LEFT OVER RIGHTS

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This Essay focuses on Duncan Kennedy’s argument for a “post-rights” position, in the wake of the earlier critical legal studies critique of rights and the ensuing response by Critical Race Theorists. I argue that, notwithstanding Kennedy’s loss of faith in rights discourse, rights talk might still be pragmatically useful for communities of color to operate strategically within the accepted legal framework, or to subvert that framework in order to advance particular political commitments for particular communities of color at particular moments in history.

INTRODUCTION

Ten years ago, at a critical theory conference in Madison, Wisconsin, a group of legal academics formally inaugurated Critical Race Theory (“CRT”) as an intellectual movement in legal scholarship. Although the movement had its own historical narrative of development,¹ it had inherited much of its direction from the civil rights and critical legal studies (“cls”) movements.² From the latter, CRT had adopted the critique of modern liberal legal consciousness, and, in particular, the argument that law reflected and reinforced the exercise of power by elites.³ From the former, CRT had drawn a deliberately modernist commitment to use race as a central category to analyze law, and to use law in an affirmative program to advance racial emancipation.⁴ As critics soon pointed out, these two unifying commitments—the postmodern critique of law as racist and the modernist desire to use law to effect racial liberation—appeared to be in fundamental

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¹ For an account of the development of CRT, see CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT xvii-xxvii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter KEY WRITINGS].

² See id. at xix (stating that civil rights scholarship and critical legal theory are elements in the conditions of possibility for CRT).

³ See id.

⁴ See id. at xxvii; Angela Harris, Foreword: The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 750-54 (1994).
tension. How could communities of color depend on law to achieve racial liberation when it was law itself that had helped to construct their oppression?

That tension provided the framework for a passionate debate about rights, and whether rights talk was an important part of any movement for racial empowerment or social change. Cls theorists like Duncan Kennedy, Mark Tushnet, and Peter Gabel argued that rights talk was indeterminate because the adjudication of rights was capable of producing conflicting and contradictory results on a particular issue. Kennedy argued that most legal rules (including rights) were too generally framed (by design) to dictate a particular result in a particular case. Accordingly, judges interpreted legal rules using a whole range of politically produced arguments that came from a source other than the text.

Similarly, Tushnet argued that the context surrounding a right—i.e., the pattern of social arrangements and political commitments accompanying a right—determined the value of the right and not the legal right itself. As claims of legal or moral entitlement, rights claims were merely arguments to recognize those preexisting political commitments, or to change them in some way. To claim a “right” to some activity or some protection was merely to say that one had a very good political, economic, social, moral, or other reason to support one’s position.

In addition, cls theorists like Gabel argued that rights legitimized the exercise of power. Rights rhetoric made the government appear as if it were resolving disputes fairly and objectively under the rule of law, when in fact the government was exercising conservative political power in ways that oppressed the

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5 See Harris, supra note 4, at 760.
6 See id.
8 See Kennedy, Freedom and Constraint, supra note 7.
9 See id.
10 For example, the right to raise one’s biological child reflects a twentieth-century Anglo-Saxon American political and social commitment to the arrangement of the nuclear family headed by biological parents, and not some moral truth grounded in rational deduction. See Tushnet, supra note 7, at 1378.
11 See id. at 1365.
Moreover, rights discourse made mass political resistance unlikely because rights discourse disguised the role of coercive state power in creating material inequalities in wealth, opportunities, and resources. In response, scholars of color mounted a sustained defense of rights discourse. Although scholars like Kimberlé Crenshaw and Patricia Williams acknowledged that rights theoretically were indeterminate and had been used to legitimate white racial power, they argued that communities of color had achieved a great deal using rights discourse during the civil rights era. By framing claims in an accepted legal vocabulary, communities of color were able to participate in the political conversation. According to Williams, reinterpreting rights to encompass blacks had conferred visibility, respect, and autonomy—the fundamental aspects of personhood—to people who previously had been treated as objects instead of subjects.

In addition, by using a term recognized by the prevailing ideology’s discourse, communities of color had been able to enlist the state’s coercive power—for example, the power of the presidency and the courts—on their behalf. Critical scholars also argued that if rights were currently indeterminate or legitimating, they could be reconstructed to reflect the real needs and political commitments of communities of color.

The disagreement about rights divided critical scholars along racial lines, and accentuated an already existing split between postmodernists and pragmatist dissenters within cls. Ultimately, the dissenters within cls went on to create CRT, an intellectual

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12 See Gabel, supra note 7, at 1577; Robert Gordon, New Developments in Legal Theory, in THE POLITICS OF LAW 419-20 (David Kairys ed., 1990); see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 275 (1987).

13 See Gabel, supra note 7, at 1578.


15 See WILLIAMS, supra note 14, at 160-64; see also Crenshaw, supra note 14, at 1367-68.

16 "[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." WILLIAMS, supra note 14, at 164. 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. See id.

17 See Crenshaw, supra note 14, at 1381; see also WILLIAMS, supra note 14, at 151-52.

18 See Harris, supra note 4, at 760.

movement devoted to the critical analysis of law as it relates to race, racism, and white supremacy.\textsuperscript{20}

For a period of time, neither cls nor the newly born CRT movement revisited the question of rights, as each concentrated on movement-building and organizing within the legal academy.\textsuperscript{21} Then, in 1997, Duncan Kennedy took up the question once again in his book, \textit{A Critique of Adjudication: Fin de Siècle}\textsuperscript{22} ("Critique"), devoting the book's last three chapters to the rights debate. 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 determinate enough to predict a particular outcome, and sometimes (much of the time, according to Kennedy) they were not.\textsuperscript{23} Whether rights were determinate in a particular situation depended not on their terms or their underlying assumptions, but on a whole range and number of forces—time, place, personalities, historical circumstance—that were neither predictable nor controllable.\textsuperscript{24}

However, Kennedy was equally skeptical about the CRT project of reconstructing rights to reflect "real" racial differences. He highlighted the already familiar criticism that identity was too fluid and indeterminate a concept itself to ground any political project of reconstructing rights.\textsuperscript{25} Indeed, in Kennedy's view, the reconstruction project was as unpredictable a project as rights discourse itself.\textsuperscript{26}

In light of this radical undecidability, Kennedy explained, he'd lost interest in trying to specify the conditions under which rights were determinate, or trying to reconstruct rights to make them responsive to the needs of disempowered groups. More importantly, he had lost faith in the central assumption of rights.\textsuperscript{27} He no longer believed that rights claims were interests that were

\begin{thebibliography}{9}
\bibitem{20} See Key Writings, \textit{supra} note 1, at xxiii.
\bibitem{21} See generally Duxbury, \textit{supra} note 19, at 503-09.
\bibitem{22} See Duncan Kennedy, \textit{A Critique of Adjudication: Fin de Siècle} (1997) [hereinafter Critique].
\bibitem{23} See id.
\bibitem{24} See id. at 311-12.
\bibitem{25} See id. at 328. The 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 Kimberlé Crenshaw, \textit{Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color}, 43 STAN. L. REV. 1241, 1242 (1991); Trina Grillo, \textit{Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House}, 10 BERKELEY WOMEN'S L.J. 16, 17 (1995); Angela Harris, \textit{Race and Essentialism in Feminist Legal Theory}, 42 STAN. L. REV. 581, 585 (1990).
\bibitem{26} See Critique, \textit{supra} note 22, at 311-12.
\bibitem{27} See id. at 312-13.
\end{thebibliography}
somehow different and categorically entitled to more protection than other competing political interests. Accordingly, there was no reason to believe that rights claims could really “trump” majoritarian will to protect a political minority against oppression.

In keeping with his arguments against reconstructive projects, Kennedy declined to propose a reconstructive theory or any programmatic replacement for rights talk. In his view, any program of reconstruction and reform would inevitably suffer from the same unpredictability and potential indeterminacy as rights discourse. 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 Critique, CRT has yet to address Kennedy’s “post-rights” position and his pursuit of the transgressive performance as a political strategy. Perhaps the time has come for CRT to again take up the “rights and reconstruction” question, and to address Kennedy’s loss of faith.

In this Essay, I argue that, notwithstanding 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. Second, rights talk might be a useful tool with which to create Kennedy’s transgressive performances. In the mode of transgressive performance, advocates might use rights talk as a way of subverting conventional rationalist assumptions about the relationship between race and law. Thus, despite the thoroughgoing nature of Kennedy’s critique, rights talk might still have enough vitality and usefulness left over to justify its use in particular circumstances.

I. CRITIQUE OF ADJUDICATION: DUNCAN TAKES ON

In the final chapters of Critique, Kennedy reworks the ground of the debate about rights in two ways. First, he shifts the critique of rights toward a more postmodernist direction compared to some

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28 See id.
29 See id.
30 See id.
31 See id.
32 See id.
33 See id.
of the earlier cls arguments. Second, after reiterating the problems of using identity politics to reconstruct rights, he offers an alternative strategy intended to avoid the pitfalls associated with any reconstructive program.

A. Kennedy's Loss of Faith

In contrast to the earlier cls position, Critique puts forward a "minimalist" indeterminacy critique that is much less corrosive.\textsuperscript{34} It is not that rights discourse is always indeterminate and can never produce closure. Although rights discourse does frequently fail to reach closure, at other times and in other (rare) circumstances, rights actually have appeared to produce some sort of useful result or determinate outcome.\textsuperscript{35}

But in neither case has the discourse succeeded or failed because rights categorically trump other competing claims. Rather, Kennedy argues that the success or failure of a rights claim depends on a range of political forces that cannot be predicted in advance. That is, a successful rights argument depends not on the "scope" of the right or its application to a set of facts, but on a less-than-formulaic interpretative relationship between the rights claim, the identity and diligence of the rights claimer, the political viability of supporting arguments, timing, and luck, among other factors.\textsuperscript{36}

Kennedy agrees with CRT argument that rights has produced value in the context of the civil rights movement, and is quick to note that his newly minimalist rights critique did not constitute an indictment of the civil rights era.\textsuperscript{37} He does not intend to suggest that communities of color had been wrong or misguided to use rights as part of a demand for inclusion.\textsuperscript{38} Rather, he seeks to remind them that their success has been a matter of hard work, chance, and historical circumstance—they have succeeded not because rights are somehow categorically distinct from nonrights political interests, but because their timing during the civil rights era had been great, rights discourse had taken on a particularly

\textsuperscript{34} According to Kennedy, a minimalist moves from the critique of indeterminacy and legitimation to a loss of faith in reason and rights talk. A maximalist, by contrast, experiences the critique as rationalist proof that rights talk can never produce a determinate result. 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. See id. at 311.

\textsuperscript{35} See id.

\textsuperscript{36} See id. at 312.

\textsuperscript{37} See id. at 334.

\textsuperscript{38} See id.
liberatory meaning at a particular time, and they had worked extraordinarily hard to organize politically.\textsuperscript{39}

Kennedy also highlights continuing problems with trying to anchor rights on a foundation of identity politics. Like other critics, including internal dissenters from CRT,\textsuperscript{40} he points out that identity cannot reliably serve as a determinate ground for defining rights claims, any more than universal principles or the language of a right can.\textsuperscript{41} Like the language of rights discourse, the definition of the identity group is often (but not always) indeterminate. Identity groups often consist of members with multiple and intersecting identities that pull them toward different and competing rights claims. Nor can one specify which rights will flow from a particular identity once it has been defined. "Rights that supposedly flow from a particular group identity may be oppression for subgroups that have a crosscutting allegiance."\textsuperscript{42}

Thus, Kennedy notes that although communities of color may agree on the right to nondiscrimination in the workplace, they have split into competing and contradictory positions on questions of affirmative action, and hate speech codes.\textsuperscript{43} According to Kennedy, communities of color are likely to run into the same sorts of problems women had faced in defining "women's rights"—white women's experiences differ so radically from those of women of color that it had become difficult to specify what rights should flow from gender difference.\textsuperscript{44}

And so, in response to these problems with identity and politics and the more general rights critique, Kennedy reports that he has experienced a change of heart, a loss of hope in rights discourse as a legal process that could produce a favorable outcome for the disempowered. As he puts it:

\begin{quote}
Once 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.\textsuperscript{45}
\end{quote}

\textsuperscript{39} See \textit{id.}. More evocatively, Gabel described this contingent historical movement as the "unpredictable convergence of 'igniting' material and cultural circumstances combined with an irreducible element of free commitment . . . ." Gabel, \textit{supra} note 7, at 1587.

\textsuperscript{40} See \textit{supra} note 25 (outlining CRT's version of the essentialism argument with regard to gender).

\textsuperscript{41} See \textit{CRITIQUE}, \textit{supra} note 22, at 328.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} See \textit{id.}

\textsuperscript{44} See \textit{id.}; see also \textit{supra} note 25.

\textsuperscript{45} \textit{CRITIQUE}, \textit{supra} note 22, at 328.
True to his postmodernist leanings, Kennedy does not describe his change of heart in rationalist terms—he did not reason his way from the rights critique to his post-rights position. Rather, Kennedy analogizes his fall from grace to a loss of faith in God.\textsuperscript{46} Like a religious faith that disappears without any precipitating moment, Kennedy awakened one morning to find that he had lost faith in the central assumption underlying rights talk. Namely, he no longer believed that rights claims were somehow distinct as legal entities from mere political claims or policy reasoning.

Kennedy's approach is not critical of rights so much as it is post-rights.\textsuperscript{47} It isn't that anyone has proved rationally that rights talk does or does not produce closure, "but only that 'it doesn't seem to have been done yet, and I'm not holding my breath.'"\textsuperscript{48} It is time to move on, Kennedy claims, to change the subject and the language and get out of the habit of describing things in rights terms.\textsuperscript{49}

Kennedy is careful to narrow the implications of his position. A loss of faith in rights discourse does not undercut the meaning or value of rights talk per se.\textsuperscript{50} Losing faith does not mean that rights talk is wrong or meaningless, but rather that rights reasoning might be experienced merely as a species of legal rhetoric, with no foundational concept to determine when rights talk would produce closure and when it would not.\textsuperscript{51} People of color might try to manipulate rights discourse in an effort to advance certain political commitments, but, ultimately, there is nothing to anchor rights talk to the desired outcome, even in a perfectly operating system of adjudication.\textsuperscript{52}

\section*{B. The Art of Transgressive Artifacts}

What is Kennedy suggesting in place of rights? If rights discourse is too potentially indeterminate to invest any faith in, how should outsiders advance their commitment to inclusion? Previously, CRT scholars had taken cls to task for failing to propose any reconstructive program of reform in the wake of the maximalist rights critique.\textsuperscript{53} But under the earlier cls rights

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\item \textsuperscript{46} See id. at 312-13.
\item \textsuperscript{47} See id. at 346-48.
\item \textsuperscript{48} Id. at 312.
\item \textsuperscript{49} See id. at 313.
\item \textsuperscript{50} See id. at 311-12.
\item \textsuperscript{51} See id.
\item \textsuperscript{52} See id.
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critique, scholars had used critique to clear the table for a new replacement program, even if critical scholars had not provided much in the way of details.\footnote{See Kelman, supra note 12, at 275.}

In contrast, Kennedy definitively rejects the idea of replacing old theories or programs with new ones. Namely, any attempt to pursue Left political commitments by way of new grand narratives like “reconstructing rights” inevitably will suffer from the same indeterminacy, and the same illusory theoretical objectiveness, that permeates rights talk.\footnote{See Critique, supra note 22, at 360.}

Rather, Kennedy proposes that the Left pursue a series of small-scale, ad hoc transgressive performances, in order to destabilize from within particular oppressive social, legal, and political structures and institutions.\footnote{See id. at 342.} How can one destabilize institutions from within while still being transgressive? Kennedy explains that certain legal and social structures appear cohesive and stable only by ignoring or marginalizing their own internal instability. A legal rule, for example, appears determinate and legitimate only by ignoring those instances in which the rule produces contradictory results using the same set of facts, or marginalizing them by describing them as exceptions.\footnote{See Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 Cal. L. Rev. 1449, 1458-60 (1997) (describing structuralist webs or “grids” that create meaning by excluding deviant definitions).} If these contradictory outcomes were to be exposed, in a way that could not be explained as a minor exception or anomaly, then perhaps the legal structure would collapse.\footnote{See Critique, supra note 22, at 342-43.}

Kennedy argues that transgressive performances may be one way to uncover such contradictions and deviations.

Of course, Kennedy does not elaborate much further on how to create transgressive artifacts or performances, nor does he provide many examples in Critique.\footnote{To have done so would have undercut his claim that transgressive performances are not reconstructive programs. See id. at 359-60. Kennedy does give the decidedly elitist example of architecture: “Le Corbusier can be a model for the dreary skyscraping style of the 1950s through the 1970s, until postmodern architectures innovate again and create a new style that will soon be old and dead.” Id. at 343. For a more controversial example of transgressive performance from Kennedy’s earlier work, see Duncan Kennedy, Sexy Dressing Etc.: Essays on the Power and Politics of Cultural Identity 163-64, 187 (1993) (describing sexy dressing as a transgressive performance, which uncovers repressed sexual desire and challenges the definition of professional dressing as nonsexual).} Of course, radical critique—
the kind of critique that put into question background assumptions and unearthed suppressed aspects—is likely to play an important role. And Kennedy does highlight the performative element of the transgressive performance, which relies for its punch on some artifact, a marker, a style or quality of performance. In his view, much as “rock and roll” replaced other forms of music in the 1950s and 1960s, the transgressive performance itself tends to dissolve the conventional forms of expression in the process of creating a new style or artifact.

Kennedy’s colleague Peter Gabel, in an article written much earlier, may inadvertently have provided an example of transgressive performance, or at least the material to sketch out an example of transgressively destabilizing an institution. In an article on rights in the Texas Law Review, Gabel wrote of the unspoken rules of professionalism, imposed by the institution of “the bank,” which govern an exchange between the bank teller and her customer:

I approach a bank teller who affects a cheerful mood and who suggests in all her words and gestures that she is glad to see me. Yet I detect in all these words and gestures an artificiality—her words are somehow “processed”; her gestures, ever so slightly delayed, have been “subject to review.” In other words she is playing the role of being a bank teller, while acting as if her performance is real. As I move toward her from my place in line, I feel myself becoming a “customer” of “the bank,” and she sees in me the same artificiality and delay-time she experiences in herself.

But as Gabel noted, the social structure of the workplace presents itself as professional and orderly only by repressing the more “intimate” forms of connection or desire that might permeate a professional relationship.

In that context, an “aside,” or a moment of personal conversation, might constitute a transgressive performance, displacing the professional and impersonal exchange between teller and customer. That conversation might be, for example, an exchange about the patron’s four-year-old son who has just pushed the bank security button and the ensuing melee when the security guards come running. The jarring contrast between the

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60 See CRITIQUE, supra note 22, at 342.
61 See id.
62 See id.
63 Gabel, supra note 7, at 1567-68.
64 See id.
65 See id. at 1568, 1586 (discussing the “aside,” which is marginalized as a “private” moment in an otherwise professional encounter). As the reader may guess, the security
dramatically “personal” and “private” conversation and the detached professional distance of the bank teller role might potentially dismantle the bank’s rules or at least destabilize them, in large part by bringing to light the way in which professionalism marginalizes the more personal connections between teller and patron.66 Indeed, the social rules of the bank might well change over time after such a performance (particularly if, in the aftermath, the bank president comes out to confess to his staff that he himself had once pushed the button as a child).67

Kennedy’s prescription for transgressive performances is thoroughly postmodern. Unlike earlier cLs authors, who promoted deconstruction or trashing as a recipe for destabilization, Kennedy does not prescribe some technique, method, or formula for transgressive performance. Moreover, like the success of the civil rights movement, he recognizes that the success of a transgressive performance is highly unpredictable, owing to the many unfathomable variables that might (or might not) produce subversion or destabilization.68

Kennedy’s reasons for preferring small-scale transgressive performances over a larger-scale reconstructive program appear to be both aesthetic and strategic. Having lost faith in the promise of reform or reconstruction, Kennedy pursues the aesthetic possibility of inducing “intense experiences in the interstices of a disrupted rational grid”—the small moments of liberation and disorientation when the rules of the bank or other aspects of social life are subverted and replaced with potentially chaotic new styles and ways of being. In Kennedy’s words, he seeks to “induce, through the artifactual construction of critique, the modernist

button incident is based on the author’s personal experience with her then four-year-old
son, Erik, who pursued his own transgressive performance at NationsBank in Washington,
D.C.

66 In an infamous exchange between Kennedy and Gabel in the pages of the Stanford
Law Review, Kennedy argued that this type of moment was not any more authentic
because it was personal than the professional roles had been. Kennedy pointed out that
there are social rules and linguistic conventions that structure the nature of a “personal”
encounter, just as they do a professional one. Peter Gabel & Duncan Kennedy, Roll over

67 In Kennedy’s view, the content of the performance or artifact does not do the work of
transgression. Rather, transgression comes from the performance in conjunction with
(a perhaps unexpected) context to create a potentially subversive effect. For Kennedy,
the disruptive effect of the transgressive performance comes from a very fact-specific and
wholly contingent relationship between a performance and its surrounding context: “[T]he
whole idea of the transgressive artifact or performance is that it does something, the
disruption, that can’t be fully accounted for by looking at its content outside its context of
belief.” Critique, supra note 22, at 343. Using the above example, a personal
conversation between a customer and his barber at the barber shop is not transgressive in
the same way as a personal conversation between the bank teller and a patron.

68 See id. at 349.
emotions associated with the death of reason—ecstasy, irony, and depression.\footnote{Id. at 342. Although Kennedy does not elaborate, perhaps the ecstasy comes from liberation from old social structures, the irony from creating a new moment that might eventually become an old social structure, and the depression from having created a structure that may soon need dismantling, or from the loss of the old structure.}

But Kennedy’s aspirations are also strategic. In his view, transgressive performances and artifacts move along the Left’s political project in two ways. First, they disrupt and loosen up the Left’s counterproductive and bad-faith claims to rightness and closure.\footnote{See id. at 344.} Second, transgressive performances provide the Left with an antirationalist tool to confront its opponents, in addition to, or instead of, just rational analysis.\footnote{See id.}

Kennedy acknowledges that the success of transgressive performances is contingent. The performance might well fail to be transgressive or might eventually become domesticated and routine. Like rights, subversive performances can be captured ("taken over by pods"), appropriated, and routinized in order to deny the shock of the original experience.\footnote{See id. at 343.} Other people can reinterpret a transgressive performance, redescribe it in various iterations, and adapt it for their own purposes, perhaps to explain why the new style actually supported the old way of thinking. ("We are all legal realists now.")\footnote{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." Id. Casual Fridays could be understood as the employer’s attempt to normalize and contain casual dressing in the workplace, which was transgressive when Silicon Valley thirty-somethings first adopted it.} To prevent inevitable domestication, Kennedy accordingly proposes a never-ending series of transgressive performances, designed to continually subvert, challenge, shake-up, and resist any move to appropriate the performance for a less radical purpose.

II. RIGHTS AS TRANSGRESSIVE AND INNOVATIVE RHETORIC

A. Critical Race Theory’s Critique of Post-Rights

What should Critical Race Theorists make of Kennedy’s latest contribution, in particular, his reworking of the rights critique and his irrationalist pursuit of the transgressive performance? This section begins with an intentionally provocative but not altogether new assertion: Kennedy’s pursuit of the ad hoc, transgressive performance once again fails to address the concerns of
communities of color and other disempowered groups. From the Critical Race Theorist's perspective, Kennedy's pursuit of the transgressive artifact is not particularly useful to advance racial emancipation in any concrete sense. While Kennedy focuses on how one "feels" using a particular discourse, and on inducing intense emotional experiences via transgressive performances, communities of color are more concerned with material empowerment, jobs, housing, education, and medical care. To paraphrase Kennedy, transgressive performances are of little use in inner-city ghettos and barrio foxholes.

More problematically, Kennedy rejects one of the central underlying assumptions of CRT. Specifically, he argues that the category of racial identity cannot reliably support the practice of identity politics because both the parameters of racial identity, and the politics that are said to flow from identity, are often (but not always) indeterminate. In contrast, CRT is founded on the very notion that racial difference creates particular needs for communities of color, and that law can be reconstructed to reflect racial difference and satisfy those needs.

Most troubling perhaps, Kennedy's "post-rights" rhetoric abandons rights talk even more definitively (or at least more dismissively) than the earlier cls critique. Kennedy largely ignores Crenshaw and William's's argument that rights discourse played a central pragmatic and rhetorical role in the "transgressive performance" that was the civil rights movement. In Kennedy's post-rights world, he does not address the pragmatic use of rights discourse to advance particular political commitments, and at times appears to argue against it. Indeed, in one of Kennedy's more critical passages, he argues that communities of color who assimilate to, and thus reinforce, the dominant rights discourse are doing harm, whether they do it out of strategic maneuvering or bad faith.

Having said all that, there is much that is persuasive about Kennedy's loss of faith in rights talk. If rights interests are no different from competing political interests, how can communities of color argue that rights will reliably achieve success with any

74 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. See Joanne Conaghan, Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy's Critique of Adjudication, 22 CORDOZO L. REV. 721 (2001).
75 See CRITIQUE, supra note 22, at 325.
76 See id. at 357. But see id. at 358 ("[I] am all in favor of deploying these discourses for strategic reasons . . . as long as the deployer has in mind the element of bad faith in his or her performance.").
regularity where politics does not? How do diverse and pan-ethnic communities begin to articulate identity-based political commitments for social change, when they are characterized by fluid definitions of identity and conflicting political commitments? Is it meaningful or useful to speak of a Latino/a position on affirmative action, on gay rights, or on economic enterprise zones? Does articulating such a position essentialize the Latino/a identity and marginalize dissenters among the community? Kennedy’s point about identity politics is one that some Critical Race Theorists have acknowledged in connection with gender.77 Defining group “identities” often excludes individuals, perhaps because of other intersecting identities like class, sexual orientation, etc.

Nevertheless, perhaps there is room, even after Kennedy’s critique, to use rights talk as a strategy that might be successful at particular moments. By Kennedy’s own admission, in certain circumstances, when forces converge in an unpredictable moment of ignition, people might agree to advance a particular political commitment arising from a particular agreed-upon identity. To be sure, Kennedy acknowledges that the civil rights movement succeeded in large part because blacks came together under the banner of rights to fight for inclusion in public accommodation. Might there be a way to salvage some of the pragmatic value of that rights discourse while still giving weight to Kennedy’s position?

This Essay seeks to carve out a niche for rights discourse in Kennedy’s post-rights world—a distinctly postmodern pragmatic niche. To that end, I advance two central arguments. First, rights claims might be used strategically as a rhetorical tool to promote certain political commitments over others. Second, rights claims might be used as props for Kennedy’s transgressive performances, in order to subvert the rationalist assumptions and dichotomies that underlie racist ideology.

B. Rights Talk as Strategic Action: Working Within the Conventional Framework

What would it mean to use rights talk strategically? Kennedy’s critique of rights suggests that rights discourse is merely a particular rhetorical species of policy arguments about collective political commitments, and that rights claims are adjudicated in the same way as competing political claims. If so, are there any strategic advantages in framing a claim as a rights claim, even if

77 See supra note 25.
rights talk is not metaphysically different from political arguments? I would suggest that there are at least three potential advantages.

First, consistent with the critique of rights, rights talk might still function as a rhetorical tool to articulate the weight, importance, and priority of a particular political commitment. Historically, to frame one’s claim as a right has conveyed the notion that the claim should enjoy priority over other claims. Communities of color can use rights talk strategically, not to argue that a claim has some special legal or metaphysical status, but to argue that there are good political, moral, and social reasons to give the claim priority and the force of law’s protection.

In conventional legal parlance, rights are considered special because they have some significant weight, particularly when balanced against competing collective political interests. Ronald Dworkin has famously argued that rights are political trumps held by individuals, because collective goals or interests (like the state’s interest in general welfare) cannot outweigh an individual’s interest in a fundamental right. Dworkin defends the concept of trumps by explaining that rights are based on constitutional principle and not mere political interest, which is more subject to short-term cost-benefit analysis. Under this view, the right to nondiscrimination trumps the state’s interest in avoiding social unrest because the individual right is based on principle, while the state’s collective interest is merely political and can be traded off for some other more important interest. As explained in previous sections, however, the els critique of rights undercuts Dworkin’s distinction between policy and principle. It argues that rights interpretation involves the same kind of open-ended policy analysis as balancing between competing nonrights claims.

However, communities of color might still rhetorically invoke the “trump” aspect of rights discourse—capturing a sort of historical residue of rhetorical meaning—without having to rely on Dworkin’s categorical distinction between principle and policy. Rios v. Regents of the University of California provides a specific example of strategic rights in action. In this case, five civil rights groups have brought a class-action rights claim under Title VI, challenging the admissions procedures of the University of

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79 See id. at xii.
80 See id. at x.
81 Kennedy rehearses this critique of Dworkin, in somewhat condemned form. See Critique, supra note 22, at 125-26 (arguing that judges invoke policy arguments where Dworkin claims that they are arguing from principle).
California at Berkeley as unfairly discriminatory. In their complaint, the plaintiffs target several aspects of an ostensibly color-blind admissions process as unfairly and disproportionately excluding applicants of color.\textsuperscript{82} The plaintiffs claim in both their complaint and accompanying press release that the admissions process unjustifiably denies Blacks and Latinos/as their rights under both Title VI and the Fourteenth Amendment.\textsuperscript{83}

Even in Kennedy's post-rights world, the plaintiffs might still articulate this kind of rights claim without having to adopt Dworkin's categorical distinction between principle and policy, or any other claim that rights are metaphysically different in some way from political claims. Plaintiffs might have used rights discourse, not to argue that a Black applicant's interest in being admitted to a prestigious law school is different in principle, but to argue that there are good moral and political reasons to prioritize the interests of currently excluded applicants of color over the interests of Whites in retaining the benefits of White privilege.

For example, in the press release accompanying the complaint, plaintiffs attack the current admissions on three grounds: (1) the admissions process does not accurately predict merit; (2) whatever small predictive value the process has is outweighed by its exclusionary effect; and (3) processes that are less exclusionary but equally predictive are available.\textsuperscript{84} These arguments are not arguments based on the legal principles underlying rights claims, but rather are arguments about the political costs and benefits of meritocratic admissions processes. Likewise, plaintiffs might have argued that morally it would be justified to admit members of groups who are excluded by current disparities in the availability of advanced placement classes. Those arguments are still very much open to civil rights groups under the rubric of rights, even after Kennedy's critique.

These rights claims are quite different from Dworkin's claim of right. These "left over" rights claims take advantage of the rhetorical force of rights talk that remains after the critique has run its course. Stripped of its foundationalist assumption—that

\textsuperscript{82} These practices include: (1) 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; (2) granting special "admissions by exception" and VIP admissions to students who fail to meet academic eligibility requirements; (3) unjustifiably and unduly relying on insignificant differences in standardized test scores in making admissions decisions. The complaint alleges that all of these practices disproportionately exclude applicants of color and favor White applicants. Complaint, Rios v. Regents of Univ. of Cal. (Feb. 2, 1999).

\textsuperscript{83} See Press Release, Plaintiffs of Rios v. Regents of Univ. of Cal. (Feb. 2, 1999) (on file with the author).

\textsuperscript{84} See id.
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 some other way—more politically or morally important, for example. Framing a claim as a “right” conveys the argument about importance with particular force.

Second, communities of color might rhetorically use rights talk to mobilize groups politically to advance particular commitments. Critical Race Theorists like Crenshaw have pointed out that Blacks used rights talk to articulate a historically specific political commitment to integrating public accommodations in the 1960s. Latinos/as, blacks, women, gay men and lesbians, and the disabled have all used rights talk as one of several rhetorical focal points around which to organize resistance to exclusion. In fact, the popular lay meaning of rights talk—as grounding mass movements and inspiring strong emotional commitment—derives in part from the historical role that rights have played in mass mobilizing. Apart from the use of rights as legal “trumps,” rights talk may still evoke meaning as a historically meaningful language that draws upon the memory of solidarity (even if a romanticized memory) and inspires people to work toward social change.

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. While rights talk in a particular moment may well serve to drain political energy through a focus on litigation, in other historical moments rights talk might help inspire political and social movements for change. Rights talk is not always and inevitably depoliticizing (take, for example, the civil rights movement), just as it is not always and inevitably indeterminate; rather, its meaning and role are contingent on historical context and circumstance.

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

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85 For example, Michael McCann documents, with sociological evidence, his view that rights talk was instrumental in mobilizing women to organize in favor of legislation, although he ultimately traces that success to the belief of women in the conventional notion that rights are in theory distinct interests, even if in practice courts don’t always recognize that difference. See Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (1994).

86 See Crenshaw, supra note 14, at 1367-68.

87 See Tushnet, supra note 7, at 1581.
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 number of other highly variable factors. Interpreting rhetorical arguments is just as unpredictable a process as interpreting metaphysical arguments.

Strategic action, as a result, is not strategic manipulation—it cannot be controlled or wielded with certainty as some sort of tool. Rather, rights talk might be used more as a brush stroke on an artist's canvas—if the artist is lucky and talented and her timing is right, the brush strokes will produce something of value in her painting.

Second, it should be noted that rights discourse evokes restrictive historical meaning as well as liberatory meaning. As the critics are quick to point out, rights talk in more recent times has been tilted in favor of preserving a conservative status quo. In assessing rhetorical residue, the modern-postmodern strategist should acknowledge that in the last several years, plaintiffs, courts, and voters have used rights discourse to advance the interests of Whites.88

Indeed, to the extent that a rights claim is deeply sedimented with restrictive historical meanings, it may prove difficult even to frame a political commitment as a rights claim. If so, communities of color may do well on those occasions to move away from rights claims toward a way of articulating their political commitments. Nevertheless, in other circumstances, in particular historical moments that may yet be unimaginied, rights talk may be an effective way of articulating political commitments for certain communities of color.

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88 Many white plaintiffs have mounted reverse discrimination claims under Title VI, claiming that race-conscious affirmative action programs violate their statutory right to nondiscrimination. See, e.g., Hunter v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999) (rejected White applicant sued for denial of admission to university lab school program); LeSage v. Texas, 158 F.3d 213 (5th Cir. 1998) (rejected White applicant sued for denial of admission to doctoral psychology program); Farmer v. Ramsay, 41 F. Supp. 2d 587 (D. Md. 1999) (White applicant rejected by medical school); Smith v. Univ. of Wash. Law Sch., 2 F. Supp. 2d 1324 (W.D. Wash. 1998) (White applicant rejected by law school). The Fifth Circuit Court of Appeals ruled in 1996 that race-conscious affirmative action violated Cheryl Hopwood's rights, and the University of Texas was obliged to revise its admissions process. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) (White applicant rejected by law school). Relying heavily on arguments with regard to equal protection, voters in California passed Proposition 209, which prohibits the state from using race in distributing opportunities or resources. See CAL. CONST. art. 1, § 31.
C. 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 the pursuit of Kennedy’s transgressive performances. Deployed as a tool of strategic action, rights claims work to advance particular political commitments within the accepted framework of existing legal and social structures. Deployed as a stage prop in a transgressive performance, rights claims might help to dismantle existing social and legal structures, like the social structure of racism and racist ideology.

The preceding section describes the Rios litigation as a possible example of strategic action because it articulates plaintiffs’ claims using standard Title VI arguments. From another perspective, however, Rios can be viewed as a radically transgressive challenge to the rationalist structure of meritocracy. Specifically, Rios challenges the conventional, highly rationalist, structures of meritocratic distribution processes by exposing the ways in which that structure unfairly excludes people of color, while pretending to be strictly color-blind.

Meritocracy depends on a purportedly rationalist distinction between merit and its marginalized opposite, bias. Within this framework, merit purports to objectively measure an individual’s ability to produce something of social value by assessing certain traits, qualities, or skills that ostensibly reflect potential ability. Universities like the University of California at Berkeley rely on standardized test scores and success in advanced honors classes because they assume that high scores reflect an applicant’s potential ability to do well in college.

In contrast, meritocracy as a social institution defines bias as the direct opposite of merit. Biased selection standards are those based on race, ethnicity, or some other trait that theoretically does not correlate to ability to produce social value. Thus, race-conscious affirmative action programs and racist segregation are both labeled bias because they both rely on traits that are not related to “merit.”

Rios stands this distinction on its head by exposing the way in which an ostensibly color-blind admissions process reflects and relies on racial difference. Indeed, the complaint in Rios argues that ostensibly race-neutral admissions standards, which purport to

89 See Rothmayr, supra note 57, at 1452, 1471.
90 See id.
91 See id.
measure objective merit, unfairly and unjustifiably exclude people of color in disproportionate numbers. By redescribing standardized tests and current admissions processes as overtly race-conscious selection standards, the complaint suggests that these conventional merit standards are a form of race-conscious bias.

Meritocracy as a social institution appears legitimate only if it suppresses the way in which, like bias, it relies on race to draw distinctions. The Rios suit exposes the way in which meritocracy is thoroughly race conscious. If advanced placement courses are offered at disproportionately white high schools, and standardized tests disproportionately exclude applicants of color, then it becomes far more difficult to continue to think of meritocracy as a race-neutral institution.

Of course, Rios is part of a much broader national reevaluation of merit that has followed the enactment of Proposition 209 and the Fifth Circuit’s decision in Hopwood v. University of Texas in the 1990s. 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, having done away with affirmative action.

More generally, the concept of meritocracy is under renewed suspicion. Various schools and colleges are reevaluating or doing away with standardized tests, and noteworthy authors are documenting the elitism and racism behind the tests’ original creation. Rios may simply reflect a newly emerging political commitment to dismantling the social structure of numbers-based meritocracy. But the lawsuit may also help to further strengthen that political commitment by publicly highlighting the aspect of race consciousness behind meritocracy’s race-neutral facade.

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92 See Complaint, Rios v. Regents of Univ. of Cal. (Feb. 2, 1999).
93 See Roithmayr, supra note 57, at 1498-99.
94 See id.
95 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996).
96 See Jeb Bush’s Drive Against Affirmative Action Roils Florida, N.Y. TIMES, Feb. 4, 2000 (describing Texas, California, and Florida plans).
97 See In with Lego Test, Out with SAT’s, DENVER POST, Feb. 1, 2000, at A1; California Plan Would Scrap Reliance on SAT, WASH. POST, Feb. 18, 2001 at A4 (president of the University of California calls for the elimination of the SAT as an application requirement).
98 See NICHOLAS LEMANN, THE BIG TEST (1999) (arguing that a few well-positioned men at Harvard popularized the SAT in order to create a new aristocratic elite). For an earlier, unsuccessful version of the argument, see STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981) (arguing that the founders of the IQ and standardized test prototypes designed the tests for racist and xenophobic purposes).
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 transhistorical or intrinsic quality of rights but on rights' pragmatic rhetorical value at a particular historical moment. Nor does the idea of rights talk as a transgressive strategy mean that external forces do not limit the effectiveness of that strategy. In the 1960s, a host of contingent forces happened to converge and ignite to create the success of rights talk as a transgressive force. It remains to be seen whether the "time is right" for a similarly successful transgressive performance with *Rios*.

Of course, as Kennedy notes, disruptive discourses will not perpetually remain disruptive. As language takes on different meaning in different contexts, disruptive performances take on different meaning as well. Thus, transgressive rights discourse might be disruptive at a particular time and place but then subsequently be domesticated as the disruptive quality of the performance loses its edge in subsequent times and places. Indeed, rights discourse may itself have served to domesticate the more transgressive performances of black nationalism, as cls scholars have previously pointed out. Nevertheless, at other instances, and in other circumstances, rights talk may well constitute a rhetorical tool to assist in dismantling existing social structures like meritocracy.

**CONCLUSION**

Kennedy's post-rights position appears to be part of the postmodern rejection of any affirmative program or discourse and their embrace of improvisation. Charles Taylor urges that activists for racial empowerment adopt an "inspired adhocery." Taylor is right to reject any formulation of a foundationalist affirmative or reconstructive program because the potential for indeterminacy, and the unreliability that it brings, goes all the way down. Similarly, Kennedy is right, I believe, to abandon a version of rights discourse as a reliable protector of the disempowered. Although Kennedy may not object in theory to mining rights discourse for its leftover pragmatic value, he appears to conceal that position in *Critique*. If he does object, as he appears to at

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times, then he misses the important implications of his own arguments.

If Kennedy is right, and rights discourse is not always indeterminate, rights discourse may at times effectively advance the political commitments of some people of color at some particular place and time. Stripped of its foundationalist trappings, rights discourse may yet have rhetorical force, as a discourse that makes political claims about racial empowerment. This is a potentially useful proposition, even if rights discourse does not have much force here and now, at the beginning of the twenty-first century in the United States, in the midst of a conservative backlash.

It may well be that Kennedy is right that rights discourse has played out its usefulness for the foreseeable future here in the United States. It may also be that as a person of color, I (and my CRT colleagues) are too emotionally attached to rights discourse to abandon it without trying to salvage some value. But it is precisely the emotional and historical value of rights discourse that may make it of potential value in future battles.

In a recent article, Mark Tushnet quotes Lévi-Strauss's method of bricolage:

[The bricoleur is] adept at performing a large number of diverse tasks . . . [by making] 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.  

Lévi-Strauss's writing contrasts the image of the engineer, who attempts to choose the right tool to achieve a particular outcome, to the bricoleur who "addresses himself to a collection of oddments left over from human endeavors." Rights discourse might yet be useful in the mode of bricolage, as props in a strategic action or transgressive performance, in a movement for social change.

\[101\] See supra note 74 and accompanying text.


\[103\] Id.