart's expensive ward-

146. Mary Kay Letourneau and Debra LaFave are probably the most well known examples. Mary Kay Letourneau received a sentence of only three month's imprisonment for repeatedly having sex with a thirteen-year old boy. Debra LaFave, who repeatedly had sex with a fourteen-year boy, fared even better. She was sentenced to only three years of house arrest. For more on the different fates faced by female molesters, see J. Hetherton & L. Beardsall, *Decisions and Attitudes Concerning Child Sexual Abuse: Does the Gender of the Perpetrators Make a Difference to Child Protection Professionals?*, 22 CHILD ABUSE & NEGLECT 12 (1998) (finding cases involving female offenders less likely to result in arrest or prosecution).

147. For example, in *Michael M. v. Superior Court of Sonoma County*, the Supreme Court upheld California's gender-specific statutory rape law on the ground that girls, but not boys, faced the risk of pregnancy. *See* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981). Nothing in the Court's ruling, however, would preclude legislators from rejecting a gender-based approach in fashioning a statutory rape law, or prevent other decision makers (prosecutors, jurors, judges) from rejecting such an approach.

148. United States v. Martha Stewart, 433 F.3d 273 (2d Cir. 2006).

149. *Id.* at 280. Stewart was sentenced to five months' incarceration, to be followed by two years' supervised release. Her conviction was affirmed on appeal. *Id.* at 318-20.

150. Joan MacCleod Heminway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN & L. 247, 251 (2003).

151. On a certain level, Stewart's selection for prosecution was interpreted as a way she could be "put in [her] place." *See* Markus D. Dubber, *The New Police Science and the Police Power Model of Criminal Process*, *in* THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE 126 (Markus D. Dubber & Mariana Valverde eds., 2006).

robe, and in particular the high price of a handbag that Stewart carried to court—a Birkin bag by Hermès that sells for $6,000 to $80,000.[152] As one commentator put it, the Birkin bag "cemented an image of her as a pampered fat cat seemingly willing to snatch money from Average Joe Stockholder."[153]

Now imagine both prosecutors and jurors had engaged in a cross dressing exercise to decide which biases were appropriate and which were inappropriate, and to either stand by or change their decisions accordingly.

Take, for example, Stewart's purse. Engaging in cross class dressing, jurors could have asked themselves whether they would have reached the same verdict if Martha Stewart were not a millionaire several times over who carries a Birkin purse, but instead someone who was not wealthy—a secretary, for example—someone who instead carried a relatively inexpensive purse purchased from The Gap, or H&M Department Store. In other words, was their guilty verdict the result of class bias? They could have asked themselves whether they would have reached the same verdict if Martha Stewart were instead a male defendant, a hypothetical "Mark" Stewart with a briefcase instead of a Martha Stewart with a handbag. This imaginative act of cross gender dressing would have alerted jurors to whether their verdict was the result of sex or gender bias. Similarly, jurors could have asked themselves whether they would have reached the same verdict were she not a public figure.

There are also implications for cases where racial bias may exist on multiple levels. Consider the O.J. Simpson case, which continues to engender controversy. The fact that the jury that acquitted Simpson was comprised of nine blacks, two whites, and one Hispanic,[154] has contributed to the impression that Simpson's acquittal was due to the racial composition of the jury, and not the evidence.[155] The point here is not to weigh in on Simpson's guilt or innocence. Rather, the point is to observe that how Simpson was perceived, guilty or innocent, murderer or victim, is inseparable from implicit biases we hold, including biases about race. As in the Martha Stewart example, engaging in imaginative cross dressing, in this case cross race dressing, would have allowed jurors (and the public) to

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152. Alex Kuczynski, *On This Accessory, the Jury Isn't Out*, N.Y. TIMES, Apr. 18, 2004, at C2. The jurors also discussed the hourly fee Stewart was paying her attorney. United States v. Stewart, 317 F. Supp. 2d 426, 429 (S.D.N.Y. 2004).

153. Kucynski, *supra* note 152, at C2. Although Stewart moved for a new trial on the ground that the jury had improperly discussed extraneous information, the court denied this motion. The court found that there could not have been any prejudice since, among other things, jurors were already aware of Stewart's status as a "wealthy woman." *See Stewart*, 317 F.Supp.2d at 428.

154. *See* Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27, 36 (describing racial composition of jury).

155. *See, e.g.*, Mona Charen, *It's Foolish to Think Simpson Verdict Wasn't Racially Motivated*, IDAHO STATESMEN, Oct. 16, 1995 (editorial).

run a check on their implicit biases. Instructed by the court to engage in imaginative acts of cross dressing, jurors might have realized that they would have been inclined to reach a guilty verdict had Simpson been white, or had his ex-wife or Ron Goldman been black. Similarly, they may have been inclined to reach a different verdict had Fuhrman been non-white. These jurors would then be prompted to ask themselves whether the different results are the result of a legitimate bias, or an illegitimate bias. Again, this could have made the difference between an unjust verdict, and a just one.

I end with *McCleskey v. Kemp*,[156] a death penalty case that has troubled scholars since it was decided.[157] In *McCleskey*, a Georgia jury comprised of eleven whites and one black convicted Warren McCleskey of killing Frank Schlatt, a police officer, during the course of a robbery, and recommended a sentence of death. McCleskey was black. Schlatt was white.[158] On these facts alone, there was nothing atypical about the case. To the contrary, it fit the teleological narrative of hundreds of death penalty cases. What made the case unique, however, was that McCleskey's lawyers challenged the Georgia capital sentencing system in a way no one had previously done. They introduced a statistical study that showed that the imposition of the death penalty in Georgia depended in great part on the race of the victim: prosecutors sought the death penalty in seventy percent of the cases involving black defendants and white victims, but only fifteen percent of the cases involving black defendants and black victims.[159] Defendants charged with killing white persons were sentenced to death in eleven percent of the cases, but defendants charged with killing blacks were sentenced to death in only one percent of the cases.[160] After taking account of thirty-nine variables that could have explained the disparities on nonracial grounds, the study concluded that defendants charged with killing white victims are 4.3 times as likely to receive the death sentence as defendants charged with killing black victims. Citing this evidence, McCleskey claimed that every stage of his prosecution—from the prosecutor's decision to seek the death penalty, to the jury's decision to recommend a sentence of death—was likely tainted by racial discrimination in violation of the Eighth and Fourteenth Amendments. And faced with so broad a challenge, the Court concluded that McCleskey's claim "must fail."[161] Writing for the 5-to-4 majority, Justice Powell observed that,

156. 481 U.S. 279 (1987).

157. Perhaps no one has been more critical of the Court's decision than Randall Kennedy. *See* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

158. *McCleskey*, 481 U.S. at 283.

159. *Id.* at 287.

160. *Id.* at 286.

161. *Id.* at 292.

notwithstanding the apparent validity of the study, McCleskey had not shown, and could not show, that purposeful racial discrimination had conclusively played a role in *his* case, the *sine qua non* of an equal protection claim.[162] Finally, noting that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system," the Court held that McCleskey's statistical evidence did not demonstrate a "constitutionally significant risk" of racial bias to establish an Eighth Amendment violation.[163] To rule otherwise, the Court concluded, would mean an overhaul of our long tradition of prosecutorial and juror discretion, and could lead to other challenges based on other biases.[164] In September 1991, the state of Georgia executed Warren McCleskey.[165]

The result of the Court's decision in *McCleskey* is simple. As Justice Brennan stated in his dissent, a candid attorney representing a death eligible defendant in Georgia would tell his client that few of the details of the crime matter; what matters is the race of the victim, and that "race would play a prominent role in determining if he lived or died."[166] Imaginative acts of cross dressing, however, offer a solution that neither overhauls the discretion of prosecutors, nor the discretion of jurors. Instead, it asks only that jurors, before they report their verdict, imagine a what if. What if the victim were a different race? What if the defendant were a different race?[167] It asks only that jurors imagine McCleskey as white, and his victim Frank Schlatt as black, and ask themselves would that have mattered. Would they have still found McCleskey guilty, but recommended a sentence of life imprisonment instead of death? Or would they have reached the same decision, guilt and death? Even more, imaginative acts of cross dressing would address the Court's fear that allowing McCleskey's challenge could open the door to other challenges based on other discrepancies "that correlate to membership in other minority groups, and even to gender."[168] After all, as Justice Brennan noted in his dissent, all inappropriate

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162. *Id.* at 292-299. The Court recognized that it had in certain cases, namely in jury selection cases and in the Title VII context, accepted statistical disparities as proof of an equal protection violation. However, the Court concluded that given the nature of capital sentencing as dependent on the discretion of prosecutors and jurors, "exceptionally clear proof" of discrimination would be required to establish a constitutional violation. *Id.* at 297.

163. *Id.* at 312-13.

164. *Id.* at 314-19.

165. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A18. Since *McCleskey*, other studies have shown continued disparities in capital sentencing. Citing *McCleskey*, however, courts have repeatedly rejected challenges predicated on statistical discrimination at sentencing. *See, e.g.*, Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001); Davis v. Greer, 13 F.3d 1134 (7th Cir. 1994); State v. Taylor, 929 S.W.2d 209 (Mo. 1996).

166. *McCleskey*, 481 U.S. at 321 (Brennan, J., dissenting).

167. This proposal is consistent with the assumption that jurors are less likely to be racially biased when the issue of race is made explicit, rather than ignored. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1014 (2003).

168. *McCleskey*, 481 U.S. at 316-17.

biases should concern us. All inappropriate biases should be repugnant to our deeply rooted conceptions of fairness.[169] The fact is that men arrested for murder are six times more likely to be sentenced to death than women arrested for murder.[170] That too should concern us. The fact is that women of color and lesbians who commit murder are more likely to face the death penalty than white heterosexual women who commit murder.[171] That too should concern us. The fact is that the "death penalty is relentlessly aimed at poor people."[172] This too should concern us. Cross dressing, re-imagining, allows us not only to see our biases, but to rise above them.

And that is the beauty of this project. Cross dressing, after all, is about more than Norman Bates in *Psycho*, or Lord Cornbury of New Jersey, or Joan of Arc, or Shi Pei Pu, or even paper dolls. By acknowledging the semiotic valence of clothes and appearance, and by tapping into the disruptive possibilities of cross dressing, we can both see and see through our biases. This is not to say that such a project would be easy. Indeed, many questions remain. What would be the limiting principles of such a cross dressing exercise for jurors, for prosecutors, for law enforcement officers? Would such exercises apply in civil cases? How would we reconcile such an exercise with our general admonition not to speculate, to consider only the facts before us? How would such an exercise play out in context specific offenses such as hate crimes? And when we cross dress others, to what extent do we risk depriving those others of agency, of the ability to dress themselves, present themselves, mask themselves? Again, none of these questions are easy. But as I hope I have demonstrated, the potential benefits of such an endeavor in the criminal arena at least—for making it fairer, and perhaps one day even making it fair—are manifold and rich. The task ahead requires only that we begin. And imagine.

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169. *Id.* at 339 (Brennan, J., dissenting).

170. *See* Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 442 (2002). As Joan Howarth has explored, the gender disparity in executions is attributable, at least in part, to society's general reluctance to execute "presentable, feminine, White wom[e]n." *See* Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 227 (2002).

171. Kathryn Ann Farr, *Aggravating and Differentiating Factors in the Cases of White and Minority Women on Death Row*, 43 CRIME & DELINQ. 260 (1997); Victor L. Streib, *Death Penalty for Lesbians*, 1 NAT'L J. SEXUAL ORIENTATION L. 104 (1995).

172. Howarth, *supra* note 170, at 223.