Left (Over) Rights

Daria Roithmayr

Introduction

As an intellectual movement in legal scholarship, Critical Race Theory ("CRT") was formally inaugurated twelve years ago, at a 1989 critical theory conference in Madison Wisconsin. Although the movement had its own historical narrative of development (Crenshaw 1995: xvii-xxvii), it had inherited much of its direction and methodology from two immediate intellectual precursors, the civil rights and critical legal studies ("CLS") movements. (xix) From the latter, CRT had adopted the critique of modern liberal legal consciousness, and in particular, the argument that law was reflected and reinforced the exercise of power by elites. From the former, CRT had drawn a deliberately modernist commitment, both to analyze law using the lens of race as a central category of analysis, and to use law in some sort of affirmative program to advance racial emancipation. (xxvii; Harris 1994: 750-54)

These two unifying commitments of critical race theory—the critique of law as reinforcing racial power and the modernist desire to use law to effect racial liberation—appeared to be in fundamental tension. (Harris 1994: 760) How could communities of color depend on law to achieve racial liberation when it was law that had helped to construct their oppression? The apparent contradiction provided the framework for a sustained debate between CLS and CRT scholars over the value of legal rights. CLS theorists like

Duncan Kennedy, Mark Tushnet and Peter Gabel argued that rights talk was as indeterminate as the rest of liberal legal discourse, because rights arguments were capable of producing diametrically opposed outcomes on the same issue. Similarly, CLS theorists argued that rights served to legitimize the conservative legal order, because rights created the illusion of resolving disputes fairly while concealing the exercise of conservative political power.

CRT scholars mounted a sustained response to the CLS critique of rights. Although they conceded that parts of the critique were legitimate, authors like Kimberlé Crenshaw, Patricia Williams, Mari Matsuda and Robert Williams argued that rights discourse had been quite pragmatically useful for communities of color, particularly during the civil rights era. Among other things, rights discourse symbolically had demanded that whites respect the personhood and agency of people of color as autonomous legal subjects. In addition, although rights served to legitimate the exercise of white racial power, they could potentially be reconstructed to empower communities of color. Indeed, in theory, rights discourse could be expanded to protect not only the interests of communities of color but of other disempowered communities as well. (Williams 1991: 159-60)

The disagreement about rights divided critical scholars along racial lines, and accentuated an already existing split between postmodernists and pragmatist scholars of color who complained that CLS had failed to include race and racism in its account of power and law. (Duxbury 1995: 147-49) Shortly after the CLS launched its rights critique, the dissenters moved to organize critical race theory formally as an intellectual movement, and created an accompanying genre of scholarship devoted to law and its relationship to race, racism and white supremacy. (Crenshaw 1995: xxiii)

For a period of time, neither CLS nor the newly-born CRT movement revisited the question of rights, as each tended to the demands of movement-building within the legal academy. Finally,

in 1997, Duncan Kennedy took up the question in his book, *A Critique of Adjudication: Fin de Siècle* (hereinafter "*Critique*"), devoting the book's last three chapter to the rights debate. (Kennedy 1997: 311-12) Taking issue with his colleagues, Kennedy argued that the CLS position on rights was too extreme. Rights weren't always indeterminate or legitimating, he argued. Sometimes they were sufficiently determinate to produce a predicted outcome, and sometimes (much of the time, according to Kennedy) they were not. In Kennedy's view, whether rights were determinate in a particular situation depended not on their terms or their underlying assumptions, but on a whole range of contingent forces that were neither predictable nor controllable. However, Kennedy also pointed out that the CRT project of reconstructing rights to protect communities of color was as unstable a project as rights discourse itself. For example, although people of color might have agreed in theory on the right to non-discrimination in the workplace, on the more specific questions of affirmative action and hate speech codes they had split into opposing camps. Likewise, defining what constitutes "women's rights" had divided the feminist movement, because the experiences of white women differed in important ways from those of women of color.

In light of this unpredictable indeterminacy, Kennedy explained, he'd lost interest in trying to specify the conditions under which rights were determinate, or trying to find a way to reconstruct them to make them responsive to the needs of the disenfranchised. Indeed, he had lost faith in the central assumption of rights—that is, he no longer believed that rights claims were interests that differed from, or were categorically entitled to more protection than, other political interests. Accordingly, he found no reason to believe that rights claims could be relied upon to "trump" majoritarian will to protect the political minority.

In keeping with his arguments against reconstructive programs, Kennedy declined to propose a reconstructive theory or any programmatic replacement for rights talk. Instead, he urged scholars

to engage in tactical guerrilla warfare—to disrupt the oppressive exercise of legal power by engaging in a series of small scale, *ad hoc* transgressive performances, in an attempt to subvert or dismantle existing social structures.

In the years since Kennedy published the Critique, CRT has yet to address his argument that the Left should adopt a "post-rights" approach of tactical transgression. Perhaps the time has come for CRT to again take up the question of rights. Indeed, in the wake of conservative domestic trends in anti-discrimination jurisprudence and the increasingly pervasive forces of globalization at the international level, the rights question has once more become a pressing issue, for communities of color both at home and abroad.

More specifically, at the beginning of the twenty-first century, blacks, Latino/as and some Asian-American groups in the U.S. face increasingly persistent discrimination in wealth, housing, jobs, education, health care and political power.[1] Recently, opponents have attempted to dismantle affirmative action via reverse discrimination cases and legislation in the form of popular referenda. (*Hopwood v. Texas* 1996).

The rights question has also reappeared in debates about the globalization of democracy. With the fall of communism and the spread of democratization in Africa, Asia and Latin America, rights talk has taken on a new salience in new contexts, particularly in connection to relations between racial majorities and minorities, where rights talk was formerly avoided or denigrated. (Elster 1991: 447) Disempowered and exploited communities in other countries are levying rights claims against multinational corporations, in an effort to create legal relationships with institutions that have no obligation to consider the interests of the disempowered or exploited. In the wake of recent events in South Africa, rights proponents are claiming once again that legal rights are the most useful way to successfully press a claim for racial emancipation.[2]

Thus, in both the domestic and global contexts, critical race theory faces squarely the question of how to advance racial

liberation. Should CRT continue to use rights talk in pressing claims for racial empowerment? Should CRT replace rights discourse with some other reconstructive program, or should it abandon reconstruction altogether to pursue some version of Kennedy's *ad hoc* transgressive performances?

In this essay, I argue that, notwithstanding Kennedy's loss of faith in rights and the corrosiveness of the CLS critique, rights talk might still be useful for communities of color, in two ways. First, rights can continue to be useful as a mode of strategic action, to operate within a conventional legal framework that recognizes certain kinds of arguments and marginalizes or disregards others. Legal advocates can choose, in certain circumstances, to deploy rights claims and rights reasoning as a rhetorical way of arguing for a particular political result. In the mode of strategic action, advocates might use rights talk, not as a claim that categorically trumps competing claims, but as a recognized language in which to argue that there are good political, ethical and moral reasons for giving priority to particular "outsider" interests. Of course, advocates must also acknowledge that, because language and intention, like rights discourse, are unstable, sometimes those arguments will succeed in achieving particular political commitments, but at other times they will not.

Second, rights talk might be a useful tool with which to create Kennedy's transgressive performances. In the transgressive mode, advocates might use rights talk as a way of subverting conventional rationalist assumptions about the relationship between race and law. Although rights talk conventionally assumes that certain entitlements are universal and objectively definable, rights talk might be deployed to argue in favor of competing entitlements on the basis of their specific value to particular groups of people. Deployed in this fashion, and under fortuitous circumstances, rights talk might still have enough strategic vitality and transgressive usefulness left over to justify its continued use, notwithstanding Kennedy's thoroughgoing critique.

To provide the full context for a reply to Kennedy, Part II of this essay will lay out more fully the earlier debate among critical theorists over rights. In this section, I will explore both the narrow disagreement over rights between the more modernist CRT scholars and the more postmodernist CLS authors, as well as the wider dispute between both groups over reconstructing rights. Having laid the background, Part III will then explore in detail Duncan Kennedy's latest contribution to the debate about rights and reconstructive programs in *Critique*. In particular, Part III discusses Kennedy's repositioning on the critique of indeterminacy and his call to engage in transgressive performances.

In Part IV, I explore the potential for using rights talk for strategic and transgressive purposes in a post-rights era. First, I discuss rights discourse as a mode of strategic action that can potentially advance particular political commitments. Here, I use as an example the successful claim by homeless plaintiffs in South Africa for a Constitutional socio-economic right to minimum housing. Second, I explore the potential for using rights talk transgressively to subvert the logic of racism by exposing its internal contradictions. In this discussion, I use the example of a recent Title VI challenge mounted by civil rights groups to the admissions process at the University of California at Berkeley.

Rights and Reconstruction: The Debate Between Critical Theorists

Critical Legal Studies: The Critique of Rights

As with any critical movement, generalizing from specific arguments by specific authors to positions of a the wider group can potentially create a misleading picture of coherence and agreement. This section will examine the critique of rights articulated by several authors from the more postmodernist, "irrationalist" wing of CLS. (Duxbury 1995: 475) Their strongest arguments against rights, like their more general critiques of liberal

legal discourse, fall into two categories: the critique of indeterminacy and the critique of legitimation.

In 1984, in "An Essay on Rights," CLS scholar Mark Tushnet argued that rights, as a species of legal rules, could not produce determinate and consistent outcomes across a broad set of facts, for two reasons. First, Tushnet argued, rights are technically indeterminate because they must be balanced in practice against competing government interests or against conflicting claims of right, to determine whether to vindicate the rights. (Tushnet 1984: 1371-72) Ronald Dworkin described rights as claims that by their very nature ordinarily trump competing collective interests of a political majority. (Dworkin 1997: xv) But as Tushnet pointed out, the judicial balancing process by which rights are adjudicated cannot produce the sort of determinate outcomes that one would expect of rights as "trumps." This is true in large part because judges engage in constitutional balancing—e.g., weighing the right to choose abortion against the government's interest in protecting the fetus—without a common measure to assess the interests on either side of the equation. (1372)

Similarly, Tushnet argued, rights discourse provides decision makers with no agreed-upon level of generality at which to describe the right or government interest, a problem which introduces a great deal of indeterminacy into the balancing process. (1373) How one frames the right in question often determines the success of a rights claim. Does an advocate describe the right to choose as the right to have an abortion, which might be outweighed by a state interest in the fetus, or as a more general right to prevent the government from intruding on one's private decisions about reproduction, which is far more likely to trump government interests? Indeed, as Tushnet noted, the question of generality is often outcome-determinative—that is, the level of generality at which one describes the right, and the way in which the right is defined, appears to determine whether the right is vindicated or not. (1373)

Beyond those problems associated with balancing, Tushnet argued that rights suffered from a second and much more fundamental indeterminacy. Namely, he pointed out that the context that surrounds a claim of right—i.e., the myriad of social arrangements and political commitments accompanying a right—are what in fact determine the right's value, rather than the content of the legal right itself. (1378) For example, the right to parental autonomy over their children reflects not some trans-historical moral values but rather a twentieth-century American political commitment to maintaining the social arrangement of nuclear families, in which biological parents are thought to have the greatest motive to care for their child. (1378) Thus, that right would mean something completely different (or perhaps nothing whatsoever) in a society without the same commitments and arrangements.

Similarly, Tushnet argued, to say that one has a "right" to engage in some activity or benefit from some protection was really just another way of saying that society ought to honor its particular social and political commitments on a particular occasion. That is, a claim of right is an argument that, given a particular set of background norms and commitments, one has a very good political, economic, social, moral or other reason for one's claim. (1365) But, Tushnet argued, rights claims do not function any differently than other sorts of "political" claims that legislators make. Although rights talk pretends otherwise, rights claims are inevitably arguments about society's political commitments, and the claim of right does not add anything different or unique to a conversation about these commitments. Accordingly, claimed Tushnet, rights claims do not magically privilege a particular claim against competing political commitments.

A short time after Tushnet published his essay, a "second wave" of critical legal scholars dramatically widened the scope of the original indeterminacy critique by focusing on the indeterminacy of language. In contrast to Tushnet's argument that the background context of a right determined its meaning, scholars like Gary Peller

argued that background context was no more determinate than the right itself. (Peller 1984: 1165) Specifying and describing the relevant contextual details–for example, describing the American social commitment to the concept of the nuclear family–was a process that required interpretation, and was thus as indeterminate as interpreting the meaning of the right. (1172) Peller argued that the process of empirically describing contextual facts—e.g., of choosing particular social trends in family formation and disregarding other trends as atypical—was as much the subject of political struggle as interpreting rights claims.[3] To describe the "American" commitment to the nuclear family, for example, a sociologist might emphasize the social practices of white middle-class Protestants, and might thereby marginalize the experiences of Asian, Latino/a and African-American groups, who defined the family unit differently to include several generations and extended kinship relationships.

Similarly, other CLS scholars argued that even if one could specify contextual details with some objectivity, a particular outcome might not thereby "logically" follow from those contextual details. For example, CLS scholar Karl Klare argued that a broad social or professional commitment to industrial peace might not necessarily compel a union to choose formal mechanisms for dispute resolution over the use of economic weapons like boycotts. (Klare 1981: 475-76) According to Klare, particular outcomes did not "flow deductively" from contextual "facts," anymore than they had from the claim that one had a legal right to that outcome.

Beyond the critique of indeterminacy, CLS scholars also argued that rights helped to make the coercive force of law and the political power of conservative elites appear legitimate and natural. [4] (Gordon 1990: 419-20) By portraying the adjudication of rights as a neutral and apolitical means of protecting the individual against the collective, rights discourse rendered political resistance to any disfavored outcome unlikely. (418) In developing this argument, critical scholars took their lead from Antonio Gramsci, who

developed the concept of hegemony to explain why workers did not rebel against capitalism. (Gramsci 1971) According to Gramsci, the masses acquiesced because capitalism presented itself as natural, necessary and just—believing that things had to be the way they were, and unable to imagine alternatives to a capitalist market structure, the proletariat failed to put capitalism on the table as the subject for political negotiation. (195-96, 246-47)

Likewise, critical scholars argued that the disempowered did not challenge court outcomes, even when they lost, because rights discourse presented itself as a neutral, technical process, and as part of a broader legal order that eschewed political decision-making. (Gordon 1990: 418-19) Rights discourse did so by making people appear "equal before the law," largely by disassociating the rights-holder from her identity and experiences. People were equal before the law because the prototypical rights holder enjoyed equal rights without regard to her cultural, political and material identity—indeed, her "private" identity was not relevant in adjudicating her claim of right.[5] (Tushnet 1984: 1581)

However, by segregating the question of identity into a "private" area, to be regulated not by law but by the market and informal norms, rights discourse disguised the role of coercive state power in creating material inequalities. (Gabel 1984: 1578) And because rights discourse denied its own political nature, it lessened the possibility that people would mount strong political resistance, or imagine alternative ways of adjudicating disputes, thereby further reinforcing the notion that a rights-based systems was the only legitimate option. (1578)

If rights were corrosively indeterminate and incapable of protecting the interests of the disempowered, what legal strategies were outsider communities to use? Many CLS scholars refused to replace rights discourse with a new set of legal categories or general theory. (Kennedy 1997: 295) Scholars like Mark Kelman suggested that, in the spirit of a radically free, existentialist remaking of the world, we "abandon known distorting categories [like rights] and

"leap ahead, not fully aware how one will reconstruct the world. (Kelman 1987: 275)" Other critical scholars like Tushnet argued that rights discourse should be abandoned in favor of a discourse of needs—"[p]eople need food and shelter right now, and demanding that those needs be satisfied –whether or not satisfying them can be characterized as enforcing a right strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced."[6] (Tushnet 1984: 1394) Still others like Peter Gabel claimed that rights possibly might be transformed, to allow people to connect in new ways and to be recognized inter-subjectively. (Gabel 1984: 1588-89) But for most critical scholars in the mid-1980s, the category of rights held little promise.

Critical Race Theorists Respond

In the late 1980s, a group of scholars of color within CLS mounted a strong defense of rights against the critiques of indeterminacy and legitimation.[7] Although the dissenters acknowledged that rights were technically indeterminate and perhaps legitimating, they nevertheless maintained that rights generally had served important pragmatic purposes during the civil rights era.

Leading the charge, CRT scholars Patricia Williams and Kimberlé Crenshaw argued that rights talk proved useful in large part because it constituted a language that law recognized. According to Williams and Crenshaw, framing claims in an institutionally approved vocabulary provided several procedural advantages. First, using the institutional vocabulary permitted communities of color to participate in the political conversation. Rights discourse gave blacks a voice with which to speak by constructing them as having an autonomous self with personal boundaries, in contrast to the language of racism, which had framed them as silent object-property to be used by others.[8] (Williams 1991: 160-64) Reconfiguring rights to include blacks symbolically conferred the visibility, the respect, and the agency of personhood for those communities who had been denied those benefits of

citizenship. As Williams put it, "[rights] is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights both positive and negative is the marker of our citizenship in relation to others."[9] (164)

Second, blacks used rights talk as a means of resistance, in particular, to resist the ideology of segregation and "separate but equal" rhetoric. (Crenshaw 1380) The ideology of racism relied on the dichotomy between black and white, where white represented superior modes of being and black represented inferior modes. Excluding people of color from public accommodations and schools during Jim Crow had reinforced the racist notion that blacks were dirty and ignorant. (1373) In contrast, rights talk countered the state-sanctioned rhetoric of white supremacy—the notion that blacks deserved to be excluded because they were an inferior other –and replaced it with a rhetoric of formal equality and integration. (1378)

Both Crenshaw and Williams emphasized the notion of internal resistance. As a language and ideology already accepted in the mainstream legal community, rights discourse permitted resistance from within. Using rights talk enabled communities of color to engage in acts of resistance by using the institution's logic against itself, in a sort of legal jujitsu, to expose internal contradictions. For example, by comparing the promise of universal citizenship for the formal rights-holder with the reality of discrimination and segregation, rights discourse exposed the discontinuity between formal legal equality and black people's lives. (Williams 1991: 149; Crenshaw 1367-88) But blacks did not have to articulate that demand for respect in some revolutionary way—rights rhetoric was an effective way to smuggle in social change under the "sheep's clothing" of stability and status quo.[10] Moreover, rights discourse permitted communities of color to advance their claims even when Jim Crow laws had closed off external political avenues through the exercise of state-sanctioned coercive power. (Crenshaw 1358)

Fourth, people of color had used rights rhetoric instrumentally to redistribute power in their favor. Namely, casting claims as "rights," in terms recognized by the prevailing ideology's discourse, allowed communities of color to enlist the state's coercive power—for example, the power of the presidency and the courts—on their behalf. (Crenshaw 1382) Although a discourse of needs might have more precisely articulated the interest of minorities, a needs discourse could not compel judicial intervention to protect disempowered communities.

Finally, the two authors argued that although rights discourse might appear indeterminate at a fairly high level of abstraction, rights gained meaning via particular historical experiences in local contexts. Rights discourse had taken on a specific and contingent meaning of resistance and mobilization during the civil rights era. And, although rights discourse alone was not responsible for the organizational energy of that era, when rights talk was combined together with direct action, mass protest, individual acts of resistance, and appeal to public opinion, it had very much helped to create a crisis in legal consciousness. (Crenshaw 1382)

Other CRT scholars like Mari Matsuda and Rob Williams argued that, from the perspective of people "at the bottom," it was not necessary to resolve the conflict between the CLS critique of indeterminacy and the CRT defense of rights' historical pragmatic value—both were true.[11] Matsuda argued that people of color were simultaneously of two minds about rights, in keeping with the double consciousness that characterized much of their life experience. (Matsuda 1987: 338) At a relatively abstract level, people of color believed in the moral force of the idea of rights—the notion that they were entitled to a certain fundamental level of respect and equal treatment as members of the human race. At this level, rights talk was an aspirational discourse, reflecting a deep desire for equality and freedom. (338)

In contrast, Williams pointed out that, at a more pragmatic level, communities of color saw rights as a tool to be used instrumentally,

to achieve concrete material gains. (Williams 1991: 120) From experience, they were aware that rights rhetoric was indeterminate, or at the very least subject to manipulation by the majority. Nevertheless, people of color viewed rights as a tactical means to achieve particular material goals—e.g., a seat on the front of the bus, protection from the desecration of sacred land, or a good-paying job. (120) In keeping with their general experience of the prevailing legal order, minorities harbored no illusion that framing a claim in terms of rights would guarantee them success. (125-26) Rather, they deployed rights claims tactically, in the hope that framing their claims in a language recognized by the majority might improve their chances of material success. (129)

The debate about rights between CLS and CRT helped to clarify more fundamental theoretical differences, which continued to play out as CRT developed a body of work. CRT adopted certain aspects of the CLS indeterminacy critique, developing for example in the critique that ostensible race-neutral legal categories like merit and colorblindness concealed the exercise of racial power. (Peller 1990: 685) At the same time, CRT worked in a more modernist vein to "reconstruct" or reform law—e.g., rights discourse–to meet the particular needs of communities of color. (Williams 1991: 16-61) Despite their critical roots, race-crits were committed to the importance of normative inquiry, and to the attempt to reconstruct legal discourse along identity lines, to reflect the difference that race makes. (Harris 1994: 760)

This "reconstructive project" required CRT scholars to make three central theoretical commitments. (Harris 1994: 760) First, race-crits had to theoretically construct a racialized identity, from which they could formulate specific political commitments and interests. (766) Second, they had to uncover the way in which law worked to support white supremacy, and imagine new ways for law to operate to eradicate white supremacy and promote racial empowerment. (766) Finally, they had to work to transform or modify existing categories of legal thought and political theory so that they might operate in those new ways. (766)

The first task, constructing a viable politics of identity, posed a central and vexing theoretical problem for race-crits. How could communities define identity in a way that was any more determinate than the definition of a right or of social context? For example, how could one determine whether the Latino/a community, a pan-ethnic community encompassing many nationalities, races and cultures, should define itself based on racial identity or an ethnic identity? And then, to the extent Latino/as could agree, what sorts of demands or rights claims would then "deductively" flow from a recial identity?[12]

Some CRT scholars attempted to avoid the indeterminacy of identity by thinking of identity in explicitly political terms. For them, constructing an identity was not a matter of uncovering those traits or characteristics which uniquely or intrinsically defined particular communities of color, but of politically choosing to link shared interests and commitment to those of a larger group that shared those commitments. Of course, defining shared interests and commitments was equally indeterminate–inevitably, group members shared some commitments or interests but diverged on others. Indeed, Crenshaw's work highlighted the conflicting and competing tensions of intersecting identities. (1991: 1242) The problem of identity was one that would continue to plague race-crits during their subsequent projects over the next ten years.

Kennedy's Critique of Adjudication:

Neither critical race theorists nor critical legal scholars pursued the rights debate for much longer, after the initial conversation had run its course.[13] Nor did race-crits systematically pursue the broader divisions between modernist reconstruction and postmodernist critique. Instead, CRT scholars moved on to address a wide range of other topics, and to organize an intellectual and political movement, with some significant success. (Duxbury 1995: 503-509) In contrast, the CLS movement proceeded to become more fragmented in the late 1980s and early 1990s, due in part to the

ever-widening fractures of race and gender that had driven much of the rights debate. (Kennedy 1997: x)

Then, towards the end of the 1990s, Duncan Kennedy published *A Critique of Adjudication: Fin de Siècle,* the final chapters of which were a response to the last round of argument in the rights debate. (1997: x) In those chapters, Kennedy reworked the ground of the debate about rights in two ways. First, he shifted the critique of rights towards a more postmodernist formulation when, compared to earlier CLS work. Second, he offered a strategy to avoid the pitfalls associated with any reconstructive program.

A Contingent Critique of Rights

In contrast to Tushnet's earlier argument, Kennedy argued in *Critique* that the critique of indeterminacy was much less corrosive.[14] It was not that rights discourse was *always* indeterminate and could *never* produce closure (as perhaps Tushnet and others had implied). Although rights discourse did frequently fail to reach closure, at other times and in other (rare) circumstances it actually did appear to produce some sort of useful result or determinate outcome. (Kennedy 1997: 311)

But to the extent the discourse did succeed, it did no succeed because rights claims were somehow categorically different from other non-rights interests, or because rights constituted determinate legal trumps. Rather, Kennedy argued that the success or failure of a rights claim was wholly contingent and political. (1997: 311-12) In particular, success depended on a less-than-formulaic interpretative relationship between the rights claim, the diligence of the rights claimer, the identity of the rights claimer, the political viability of supporting arguments, and many other variable local and historical circumstances. (312)

Ultimately, in the wake of this newly-formulated rights critique, Kennedy reported, he had experienced a change of heart, a loss of hope in rights claims. As he put it, "[o]nce I believed that the

materials and the procedure produced the outcome, but now I experience the procedure as something I do to the materials to produce the outcome I want. Sometimes it works and sometimes it doesn't, meaning that sometimes I get the result that I want and sometimes I don't." (328)

True to his postmodernist leanings, Kennedy did not describe his change of heart in rationalist terms, but instead analogized it to a loss of faith in God. (312-13) Like a religious faith that disappears without any precipitating moment, Kennedy had awakened one morning to find that he had lost faith in the central assumption that sustains rights talk as an institution. Namely, he no longer believed that rights claims were somehow distinct as legal entities from mere political claims or policy reasoning—in many instances, because rights were indeterminate, they had to be interpreted, and judges interpreted them using a whole range of politically produced policy arguments. (316-317) In addition, although it was not wholly indeterminate in all circumstances, rights talk was sufficiently open-textured that it often produced conflicting and contradictory outcomes across a range of facts and circumstances. (346-48)

Kennedy's posture was as he put it, "modern-postmodern," but above all, it was post-rights. (346-48) It wasn't that anyone had proved that rights talk did or did not produce closure, "but only that 'it doesn't seem to have been done yet, and I'm not holding my breath'." (312) It was time to move on, Kennedy claimed, to "park" the question, to become "post-rights" and get out of the habit of describing things in rights terms. (313)

Kennedy was careful to narrow the implications of his fall from grace. The loss of faith in rights discourse did not undercut the meaning or value of rights talk *per se*. (311-12) To lose faith did not mean that rights talk was wrong or meaningless, but rather that one experienced rights reasoning as a species of legal rhetoric, with no determinate anchor to predict when rights talk would produce closure and when it would not. (311-12) One might try to manipulate rights discourse in an effort to advance certain political

commitments. But ultimately, there was nothing to anchor rights talk to the desired outcome, even in a perfectly operating system of adjudication.

In response to the critical race theory argument that rights had produced value in the context of the civil rights movement, Kennedy was quick to note that his newly-minimalist rights critique did not constitute an indictment of the civil rights era. (1997: 334) He did not mean to suggest that communities of color had been wrong or misguided to use rights as part of a demand for inclusion. (334) Rather, he sought to remind them that their rights claims had not necessarily succeeded because rights were somehow categorically distinct from non-rights political interests. (334)

Kennedy also highlighted continuing problems with trying to anchor rights on a foundation of identity politics. Specifically, he reiterated the point that identity could not serve as a determinate ground for defining rights claims, any more than universal principles or the language of a right could. [15] (328) Like the language of rights discourse, the definition of the identity group was often (but not always) indeterminate. Identity groups often consisted of members with multiple and intersecting identities that pulled them towards different and competing rights claims. "Rights that supposedly flow from a particular group identity may be oppression for subgroups that have a crosscutting allegiance." (Kennedy 1997: 328)

Transgressive Performances and Artifacts

So what was Kennedy proposing in place of rights? Previously, CRT scholars had taken CLS to task for failing to propose any reconstructive program of reform in the wake of their rights critique.[16] (Delgado 1987: 313) People of color needed something to advance their cause for social change. If rights discourse was insufficiently distinct from political discourse to invest any faith in it, what was CLS proposing that outsiders use? At least under the old CLS rights critique, scholars had used critique to clear the table

for some new reconstructive, "remake-the-world" political or theoretical program, even if critical scholars had not provided much in the way of details. (Kelman 1987: 275)

In contrast, Kennedy rejected out of hand the idea of replacing old theories or programs with new ones, or the notion of substituting faith in some notion of reform or transformation for his lost faith in rights. Any attempt to pursue Left political commitments by way of new grand narratives like "reconstructing rights" inevitably would suffer from the same unpredictable indeterminacy, and the same illusory theoretical objectiveness, that had permeated rights talk. (Kennedy 1997: 360)

In the spirit of the truly postmodern, Kennedy instead proposed that the Left pursue a series of small-scale, *ad hoc* transgressive performances that might dismantle existing social structures, institutions and rules. (342) In Kennedy's view, transgressive performances could uncover and highlight the contradictions and deviations, in a way that might destabilize the foundations of a rule-determinate system of law if the contradictions could not be explained away as minor deviations or anomalies. (342-43) Conceptual legal structures, like the "application" of "rules" to facts, were only able to present themselves as orderly and rational by suppressing those instances in which outcomes deviate, contradict or conflict with rules. (Roithmayr 1998: 1458-60) Destabilizing this rational order, transgressive performances or artifacts uncovered those deviant examples and brought them from the periphery to the center, thereby exposing the instability at the very heart of the legal order.

Unfortunately, Kennedy gave relatively little description of transgressive performance in *Critique* itself. In a recent reply to commentators on *Critique*, however, Kennedy outlined a multi-pronged genealogy of transgressive strategy, a listing and explanation of a variety of critical moves and theories aimed at disrupting liberal notions of the autonomous individual who consents to regulation by rational legal rules in order to maximize

freedom. Among others, Kennedy included oranicism, antinomianism, paranoid structuralism, and semiotics.[17]

In addition, Kennedy provided a (perhaps tongue-in-cheek) prescription for how to deploy weapons from this arson of theoretical moves in easy steps: (1) Identify a distinction used to justify some particular set of liberal rules or ideas–for example, the distinction between rights and political interests. (2) Put aside for the moment the question of whether you really believe in the distinction or whether it really exists. (3) Locate the way in which one side of the distinction possess traits or qualities traditionally attributed to the other side—e.g., the way in which rights are balanced and sometimes traded off against other collective interests, which typically is represented as a trait of political interests but not rights. (4) Hook up the now-destabilized distinction to one of the theoretical moves described above, like organicism or semiotics, by using the theoretical move to explain the incoherence or lack of stability. (Kennedy 2001)

Beyond this largely abstract theoretical genealogy of critical moves, Kennedy elaborated only a bit further on how to engage in a transgressive performance or create a transgressive artifact. To be sure, the radical critical moves played an important role. (342) But transgressive performances also relied for their punch on some artifact, a marker, a style or quality of performance that gave life to the radical critique. (342) And a truly transgressive performance destroyed existing styles or social conventions—e.g., "forms of 'proper' expression"—at the same time they inaugurated a new style or created a new artifact.[18] (342) Transgressive performances did not necessarily depend for their success on methodically undercutting or logically undermining some preceding set of conventions are rules. Rather, transgressive performances simply eclipsed the old style, changing the subject or the angle or the perspective by being fresh and innovative and more fashionable.

Kennedy's reasons for preferring small-scale transgressive performances over a larger-scale program of reform appeared to

be both aesthetic and strategic. Having lost faith in the promise of grand-scale reconstruction, Kennedy settled for the possibility of inducing "intense experiences in the interstices of a disrupted rational grid"—the small moments of liberation and disorientation when social rules at a dinner party, the rules of dressing professionally, legal rules in the workplace or other aspects of social life were subverted and replaced with potentially chaotic new styles and ways of being. In Kennedy's words, he sought to "induce, through the artifactual construction of critique, the modernist emotions associated with the death of reason–ecstasy, irony and depression."[19] (342)

Never just an aesthete, Kennedy also argued that transgressive artifacts strategically moved along the Left's project. Transgressive performances disrupted and loosened up the Left's counterproductive and bad-faith claims to rightness and closure. (344) In addition, transgressive performances provided the Left with an anti-rationalist tool to confront its opponents, in addition to, or instead of, just rational analysis. (344)

Kennedy acknowledged that the transgressive performance might well become domesticated and routine over time. Like rights, subversive performances could be captured ("taken over by pods"), appropriated and sterilized in order to deny the shock of the original experience. (343) Other people could reinterpret a transgressive performance, redescribe it in various iterations, and adapt it for their own purposes, thereby diluting its subversive force ("E.g., are all legal realists now.").[20] Accordingly, Kennedy proposed a never-ending series of transgressive performances, designed to continually subvert, challenge, shake-up and resist the tendency toward domestication.

Rights As Transgressive and Innovative Rhetoric

So what should critical race theorists now make of Kennedy's latest contribution, and in particular, his reworking of the rights critique

and his irrationalist pursuit of the transgressive performance? This section begins by throwing out an intentionally provocative but not altogether new assertion: Kennedy's tactic of ad-hoc, transgressive performance hardly seems to address the concerns of communities of color and other disempowered groups.[21] Most modernist CRT scholars would find little positive about Kennedy's tactical maneuvers. From the critical race theorist's perspective (and from the person of color's viewpoint), Kennedy's pursuit of the transgressive artifact appears to leave communities of color no more to work with than did the earlier CLS critique. While Kennedy focuses on how one "feels" using a particular discourse, and on inducing intense emotional experiences in the wake of a particularly subversive transgressive performance, communities of color are far more concerned with material emancipation and empowerment. To borrow a phrase from Kennedy, transgressive performances are of little use in inner city ghettoes and barrio foxholes. (Kennedy 1997: 325)

CRT scholars would also object that Kennedy strips away the foundations of a critical project based on racial identity. Specifically, Kennedy claims that the category of racial identity itself constitutes a bad-faith claim to determinacy and rightness. In addition, in Kennedy's view, there appears to be little room for strategic and rhetorical use of rights discourse to advance particular political commitments. Communities of color who assimilate to, and thus reinforce, the dominant rights discourse are doing harm, whether they do it out of bad faith or strategic maneuver. (357) Most troubling, Kennedy appears to ignore altogether Crenshaw and Williams' argument that rights discourse has played a central pragmatic role in the "transgressive performances" surrounding the civil rights movement and in other contexts.

Having said all that, there is much that is persuasive about Kennedy's loss of faith in rights talk. To the extent that rights interests are not categorically distinct or in any way more determinate than competing political interests, how can

communities of color trace the pragmatic success of rights claims to their legal power? To the extent that identity politics are equally problematic, how do communities of color even begin to articulate coherent identity-based political commitments for social change? And yet, if Kennedy is right and rights talk does produce closure at times, why not use rights talk, as one tool among many, if the circumstances indicate that it might usefully advance a particular political commitment for a particular political group at a particular moment in time? Is there a way of salvaging rights discourse while still giving full weight to the CLS critique of rights? The next section takes up these questions in more detail.

Rights Talk as Strategic Action: Working Within the Legal Framework

This essay seeks to carve out a pragmatic niche for rights discourse in Kennedy's post-rights world—a distinctly postmodern pragmatic niche. To that end, this section advances three central arguments. First, I propose that rights claims might be used strategically as a rhetorical tool to advance particular political commitments. Second, in the following section I argue that rights claims might be used as tools –stage props, perhaps—for Kennedy's transgressive performances, in order to subvert the rationalist assumptions and dichotomies that underlie racist ideology. To the extent that strategically working within the system may not move people of color further toward their political commitments in a particular historical moment, rights talk might be part of a transgressive performance that subverts formal and informal social rules about race—for examples, the rules about what constitutes merit and the ways in which merit is distributed.

Finally, both this section and the next caution that communities of color should not invest rights talk with a rhetorical power that it does not always have. As Kennedy rightly notes, the rhetorical successes of rights claims cannot be traced to something determinate about those claims. To that end, this essay proposes,

as does Kennedy, that people of color embrace an ad-hoc and self-consciously strategic/subversive approach. This postmodern pragmatic "adhoccery" embraces no grand theory about rights talk or identity, but focuses instead on the possibility of using rights talk instrumentally to advance some set of political commitments, for some politically defined group of people who happen to embrace some set of commitments at some particular time in history.

What would it mean to use rights talk strategically? The critique of rights suggests that rights discourse is merely a particular rhetorical species of policy arguments about collective political commitments, and that in actuality rights claims are adjudicated in the same way that competing political claims are. If so, are there any strategic advantages in framing a claim as a rights claim? I would suggest that there are at least three potential advantages.

First, consistent with the CLS critique of rights, rights talk might still function as a rhetorical tool to articulate arguments that certain claims should enjoy priority over other claims. Rights should be given priority, not because they have some special legal or metaphysical status, but because there are good political, moral and social reasons to give them priority. Moreover, communities of color can continue to enlist the coercive power of the government to protect their interests, to the extent they can articulate persuasive political, moral and social reasons to do so.

Rights are commonly understood to be special because they have some special categorical weight, particularly when balanced against competing collective political interests. Ronald Dworkin has famously argued that rights are political trumps held by individuals, in the sense that collective goals or interests (like the state's interest in general welfare) cannot constitute a sufficient reason for denying the individual's right. (1977: xv) Dworkin defends the idea of rights as trumps on the ground that a rights claim is a distinct species of political argument based on principle and not political interest, which is more subject to short-term cost-benefit

analysis. (xii) Under Dworkin's view, one might argue for example that the right to non-discrimination trumps the state's interest in avoiding social unrest because the right is based on the principle of equality, while the state's interest is a collective goal grounded in political interests that can be traded off.

As explained in previous sections, however, the CLS critique of rights undercuts Dworkin's distinction between policy and principle, by arguing that rights interpretation involves the same kind of open-ended policy analysis as deciding between competing non-rights claims. Indeed, as Tushnet pointed out, calling something a right is really a rhetorically particular way of arguing that there are good political, moral, social and economic reasons for finding that one interest outweighs competing claims. (Tushnet 1984: x)

Accordingly, communities of color might still rhetorically invoke the "trump" aspect of rights discourse—capturing the remaining historical, rhetorical residue of meaning to evoke the idea of "more important" or "really important"—without having to rely on Dworkin's distinction between principle and policy. More specifically, people of color might still deploy the concept of rights to argue that there are good political, social and moral reasons to privilege one set of interests over competing or conflicting claims.

Here, it may be useful to examine a specific example of strategic rights talk in action, drawn from a recent Constitutional Court decision in South Africa. In *Government of the Republic of South Africa v. Grootboom and Others*, the country's highest court recently held that South African citizens have an affirmative socio-economic right to minimum access to housing.[22] In that case, over eight hundred homeless South Africans sued the government to obtain some form of emergency housing provisions. Plaintiffs used the South African constitutional right to adequate housing, to challenge the government's reconstruction housing program, which did not contain any emergency provision for immediate relief for the homeless. The Court struck down the government's reconstruction program as unconstitutional, and ordered the government both to

provide housing for the plaintiffs, and to implement some sort of program designed to provide emergency relief for people who are currently without any form of shelter.[23]

The South African example illustrates several important points about rights discourse after the critique. First, "left over" rights claims can take advantage of the rhetorical residue of rights talk that remains—is "left over"—after the critique has run its course. Stripped of foundationalist assumptions—that rights are somehow different in kind from competing interests—rights discourse can still make the case that a particular interest should trump its competitors because it is different in degree—more politically or morally important, for example.

By framing their claims as rights claims, plaintiffs in *Grootboom* were able to argue forcefully to the judiciary that there were good political and social reasons for privileging their need for immediate shelter over local and national government's competing economic and administrative interests in retaining discretion over how to allocate funds toward housing. One need not believe in a metaphysical difference between plaintiffs' needs and the government's interest in administrative control to acknowledge the pragmatic and rhetorical usefulness of using rights rhetoric to emphasize the importance of their claim. Similarly, one need not decide in the theoretical abstract whether citizens actually possess affirmative socio-economic rights—a philosophical argument of much debate within the U.S. tradition of negative rights—to recognize that plaintiffs' suit allowed them to articulate the importance of their needs in a language that the court could recognize.

Of course, the success of this kind of strategic rights claim will depend greatly on a whole host of contingent factors. Context, timing and a variety of other forces may well be behind the plaintiffs' success in *Grootboom;* the first case decided in South Africa in 2000 under the new Constitution's socio-economic rights provision might well produce a very different result than the same claim made here

in the U.S. in the same time frame. But it is useful to acknowledge that, under particular circumstances, the claim of rights was useful in an immediate and very material way.

Second, communities of color can potentially (if not reliably) use rights talk rhetorically to mobilize groups politically to advance those commitments. The *Grootboom* case galvanized many non-governmental organizations in South Africa, as well as the South African Human Rights Commission, to demand anew that the government provide for the country's homeless populations. Likewise in the U.S., in the context of the feminist movement, sociologist Michael McCann has documented how rights talk was instrumental in mobilizing women to organize in favor of equal rights legislation.[24]

Similarly, critical race theorists like Kimberlé Crenshaw have long pointed out that rights talk permitted blacks to mobilize around a commitment to integrating public accommodations in the 1960s. (Crenshaw 1367-68) Latino/as, blacks, women, gay men and lesbians, the disability community, all have used rights talk as one of several rhetorical focal points around which to organize around a commitment to inclusion. In fact, the popular lay meaning of rights talk—as grounding mass movements, and inspiring strong emotional commitment—derives in large part from the historical role that rights have played in mass mobilizing. Separate from Dworkin's categorical distinctions, rights talk may still have value as a historically meaningful language that both evokes the memory of solidarity (even if a romanticized memory) to inspire people to work toward social change.

As pointed out in the first section of this essay, CLS scholars have argued that rights talk in fact depoliticizes social movements because it promotes the idea of orderly principle over the chaos and contingency of political struggle, and focuses too much energy in litigation at the expense of street-level organizing. (Tushnet 1984: 1581) While rights talk in a particular moment may well serve to drain political energy through a focus on litigation, at another

historical moment, rights talk might instead help inspire political and social movements for change. (Williams 1987) Rights talk is not always and inevitably depoliticizing, just as it is not always and inevitably indeterminate; rather its meaning and role is contingent on a whole host of factors.

To be sure, these two arguments about the strategic value of rights rhetoric must acknowledge the full scope of Kennedy's "modern-postmodern" critique. First, as Kennedy points out generally, the rhetorical success of rights claims depends not on any precise terms used nor on any special metaphysical quality of the language, but rather on luck, custom, historical use, political commitment, persuasion, timing, the ideological predispositions of the audience, and a whole host of other factors that are highly variable. (Kennedy 1997: 316-17) Interpreting rhetorical arguments is an inevitably contingent process. Strategic action, as a result, is not strategic manipulation—rights talk cannot be controlled or wielded with certainty as any sort of tool to advance particular commitments. Rather, rights talk is wielded more as a brush stroke or a particular color or shading on an artist's canvas–if the artist is lucky and talented and her timing is right, she will accomplish something in her painting that is of value to someone.

Relatedly, rights discourse evokes not just inspirational rhetorical residue, but restrictive historical meanings as well. As the critics have pointed out, historically rights talk has been tilted in favor of preserving a conservative status quo, even when the discourse has appeared to achieve gains for outsider communities. Rights talk in a post-Bakke era makes it difficult to promote the importance of a political commitment to remedying societal discrimination, because the Bakke court decided that societal discrimination did not constitute a sufficiently compelling government interest to justify affirmative action programs. (*Regents of the Univ. of Calf. v. Bakke* 1978) In assessing rhetorical residue, the modern-postmodern strategist would do well to acknowledge that courts, and indeed the general public, have recently interpreted the right to non-

discrimination quite narrowly, to exclude any right to equal results in hiring or college admission, and to require that the rights holder prove an intent to discriminate.

Indeed, to the extent that a rights claim is deeply sedimented with restrictive historical meanings, it might prove difficult even to frame the political commitment as a rights claim. If so, communities of color should consider moving away from rights claims toward some other way of articulating their political commitments. Nevertheless, in other circumstances, in particular historical moments, rights talk may be an effective way of articulating political commitments for certain communities of color.

Rights Talk as Transgressive Performance: Dismantling Existing Social Structures

Beyond serving as a tool for strategic action, rights discourse might also play an important role in Kennedy's transgressive performances. Deployed as a tool of strategic action, rights claims may advance particular political commitments within the framework of existing legal and social structures. But when deployed as a tool in transgressive performances, rights claims might actually help to dismantle existing social and legal structures, like the social structures and ideologies of racism.

Here, it may be useful to explore the notion of transgressive performance using an example drawn from recent litigation over the racially disproportionate impact of law school admissions. In *Rios v. Regents of the University of California*, five civil rights groups have brought a class-action rights claim under Title VI, challenging the admissions procedures of University of California at Berkeley as unfairly discriminatory. In their complaint, the plaintiffs target several aspects of an ostensibly colorblind admissions process as unfairly and disproportionately excluding applicants of color.[25] The plaintiffs make the case in both the complaint and supporting literature that the admissions process unjustifiably excludes people

of color, denying them their rights under both Title VI and the Fourteenth Amendment.[26]

Viewed as strategic action, the complaint in *Rios* resembles many other Title VI suits—it seeks to strike down admissions practices as unfairly, and illegitimately, discriminatory. (*Hunter v. Regents of University of Calif.* 1999; *LeSage v. Texas* 1999; *Hopwood v. Texas* 1996; *Farmer v. Ramsay* 1999; *Smith v. Univ. of Washington Law School* 1998) From another perspective, however, the complaint in *Rios* can be understood as a radically transgressive challenge to the rationalist structure of meritocracy. As the following discussion sets forth, the rights claims in *Rios* are striking and transgressive in that they challenge the conventional, highly rationalist, structures of meritocratic distribution processes, by exposing the ways in which meritocracy unfairly excludes people of color, while purporting to be strictly colorblind.

Meritocracy depends for its power and preferred status on the rationalist distinction between merit and its opposite, bias. (Roithmayr 1998: 1452, 1471) Within this framework, merit ostensibly measures an individual's ability to produce something of social value—high performance in school and then in the world at large—by assessing certain traits, qualities or skills that reflect their potential ability. Universities like U.C. Berkeley rely on standardized test scores and success in advanced honors classes because admissions committees that high scores reflect an applicant's potential ability. (1452, 1471)

In contrast, bias is defined as the direct opposite of merit. Biased selection standards are based on some trait, like race or genetic relationship to an important personage, that theoretically does not correlate to any ability to produce social value. (1452, 1471) Within this framework, opponents can argue that race-conscious affirmative action programs are analogous to segregation—they are both instances of bias because they both rely on traits that are not related to one's "merits."

The rights claims in *Rios* destabilize this distinction by exposing the way in which an ostensibly colorblind admissions process works to exclude people on the basis of race. By bringing a claim under Title VI, which prohibits discrimination in federally funded programs, the complaint analogizes standardized tests with racial segregation, by suggesting that conventional merit standards are a form of race-conscious bias. Specifically, the complaint alleges that ostensibly race-neutral admissions standards, which purport to measure objective merit, unfairly and unjustifiably exclude people of color in disproportionate numbers. Thus, the plaintiffs in *Rios* have used rights discourse to destabilize the distinction between merit and bias by exposing the way in which meritocratic institutions are race-conscious. (Roithmayr 1998: 1498-99) To complete Kennedy's prescription for transgressive performance, plaintiffs might argue that the forces of white supremacy have constructed meritocracy as a way of maintaining white privilege, and have defined meritocratic standards in a way that favors white applicants in admissions. (But of course, plaintiffs would have to consider whether tactically such an argument might be a bit too subversive to achieve victory in the ordinary courtroom.)

Of course, the potential success of the claim in *Rios* would impact upon a much broader re-evaluation of merit undertaken by educators since the enactment of Proposition 209 and the Fifth Circuit's decision in *Hopwood v. Univ. of Texas*. Both the Texas and California legislatures have moved to automatically admit a certain percentage of their top high school graduates (Texas admits the top 7% and California the top 4%) and Florida is considering a similar plan to admit the top 20% of graduates, after doing away with affirmative action.[27]

Moreover, the general concept of meritocracy is under renewed attack. Standardized testing is suddenly suspect. Various schools and colleges are re-evaluating or doing away with standardized tests,[28] and noteworthy authors are documenting the elitism and racism behind the tests' original creation. (Lemann 1999; Gould

1981) *Rios* is perhaps part of this political change in the meritocratic landscape, as an articulation of the commitment to dismantling the social structure of numbers-based meritocracy.

Indeed, CRT scholars have written eloquently about the transgressive value of rights discourse, although they have not labeled it as such. In an early response to the CLS critique of rights, Kimberlé Crenshaw pointed out that rights talk, when set against the backdrop of a segregated South, also served to dismantle segregation by disrupting the logic of Jim Crow. (1368, 1379)

Specifically, Crenshaw explained that the rationalist logic of Jim Crow ideology constructed race relations as a set of oppositional pairs: where whites were virtuous, intelligent, moral, knowledgeable, responsible and law-abiding, blacks were lascivious, stupid, immoral, ignorant, shiftless and criminal. (1373) Similarly, Patricia Williams argued that racist ideology relied upon rhetorical binary opposition between the rights-holding, autonomous white self and the non rights-holding, object-property black other. (Williams 1991: 154-60)

As the two authors note, rights claims disrupted these distinction between blacks and whites. Giving a voice to people who had been defined as silent object-property and privileging that voice over the voices of white racists subverted the apparent order of racism. Rhetorically constructing blacks as rights-holders who could exercise their agency and autonomy, rights talk retrieved the suppressed possibility that blacks were subjects and not objects, selves and not others, autonomous and not dependent on the kindness of strangers. (Williams 1991: 160) By integrating public spaces, rights discourse demonstrated that blacks were responsible, law-abiding, virtuous, intelligent and moral (and that in the context of resistance to desegregation, whites could appear ignorant, immoral and criminal). (Crenshaw 1378-79)

Thus, blacks' claim to rights symbolically shattered the rationalist grid on which racism was based, literally by moving that which had been excluded to center stage, and by demonstrating the incoherence of the binary oppositions on which racism was based.

Integration put the physical bodies of blacks in places they had never before occupied—on the front of buses, in white schools, in hotels and railroad stations. (Crenshaw 1378-79) The act of people of color going about their daily lives in places of public accommodation—sitting at the lunch counter in Woolworth—was a transgressive performance of unimaginable proportion, momentarily disrupting the web of social rules and customs and replacing them with evocative glimpses of what formal equality and integration might look and feel like. Ultimately, those transgressive performances ushered in the "post-civil rights era," with all its complex gains and losses.

It is important to note, however, that, as with strategic action, the rhetorical value of rights talk in transgressive performances is historically contingent and limited. As Kennedy notes, whatever success "civil rights talk" may have achieved as a transgressive performance, or may yet achieve in *Rios*, depends not on some special trans-historical or intrinsic quality of rights (as Williams and Crenshaw appear to suggest at certain moments), but on rights' pragmatic rhetorical value at a particular historical moment. Nor does the idea of rights talk as a rhetorical strategy evade the notion that a wide range of forces beyond rhetoric—timing, luck, diligence, personalities, etc.—will determine the effectiveness of that strategy. In the 1960s, a host of contingent forces converged to ignite the civil rights era, which was quite transgressive for its time. It remains to be seen whether the "time is right" for a similarly successful, small-scale transgressive performance with *Rios*.

Of course, it is also important to note that disruptive discourses likely will not perpetually remain disruptive, as the civil rights era illustrates. Just as language produces a proliferation of different meanings in different contexts, disruptive performances take on different meanings as well. Thus, they might be disruptive at a particular time and place, and subsequently domesticated as the disruptive quality of the performance loses its edge in subsequent times and places. Indeed, subsequent incarnations of rights

discourse may itself have served to domesticate the transgressive performances of the civil rights era. Nevertheless, in other times and places, and under other circumstances, rights talk may well constitute a rhetorical tool to assist in dismantling existing social structures like meritocracy.

Conclusion

This essay has proposed that rights talk might yet be rhetorically useful for communities of color, either as a mode of strategic action, or as transgressive performance. This contingent and instrumental use of rights talk may help to make a broader point about an ad-hoc, contingency-oriented approach to social action that elsewhere I have described as radical or postmodern pragmatism. (Roithmayr 1998)

Postmodern pragmatism looks quite different from the (neo)pragmatism of Rorty or Fish or Radin, or, farther back, the pragmatisms of Pierce and Dewey.[29] Pragmatism in either form has defined "truth" as those practices that collectively proved useful for a particular society or community—something that has some sort of cash value for a community—in contrast to the more conventional definitions of truth that anchor their foundation in logic, moral imperatives or some other sort of objective sounding meta-discourse. (Rorty 1989: 5)

Critical race theory appears to adopt a slightly modified version of neo-pragmatism, one which is based on the relationship between usefulness and identity. Like the neo-pragmatists, CRT anchors pragmatic strategies in the needs of a community, but CRT focuses on the needs of a particular identity-based subset of the community. CRT scholar Mari Matsuda has argued that "the perspective from the bottom"—from outsider communities who are at the bottom of the economic, social and political ladder –should drive pragmatic strategies for social change. (Matsuda 1987) But regardless of whether the common thread is disempowerment or cultural

practices, truth for CRT scholars appears to be that which is useful for communities of color. (Powell 1997: 789; Yamamot 1997: 821)

In contrast to both neo-pragmatism and CRT pragmatism, postmodern pragmatism explicitly abandons the CRT notion that it is possible to pinpoint some common identity to unite communities of color, or that policymakers can derive notions of usefulness from whatever that identity may be. But radical pragmatism also abandons the neo-pragmatist idea that usefulness can be determinately defined apart from specific questions about history, geography, community identity and a whole host of other factors.

Instead, postmodern pragmatism adopts a contingent, non universalist conception of both usefulness and identity. First, many purportedly collective answers about usefulness—both at the general level and for communities of color—contain the potential for disruption, suppressed dissent, alternative interpretations, pockets of resistance, or deviant and unruly meanings.. (Laclau 1996: 60-61) Moreover, this potential for disruption is structured at least partly on identity-based lines. As Richard Rorty points out, usefulness is a socially-constructed, wholly situated and inevitably contingent concept (Rorty 1989: 48). When one says a strategy is useful, one must also ask, "useful for whom?"

Second, and by the same token, as Kennedy highlighted earlier, the idea of community identity is similarly a contested concept that contains suppressed dissent and pockets of resistance. Not only do group members and non-group members often disagree about what constitutes the group's defining features at any particular point in time but communities of color also contain fractured and intersecting sub-communities with conflicting perspectives, as Crenshaw's theory of inter-sectionality illustrates. (Crenshaw 1991: 1241) Moreover, even if common experiences (like the experience of racialized oppression) or cultural practices *could* define the identity of a particular community, those experiences and investments do not necessarily dictate the kinds of political commitments that such

a community would find useful. Thus, the concept of community is too contingent to completely determine usefulness, and usefulness is equally unable to serve as the foundation for definitions of community.

Postmodern pragmatism embraces this contingency and conflict, to make the following claim: Truth is that which advances contingently defined purposes or political commitments for contingently defined communities of color at a particular time and place (also contingently defined) and for a contingently defined period of time. In this definition, not only are the concepts of identity contingent, but more importantly, they partly reflect and partly constitute one another at the same time. That is, a community is defined at a particular moment in time by a whole host of factors, which includes the set of political commitments that a group finds useful.[30] By the same token, the political commitments that a group finds useful are constructed by a whole host of factors, one of which is the community's pre-existing identity.

Of course, in particular circumstances, community identity might itself be understood, like rights discourse, as a rhetorical strategy designed to advance particular political commitments. Ian Haney Lopez has urged Latino/as to embrace an explicitly racialized identity as opposed to an identity based on ethnicity, nationality or culture, because such an identity will advance shared political commitments to anti-subordination. (Haney-Lopez 1998: 1154) In his view, an identity framed in racial terms will draw critical attention to the way in which Latino/as have been oppressed on the basis of the same sort of racialized assumptions about intelligence, virtue and productivity that blacks and other racialized groups have suffered. (1154) Haney Lopez's vision of identity is neither naturalized nor essentialized, but explicitly political, in that it relies on shared political commitments to anti-subordination.

But a political commitment to anti-subordination may mean many different things to different groups of Latino/as, depending

on their nationality, their gender, their sexual orientation, the color of their skin, their history, their age. Adopting a racialized identity for anti-subordination purposes may have far more appeal for dark-skinned Mexican-Americans of indigenous descent than for light-skinned Cubans, who may think of themselves as white and may consider anti-subordination primarily in terms of political resistance to Fidel Castro. Thus, although political commitments, identity and notions of usefulness can all contribute to the pragmatic value of a particular strategy, none can serve as the foundation because each is contingently shaped by the other, and by interaction with many other factors. (Scott 1991: 773)

This essay advocates using rights discourse as a mode of strategic action or transgressive performance. Although outcomes cannot be guaranteed in advance, because contingency often precludes closure in advance, that fact should not foreclose engaged activity.

To that end, people of color should engage, as Charles Taylor advises, in an "inspired *ad hoccery*," "regarding each situation of crisis as an opportunity for improvisation." (Taylor 1989: 121) People of color should, from their unstable positions within language and history, generate as many different species of transgressive and strategic performances as possible, using whatever tools we might have at our disposal, to advance our vision of social change.

Put differently, critical race theorists should engage in *bricolage*.[31]

Levi-Strauss's original vision of *bricolage* contrasts the image of the engineer, who attempts to select precisely the right tool to achieve a particular outcome, to the '*bricoleur*,' who "addresses himself to a collection of oddments left over from human endeavors." (Tushnet 1993: 1071) Accordingly, as an oddment left over from a distinctly liberal understanding of the "rule of law" or "social order," rights discourse might yet be useful as a mode of strategic action or as a prop for transgressive performance, in movements for social change.

Notes

1 *See* Darity W A and P L Mason 1998 "Evidence on Discrimination in Employment: Codes of Color, Codes of Gender" *J Econ Persp* 12: 63 (canvassing evidence of persistent discrimination in labor markets); Munnell A H et al 1996 "Mortgage Lending in Boston: Interpreting HMDA Data" *Am Econ Rev* 86: 25 (documenting discrimination in mortgage lending); Rapaport C 1995 "Apparent Wage Discrimination When Wages Are Determined by Nondiscriminatory Contracts" *Am Econ Rev* 85: 1263 (exploring lower salaries for African-American school teachers); Wilkins D B and G M Gulati 1996 "Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis" *Cal LR* 84: 493 (explaining ways in which discrimination can influence decisions in law firms) The foregoing resources were cited by Selmi M 1998 "The Facts of Affirmative Action" *Va LR* 85: 697, n 148.

2 *See* Mutua M 1997 "Hope and Despair for a New South Africa: The Limits of Rights Discourse" *Harv Hum Rts J* 10: 63 (addressing rights proponents claims and arguing that rights discourse is limited).

3 "One response to the inadequacy of author's intent as a source of meaning is to conclude that meaning is contextual and can be determined by specifying the context of a text. This approach supposes that the context 'exists' around the text, to be discovered by the interpreter as the source for the meaning of the text. But the problems of indeterminacy are not avoided by this approach. Any attempt to fix the meaning of a text by the specification of context runs up against the problem that any given context is open to further description. Context does not exist somewhere. Context is constructed by the interpreter according to her calculus of relevance and irrelevance. A particular description of the context involves screening the text through representational terms used by the interpreter. It is an effect of the interpreter's differentiation of what outside the work counts and what doesn't. Accordingly, context is the result of the interpreter's activity rather than the ground for it." (Peller 1984: 1172-73).

4 Gordon R 1990 "New Developments in Legal Theory" in *The Politics of Law* Kairys ed 1990: 419-20; *see also* Kelman M 1987 *A Guide to Critical Legal Studies* 275.

5 See also Horowitz M 1977 "The Rule of Law: An Unqualified Human Good?" *Yale LJ* 86: 561 (rights sanction material inequalities while guaranteeing formal equality).

6 Tushnet was careful not to deny the historical importance of rights talk. "The critique of rights does not deny the historical achievements of these struggles; it suggests only that success in the future will depend on simultaneously acknowledging the importance of the past and transcending the limitations that the language of rights places on continuing struggles." (Tushnet 1984: n. 381).

7 The ensuing debate about rights helped to inaugurate onto the legal academic scene the new movement that was to call itself critical race theory. West R 1992 "Murdering the Spirit: Racism, Rights and Commerce" *Mich LR* 90: 1771; Harris 1994: 750-51.

8 *See also* Crenshaw K "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" *Harv LR* 101: 1331, 1367-88.

9 Williams argued that because white male critical scholars had failed to take into account their own social position of privilege, they had undervalued the perspectives and experiences of blacks for whom rights discourse had value, and had overvalued their own feelings of alienation and distance in connection with rights. (Williams 1991: 408-16)

10 "Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values that guise of stability, and from whom social change for the better must come (whether it is given, taken or smuggled) Change argued for in the sheep's clothing of stability ("rights") can be effective even as it destabilizes certain other establishment values (segregation) The subtlety of rights' real instability thus does not render unusable their persona of stability." (Williams 1991: 149)

11 Matsuda M 1987 "Looking to the Bottom: Critical Legal Studies and Reparations" *Harv Civ Rts Civ Lib LR* 22: 323, 333, 338; Williams R 1987 "Taking Rights Aggressively" *Law & Inequality* 5: 103.

12 This critique, that identity categories essentialized and glossed over differences among members of the group, had originated in part in the CRT movement itself, although it took the form of a critique of

feminist legal scholars for essentializing racial differences among women. *See* Crenshaw K 1991 "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" *Stan LR* 43: 1241, 1242; Grillo T 1995 "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" *Berkeley Women's LJ* 10: 16, 17; Harris A 1990 "Race and Essentialism in Feminist Legal Theory" *Stan LR* 42: 581, 585.

13 *See generally* Duxbury 1995: 503-509 (discussing CRT and feminist reactions to the CLS critique of rights)

14 According to Kennedy, a minimalist processes the critique of indeterminacy and legitimation as a loss of faith in reason and rights talk. A maximalist, by contrast, experiences the critique as *proof* that rights talk can never produce a determinate result, thus using the power of reason to correct an error. A strategic maximalist uses this last argument to clear rights talk from the table, and to replace it with some other preferred sort of discourse. (Kennedy 1997: 311)

15 *See also* note 12 and accompanying text.

16 *See e.g.,* Delgado R 1987 "The Ethical Scholar: Does Critical Legal Studies Have What Minorities Want?" *Harv CR Civ Lib LR* 22: 301 313. This symposium issue of the Harvard Civil Rights Civil Liberties Law Review contained an exchange of scholarship between CLS and CRT on the critique of rights. (Duxbury 1995: 476)

17 Organicism teaches us that we are functions of normative systems beyond our control, historically and in cross cultural comparison consenting to whatever the whole dictates. Anti-nomianism teaches that whatever order we consent to will under-determine choices with large stakes, putting us at the mercy of ... dictators, in the shadow of the war of all against all. Paranoid structuralism suggests that this same under-determined order is over-determined by sinister forces we deny, and reproduce through our denial. Semiotics tells us that because consent is an inter-personal concept, we can consent only to a text, which will neither say what we mean nor mean what we say, will be performed rather than authored, floating, endlessly privileging something or other, caught in the phallogocentric logic of representation. (Kennedy 2001)

18 For an additional example of a transgressive peformance from Kennedy's other work, *see* Kennedy D 1993 *Sexy Dressing, etc. Essays on*

the Power and Politics of Cultural Identity 163-64, 187 (discussing sexy dressing as possible critique of the asexual nature of the workplace and the disruption of rational grids that mark out appropriate contexts for sexual dress)

19 One might speculate that Kennedy is referring to the ecstasy of liberation from old social structures, the irony of creating a new moment that might become a social structure, and the depression of having created a new structure that will need dismantling.

20 Put differently, "[t]he critique might succeed as disruption in its context and then get reproduced as a theoretical routine, as a piece of critical "normal science," performed over and over again without either disruptive effect or disruptive intention." (Kennedy 2001: 343)

21 Joanne Conaghan notes that aside from the gender-neutral pronouns, Kennedy's theory of adjudication would look the same without his efforts to integrate gender into his theory, which he does mostly at the margins. Conaghan J 2001 "Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy's Critique of Adjudication" *Cardozo LR* 22.

22 *Government of the Republic of South Africa v. Grootboom, et al.* A copy of the decision can be located at *(Http://www.concourt.gov.za/cases/2000/grootboom1sum.shtml)* (thereafter cited as Grootboom)

23 *Id.* at par. 13, 66.

24 McCann M W 1994 *Rights at Work: Pay Equity Litigation and the Politics of Legal Mobilization.* It is important to note that McCann traces the success of rights rhetoric to its ability to persuade women that rights are in theory distinct interests, even if practically, courts don't always recognize that difference.

25 These practices include: (i) granting preferences to applicants who have taken advanced placement, college preparatory and other honors classes, which are disproportionately unavailable at high schools serving students of color; (ii) granting special "admissions by exception" and VIP admissions to students who fail to meet academic eligibility requirements; (iii) unjustifiably and unduly relying on insignificant differences in standardized test scores in making admissions decisions, all of which disproportionately exclude applicants of color and favor white applicants. Complaint, *Rios* v. *Regents of Univ. of Cal.* (Feb. 2, 1999) (thereafter cited as *Rios*)

26 *See* Press Release, Plaintiffs of Rios v. Regents of Univ. of Cal., Feb. 2, 1999 press release accompanying complaint)

27 "Jeb Bush's Drive Against Affirmative Action Roils Florida," New York Times, February 4, 2000.

28 "In With Lego Test, Out With SAT's," Denver Post, Feb. 1, 2000,at A1. *See also* "Most Colleges Are Expected to Continue to Use SAT," N.Y. Times, February 24, 2001 (President of University of California system calling for elimination of the SAT, while most administrators indicate that they will continue using the test for now)

29 For an excellent review of pragmatist traditions, see Rorty R 1989 *Contingency, Irony and Solidarity* 5.

30 *See generally* Omi M and H Winant 1986 *Racial Formation in the United States: From the 1960s to the* 1980s.

31 In a recent article, Mark Tushnet describes the method of *bricolage* as:

> performing a large number of diverse tasks... [by] mak[ing] do with 'whatever is at hand,' that is to say with a set of tools and materials which is... heterogeneous because what it contains bears no relation to the current project, or indeed to any particular project, but is the contingent result of all the occasions there have been to renew or enrich the stock." (Tushnet 1993: 1071)

References

Conaghan J 2001 "Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy's Critique of Adjudication" *Cardozo LR* 22

Crenshaw K 1991 "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" *Stan LR* 43

—ed 1995 *Critical Race Theory: Key Writings That Formed the Movement* New Press New York

—"Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" *Harv LR* 101

Darity W A and P L Mason 1998 "Evidence on Discrimination in Employment: Codes of Color, Codes of Gender" *J Econ Persp* 12

Delgado R 1987 "The Ethical Scholar: Does Critical Legal Studies Have What Minorities Want?" *Harv CR Civ Lib LR* 22

Duxbury N 1995 *Patterns of American Jurisprudence* Oxford University Press New York

Dworkin R 1977 *Taking Rights Seriously* Duckworth London

Elster J 1991 "Constitutionalism in Eastern Europe" *Chicago LR* 58

Farmer v Ramsay, 41 F Supp. 2d 587 (D Md 1999)

Gabel P 1984 "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves" *Texas LR* 62

Gordon R 1990 "New Developments in Legal Theory" in *Politics of Law* ed Kairys Pantheon Books New York

Gould SJ 1981 *The Mismeasure of Man* Norton New York

Gramsci A 1971 *Selections from the Prison Notebook* Hoare and Nowell-Smith eds Lawrence & Wishart London

Grillo T 1995 "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" *Berkeley Women's LJ* 10

Haney-Lopez I 1998 "Race, Ethnicity, Erasure: The Salience of Race to Lat-Crit Theory" *Cal LR* 85

Harris A 1990 "Race and Essentialism in Feminist Legal Theory" *Stan LR* 42

—1994 "The Jurisprudence of Reconstruction" *Cal LR* 82

Hopwood v Texas, 78 F3d 932 (5th Cir 1996)

Horowitz M 1977 "The Rule of Law: An Unqualified Human Good?" *Yale LJ* 86

Hunter v Regents of University of California, 190 F3d 1061 (9th Cir 1999)

Kennedy D 1997 *A Critique of Adjudication: Fin de Siècle* Harvard University Press Cambridge Massachusetts

—2001 "A Semiotics of Critique" *Cardozo LR* 22

Klare K 1981 "Labor Law As Ideology" *Indus Rel LJ* 4

Laclau E 1996 "Deconstruction, Pragmatism, Hegemony" in *Deconstruction and Pragmatism* Mouffe ed Routedge London & New York

Lemann N 1999 *The Big Test* Farrer, Strauss and Giroux

LeSage v Texas, 158 F3d 213 (5th Cir 1999)

Matsuda M 1987 "Looking to the Bottom: Critical Legal Studies and Reparations" *Harv CR Civ Lib LR* 22

Mutua M 1997 "Hope and Despair for a New South Africa: The Limits of Rights Discourse" *Harv Hum Rts J* 10

Peller G 1984 "The Metaphysics of American Law" *Cal LR* 73

—1990 "Race Consciousness" *Duke LJ* 1990

Powell J 1997 "The Colorblind Multiracial Dilemma: Racial Categories Reconsidered" *USF LR* 31

Regents of the Univ. of Calif. v Bakke, 438 US 265, 287 (1978)

Roithmayr D 1998 "Deconstructing the Distinction Between Bias and Merit" *Cal LR* 85

Rorty R 1989 *Contingency, Irony and Solidarity* Cambridge University Press New York

Scott J 1991 "Evidence of Experience" *Critical Inquiry* 17

Smith v Univ. of Washington Law School, 2 F Supp.2d 1324 (WD Wash 1998)

Taylor C 1989 "The Rushdie Controversy" *Public Culture* 2

Tushnet M 1984 "An Essay on Rights" *Tex LR* 62

—1993 "The *Bricoleur* At the Center" *U Chi LR* 61

West R "Murdering the Spirit: Racism, Rights and Commerce" *Mich LR* 90

Williams R 1987 "Taking Rights Aggressively" *Law & Inequality* 5: 1

Yamamot E 1997 "Critical Race Praxis: Race Theory and Political Lawyering Practice in Post Civil-Rights America" *Mich LR* 95