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A. Taking Schlag to (the) Task: Reconstructing Rights, Reason, and Politics: *Dissonance Orientation: The Occupational Hazard of Being a Judge or a Requirement for the Job?*

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# Dissonance Orientation: The Occupational Hazard of Being a Judge or a Requirement for the Job?

THE HONORABLE DENNIS M. DAVIS\*

Pierre Schlag's *The Enchantment of Reason* sells in softcover for less than twenty dollars. That is a fraction of the price demanded by a competent therapist, yet the results offered by Schlag are far more impressive. Scarcely fifty pages into this book, and all my angst about adjudication and my delusion of the possibility of even the most insignificantly modest of contributions to the transformation of South African society—where it is only within the last seven years that ninety percent of the population have finally obtained some rights—had disappeared.

In the words of my new guru (and with the rand having plunged thanks to those speculators who are also immersed in text, even I can afford a permanent session at \$17.95), “reason is unstable. Law is not benign. . . . When reason runs out, but continues to rule, we get precisely what we see all around us—the excessive construction of a pervasively shallow form of life.”<sup>1</sup>

Doubtless there will be readers of this work who will argue that I am unfair to the purport of this work. After all, Schlag turns out to be only an American legal therapist. Early in the book he writes: “My claims . . . refer to American law and American legal thought. The social and intellectual contexts in which law and legal thought is produced in other countries is likely to differ and to require a different analysis.”<sup>2</sup>

What is troubling about this uncharacteristic display of American modesty compared with the more common exercise of intellectual imperialism is that Schlag's central claims, as I read them, turn out to be equally applicable to many other countries, including that in which I work, South Africa. As I understand these claims they can be summarized thus: The claim of law constituting an autonomous entity that works itself pure through the exercise of reason is a political claim, and, as Schlag shows in 145 unrelenting pages, it is devoid of any theoretical coherence. Far from constituting a coherent body, law consists of a series of diverse linguistic, political, and cultural practices that become

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\* High Court of South Africa.

1. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 145 (1998).

2. *Id.* at 14.

encrusted with the claim of reason so that “[u]ltimately, cultural and individual memory are erased.”<sup>3</sup> In this way, the members of a legal community become believers that in doing law they are involved in “some objective (stabilized) and subjective (authorized) reality greater than one’s self . . . .”<sup>4</sup>

These claims have application beyond the borders of Colorado, New Haven, and Cambridge. Take the following passage from Schlag’s book:

Law—in the sense of authoritative codification—has become the desired end point of all kinds of political programs from the far right to the far left. The patriot militias, the Christian right, the pro-life groups, the school curricular reform movements, the pro-choice groups, the affirmative action partisans, the gay-lesbian rights groups—all speak in a legalist idiom and seek to institute their politics in the aesthetics of the legal code.<sup>5</sup>

This description of how “rights talk” has embedded itself in the political discourse of civil society is surely accurate, but it reflects a development that is hardly confined to America. Rights struggles have dominated many countries’ political landscape. For example, for more than three quarters of a century, the political demands of the African National Congress (ANC) were inextricably linked to a rights discourse. In 1923, the ANC promulgated the African Bill of Rights, which emphasized the right to own land. In 1943, the African Claims were published, following the Atlantic Charter’s precedent. In 1955, the ANC launched the Freedom Charter which contained the seeds of what appeared later in the constitutions that ultimately launched South Africa into democracy. In 1988, the ANC effectively updated the Freedom Charter when it published its Constitutional Guidelines.<sup>6</sup> These documents—all full to brim with “rights talk”—were central to the struggle that eventuated in the demise of apartheid in the early 1990s.

Rights struggles are not unique to America, nor are they confined to clashes for control of the nation-state. Without traversing the range of feminist scholarship, which of necessity falls outside the scope of this analysis, it is fair to say that a critical reconstruction of rights, particularly the ideas of equality and justice, has been a persistent theme of feminist political thought and action.<sup>7</sup>

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3. *Id.* at 143.

4. *Id.* at 109.

5. *Id.* at 14.

6. These documents are collected in HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998).

7. *See, e.g.*, NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND*

In short, Schlag's critique of the tendency toward "authoritative codification"—the casting of political struggles in the idiom of "rights"—would seem to have unavoidable implications for those (such as South Africans and feminists) engaged in struggles in other arenas, unless Schlag is correct in his suggestion that the "social and intellectual contexts" of those struggles can be shown to differ significantly from those encountered in the American setting.<sup>8</sup>

"Heidegger forbid" that the concerns to which Schlag refers should be extended to include the political and the economic! We now arrive at the first of the two fundamental difficulties that I have with Schlag's work. If the analysis of law differs from country to country as a result of social, political, economic, and intellectual concerns, then the least one can expect from an analysis of American law is that it should be located within a similar context. If the kind of analysis undertaken by Schlag would differ if applied to the law of South Africa, Brazil, Hungary, or India, for example, then that very conclusion should trigger some inquiry as to the reason therefor. To summarize, there is a marked absence of this kind of analysis within *The Enchantment of Reason*—as if these concerns may apply elsewhere but not in his own backyard.

The second difficulty concerns Schlag's critique of what he views as a progressive fallacy that "the good aspects of a practice are essential to its constitution, but the bad ones are not . . ." and hence that "intellectual effort can be usefully deployed to reform the practice so as to eliminate the bad aspects."<sup>9</sup> For Schlag, this is a fallacy because there is no basis for assuming that such separation is possible. Schlag's argument here is firmly located in his belief that we are all hopelessly stuck in our own language games and that there is no possible recourse to a transcendent critique that would not be yet another expression of the very normative enterprise so assiduously deconstructed elsewhere in his scholarly work.<sup>10</sup> But does this claim lead inevitably to the progressive fallacy? If the answer is in the affirmative, as Schlag suggests so energetically, what implications does such a conclusion hold for those who take the business of legal struggle seriously—not just lawyers but also AIDS sufferers, the homeless, or black women operating in a racist and sexist society? Thus, the claim that law is so universally one-dimensional as only to admit of a progressive fallacy is the second of Schlag's claims I wish to interrogate.

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SOCIAL THEORY (1998); MARY JO FRUG, *POSTMODERN LEGAL FEMINISM* (1992); *FEMINIST THEORY AND LEGAL STRATEGY* (Anne Bottomley & Joanne Conaghan eds., 1993).

8. SCHLAG, *supra* note 1, at 14.

9. *Id.* at 99.

10. See generally Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

From this second challenge two further questions follow: Can a citizen use the law, particularly a constitutional text capable of disruption, to challenge the propriety of so-called proper law and thereby introduce plurality and consideration of the voice of the “other”? The second and related question concerns the political implications for a society that was born out of one form of law and has evolved into another. If one accepts the argument in *The Enchantment of Reason*, it would inevitably mean that a society committed to a constitution which promises transformation cannot but pursue the “shallow life.” Does law inevitably reduce otherness to an “other” unwittingly fashioned in its own image and thereby (re)produce a community committed to a circular return to itself?

In answering these questions, I propose to show either that Schlag is guilty of over-egging his post-modernist pudding, or that we should take him at his word when he says that his challenge to reason has no application beyond the American legal community. If the latter claim is correct, this raises a question concerning the basis for assuming a sharp distinction between law in the United States and law elsewhere, an issue which relates to the first challenge that I wish to pose to Schlag’s central claims.

#### THE IMPORTANCE OF POLITICAL AND ECONOMIC CONTEXT

It simply does not occur to American legal thinkers . . . to inquire into the ontological status of law or legal artifacts. . . . To the extent that “doing law” is an enterprise of legal advocacy, there is no payoff in any public questioning of the fundamental artifacts that make this work of legal advocacy and legal persuasion at once possible and seemingly meaningful.<sup>11</sup>

In contrast to the legal scholars on whom he pours scorn for their inability to interrogate the law rather than celebrate it, Schlag devotes a considerable portion of *The Enchantment of Reason*, and the entirety of his most recent scholarly article,<sup>12</sup> to such an investigation by way of an examination of law’s aesthetics. Thus, he finds the forms that recur to shape the creation, development, and identity of law within four aesthetics: grid, energy, perspectivist, and dissociative.<sup>13</sup>

A detailed analysis of these aesthetics is not necessary for my argument. Suffice it to say that in each aesthetic one can find a particular brand of legal theory.<sup>14</sup> For Schlag, the purpose is to “enabl[e] the

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11. SCHLAG, *supra* note 1, at 97.

12. See, e.g., Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002) [hereinafter Schlag, *Aesthetics*].

13. *Id.* at 1051-52.

14. Within modern legal writing, the grid aesthetic is reflected in the work of ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995), and FREDERICK SCHAUER, *PLAYING BY THE RULES:*

reader to recognize the various aesthetics of law and their influence on law and legal professionals—including most especially herself or himself.”<sup>15</sup> If the reader has an expectation of discovering guidance as to a politics of law, Schlag’s analysis can only lead to disappointment. As Schlag writes: “In each case, the aesthetic becomes pathological because it becomes enthralled with its own logic and thus fails to recognize or encounter resistance. This tendency is not surprising, given that each aesthetic constructs or enacts the self in its own image.”<sup>16</sup> So we return to the starting point: Lawyers are irredeemably confined to the play of language games, each game confined within its own “aesthetic.”

To be fair, Schlag concedes that each of the four aesthetics that he identifies are powered by their own politics. In light of Schlag’s acknowledgement of a political dimension, I half-expected Schlag to ask the following question: From whence do these different political forms emerge? Is there not some purpose served, at the very least, in examining whether these forms of politics are born within a particular economic and social context? But that inquiry is not the focus of Schlag’s enterprise. Because we are doomed, in Schlag’s view, to play language games, we are not able to mount any critique which may transcend our immediacy. Legal theorists are in a jurisprudential submarine, the periscope of which allows sight of only the water’s surface, but no high ground.

Under the influence of this kind of thinking, legal theory will have no truck with history. Diversity and fragmentation are the characteristics of the post-modern world, and any reference to the inexorable unfolding of global capitalism is to be dismissed as a part of one particular “grand narrative.” Schlag offers his arguments at the very historical moment when the systemic logic of capitalism, fashioned in the form of globalization that characterizes post-modern legal theory, is once again revealing itself as it did in the body of historical scholarship ignored by Schlag but personified in the work of E.P. Thompson, who sought to show how the growth of capitalism helped fashion legal forms. Born of his investigation into the eighteenth century political economy of Brit-

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A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991). The energy aesthetic can be found in RONALD DWORKIN, *LAW’S EMPIRE* (1986), and in BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). While Dworkin and John Rawls may also find themselves located in the perspectivist aesthetic, see, for example, RONALD DWORKIN & JOHN RAWLS, *POLITICAL LIBERALISM* (1995), so may Duncan Kennedy, see DUNCAN KENNEDY, *SEXY DRESSING, ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993). NARRATIVE, VIOLENCE, AND THE LAW: ROBERT COVER (Martha Minow et al. eds., 1992), and STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989), are to be found within the dissociative aesthetic.

15. Schlag, *Aesthetics*, *supra* note 12, at 1054.

16. *Id.* at 1114.

ain, Thompson's essential argument was that productive relations of that period were as inconceivable without legal forms as they were without economic forms.<sup>17</sup> As he wrote of his historical work's implications for law,

I found that law did not keep politely to a "level" but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-right and definitions of agrarian practice) . . . contributed to the definition of the self-identity both of rulers and of ruled; it afforded an arena for class struggle, within which alternative notions of law were fought out.<sup>18</sup>

From Thompson's work it was possible to distill a clear implication for legal theory, namely that law and productive relations are inextricably linked such that a separation can only be effected by a jurisprudential apartheid.<sup>19</sup> By contrast, Schlag's work conceptualizes productive relations in particular and capitalism in general out of existence, and it refuses even to entertain questions of historical causality or of the manner in which capitalism (as is so evident in the era of globalization) shapes identity and social relations.<sup>20</sup>

This latter approach can only lead to one of two tendencies, Schlag's aesthetics notwithstanding: Either law is elevated to an eternal idea of justice and equity, or it is no more than a mirage of reason, a set of unprincipled and opportunistic rules masquerading as a coherent body of principle. Ironically, it was against a similar dichotomy that Thompson battled a quarter of a century ago:<sup>21</sup> A juridic observance of rights and citizenship which was to be found at the heart of the Enlightenment project (on the one hand) vs. an antinomian opposition to the impersonal, other-disregarding rules of law which later became the subject of deconstructive notions of justice and alterity (on the other).<sup>22</sup> Then as

17. See E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1966); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1976).

18. E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 288 (2d ed. 1979).

19. For detailed discussions of the importance of Thompson in particular and theoretical integration, see Robert Fine, *The Rule of Law and Muggleonian Marxism: The Perplexities of Edward Thompson*, J.L. & POL'Y, June 1994, at 193. See also Paddy Ireland, *History, Critical Legal Studies, and the Mysterious Disappearance of Capitalism*, 65 MOD. L. REV. 120 (2002).

20. See Ireland, *supra* note 19, at 130.

It is difficult to escape the conclusion that postmodernism's fascination with culture is largely a product of the culture industry itself, of culture's subsumption within the general process of commodity production; and that its cultural egalitarianism is as much a product of the value-leveling commodity form as a resistance to it, its resolute anti-foundationalism sitting remarkably comfortably with capitalism's melting of all that is solid into air.

*Id.*

21. Fine, *supra* note 19, at 199.

22. See, e.g., Jacques Derrida, *The Force of Law: The "Mystical Foundations of Authority,"* 11 CARDOZO L. REV. 919 (1990).

now, those working in the legal field are confronted with a rather stark choice: Either accept the form of law which presently exists in a constitutional society as a universal good, or dismiss law as a deception from which justice is but a most distant relative.

Thompson's response to this dichotomy was to postulate the timeless essence of law as a guarantee of equity. He was thus constrained to argue that the class character of law was a corruption of the essence by class-bound procedures and institutions which were alien to the law's own logic, rules, and procedures.<sup>23</sup> In *Whigs and Hunters*, Thompson contended that the eighteenth century Black Act was an example of "class corrupt law," drafted by bad legislators and enlarged by the interpretation of bad judges.<sup>24</sup>

Thompson's work is manifestly guilty of "fetishising" the form of capitalist law and claiming for it the title of law's universal essence. But if he failed to pursue the logic of his own historical work, the message remains clear: All forms of life are shaped by the interrelationship between the unfolding of capitalist relations of production and the social relations spawned therefrom. Further, the study of eighteenth century England revealed the extent of the influence of the capitalist form over all spheres of social activity, including the legal system.<sup>25</sup>

By contrast, Schlag does not offer any history suggesting that at the present moment global capitalism has more totalizing effects upon humankind than at any previous moment. We are asked to replace one grand narrative, historical inquiry, for another, the inexorable logic of the dissociative aesthetic and its foundational premise that law of whatever form is but an illusion which deceives all but that happy band of resolute post-modernists. In this way all forms of law, even ones which may emerge from new struggle, are eschewed. Law is seen through the prism of the specific limitations of the law that emerged from capitalism's dominance. Like the classic liberals of the nineteenth and early twentieth centuries, the essence of law is seen in the way the system works through individual cases. By means of abstract standards of comparability, and of retrospective sanctions, and by way of mediation through unelected judicial offices, they are seen as essential to all legal systems.

This treatment of law not only heralds the end of a politics by means of a transformed law, but also condemns any use of existing law as a means of struggle to irrelevancy and possibly naivety. If *The Enchantment of Reason* does not expressly show contempt for popular

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23. THOMPSON, *WHIGS & HUNTERS*, *supra* note 17, at 260.

24. *Id.*

25. *See Ireland*, *supra* note 19, at 138-39.

struggles for rights, it shows no understanding as to why feminists and gay rights activists may seek to struggle, albeit partially, through the law. It is to this second criticism of the book that I turn.

### THE POLITICS OF RIGHTS STRUGGLE

To recapitulate the second criticism of Schlag's book, I focus on the argument that in the post-modern world there is no single unified process which can be ascertained from historical inquiry and which moves inextricably towards human liberation. For this reason, it is contended that the discourse of rights has lost any coherence. The lack of a transcendent standard aside, human rights continue to represent an expression of a yearning on the part of the individuals and groups to free themselves from external constraint and allow for self-realization. At times, these struggles end in dismal failure, but, occasionally, successful battles have been fought. For this reason, a far more nuanced examination of rights struggles is required than that advanced in *The Enchantment of Reason*.

Schlag's work focuses exclusively on American law, but no reason is advanced as to why rights struggles should be analyzed differently in other countries. For this reason, it appears to be a useful exercise to examine experience elsewhere. As an illustration, I wish to employ the battle which has been waged in South Africa by persons infected with HIV to be provided with appropriate medical treatment by the State.

It is estimated that about 4.68 million people, some ten percent of the South African population, are HIV positive.<sup>26</sup> Notwithstanding the scale of this epidemic, the government of South Africa equivocated on initiating a comprehensive anti-retroviral treatment campaign.

During July 2000, the manufacturer of nevirapine offered to supply the drug to South Africa public health authorities free of charge for five years.<sup>27</sup> The government decided to make nevirapine available for the prevention of mother-to-child transmission of HIV at only a limited number of pilot sites. There was considerable public dissatisfaction with this approach. As Supreme Court of Appeal Judge Edwin Cameron observed:

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26. The figures are provided in Judge Botha's opinion in *Treatment Action Campaign & Others v. Minister of Health & Others*, 2002 (4) BCLR 356 (T), available at <http://www.tac.org.za/Documents/MTCTCourtCase/mtctjudgement.doc>.

27. Nevirapine was registered in April 2001 to reduce the risk of intrapartum transmission of HIV-1 from mother to child in pregnant women who are not taking anti-retroviral therapy at the time of labor. It was registered subject to the condition that the manufacturer continue to provide data on the performance of the drug. There was also the requirement that the patient be informed that breast feeding is counter-indicated.

In my own country, a government that in its commitment to human rights and democracy has been a shining example to Africa and the world has at almost every conceivable turn mismanaged the epidemic. So grievous has governmental ineptitude been that South Africa has since 1998 had the fastest-growing HIV epidemic in the world. It currently has one of the world's highest prevalences.<sup>28</sup>

Public dissatisfaction with the South African government's treatment of AIDS resulted in the formation of the Treatment Action Campaign in 1998, an organization consisting of a broad coalition of governmental organizations. The Treatment Action Campaign focused its attention on obtaining affordable drugs for people with HIV/AIDS; reducing the prices of essential medicines by drug companies; obtaining a better health service for all South Africans; and resisting American interference with South African drug policy.<sup>29</sup> Notwithstanding the growth of support for the Treatment Action Campaign and the intensification of the political struggle to ensure that pregnant mothers infected with the HIV virus should be given anti-retroviral therapy at State expense, the government continued to equivocate.

Eventually, on August 21, 2001, the Treatment Action Campaign launched an application before the High Court. They sought a declaratory order that the government be obliged to make nevirapine available to such women where it was medically indicated. They sought to compel the government to produce and implement an effective national program to prevent or reduce mother-to-child transmission of HIV, including the provision of voluntary counseling, testing, and nevirapine or other appropriate medicine, as well as formula milk for feeding.

The application was essentially based on section 27 (1) of the South African Constitution.<sup>30</sup> This provision provides: "Everyone has the right to access to . . . health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."<sup>31</sup>

Under a closely related provision—section 27(2)—the State must take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these rights.

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28. Justice Edwin Cameron, *The Deafening Silence of AIDS*, First Jonathan Mann Memorial Lecture at the XIII International AIDS Conference at Durban, South Africa (July 10, 2000) available at <http://www.actupny.org/reports/durban-cameron2.html> (last visited Oct. 24, 2002).

29. SUPPORT THE HIV/AIDS TREATMENT ACTION CAMPAIGN: AN INFORMATION LEAFLET ON HIV/AIDS TREATMENT (1999).

30. S. Afr. CONST. ch. II, § 27.

31. *Id.*

Interpreting section 27(2), which manifestly qualifies the rights contained in section 27(1), Judge Botha stated:

Sections 27(2) clearly presupposes a situation where there is not yet a full realisation of the right to health care. No doubt that is in recognition of a host of historical and socio-economic realities. It equally imposes the duty to achieve a progressive realisation of the right to health care as an ongoing obligation. It obviously does not impose the duty to achieve the realisation of access to health care overnight. The pace is dictated by available resources. Yet, in my view the inexorable goal is a realisation of the right, even through [sic] it may be achieved progressively.<sup>32</sup>

The court found that there was capacity in the public health sector to prescribe nevirapine outside of the few pilot sites which had been established.<sup>33</sup> Little, if any, evidence was provided to support the government's argument that allowing doctors in the public sector to prescribe nevirapine would throw the system into disarray, cause budgetary distortions, and set a precedent for the prescription of expensive drugs for the most esoteric of conditions. The court found that State doctors should be allowed to prescribe nevirapine after proper testing and counseling.<sup>34</sup> Judge Botha concluded that the prohibition of nevirapine's use outside a few pilot sites in the public health sector was unreasonable and constituted an unjustifiable barrier to the progressive realization of the right to health care.<sup>35</sup> Rejecting the government's program, the judge said: "A programme that is open-ended and that leaves everything for the future cannot be said to be coherent, progressive and purposeful."<sup>36</sup>

The court ordered the State to make nevirapine available to pregnant women with HIV who give birth in the public health sector and to their babies in public health facilities to which the government's then-existing program for the prevention of mother-to-child transmission of HIV has not yet been extended.<sup>37</sup> It also ordered the government to develop an effective comprehensive national program to prevent or reduce the mother-to-child transmission of HIV.<sup>38</sup> This includes the provision of the various services sought by the Treatment Action Campaign (voluntary counseling, testing, and so forth), as well as a require-

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32. *Treatment Action Campaign v. Minister of Health*, No. 21182/2001, 4 BCLR at 382D, available at <http://www.tac.org.za/Documents/MTCTCourtCase/mtctjudgement.doc> (last visited Oct. 24, 2002).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 385F, available at <http://www.tac.org.za/Documents/MTCTCourtCase/mtctjudgement.doc>.

37. *Id.*

38. *Id.*

ment for the progressive implementation of the plan to the whole of the Republic.

The government immediately appealed this decision, effectively staying the court's order. The Treatment Action Campaign responded by obtaining an order that instructed the government to make nevirapine available in accordance with the terms of the original judgment, pending an appeal before the Constitutional Court. The legal struggle did not entail the abandonment of political activity. Public comment and protests continued unabated, indeed building with intensity, until the matter was heard before the Constitutional Court on May 2, 2002.

On April 17, 2002, the government issued a statement that it would continue with research on nevirapine and extend sites where nevirapine would be dispensed until it made a final decision in December 2002 concerning universal access to nevirapine.<sup>39</sup> Contrary to an earlier policy, the government committed itself to providing a comprehensive support package for sexual assault survivors. It stated that such survivors would be counseled, including counseling on the risks of drugs, thereby allowing them to make an informed choice, and would be provided with drugs in accordance with guidelines and protocols if they choose.<sup>40</sup>

Whatever the outcome of the Constitutional Court's decision and the government's appeal, the campaign has prevailed.<sup>41</sup> Nevirapine has now been made available to a far wider range of HIV infected pregnant mothers that would otherwise have been the case. Rape survivors can now gain access to anti-retroviral drugs where previously the government refused such provision. The victory extracted from an unwilling and recalcitrant government by the Treatment Action Campaign was not entirely attributable to the legal victory, but rather to a combination of a successful application to court to ensure the implementation of a consti-

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39. Cabinet Statement on HIV-AIDS, Apr. 17, 2002, available at <http://www.gov.za/speeches/cabinetaidsoz.htm>.

40. *Id.* The statement marked a total reversal of previous government statements with regard to anti-retroviral therapy in general and to the provision of anti-retroviral therapy to rape victims in particular. See, e.g., Belinda Beresford, *Opinion: What Bent Mbeki*, DAILY MAIL & GUARDIAN, (Apr. 19, 2002), at <http://www.aegis.com/news/dmg/2002/MG020414.html>.

The story that HIV causes Aids [sic] is being promoted through lies, pseudo-science, violence, terrorism and deception . . . . We are urged to abandon science and adopt the religion and superstition that HIV exists and that it causes Aids [sic]. We refuse to be agents for using our people as guinea pigs and have a responsibility to defeat the intended genocide and dehumanisation of the African child, mother, family and society.

*Id.* (quoting Peter Mokaba, ANC Chief Electoral Officer, Statement, Mar. 2002) (last visited Oct. 24, 2002).

41. As this Article was being edited for publication, the Constitutional Court handed down its judgment, in essence upholding the finding of the lower court. See *Minister of Health v. Treatment Action Campaign*, No. 2002(10), BCLR1033(cc).

tutional right to health care, coupled with an intensification of political campaigns. It could be argued that the manner in which the application was brought to court added to the intensity with which the political campaign was waged by heightening public awareness of the struggle.

The lesson of the Treatment Action Campaign is that rights may represent nothing more than a negative principle functioning as a means of resistance to unjust practices without a definite content. Strategically employed in order to force government to be accountable to the promises it made (in this case via the constitution) and which it has no intention of implementing, coupled with political action, rights struggles can represent a most effective form of resistance to an unjust practice. *The Enchantment of Reason* provides no explanation nor recognition of such developments. It simply replies that they do not happen in the United States of America. This is surely an insufficient defense to this criticism of the theoretical understanding of law developed in Schlag's book. If the reply is that such struggles are representative of the delusion of those who employ the law in this fashion, then this really reduces to contempt for any human agency other than the deconstruction developed in the office of the postmodern academic.

#### CONCLUSION

The absence of history and the unrelenting critique of rights based upon a universal form of law lie at the root of the despair which ultimately engulfs Schlag's work. Although I agree that law in its modernist form is characterized by universalism and sameness, a cursory examination of the modernist project's historical roots reveals that the latter contains, at the very least, the rudiments of another political project based upon equality, freedom, and liberation.

The record of rights struggles that have sought to push these boundaries has indeed been patchy. Thus, Sarat and Scheingold suggest that "cause lawyering" tends to lead toward liberal rather than egalitarian democracy, though they concede that occasionally, and "usually ephemerally," cause lawyering has been able to thrive on an egalitarian, redistributive democratic agenda.<sup>42</sup> The struggle waged in South Africa for adequate medical treatment for HIV patients may well defy precise classification. However, the campaign, which culminated in legal challenge and victory, held the state accountable to egalitarian commitments made in terms of the constitution and thereby helped save hundreds of thousands of lives.

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42. CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 391 (Austin Sarat & Stuart A. Scheingold eds., 2001).

These legal campaigns point to the direction that the critical legal project should follow. To assert that we need to look to love alone as the panacea for the ills of our society is to ignore that love is all that a community possesses when confronted with the fall of politics and law. It may be easier to write a book in which law's pretensions are stripped bare than it is to engage in a project designed to work for political integration, love, and law without privileging one in isolation.<sup>43</sup> Nevertheless, it is to the latter project that we should be exercising our minds and energy at the very time that the force of global capitalism remains unchecked, save for the neo-fascism of the new century. Being a religious fundamentalist, I must conclude (sadly, given the enchanted offer from Schlag) that politics is a contested business, curiously inelegant, unhappily incoherent, and that Karl's employment of the dialectic rather than Schlag's employment of thunderous laughter, is a better cure for our condition in the first decade of the new century.

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43. See Fine, *supra* note 19, at 210.