BOOK REVIEW

JUDGING THE JUDGES, JUDGING OURSELVES

JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER. By David Dyzenhaus. Oxford: Hart Publishing, 1997. Pp. xvii, 199. $40.00.

BY JOHN P. MCCORMICK*

It is an irrefutable fact that South African judges were thoroughly complicit in the injustices perpetrated by the apartheid regime. According to David Dyzenhaus, a native of South Africa and a Professor in Law and Philosophy at the University of Toronto, judges participated in the "ordinary violence" of racist law which confined a vast segment of the population to subservient status and condemned them to abominable life choices. They also facilitated the "extraordinary violence" of murder, abduction, torture and general mistreatment of black South Africans. As Dyzenhaus convincingly argues in his remarkable *Judging the Judges, Judging Ourselves*,[1] the widespread dereliction of duty characteristic of apartheid judges affirmed the unjust South African regime, and effectively helped make possible the individual incidences of terror regularly perpetrated in the service of apartheid. However, it is what judges *failed* to do, as opposed to what they actually did, that is Dyzenhaus's ultimate focus.

The Truth and Reconciliation Commission ("TRC")[2] was intended to aid the transition from authoritarian to democratic South Africa by documenting the unjust conditions of apartheid. The new regime, it was supposed, might begin afresh with the airs of injustice cleared, if not fully purged or completely forgotten. Unfortunately, we do not have any clearer sense of apartheid's judicial reality as a result of the participation of South African judges in the TRC's Legal Hearing, because they simply refused to show up. In *Judging the Judges*, Dyzenhaus argues that by refusing to participate, the South African judiciary in effect stymied the hoped–for political catharsis and the public explanation of negligent judicial behavior.

* B.A. 1988, Queens College (CUNY); Ph.D. 1995, University of Chicago; Assistant Professor, Department of Political Science, Yale University.

1. DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION, AND THE APARTHEID LEGAL ORDER (1998) [hereinafter "JUDGING THE JUDGES"].

2. The TRC, established in 1995, was presided over by Nobel Prize Laureate Archbishop Desmond Tutu. It was divided into three committees: (1) Human Rights Violations, (2) Amnesty, and (3) Reparations and Rehabilitation. DYZENHAUS, JUDGING THE JUDGES, at 3-5. The Legal Hearing component of the TRC took place in October 1997. *Id.* at xiii.

This is sadly ironic since the South African judiciary stifled the moral potentialities and resources of the rule of law under apartheid rule.

In this earnest, probing and multifaceted analysis of the Legal Hearing of the TRC (to which he served as observer and contributor), Dyzenhaus counterfactually considers the progressive possibilities of the rule of law in authoritarian regimes like apartheid South Africa. His book also raises the question of the moral responsibilities of the judicial officers who serve those regimes during transitions to democracy. Dyzenhaus's analysis and prescriptions will inevitably incur the disdain of "realist" skeptics who question the efficacy of pursuing progressive change through judges, courts and the law. But Dyzenhaus is not under any illusion concerning the actual power of courts that lack the independent means of enforcing their decisions. What is perhaps most provocative about *Judging the Judges* is his account of the normative-factual possibilities of what I term "judicial civil disobedience" in situations where courts and the rule of law are purportedly most weak.

The predicament of judges under apartheid and in the present transition to a new South Africa, as portrayed in *Judging the Judges*, highlights the issue of independence vis-à-vis responsibility. The judges' claims include the argument that they were not responsible for whatever injustices "may have" occurred under apartheid because they weren't "independent," or fully free to choose and act, as a result of the specific structure of South Africa's legal order.[3] But judicial independence has particular resonance for the kind of constitutional order that South Africa wishes to become presently and in the future. In the new South Africa, independence is essential to the separation of powers, the insularity of the judiciary from "political" interference, and the impartial law that one would expect to result from such arrangements. As a result, judges effectively blackmailed the TRC when they rejected its invitation to participate. The message was clear: if the new South African officials wanted independent judges in the present regime, they should not hold the judges publicly accountable for their lack of independence under the ancien regime.[4]

Dyzenhaus's response to this situation is two-fold. First, even under the strict constraints imposed by the apartheid legislature and administrative authorities, South African judges could have cast in relief the injustice of the South African regime by upholding traditional rule of law principles in the performance of their adjudication.[5] Moreover, the judges' newfound appreciation of judicial independence is misplaced and inappropriate

3. On the structure of the apartheid judiciary and its relationship with other branches of government, see H.R. HAHLO & ELLISON KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND (1968), and INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA, HUMAN RIGHTS AND THE RULE OF LAW (Geoffrey Bindman ed., 1988).

4. *See* DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 37-38.

5. *Id.* at 83-85.

in the context of proceedings that seek to clarify and purify the very conditions that will make it possible for judges to better uphold the rule of law in the new order.[6]

The goal of the TRC, as Dyzenhaus clearly articulates, was not retributive justice, but reconstructive justice: "institutional transformation through an examination of the wrongs of the past."[7] The TRC was modeled on truth commissions in Chile, Argentina and El Salvador. It was conceived as a compromise between, on the one hand, a Nuremberg trial model of relentless and meticulous establishment of fact by which to exact retribution, and, on the other, a comprehensive policy of official amnesia.[8] While reparations could result from the proceedings, their main goals were institutional reform through repentance and forgiveness.[9] However, if one evaluates the success of the TRC as a whole,[10] the legal inquiry component must be deemed a disaster since no judicial officer bothered to participate, even without the threat of any sanction.

Judges of the old regime generally gestured to a simple structural fact that supposedly obviated the need for them to appear and explain their behavior before the TRC: they were just vehicles for the legislative branch under apartheid. The legal order of apartheid was predicated on parliamentary supremacy. There could be no limits or restrictions on the substance of statutes that were not imposed by the South African legislature itself.[11] As a result, judges were "compelled" to adjudicate in accord with the legislative will notwithstanding their own views.[12]

But Dyzenhaus argues that the common law-heritage and training of judges deriving from Roman Dutch law is incompatible with discriminatory legal practices, because it contains principles, both immanent and explicit, of rights and freedoms which should and could have been invoked to protect the most vulnerable members of South African society.[13] These jurisprudential resources could and should have served as bulwarks against statutory tyranny. But, as far as Dyzenhaus is concerned, this contradiction

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6. *Id.* at 47.

7. *Id.* at 6.

8. *Id.* at 2-3.

9. *Id.* at 3; *see also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 55-75 (1998) (discussing the goals of the South African Truth and Reconciliation Commission).

10. For different views on the matter, see Amy Gutmann & Dennis Thompson, *The Moral Foundation of Truth Commissions* (1998) (unpublished manuscript on file with author) (viewing the South African TRC as a positive and important undertaking); and Andre du Toit, *A Historical Interpretation of the South African TRC* (1998) (unpublished manuscript on file with author) (expressing reservations about the South African TRC); Jon Elster, *Coming to Terms with the Past: A Framework for the Study of Justice* in *the Transition to Democracy*, 39 EUR. J. SOC. 7 (1998) (presenting differing views on the efficacy of models of transitional justice).

11. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 14-15.

12. *Id.*

13. *Id.*

within the very structure of the South African system was never sufficiently exploited by judges.[14]

As Dyzenhaus has illustrated previously,[15] the South African judges chose to adhere strictly to an overly Austinian/Kelsenian notion of the rule of law as the embodiment of legislator's will, whereby adjudication is confined to statutory interpretation and not questions of the "common weal."[16] This primarily fact-centered approach to law is concerned with concrete parliamentary will rather than legal tradition or principles.[17] However, traditional positivists assumed that *all those affected* by a particular law had the chance to participate in its making through parliamentary representation.[18] This was certainly not the case under apartheid. Legislative supremacy conforms with the rule of law only when all those persons affected by the laws made by that legislature participate in electing it. In the context of selective and non-universal suffrage, positivism is tantamount to tyranny and would have been deemed as such quite readily by Austin or Kelsen themselves.

Dyzenhaus considers alternate strategies whereby judges could have used the rule of law to mitigate against the legislative tyranny and the racial oligarchy it served. For instance, in juridical moments where the meaning of the law is in question, judges should have availed themselves of common law principles to make the statutory language coherent.[19] Instead, they bent over backwards to pander to the legislature where rules and cases did not correspond snugly.[20] Dyzenhaus's ingenious idea of deploying the ubiquitous "indeterminacy thesis" of law to uphold and enforce traditional rule of law principles rather than to accelerate their demise is a refreshing change from the commonplace use of it on the aesthetic left and traditional right of legal theory.[21]

Dyzenhaus demonstrates how the South African judges' own oath of office invoked rule of law principles, especially in the promise to administer law to all equally.[22] Yet the judges consistently compromised this pledge

14. *Id.* at 16-7.

15. DAVID DYZENAHUS, HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY (1991) [hereinafter "HARD CASES"].

16. The classic nineteenth and twentieth century statements of this kind of legislatively-centered legal positivism are, respectively, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (1998), and HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (B.L. Paulson & S.L. Paulson trans., 1992).

17. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 19.

18. *Id.* at 76.

19. *Id.* at 15-6.

20. *Id.* at 16-7.

21. For a criticism of the appropriation of the indeterminacy thesis by left- and right-wing "critical" legal scholars, see John P. McCormick, *Three Ways of Thinking "Critically" about the Law*, 93 AM. POL. SCI. REV. 413 (1999).

22. *See* DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 34 (noting that apartheid judges swore to "administer justice to all persons alike without fear, favour or prejudice,

by capitulating to the "substantial inequalities" that would necessarily be incurred in a "social experiment" as vast as that of apartheid.[23] Principles of fairness, reasonableness, equality of treatment, and proportionality, Dyzenhaus reminds us, are not optional components of a legal regime but rather necessary attributes if that regime is not to be unjust, self-contradictory, and self-destructive.[24] This immanent morality of law is an internal resource by which regimes continually make themselves more just.[25] In the rule of law tradition judges can hold legislatures to standards of statutory content that do not violate principles such as those invoked above.[26] Indeed, the proper functioning of the rule of law requires that neither the legislature nor the executive operate fully unencumbered.[27] Enlightenment thinkers were not sanguine about law being legitimate without such an arrangement that to some extent limited the "more" dangerous branches, whether or not this entailed judicial review.[28]

According to Dyzenhaus, there could have been real judicial constraints on, for instance, the implementation of apartheid policy, the suppression of political opposition, and the detention of suspects.[29] Principles of non-discrimination in the execution of policy, and, especially of the right of the accused to be heard in her own defense, could have been evoked far more often and consistently than they were, even by so-called "liberal" judges.[30] Moreover, requirements that the administration justify in court the state of emergency with good cause could have somewhat curtailed its excesses.[31] Even further, judges could have made the argument that

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and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa"). In both his submission to the TRC and the book, Dyzenhaus argues that the appeal to justice in the oath outweighs the reference to laws and customs. *Id.*

23. *Id.* at 75.

24. *Id.* at 152; *see generally* GEORGE P. FLETCHER, THE BASIC CONCEPTS OF LEGAL THOUGHT 79-135 (1996).

25. Dyzenhaus explicitly cites Fuller on the idea of the law's immanent morality. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 191. *See generally* LON L. FULLER, THE MORALITY OF LAW (1964). But Dyzenhaus clearly draws as extensively on his recent engagements with the German tradition of substantively-normative legal theory represented by Hermann Heller and Jürgen Habermas. *See, e.g.*, David Dyzenhaus, *Hermann Heller—An Introduction*, 18 CARDOZO L. REV. 1129 (1996); David Dyzenhaus, *The Legitimacy of Legality: Review of Jürgen Habermas*, Faktizität und Geltung, 46 U. TORONTO L.J. 129 (1996). Selections from Heller appear in WEIMAR: A JURISPRUDENCE OF CRISIS (Arthur J. Jacobson & Bernhard Schlink eds., 2000). For an example of Habermas, *see* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

26. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 152.

27. *Id.* at 160.

28. The best known example that does in fact include judicial review is THE FEDERALIST NO. 78 (Alexander Hamilton).

29. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 151.

30. *Id.* For an alternative account of the progressive legal opportunities provided by specific cases during apartheid, see RICHARD ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID (1995).

31. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 151.

sufficient warrant must be demonstrated in all justifications for security measures. Without such demonstration of warrant, judges could argue that no law was being adjudicated at all and that, in fact, a situation of lawlessness had been reached.[32] Along these lines, courts should have declared evidence extracted from tortured or solitary-confined prisoners inadmissible in court.[33] This would have made the illegality of apartheid all the more apparent when the administration inevitably reacted to assert its power.[34] Finally, South African jurists could have applied the law faithfully in accord with parliamentary intentions but also could have made clear in their opinions their own repugnance to the statutes they were applying, or the incompatibility of those statutes with the rule of law.[35]

Building upon these arguments, Dyzenhaus describes "the rule of law dilemma" that apartheid judges might have posed to the South African legislature. Adherence to legal standards would have given the ultimatum to the government of either completely ignoring the law and abandoning their cloak of legality or forcing them to observe some substantive legality. The desire of governmental elites to appear civilized before the international community would have mitigated against the former option, and the judges might have thereby encouraged some genuine social progress in guiding the administration toward the latter.[36] Even without appeals to substantive rule of law standards which might appear as external or foreign to the South African system, again, Dyzenhaus suggests that the judges could always have claimed that what was passing before them was blatantly *not* law and was thus simply unadjudicable.[37] Any one or combination of the strategies mentioned above would have "opened up precious space for opposition to apartheid from within."[38]

The likely prospect of statutory countermand—legislative circumvention through subsequent legislation or court-packing—of what little power and autonomy that courts already had, is a frequent excuse for judicial acquiescence to political power in the ancien regime.[39] But the logic of Dyzenhaus's criticisms suggests that these acts also should have been challenged on the basis of the immanent morality of the law. Political circumvention of the judicial defense draws attention to the active and violent undermining of the regime's own legal ideals, even when the regime is one as cynical as apartheid South Africa.

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32. *Id.* at 152. *See also* MICHAEL LOBBAN, WHITE MAN'S JUSTICE: SOUTH AFRICAN POLITICAL TRIALS IN THE BLACK CONSCIOUSNESS ERA (1996) (discussing the status of political trials in South Africa).

33. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 161.

34. *Id.* at 162.

35. *Id.* at 79.

36. *Id.* at 159.

37. *Id.*

38. *Id.*

39. *Id.* at 17, 154.

However, even in the most iron-clad legislative systems, judicial discretion is a jurisprudential and empirical *fact*: why was this discretion not used to ameliorate or highlight the injustice of apartheid policy that makes a mockery of the rule of law?[40] For instance, Dyzenhaus demonstrates at length how contradictions in the laws dealing with the treatment of detainees should have been reduced to absurdity by judges, magnifying the ludicrousness of adjudicating "law" under such conditions:

> the fact that judges were prevented by such provisions from ensuring that detainees were treated lawfully in detention meant that judges had a legitimate ground for complaint that the law to which they were supposed to hold public officials to account had been rendered unenforceable by the Legislature. Since the conditions of detention made it difficult, if not impossible, for a court to ensure that a detainee was not subject to unlawful treatment, and since there was a plausible case to be made for the claim that solitary confinement is a kind of torture, the map of judicial duty was not as clearly drawn as [some judges] tried to convey.[41]

Thus, judges could have maneuvered to better dignify their own positions as officers of the law. Further, emphasizing the conflict that South African policy created for its judges—albeit a conflict that never sufficiently inspired them to act—Dyzenhaus poses the powerful hypothetical: if "evidence is obtained by torture or by placing the witness in circumstances of extreme psychological compulsion, judges may well find that a more fundamental duty—one to uphold rule of law requirements—preempts the duty to consider evidence on its merits."[42]

Of course, all of these alternative courses of actions available to South African judges were contingent on their (un)willingness to take them up. In fact, as Dyzenhaus's earlier work has shown,[43] judges were far more inclined to concede to the will of the parliament *as quickly and easily as possible*. They adhered faithfully to the "plain fact" approach and looked to the public record for guidance as to the exact nature of the legislator's intentions so that there should be no doubt.[44] This facilitated the operation of a completely unencumbered legislature,[45] and ultimately gave maximum effect to apartheid law.[46] But the *cause* of this may be more readily explained by means of a thorough-going sociology of the judicial profession in South Africa and, indeed, elsewhere,[47] as much as through a "realist"

40. *Id.* at 27.
41. *Id.* at 70.
42. *Id.* at 71.
43. DYZENHAUS, HARD CASES, *supra* note 15.
44. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 16.
45. *Id.* at 157.
46. *Id.* at 55.
47. *See* INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., 1991) (studying Nazi judges).

assertion of the universal inefficacy of courts vis-à-vis other departments of government.

Dyzenhaus's criticism of the apartheid judiciary amounts to a blueprint for judicial civil disobedience. One can only hope that in the future Dyzenhaus will continue to develop these arguments, and incorporate them into the wider literature on civil disobedience.[48] Dyzenhaus should also generalize his approach to include other historical and contemporary cases where there was—and is—jurisprudential space for resistance and subversion *by* the rule of law in authoritarian regimes. First, the specific incentives for, and practical protection of, judges engaged in such activity must be more fully elaborated. Such an approach fully explicated would not only draw attention to the violence and hypocrisy of the supposedly law-abiding governments who in practice degrade the law everyday, but it would also challenge the "realist" critics who dismiss on the basis of serious empirical analysis the possibility of court-inclusive programs of social change.[49] However, the case of apartheid judges as described in *Judging the Judges* confirms not the *weakness* of judges vis-à-vis other governmental branches, but rather their *inherent* strength: Dyzenhaus's inquiry after the behavior of judges highlights not the fact that they were "just following orders," but rather the space, often vast, within which South African judges had room to protect those most abused by apartheid policy and secure principles of the rule of law.[50]

Perhaps hoping to preempt criticisms along "realist" lines, Dyzenhaus repeatedly asserts that his prescriptions, while admittedly counterfactual, nevertheless are not hopelessly idealistic. First, the gains that Dyzenhaus seeks to reap from his strategy are not overly ambitious: judicial subversion of authoritarianism through the rule of law simply aims to ameliorate the effects of certain unjust practices and to expose the massive hypocrisy in the expressed principles of regimes like apartheid South Africa. The many

48. *See, e.g.,* MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES (James Melvin Washington ed., 1986); MAHATMA GANDHI, SELECTED POLITICAL WRITINGS (Dennis Dalton ed., 1996).

49. This juro-skeptical approach to the study of democracy is perhaps best-represented by what might be termed "the Yale School." *See, e.g.,* Robert Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279(1957); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Rogers M. Smith, *Equal Protection Remedies: The Errors of Liberal Ways and Means*, 1 J. POL. PHIL. 185 (1993); IAN SHAPIRO, DEMOCRACY'S PLACE 256-61 (1996); Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171 (1995) [hereinafter *The Politics of Legal Integration*]; and Ran Hirschl, *Do Bills of Rights Matter? A Comparative Inquiry into the Political Sources and De Facto Impact of the Constitutionalization of Rights* (1999) (unpublished Ph.D. dissertation on file with the author); *but c.f.* BRUCE ACKERMAN, THE FUTURE OF THE LIBERAL REVOLUTION (1992). Two examples of legal scholarship dealing with the competence of courts engaging in social change are Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), and Lawrence G. Sager, *What's a Nice Court Like You Doing in a Democracy Like This?*, 36 STAN. L. REV. 1087 (1984).

50. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at 151.

"coulds," "shoulds," "mays," and "mights" that appear in Dyzenhaus's book and in my explication of its arguments ought not to encourage readers to dismiss this project as necessarily unworkable. Dyzenhaus goes to great lengths to show how the project is not "unrealistic" in its expectations of the "interpretive maneuvers" fully practicable by judges. Nor does it demand from white South Africans much more than they were actually capable of in the pursuit of justice in their own lives.

Strategies such as those presented by Dyzenhaus would be ineffective in the absence of the pressure from social movements, such as the African National Congress, the good will and active working for progress on the part of some segment of the ruling elites, and the continued promise/threat of incentives and sanctions by the international community.[51] But to rule out the possibility of a robust judicial component to such projects of social change seems short-sighted and hasty. The inherent weakness of a law—, judge— or court—inclusive approach is the necessity that it be practiced in a regime which at least ideologically upholds the rule of law and appeals to fundamental human rights. It is only as a counter-example to such ideals that a judicial practice of subversion can have the effect of embarrassing, educating, thwarting and chastising a so-called legal order. The success of Gandhi– or King–styled civil disobedience only works in what might be called "limited tyrannies" that fancy themselves "civilized," "progressive," or even "enlightened." It is only in the unabashedly recidivist, theocratic and totalitarian regimes where judicial subversion in the name of law can hope for *no* effect.

If there is anything "unrealistic" about Dyzenhaus's book, it is its unwavering adherence to a conception of law as a moral actuality and possibility in the world. While this might be interpreted as unrealistic in some crude material or positivist sense, Dyzenhaus effectively shows the real impact that the rule of law can have upon the ethical life of a political community even when it is not being fully or appropriately exercised. Dyzenhaus's uncompromising criticism of the apartheid judiciary brings to mind the "Messianic vision" of law revived in recent years by Jacques Derrida.[52] Dyzenhaus appropriately describes his critique as "relentless, leaving no shelter behind which to hide, except finally fidelity to law."[53] In his devastating foray into legal philosophy, Derrida exposes all of the intellectual antinomies of law—abstract and concrete, formal and material, rule

51. Ian Shapiro paints a different picture than Dyzenhaus of the amount of progressive intent among South African whites and the extent of their desire to make the country appear more progressive to the rest of the world. *See, e.g.*, Ian Shapiro, *On the Normalization of South African Politics*, DISSENT, Winter 1999, at 29; SHAPIRO, DEMOCRACY'S PLACE, *supra* note 49, at 193 et. seq.

52. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority," in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 3-67 (Drucilla Cornell, Michel Rosenfeld, & David Gray Carlson eds., 1992).

53. DYZENHAUS, JUDGING THE JUDGES, *supra* note 1, at xiv.

and case. He emphasizes all the injustices that obtain within legal orders and are perpetuated through their practice—the bloody violence of foundings and the unavoidably coercive-arbitrariness of decisions. Yet Derrida holds out the real possibility of a law that delivers retribution without letting blood, and enforces equality without homogenizing the variety of the world. In its project of bloodless founding or vengeless transition, the TRC already points provisionally and historically to this possibility. Dyzenhaus provides the immanent critique of the violently corrupt law of South Africa's past that helps to facilitate the possibility of a more just law in its future.

More mundanely than founding or re-founding moments, Dyzenhaus's attention to the everyday functioning of the rule of law also points to this more just and less bloody possibility. In Derridean terms, until the moment of divine violence, it is the jurist's mission to continually purify law in the direction described above, moving the potentialities of the law ever closer to the nonviolent, even though he or she may never be fully successful. In so doing, jurists make space for a justice that is both immanent in the presently imperfect rule of law, but nevertheless still yet to arrive: the entirely transcendent law that is ultimately free of blood-letting. When Dyzenhaus quotes Edwin Cameron on the existence of "at least a partial internal logic of justice"[54] he points up the simultaneous residue of some justice, however imperfect, already immanent in the law; but his book as a whole also attunes us to waiting for the transcendence yet to come when fully non-violent justice is attained.

Dyzenhaus has focused on a particular historical case where judges proved negligent in their duties and where the rule of law remained all too pitifully unrealized. Nevertheless, Dyzenhaus challenges us to consider the role of judges and the potentialities of law wherever the former pledge to uphold the latter. The very practice of the rule of law makes space for justice even in regimes purportedly least capable of guaranteeing or pursuing it. The further opening and exploitation of these spaces are avenues that progressive legal theorists and practitioners ought to pursue as the rule of law confronts injustice around the world in the new century. As legal fora increasingly lose direct state-related implementation power as a result of globalization and regionalization, judges will need to consider methods that pursue civil and social justice when actual implementation is likely to be imperfect or ineffectual.[55] *Judging the Judges, Judging Ourselves* is an excellent contribution to considerations of this historical dilemma.

54. *Id.* at 151.

55. For contrary views of the power of courts in the supranational context of the European Union, see Garrett, *The Politics of Legal Integration*, *supra* note 49; Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63 (1998).