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B. Taking Schlag Seriously: Practices in the Legal Academy: *Peace, Civil Disobedience, and Anti-Discrimination Law: A Critical Appraisal of Reason and Politics*

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Peace, Civil Disobedience, and Anti-Discrimination Law: A Critical Appraisal of Reason and Politics

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There are some critiques that seem to just roll off the backs of their targets, while other critiques hit home and offend the targets. Radical critique in particular often inspires a personal response. Pierre Schlag's critique of the legal establishment's excessive claims about the role of reason in law and in the work of the legal establishment is likely to encourage such a personal response from many members of the legal establishment (though perhaps not from those participants in this symposium on Schlag's work who are themselves critical of reason).

Perhaps the classic case of a critique being taken personally involves the feminist critique of the exaggerated legitimating role that liberalism expects women's consent to serve. When feminists point out the systematic domination of women by men, the failure of society as well as the refusal of men to hear or believe a woman's "no," and the limited meaningfulness of a "yes" when "no" is in fact denied as an option, some men take it personally. If the feminists are right about consent, these men wonder, what does that say about their intimate relations with women? Men ask themselves whether this feminist critique means that their acts of sexual intercourse have in fact been acts of rape.

In the case of the critique of reason, the defensive response of those committed to reason in law is slightly less personal but perhaps more global: Is my life's work nonsense? Pierre Schlag challenges the pretensions of reason in law. More than this, he accuses lawyers and others of complicity in making reason itself "simply a name—a venue for faith, prejudice, dogma."[1] Moreover, these lawyers deceive themselves about reason in order to feel good about the work they do, work that might well seem mere "ritualized forms of violence . . . killing, plunder, extortion"[2] if it were not shored up by false claims of reason. Schlag views legal academics, perhaps his chief target, as supporting

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1. PIERRE SCHLAG, THE ENCHANTMENT OF REASON 16 (1998).

2. *Id.* at 21.

reason in order to avoid being "demoted to the status of thug-trainers."[3]

There are two typical responses (responses that I myself have encountered to my critique of rights analysis).[4] One response is denial — somehow I am an exception: My encounters with women avoid oppression; my theorizing makes sense. Perhaps the consent of most women to sex cannot be understood as a meaningful consent, given the background condition of subordination, say the deniers, but the women I have associated with have been totally free to say yes or no and their consent is indeed a real consent. My use of reason in law is not the kind of mystification Pierre Schlag criticizes, assert the deniers.

A second response to Schlag's assertions about law is to adopt the critique, apply it directly and severely to one's own activity, and thus condemn the critique. If the feminists were right, that would make many of my most intimate shared moments with my wife nothing but rape, which is utter nonsense; therefore the feminists must be wrong. Pierre Schlag's analysis means that law could not possibly serve the functions we all know it serves; therefore Schlag must be wrong.

In light of Pierre Schlag's critique of lawyers and legal academics, I examine a speech I delivered in Tel Aviv, Israel. In using the speech as a concrete example to analyze Schlag's critique of reason, I hope my analysis avoids the twin dangers of simple denial of applicability on one hand and over-application and rejection on the other.

First, the setting for the talk. I taught a feminist legal theory course in Tel Aviv on an intensive schedule during December 2001 and January 2002. Three hours before I was to return to UCLA for the spring semester classes, I presented the opening lecture at a conference on Women and Peace. The opening panel was composed of myself, Galia Golan, a well-known, long-time peace activist from Israel, and — following a practice I admire of including graduate students and junior scholars on academic panels — a Ph.D. candidate who had been my student six months earlier when I taught Feminist Legal Theory at the Hebrew University of Jerusalem. The audience was both general and academic; there were no hecklers and apparently no other radically unsympathetic listeners. The conference took place two weeks before the beginning of the new "Refusenik" movement, a movement of highly decorated Israeli Defense Force (IDF) officers signing a statement that, for reasons of conscience and justice, they would refuse to serve in the Occupied Territories. IDF officers who were students at Tel Aviv University began this

3. *Id.*

4. *See* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984).

movement by posting a notice of their own intent and inviting others to join them.

The following is the text of the talk I presented at Tel Aviv University, January 2002:[5]

> The conventional, stereotyped association of women with peace and of men with war has often been used both to justify the subordination of women and to glorify war. Women have achieved some progress by playing on their role stereotypes (for example, as caretakers or peacemakers) and struggling to establish the importance of the roles ceded to women (for example, the importance of care-giving and the possibility of peace).
>
> Although women — and society in general — are damaged by efforts to limit women to the family roles of wife and mother, women have nevertheless on occasion made a considerable difference in the world by playing on these roles as wives and as mothers. Most of us are familiar with the ancient Greek comedy *Lysistrata*, in which the women manage to force the men to stop fighting by refusing to have sexual relations with their husbands until the men ended the war.[6] The mothers of Plaza de Mayo, demanding to know what happened to their children who had been arrested in Argentina's "dirty war," were ignored and ridiculed, but eventually they captured the imagination of the world and forced a change of government.[7] Many people give credit for ending the last war in Lebanon to the Israeli women who protested in their role as mothers.[8] I engaged in non-violence with the American Indians throughout the seventy-one-day siege by the U.S. Government at Wounded Knee, South Dakota, in 1973.[9]

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5. I have added footnotes to my original text to facilitate understanding by those less familiar with the issues than my Tel Aviv University audience and to encourage further reading on these important topics. While I make some references to events occurring through July 2003, I have not attempted to keep the comments current through the moment of publication. In my opinion, despite the appearance of great volatility in the region, surprisingly little has actually changed since January 2002.

6. *See* Aristophanes, *Lysistrata*. The play continues to be used by those promoting peace; a group of artists and other war protesters organized a series of group readings of *Lysistrata* in some 919 venues world-wide on March 4, 2003, as the U.S. made preparations to commence its recent war against Iraq. *See Actors Planning Theater Protest for Iraq*, Associated Press, Mar. 1, 2003, *available at* http://www.nytimes.com/aponline/arts/AP-Anti-war-Theater-Protest.html; *Peace from the ancients: Around the world, activists opposed to an invasion of Iraq plan hundreds of readings of Aristophanes' 'Lysistrata' and its offspring*, L.A.Times, Mar. 2, 2003; Julie Salamon, *Mobilizing a Theater of Protest. Again; Artists Try to Recapture Their Role as Catalysts for Debate and Dissent*, N.Y. TIMES, Feb. 6, 2003, at E1.

7. *See* Andrea Malin, *Mother Who Won't Disappear*, 16 HUM. RTS. Q. 187 (1993).

8. *See* Allison Kaplan, *Bargaining Chips on a Plate*, JERUSALEM POST, Dec. 4, 1998, at 13; Joel Greenberg, *"Out of Lebanon!": Mothers' Cry Rouses Israelis*, N.Y.TIMES, Sept. 19, 1997, at A4. Israel invaded Lebanon on June 6, 1982, and withdrew its troops in 1985 after the death of at least 650 Israelis.

9. *See* VOICES FROM WOUNDED KNEE, 1973 (R. Anderson, et al., eds., 1974). A short description of the events at Wounded Knee can be found in Frances Olsen, *Socrates on Legal*

While these approaches to peace may seem to accept the limited role assigned to women, in expanding and playing on these roles women also indirectly challenge the sex role stereotypes.

Women have been able to showcase the terrible human tragedy and suffering of war. War is, in reality, not glorious, and if society ever comes fully to recognize the stupidity and futility of war, men would stop wanting to be identified with war. Women who successfully challenge the glorification of war thus also indirectly challenge the association of men with war.

Women can also work effectively against war while more directly challenging the sex role stereotypes. Many efforts to bring about peace focus on ending conflict. While ending conflict is a nice thing, it is often not possible to do so, and there are other important ways to reduce violence. Feminist perspectives on conflict transformation can be as important as feminist perspectives on conflict resolution. The two ways to carry on conflict without violence that I want to discuss tonight are civil disobedience and anti-discrimination civil rights work. These two ways of promoting peace in the face of on-going conflict introduce possibilities for shifting the arena of conflict from violence to non-violent civil disobedience, and from battlefields and military occupation zones to courtrooms. It may also be possible to re-conceptualize some world conflicts from nationalist or ethnic to civil rights and non-discrimination.

The best-known practitioners of non-violent civil disobedience have been men. Henry David Thoreau non-violently refused to pay taxes — taxes that supported a war in Mexico that Thoreau argued was an unjust land-grab and an effort to expand the abomination of slavery.[10] Mahatma Gandhi began his non-violent disobedience when he lived in South Africa, protesting racial classifications and identity cards in the early stages of the racism that led to apartheid.[11] Gandhi moved to India and is credited with freeing the sub-continent from British imperial rule.[12] Martin Luther King led the non-violent civil rights movement in the United States.[13] Nelson Mandela generally supported the non-violent stance of the ANC — African National

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Obligation: Legitimation Theory and Civil Disobedience, *in* LEGAL AND POLITICAL OBLIGATION: CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY 69, 85-86 (R. George Wright ed., 1992) (hereinafter "LEGAL AND POLITICAL OBLIGATION").

10. *See* Henry David Thoreau, *On the Duty of Civil Disobedience*, *in* LEGAL AND POLITICAL OBLIGATION, *supra* note 9, at 25.

11. *See* M.H. GANDHI, *The Advent of Satyagraha*, *in* THE GANDHI READER 59 (Homer A. Jack ed., 1995).

12. On Gandhi's decision to return to India, *see* GANDHI, AN AUTOBIOGRAPHY 183 (1990). For an analysis of the role Gandhi's style of non-violence played in freeing India from English rule, *see, e.g.*, CURTIS CRAWFORD, CIVIL DISOBEDIENCE: A CASEBOOK 180 (1973); GENE SHARP, THE POLITICS OF NONVIOLENT ACTION: PART ONE, POWER AND STRUGGLE 86-87 (1973).

13. *See, e.g.*, Gary Peller, *Frontiers of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758, 814 (1990).

Congress.[14] Mandela departed from non-violence and engaged in property destruction only when he came to believe that sabotage was the minimal violence that would prevent the otherwise inevitable outbreak of personal violence against the white settlers of South Africa.[15] These men indirectly challenged the stereotype associating men with violence and war.

Women who have practiced non-violence have generally also challenged the stereotype of women as passive. Civil disobedience is active and non-violent.[16] Many of the British and American suffragists demanding that women be allowed to vote engaged in non-violent civil disobedience quite effectively.[17] Moving to the present day, some of the Israeli women trying to end the occupation and bring peace to the Middle East have begun engaging in civil disobedience.[18] During the winter of 2002, women from Europe non-violently removed roadblocks in the Occupied Territory.[19] This is one way to counter the increasing aggression of the war camp without resorting to violence. Many people believe that the violence in the Middle East cannot be replaced with non-violence, but in my view these people are mistaken, and they have not adequately calculated the possible role of women.

Many people remember that a decade or two ago an Arab-American, Mubarak Awad, returned to Palestine and tried to initiate a non-violent resistance movement to oppose the Israeli occupation.[20] Iron-

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14. *See* NELSON MANDELA, *The Rivonia Trial 1963-64, in* THE STRUGGLE IS MY LIFE 161-63, 166 (1986).

15. *See id.*

16. *See, e.g.*, Martin Luther King, Jr., *Pilgrimage to Nonviolence, in* NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY 209, 217 (Staughton Lynd & Alice Lynd eds., 2001) (describing Martin Luther King's view of the differences between passive resistance and nonviolence); *see also* Gandhi, *supra* note 11, at 65 (discussing Gandhi's objection to term "passive resistance").

17. *See* II HISTORY OF WOMAN SUFFRAGE (Elisabeth Cady Stanton et al. eds., 1969).

18. The Coalition of Women for Peace, for example, has been engaging in non-violent resistance since its foundation. For its website, *see* www.coalitionofwomen4peace.org.

19. Some of these activities were reported on the internet ALEF list serve. (ALEF, the first letter in the Hebrew alphabet, is a list serve established by and primarily for leftist and left-centrist academics in Israel.) *See also* International Solidarity Movement *at* www.palsolidarity.org. This group received increased international attention in March 2003, when one of its members, Rachel Corrie, was run down and killed by an Israeli bulldozer she was trying to prevent from demolishing the house of a Palestinian Family in Rafah, a town in Gaza near the border with Egypt. *See* Greg Myre, *Israeli Army Bulldozer Kills American Protesting in Gaza*, N.Y. TIMES, Mar. 17, 2003, at A3.

20. *See* Isabel Keershner, *The Return of Mubarad Awad*, JERUSALEM REPORT, Feb. 11, 2002, at 24; Ann Peters, *Awad's Deportation Will Have Little Impact on Uprising*, UPI, June 14, 1988; David Landau, *Israel Deports U.S. Advocate of "Non-Violence": Will Expulsion of Activist Backfire?*, TORONTO STAR, June 14, 1988, at A18; Wilber G. Landrey, *Whom the Gods Would Destroy*, ST. PETERSBURG TIMES, June 14, 1988, at A2; *Over Protests, Israel Expels Palestinian-American*, N.Y. TIMES, June 14, 1988, at A12; *Activist is Deported by Israel*, CHI. TRIB., June 14, 1988, at M1; *Forced Exile: An Activist is Deported*, TIME, June 27, 1988, at 32.

ically, his effort has been used lately to discount the possibility of widespread non-violent civil disobedience in the Middle East because, according to various opinion polls, most people didn't support him.[21] Some people have even claimed to me that Mubarak Awad "wasn't taken seriously."[22] Yet, I cannot help from noticing that the Israeli government took him seriously enough to kick him out of the country — to bar him from Israel and prevent his return to the Occupied Territories.[23] When a civil rights lawyer challenged this exclusion of Mubarak Awad, the Israeli government fought hard in the courts to maintain its exclusion order.[24]

If non-violence were not effective, oppressive governments would not be so viciously opposed to it. Granted, governments facing violent resistance movements often claim to support non-violence: Martin Luther King was selectively praised by those opposed to Malcolm X and the Black Power movement's call for armed self-defense;[25] some Israeli government officials even claim to oppose only Palestinian violence, not Palestinian resistance.[26] In the early stages of any non-violent movement, it is usually a small minority of the people who support non-violence. Thoreau never had much support during his lifetime. Martin Luther King was always controversial, until he was murdered. Usually non-violence is a deviant form of resistance practiced by a small minority of activists, and it generally becomes popular only as it begins to show clear successes. In the United States, government officials frequently send agents provocateur to stir up enough violence to try to legitimate police repression of non-violent resistance when it begins to gain popularity.[27] The success of non-violence depends upon the majority of the general population refusing to tolerate violent governmental repression of

21. *See* Ann Peters, *supra* note 20; David Landau, *id.*

22. Conversations with several Israelis during December of 2001 and January and December 2002.

23. On Awad (sometimes transliterated as "Awwad"), *see* sources cited *supra* note 20.

24. The Israeli academic (and my colleague) Professor David Kretzmer represented Awad in a suit to prevent his expulsion. *See* E-mail from David Kretzmer, Professor of Law, the Hebrew University of Jerusalem, to Frances Olsen, Professor of Law, University of California at Los Angeles (Mar. 10, 2003) (on file with the author); Jonathan Broder, *Brutal Image of Israeli Security Branch Survives Investigation*, CHI. TRIB., Dec. 7, 1987, at C19; Timothy M. Phelps, *Through Palestinian Eyes: Arabs in Territories Say Israel Has Gone Beyond Occupation to Confiscation*, NEWSDAY, June 6, 1988, at 4.

25. Lyndon Johnson is said to have argued in favor of the Civil Rights Bill that if King were not seen as having some successes, it would be difficult to prevent the more radical elements from having greater influence.

26. In my experience, repeated comments of government officials in Israel mention only the Palestinian violence, as though the occupation itself and resistance to the occupation are no problem.

27. *See* Gary T. Marx, *Thoughts on a Neglected Category of Social Movement Participants: The Agent Provocateur and the Informant*, 80 AM. J. SOC. 402-42 (1974) *available at* http://www.jstor.org.

non-violent protesters. The police response to the non-violent protests against the World Trade Organization (WTO) was widely criticized.[28] Non-violent resistance brings into the open and exposes the brutal violence of repression, which governments that repress populations hope to keep disguised and out of sight.

There is another important aspect of civil disobedience that may have particular relevance here these days. In the United States, the period between the Civil War, around the middle of the nineteenth century, and the civil rights movement, around the middle of the twentieth century, saw white people split among themselves on the question of how the freed slaves and their descendants should be treated. Many whites and virtually all blacks wanted black people to be treated better than they were. But for many years the whites who wanted to keep all blacks in a systematically inferior position spoke louder and seemed to care more about the issue than the whites who supported a more humane treatment. The white segregationists amplified their voices through brutal violence.[29] White segregationists frequently murdered fellow whites who opposed them, as well as blacks. Until the mid-twentieth century, lynchings were common in many parts of the United States and they were socially accepted by a large segment of the society.[30] Death threats, realistic under the circumstances, were even more common.[31]

The civil rights movement gave both blacks and supportive whites a way to amplify their voices without resorting to violence. Direct action can be as effective as or more effective than violence in making society listen to your argument and take your views into account.

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28. *See* GLOBALIZE THIS! THE BATTLE AGAINST THE WORLD TRADE ORGANIZATION AND CORPORATE RULE (Kevin Danaher & Robert Burbach eds., 2000); *Mass Non-Violent Uprising Against the WTO Declared a Victory; Despite Police Brutality & Vandalism, Peaceful Protests Expose and Tarnish the WTO*, PR NEWSWIRE, Dec. 3, 1999; Abby Scher, *The Crackdown on Dissent—-Police Are up to Old Tricks: Disrupting and Spying on Legal Political Activities*, NATION, Feb. 5, 2001, at 23; *The Assault on Civil Liberties; Speech and Assembly*, 64 PROGRESSIVE 8 (AUG. 1, 2000); *Rights Group Says U.S. Use of Pepper Spray, Stun Belts, is Torture*; CHI. TRIB., May 10, 2000, at N6; J. Martin McOmber, *Coordinator of WTO Investigation Named Ex-Bank Executive to Lead 'Complex' Probe*, SEATTLE TIMES, Jan. 12, 2000, at B3; Jeff Hodson, *Anger Erupts Again over WTO Events—Hundreds Tell their Stories at Second Hearing*, SEATTLE TIMES, Dec. 15, 1999, at B1; Tilman Streif, *Seattle's Image of Friendly Metropolis Tarnished After WTO Riots*, DEUTSCHE PRESSE-AGENTUR, Dec. 10, 1999. Seattle Police Chief Norm Stamper was forced to resign. *See Seattle Police, Activists Prepare for WTO Anniversary*, THE DAILY via U-Wire University Wire, Nov. 27, 2000.

29. *See* ROBERT L. ZANGRANDO, The NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980); Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 579, 596 (2003); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 36-37 (1996).

30. *See* sources cited *supra* at note *29*.

31. *See id.* As well as formal death threats, each lynching served also as a threat to others who would identify with the victim.

Similarly, in Israel there is a debate among people who have different views about what should be done. It would appear that some years ago the right-wing militarists became more militant. After Oslo, some members of the right wing dramatically escalated the rhetoric against Prime Minister Rabin and made numerous death threats against him.[32] Eventually, a law student from Bar Ilan University shot him.[33] Similar death threats were made against Prime Minister Barak whenever he seemed on the verge of making a significant movement toward peace.[34] I have even heard that some members of the right wing threatened civil war.[35]

During my time in Israel teaching at Hebrew University, Haifa University, and the University of Tel Aviv, I have met many people who want peace. I have also met people who want to fight for more land, retain and expand settlements in the Occupied Territories, and bully the Palestinians into leaving or dying.[36]

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32. *See* Raphael Cohen-Almagor, *Boundaries of Freedom of Expression Before and After Prime Minister Rabin's Assassination*, *in* LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN 79, 84-91 (R. Cohen-Almagor ed., 2000) (discussing the atmosphere created before the assassination of Prime Minister Rabin).

33. The assassin, Yigal Amir, was sentenced to life in prison. *See Amir Brothers' Sentences Increased*, JERUSALEM POST, Aug. 30, 1999, at 4. *See generally* Barton Gellman, *Assassination's Legacy: A Widened Gulf; Anniversary of Rabin's Slaying Stirs New Bitterness Among Israelis*, WASH. POST, Oct. 24, 1996, at A1.

34. *See* Amos Har'el & Mazal Mualem, *Reinforcement of Barak's Security*, HA'AREZ, May 17, 1999, at A5 (reporting that secret service ("shabak") increased Barak's security due to increased death threats); Sharon Gal, *A Sign, 'Barak Will Die' Was Sprayed in Tzfat*, HA'AREZ, Nov. 25 1999, at A5 (reporting graffiti threat in Tzfat, a northern Israeli town with a mixed population—secular Jews, ultra-orthodox Jews, and Arabs); Eli Kamir, *Head of the Shabak: Increasing Talk of Right Wing Regarding Murdering Barak or Arafat*, MA'ARIV, July 24, 2000, at 1 (reporting that the head of the Shabak, Avi Dihter, stated that "during the last month [during Camp David Summit] the perimeter of talks about murdering Barak has increased"); Arye Bander, *Head of the Shabak: Dahlan and Rajub Are Not Responsible to Terror Acts*, MA'ARIV, Nov. 29, 2000, at 17 (reporting an increasing number of death threats on prime minister Barak's life, mostly from extreme right-wing activists). Some people optimistically believe or hope that Ariel Sharon, himself a right-winger, might be able to make peace with the Palestinians without generating as strong a resistance from other right-wingers; as of July 2003, this remains to be seen.

35. Discussions with several Israelis during May, June, July and December 2001, and January and December 2002.

36. Since giving this talk, I have also taught at Bar Ilan University as well as teaching civil disobedience at Tel Aviv University. I have met more of each kind of people during these teaching experiences. In Israel, the term "transfer" is used as a euphemism for ethnic cleansing, itself a euphemism for murder and expulsion. One of the parties allied in the Sharon government as of February, 2003, openly advocates such "transfer" of the Palestinian population. *See* Helena Cobban, *Stop Ethnic Cleansing in the Mideast Before It Starts*, CHRISTIAN SCIENCE MONITOR, Oct. 11, 2001, at http://www.people.virginia.edu/~hc3z/mideast-transfer-1002.html. Prime Minister Golda Meir throughout her career denied that there existed any such people as Palestinians. *See* John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 PENN ST. INT'L L. REV. 363, 383 (2002); Hanan Ashrawi, *The 2000 Goodwin Seminar Article & Essay: A Conversation With Dr. Hanan Ashrawi*, 7 ILSA J. INT'L & COMP. L. 649, 659 (2001).

Most political opinion polls have indicated that the majority of Israelis want to compromise for peace;[37] it is a minority who want to expand settlements, to take away more land, and to drive Palestinians out. So there are more people who want peace than who want war. The people who want peace feel just as strongly or more strongly about the issue than the people who want war. Yet the people who want war keep getting heard and advancing their position, while the people who want peace seem to be losing ground and growing frustrated and pessimistic.[38]

The people who want war have learned vicious ways to amplify their voices. In Israel, as in the United States, the right wing is more violent, threatening, and in-your-face than left wingers.[39] The right wing makes death threats and actually kills people.[40] Sometimes they threaten civil war if they don't get their way.

It can be very hard to stand up to this kind of bullying. And it can be hard to fight back without seeming to adopt the very tactics of the right wing that we oppose. I would argue that direct action and non-violent civil disobedience offer a way to respond to the right more effectively. This is certainly the case in the United States, and I believe it is also the case in Israel.

Many people wonder how different things might be if the right-winger had not assassinated Prime Minister Rabin, and if other right wingers had not leveled so many death threats against Prime Minister Barak.[41] I wonder how different things might be if the left wing used non-violent civil disobedience to push as hard as the right pushes. I wonder how different things might be if, say, fifty of the Israeli women who did not want Sharon to go to the Temple Mount had non-violently blocked his way.[42] Before the start of the present

37. *See, e.g.*, Uri Avnery, *A Maddened Cow* (Nov. 7, 2002), *at* http://gush-shalom.org/archives/article201.html; www.dailystar.com.lb/opinion/11_07_02_b.htm.

38. *See* Ilan Pappe, *Palestine: The Decline and Fall of the Israeli Left*, AL-AHRAM WEEKLY, Sept. 27, 2001, *available at* www.globalexchange.org/campaigns/palestine/news2001/alAhram092701b.html.

39. The main exception to this generalization would seem to be the Democratic consultant James Carville. *See* JAMES CARVILLE, WE'RE RIGHT, THEY'RE WRONG (1996); JAMES CARVILLE & PAUL BEGALA, BUCK UP, SUCK UP . . . AND COME BACK WHEN YOU FOUL UP (2002).

40. The best-known examples of these tendencies in the United States in recent years come from the various terrorist groups opposing a woman's right to abortion. Death threats are common, women's health clinics have been bombed, and doctors have been murdered. *See 1 Dead, 1 Critical in Clinic Bombing*, U.S. NEWS, Jan. 29, 1998 *available at* http://cgi.cnn.com/US/9801/29/bombing.update. *See also Another Doctor Murdered in the Name of Life*, ProChoice Online *at* http://www.wcla.org/99-spring/slepian.html.

41. *See* Gellman, *supra* note 33.

42. An attorney in Israel's Ministry of Foreign Affairs suggests that Barak considered himself unable to stop Sharon. *See* Arthur Lenk, *Fact-Finding as a Peace Negotiation Tool — The Mitchell Report and the Israeli-Palestinian Peace Process*, 24 LOY. L.A. INT'L & COMP. L. REV. 289, 300 (2002) ("Generally, in Israel, this action was considered to be a domestic challenge to Prime Minister Barak."). *See also* Marc Gopin, *New Modes of International Conflict Resolution:*

intifada, if Prime Minister Barak could not stand up to Sharon, I wonder whether a cordon of non-violent women could have blocked Sharon and prevented him from succeeding in his provocation.[43] Maybe with the couple of hundred police he had with him, Sharon would have gotten through anyway, but certainly the reporting on the incident would have been different, and just maybe the overall results would have been dramatically different. In the United States, we have found that a relatively small number of people can make a greater difference than they would ever imagine, and they can do so non-violently.

We have been asked to limit our talks to twenty minutes so that there will be time for discussion. I particularly want time for discussion, so let me move on to anti-discrimination law, and I will try to be brief.

Women and men fighting to end discrimination against Arabs in Israel are contributing to the possibility of transforming violent conflict to non-violent conflict.[44] Much of this work is informed and can be further informed by the feminist struggles to end discrimination against women. Feminist legal theory has developed fairly sophisticated analyses of complex forms of discrimination — direct and indirect discrimination, paternalistic and hostile discrimination, etc.[45] These analyses can be important for any serious effort to promote equality.

I know that to some of you it will seem that there is nothing subtle or complex about the discrimination imposed on Arab citizens and upon whole Arab villages in Israel.[46] Yet, in fact, the Israeli Supreme Court has made some progressive rulings, civil rights attorneys do have important successes, and anti-discrimination law may develop in even more productive ways.[47] Political activity and direct

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Shared Public Space and Peacemaking: New Visions of Place in Israel and Palestine, 26 FLETCHER F. WORLD AFF. 101, 107 (2002):

> Many blame the current escalation of violence in the Middle East on Ariel Sharon's visit with hundreds of troops to [the Temple Mount]. These individuals see this event as the match that lit the Al-Aqsa Intifadah. Many others argue it was the killing of the stone throwers by Israeli riot police on the holy ground the day afterwards. Still others will point to various Palestinian voices that claim that they had long planned an Intifadah and Sharon just gave them the excuse.

43. *See* Tony Karon, *Ariel Sharon*, TIME, Feb. 9, 2001.

44. *See* DAVID KRETZMER, THE LEGAL STATUS OF ARABS IN ISRAEL (1990).

45. *See, e.g.*, Frances Olsen, *Legal Responses to Gender Discrimination in Europe and the USA*, *in* European University Institute, THE PROTECTION OF HUMAN RIGHTS IN EUROPE 199-268 (1993); Joanne Conaghan, *The Invisibility of Women in Labour Law: Gender-Neutrality in Model Building*, 14. INT'L SOC. L. 377, 384 (1986); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 391 (1984); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Theory of Law and Patriarchy*, , 8 J. OF WOMEN IN CULTURE & SOC'Y 635 (1983).

46. *See* KRETZMER, *supra* note 44.

47. *See, e.g.*, H.C. 6698/95 Ka'adan v. Israel Land Authority, 54(1)P.D. 258 (2000) (Israeli

action in support of civil rights also encourage courts, however they may deny it, to decide cases more favorably.[48]

Ending discrimination would do more than most people realize to increase options for reconceptualizing conflict here and around the world. The Bush administration both opposes efforts against racial and sexual discrimination[49] and promotes war.[50] It is no surprise that those in the Israeli government who support war also support discrimination against Arabs.[51]

Supreme Court decision giving Arab citizens access to new housing development in Katzir, Israel); Sandy Kedar, *A First Step in a Sensitive Road: Preliminary Observations on* Qaada v. Katzir, 16 ISRAEL STUD. BULLETIN 3 (2000). *But see* Aeyal M. Gross, *The Politics of Rights in Israeli Constitutional Law*, 3 ISRAEL STUDIES 80, 86 (1998)(pointing out failures of Supreme Court to protect Arab rights in Occupied Territories); *id.* at 101 (criticizing Israeli Supreme Court for rejecting Israeli-Arab claims to equal protection); *id.* at 103 (pointing out that granting economic rights to Israelis serves to entrench prior "major expropriations of land from Arabs"); *id.* at 104-05 (detailing Supreme Court's refusal to stop home demolitions in Occupied Territories or to protect Arab property rights). *See generally* KRETZMER, *supra* note 44; DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002).

48. *See generally* Anshil Fafer, *Organization Against Religious Forcing: Barak Is Influenced from Orthodoxy Pressure*, HA'ARETZ, June 12, 2002, at A1 (reporting that lawyers who used to litigate in the Supreme Court on religious-state issues are claiming that justices are "giving up to the massive political pressure" of religious orthodox); Shahar Ilan et al., *Porus: If Bagatz Won't Be Convinced with Good Spirit, There Will Be a War*, HA'ARETZ, Feb. 15, 1999, at A1 (describing demonstration of 250,000 people organized by Haredim against the Supreme Court in Jerusalem); KRETZMER, *supra* note 47, at 12-13 (public image of court as politically neutral).

49. *See* Brief of the United States, Gratz v. Bollinger, 71 U.S.L.W. 4480 (U.S. June 23, 2003) (No. 02-516); Brief of the United States, Grutter v. Bollinger, 71 U.S.L.W. 4498 (U.S. June 23, 2003) (No. 02-241).

50. *See* BOB WOODWARD, BUSH AT WAR (2002); John W. Dean, "Is lying about the reason for a war an impeachable offense?" at http://cnn.law.printthis.clickability.com/pt/cpt?action=cpt&expire=-1&urlID=65364287fb=Y (last visited 6/8/2003) ("the war in Iraq is all Bush's doing"). On the connection between opposing war and supporting racial justice, *see* Martin Luther King's speech against the Vietnam War one year before he was murdered. Martin Luther King, Beyond Vietnam: A Time to Break Silence, Address Delivered to Meeting of Clergy and Laity Concerned at Riverside Church, New York, (Apr. 4, 1967) (transcript available at http://www.hartford-hwp.com/archives/45a/058.html). On the other hand, there is evidence that affirmative action enjoys some support among U.S. military officials, *see* Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* at 27, Grutter v. Bollinger, 71 U.S.L.W. 4498 (U.S. June 23, 2003) (No. 02-241) (brief submitted by retired high-ranking military officers defending affirmative action in service academies and ROTC as "essential" to the military's ability to fulfill its mission), despite more ambivalent views on sexual discrimination and on particular military adventures pursued by political leaders.

51. As in the United States, it is difficult to "prove" this assertion, yet many Israeli friends have assured me that it is correct. While this has been widely repeated to me in Israel, citation support is less easy to obtain. Just as Bush supporters would claim they support civil rights and women's rights, so too Sharon supporters deny he opposes civil rights for Palestinians. Yet, of course, just as Americans can make the statements they do regarding Bush, Israelis make similar statements regarding Sharon. I personally disagree with those who see in Sharon's June 2003 use of the word "occupation" any growing sensitivity to Arab rights or greater desire for peace. *See* James Bennet, *Sharon Laments 'Occupation' and Israeli Settlers Shutter*, N.Y. TIMES, June 1, 2003, § 1, at 1. Of course, time may tell.

I have two major points here about anti-discrimination. First, reducing or ending discrimination makes an important, direct contribution toward peace. Second, the struggle over the civil rights of Arabs reminds the Israelis who want to grab more land that the land comes complete with people who already live there, and that their fellow Israelis are going to insist that these people receive fair and equal treatment.

If the war-makers in Israel continue to prevent the creation of a viable Palestinian state, then the only acceptable alternative will be some kind of bi-national solution — a solution advocated by some Palestinian intellectuals such as Edward Said and Lama Abu-Odeh and, on the Israeli side, by people such as Hillel Barak.[52] Such a development would bring civil rights law and anti-discrimination principles to the forefront of discussions and political activity. Many would agree that a bi-national state is better than a supposed two-state solution that in fact consists merely of one state and a series of disconnected Palestinian homelands (or prison camps?) as proposed for the blacks in apartheid South Africa.[53]

As the world economy becomes "globalized," national independence becomes something of a myth or fantasy in any event, some argue.[54] Today, a major goal of national independence is simply to reduce or eliminate discrimination and unfair treatment by the dominant group against one or another minority.[55] Decade after decade of brutal discrimination against Jews provided a major argument for – and an important boost to – the Zionist movement.[56]

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52. *See* Edward Said, *The One-State Solution*, N.Y. TIMES, Jan. 10, 1999; Lama Abu-Odeh, *The Case for Binationalism*, 26 BOSTON REVIEW 4 (2001-02); Hillel Barak, *The Israeli-Palestinian*, June 21, 2001, *at* http://www.pmwatch.org/pmw/manager/features/display_message.asp?mid=462; THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID (Roane Carey ed., 2001); *see also* http://www.one-state.org/articles.htm and http://www.uofidivest.org/index.php?topic=articles.

53. On the South African "Bantustan," *see, e.g.*, ROGER J. SOUTHALL, SOUTH AFRICA'S TRANSKEI: THE POLITICAL ECONOMY OF AN "INDEPENDENT" BANTUSTAN (1983). On the comparison between these Bantustans and certain right-wing plans for a Palestinian "state," *see* TANYA REINHART, ISRAEL/PALESTINE: HOW TO END THE WAR OF 1948, 236-37 (2002); Francis A. Boyle, *Obituary for the Oslo Accords: R.I.P. Sept. 13, 1993 - Sept. 28, 2000,* July 3, 2002, *at* http://www.counterpunch.org/boyle0703.html.

54. *See* Martin Wolf, *Will the Nation-State Survive Globalization?*, 80 FOREIGN AFFAIRS 178 (2001); Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CAN.-U.S. L.J. 9, 13 (2002); Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 526-27, 530 (2002); PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE 263 (1999); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 24-25 (1995).

55. *See* Frances Olsen, *Discrimination, Equality and Peace*, *in* EQUALITY IN DIVERSITY—THE NEW EQUALITY DIRECTIVES 55-74 (C. Costello & E. Barry eds., 2003).

56. *See* EDWIN BLACK, THE TRANSFER AGREEMENT: THE DRAMATIC STORY OF THE PACT BETWEEN THE THIRD REICH AND JEWISH PALESTINE (3d ed. 2001).

While fake claims of "discrimination" have been used cynically to promote a nationalist project — for example, by the Sudaten Germans before World War II who complained simply that their preferential treatment was not preferential enough[57] — it is also the case that actual discrimination often provides a major incentive for nationalist aspirations. Northern Ireland broke out in violence some years ago largely over unfair discrimination, and an important key to peace in Northern Ireland is to treat Irish Catholics fairly vis-à-vis their Protestant counterparts, and to eliminate the more subtle and intractable forms of discrimination.[58]

Let me address two objections to what I propose. First, critics from the left might say that Israeli society is itself no longer egalitarian, so it is sheer utopianism to expect greater equality between Israel and Palestine. A recent study revealed that Israeli society has the greatest gap between the income of the top ten percent and the bottom ten percent of any comparable country.[59] Yet, this broader-based inequality also means that virtually every Israeli is affected by the numerous divisions within society and should have an interest in accommodating those divisions. Second, critics from the right say that Israel will lose its character as a Jewish state unless it grants special status to Jews.[60] Without the law of return, Jews might again suffer the evils of anti-Semitism.[61]

I am an atheist, second or third generation.[62] My grandparents on both sides come from Christian Protestant traditions. I have known enough Jews and spent enough time in Israel to have some idea what it means to be Jewish. Of course, when Israelis disagree about who is Jewish, there will inevitably be some dispute about what

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57. *See* REAPPRAISING THE MUNICH PACT: CONTINENTAL PERSPECTIVES 10 (Maya Latynski ed., 1992); WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 359 (1985).

58. *See* Colin Harvey, *Academic Viewpoint: Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context*, 22 FORDHAM INT'L L.J. 1389, 1399 (1999); BOB PURDIE, POLITICS IN THE STREETS – THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT IN NORTHERN IRELAND 82-97 (1990). *But see* Lisette M. Currier, *Religion and Employment in Northern Ireland: U.S. Influence on Anti-discrimination Legislation*, 12 COMP. LAB. L.J. 73 (1990) (arguing that "[a]lthough religious differences have contributed to the employment discrimination faced by Northern Ireland's Catholics, most agree that these differences are not at the core of the hostilities in Northern Ireland").

59. *See* Ruth Sinai, *Israel No. 2 in West in Social Inequality*, ARONS ISRAILI PEACE WEBLOG, *at* http://www.shtull-trauring.org/aron/Community/Articles/Israel_No_2_in_West_in_social_inequality.html.

60. *See* Amnon Rubinstein, *The Revolution Failed, the Zionism Succeeded*, HA'ARETZ, June 10, 1997 (defending need for Law of Return against "post-Zionists" who believe anti-Semitism is phenomenon of the past).

61. *See id.*

62. Although my father was baptized, he has asserted that his parents were atheists. His mother's father was driven out of Fredericia, Denmark, for voting Socialist before the establishment of the secret ballot.

it means to be Jewish.[63] Being Jewish is not about orthodoxy, but about tradition. Being Jewish is not about religious, doctrinal hocus pocus, but about ethics and basic values.[64] I can understand the appeal of a Jewish state. But is a state that inflicts wanton suffering upon innocent people a Jewish state? Can a state that creates a series of euphemisms for murder be a Jewish state?[65] A state that refuses to acknowledge the suffering of others is not a Jewish state.

Israel is essentially already a multicultural state and it seems to me it can never live up to any truly worthy claim to be a Jewish state unless it treats all its citizens and residents in a fair and respectful manner, recognizing the dignity and equality of all.

I am pleased and honored to participate in this conference, which I hope is one more step in this direction.

ANALYSIS

Now, to what extent have I fallen into the many traps against which Pierre Schlag warns us? To what extent am I enchanted by reason? Too glib a claim would be that I am simply not relying on law and legal reasoning at all and thus avoid all Pierre's traps. The easy answer, that I am simply making a political gesture, is appealing, but on the slightest reflection it seems too simple to me, and incorrect.

Of course, my purpose was political in the sense that I hoped to influence my listeners to change some of their views and to inspire them to act effectively upon their other views. The legal academics Schlag criticizes are also pursuing political agendas. Indeed, among the most convincing and enduring of the insights of Critical Legal Studies are that law is deeply political and that political argument cannot be sharply distinguished from legal argument. The appeals that I made in the talk are legal as well as political, and some of my arguments made claims to the kind of universal acceptability or truth that are usually justified by a kind of appeal to reason.

Let me consider four traps into which my talk might well have fallen. To illustrate the first trap, Schlag describes the police search of the thief's living quarters in Edgar Allan Poe's "Purloined Letter"[66] and suggests that the search failed in part because the description of the letter for which they were looking was flawed.[67] That is, the police "substi-

63. A popular joke in Israel suggests that if you have four Jews in a room you will have five divergent opinions.

64. *See* MARTIN BUBER, I AND THOU (1974).

65. "Transfer," for example, is the term used to describe expulsion and perhaps death of Palestinians. So too, "extra-judicial executions."

66. EDGAR ALLAN POE, *The Purloined Letter*, *in* EDGAR ALLAN POE: TALES AND SKETCHES (Thomas Ollive Mabbott ed., 2000).

67. Schlag, *supra* note 1, at 3-4.

tuted a simulacrum of the letter for the real object of their desire"[68] and – because the appearance of "the real object of their desire" had been altered by the thief – the police had been unable to detect the letter, which was "hidden" in plain view.[69] Schlag then suggests that legal thinkers who try to focus on the relationship between law and justice often fail to recognize that they are operating within a framework in which the "object of their desire, justice, has already been replaced by 'justice' — a term whose meaning and appropriate modes of use are largely a function of academic fashions, protocols, anxieties, ambitions, wish fulfillment, and other formations that often have very little relation to justice."[70] Although I talk little of justice as such, I certainly do refer extensively in the talk to peace.

Surely there is some similar danger in discussion of the Middle East of peace being replaced with "peace" — a term whose meaning may have very little relation to peace. Some people talk as though before the intifada there was "peace" and that there will again be "peace" whenever suicide bombings cease and the Palestinians stop resisting. Rather than advocating such a "peace" that might not be peace, I am suggesting the possibility of a broader, more open concept of peace. More importantly, I hope to be conscious of the use I make of the term and not unconsciously allow a "crucial substitutio[n]"[71] to take place whereby I merely help to circulate the term "peace" "through the disciplinary grids of American legal thought."[72]

A second pitfall into which I may have fallen is Schlag's criticism that American legal thinkers are critical only of "specific cases, statutes, constitutional provisions, and the like" and in such a narrow way that they "presum[e] and systematically reaffir[m] the essential rationality and essential value of American law."[73] Certainly this too is a risk. What is it that my talk is affirming while criticizing at the same time? For one thing, I seem to be accepting the continued existence of Israel, a notion to which some would object; but this is not unconscious.

The historical role of Palestinian Zionists is indeed morally questionable. Before the Second World War, Zionists received help from Adolf Hitler; Zionists in turn gave help to Hitler.[74] Surely more promising alternatives may have been available to redress the wrongs at the end

68. *Id.* at 8.

69. *See* POE, *supra* note 66, at 990-91.

70. Schlag, *supra* note 1, at 9.

71. *Id.*

72. *Id.*

73. *Id.*

74. BLACK, *supra* note 56, at 12-15 (breaking the world economic boycott against Hitler's Germany).

of World War II than to partition Palestine and create a Jewish State in the Middle East.[75] But at this point, that seems to be neither here nor there. Israel's continued existence in the Middle East is no longer in real doubt.[76] The best way to make things right at this point might be to endeavor to make things better for the Palestinians, who are now the victims of injustice.[77] Things can, and in my view should, be made right for the Palestinians. It would not be impossible to make the Palestinians better off living next to Israel then they would have been without the creation of Israel; in my view, this should be an international goal.

However, a question remains: Am I unconsciously affirming something that I should be challenging? Perhaps, but if so, I do not know what it is. Pierre Schlag does say that those enchanted by reason are unlikely to be able to detect their own enchantment.[78]

In his third trap, Schlag warns against assimilation. In the context of discussing critical reflexivity, he notes that "[t]here is no success that does not end in failure. What critical reflexivity may at first reveal as an interesting insight into context (success) will eventually retreat into the background where it will once again become a taken-for-granted aspect of context (failure)."[79] In the context of the construction of a rational frame of inquiry, the warned-against assimilation takes the form of the frame that the would-be critic constructs, becoming itself a substitute for

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75. There is a certain irony in the Federal Republic of Germany's post-war practice of making payments not to the actual victims or their families but to the State of Israel to compensate or make reparations for the property Nazi Germany stole and the Jews Nazi Germany murdered in pursuing the Nazi policy to get the Jews out of Europe. Recent lawsuits, for example against Switzerland, have recovered for the surviving relatives, in or outside of Israel, money damages and property stolen during the war. *See* Isabel Vincent, *Who Will Reap the Nazi-era Reparations?*, NAT'L POST, Feb. 10, 1999, *available at* http://www.uccla.ca/issues/genocide/i_gncd_020.html.

76. *See* Roy Butman, *Coaxed to Stay: U.S. Moves to Prevent an Israeli Walkout*, NEWSDAY, Oct. 22, 1998, at A3 (calling revision of Palestinian National Covenant's opposition to existence of Israel "largely symbolic at this point" and asserting "Israel's existence is hardly in doubt"). Although Israel has frequently expressed concern it would be "pushed into the sea" and that its Arab neighbors remain belligerent, each war has resulted in a larger state of Israel. Egypt and Jordan have formally accepted the reality of Israel. With the Oslo Accords, the Palestinian Liberation Organization formally renounced the destruction of Israel as a goal. *See* Justus R. Weiner, *Wye River Memorandum: A Transition to Final Peace?*, 24 HASTINGS INT'L & COMP. L. REV. 1, 11 (2000); Danna Harman, *Netanyahu Praises Palestinian Vote*, JERUSALEM POST, Dec. 15, 1998, at 1 ("On December 14, 1998, the Palestinian National Council . . . voted by an overwhelming majority to revoke sections of the Palestinian Covenant calling for Israel's destruction."). Saudi Arabia proposed and received Arab approval for an offer for the Arab nations to establish normalized relations with Israel if Israel ended the occupation of the West Bank and Gaza and dismantled the Israeli settlements, constructed in violation of United Nations resolutions.

77. *See, e.g.*, TANYA REINHART, ISRAEL/PALESTINE: HOW TO END THE WAR OF 1948, 112-28 (2002); KRETZMER, *supra* note 47.

78. See SCHLAG, *supra* note 1, at 74.

79. *Id.* at 74-75.

what it was supposed to chart. "Its referents drop out . . . . Instead of serving as a heuristic, a map, and aid to understanding, it becomes an aspect of reality itself — something that is lived. It is no longer the map, but rather something that itself needs to be mapped."[80]

This process of the revolutionary becoming banal is encountered again and again. In law, the idea (or "rhetorical device") of balancing has just such a life cycle. It was introduced, according to Schlag, in the 1950's to induce or "force judges to stop hiding behind the formalisms of 'wooden' doctrinal rules,"[81] and to articulate actual reasons for the decisions they made to sacrifice one right or interest for the sake of another right or interest. The notion of balancing or weighing one competing consideration against another, or devising a balancing test, was a way of acknowledging instead of denying the competition between the interests. Yet, over time, "balancing has itself become formulaic, wooden, mechanical — in short, the repository of precisely those formalist vices that it was designed to avoid."[82]

This problem is the same basic problem Schlag raises in the provocative notion of the enchantment of reason: Reason has become a venue for "faith, prejudice, dogma."[83] Reason entered our world as an alternative to faith, prejudice, and dogma. Diderot and other courageous non-believers struggled to establish reason as an alternative to the practices that Diderot saw crushing the human spirit and legitimating the confinement and destruction of human possibility.[84] For reason to be turned around and serve the very masters it was introduced to overthrow is both shocking and strikingly familiar. Each generation overthrows the last and then becomes the old fogies who need to be overthrown.

This is the underlying problem that leads so many in Critical Legal Studies to reject altogether the notion of a positive program and opt for advocacy of endless critique — just keep the kettle boiling. In the context of the United States, this aspiration makes a lot of sense. We have too much stability; change is more likely to be good than bad, or at least likely enough to be worth the chance. Context is crucial, however. It might not be an exaggeration to say that context and perspective are everything. This is the same context and perspective that Joanne Conaghan (quite correctly in my view) faults Schlag for failing ade-

80. *Id.* at 75.

81. *Id.* at 31.

82. *Id.* at 31-32.

83. *Id.* at 47.

84. *See* IRA OWEN WADE, THE INTELLECTUAL ORIGINS OF THE FRENCH ENLIGHTENMENT 20-27 (1971) (discussing Diderot and his ideas).

quately to consider.[85]

Non-violent civil disobedience, which I advocate in my talk, can, of course, become routine and banal. When this happens, it loses its effectiveness. The most effective civil disobedience is that which surprises and forces a reconsideration of firmly held values and a rethinking of taken-for-granted truths. One reason the Tel Aviv students who began the new "Refusenik" movement made such an impact (and broke through the wall of silence about Israeli dissent that the media had maintained from the time of the second intifada until then) was the contrast between the undeniably sterling military records of the people who signed the letter and the cowardly or "soft" image that opponents had imposed on those advocating peace - an image Israeli militarists used to dismiss anyone critical of the pro-war camp.[86]

The last trap I want to consider is the trap of expecting to be able "to use reason to evaluate and adjudicate the validity of core ethical and political beliefs."[87] To the extent that I use reason to challenge the alleged reasonableness of the militarists, I use it as critique and in the spirit of Diderot. Insofar as I may inadvertently try to claim that my view is the only reasonable one, I am indeed on shaky ground. Again, it would seem to be a matter of context. The abstract critique of reason is interesting and in a sense correct, but in application it all depends upon context.

Thus would I evaluate these four pitfalls or traps. I hope that in doing so I have shed some light on the practical application of Schlag's critique of reason and simultaneously avoided the twin dangers of glib denial and of glib over-application and too-easy dismissal.

85. *See* Joanne Conaghan, *Schlag in Wonderland*, 57 U.MIAMI L. REV. 543, 547-49, 566-69 (2003).

86. *See, e.g.*, Holger Jensen, *I Made Serious Error in Sharon Column*, ROCKY MOUNTAIN NEWS, Apr. 16, 2002, at A27 (quoting an Israeli military man referring "contemptuously" to Israeli pacifists as "those with 'soft and delicate hands'").

87. SCHLAG, *supra* note 1, at 91.