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Law, Economics, and Torture

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LAW, ECONOMICS, AND TORTURE

James Boyd White

It is common to observe that in the past decade or so there has been a massive transfer of wealth from ordinary people and the poor to the rich. But it is plain that there has been very little effective resistance to this transfer by the majority who are disadvantaged by it and who presumably constitute the ultimate power in a democracy. Why is this so?

This is the first question James Boyd White addresses in this essay.

The second question, seemingly unrelated, has to do with a deep change in the understanding of law and its practice, both in the courts, where judicial opinions now tend to be written in a dead and mechanical way, and in law schools, where there seems to be little interest in or excitement about what lawyers and judges actually do and, instead, a focus on questions of policy. Why has this change occurred and what does it mean?

The third question in a sense bridges the other two: why is it that there has been so little public outrage and outcry at the efforts by the administration to make the torture of suspects or captives a normal and legalized part of our government's business?

In this essay White's aim is to suggest at least preliminary answers to these questions, and to a fourth as well: What are we to do about the situation in which we find ourselves?

In our invitation to them as speakers at this conference Jeff and I encouraged the contributors to this volume to talk in whatever way seemed best to them, whether or not it happened to comport with usual academic styles of thought or expression. I here take advantage of our own invitation and talk a little differently from the way I usually do, about what I take our culture of politics and law to be like at the moment. What I say will necessarily be impressionistic and personal, and of course I do not ask you to accept any of it on my say-so.

Take these reflections, rather, as a question, which is how far your own experience, or your own thinking, is like or unlike my own. Perhaps I may say that, in the terms suggested by Cathleen Kaveny, I am speaking in something of a prophetic voice, not a casuistical one, and it is a fair question for you to ask whether this is justified and, if so, how.

As I think about the way things are changing under our feet, a series of phenomena come to my mind. Maybe they are connected, maybe not. That is one of my questions.

MAKING THE RICH RICHER

The first of these is the response—or more properly nonresponse—of the public and the media to the remarkable transfer of national wealth to the very rich that has taken place in our lives. I grew up under Eisenhower, when there was a 90 percent tax on incomes over one hundred thousand dollars (a million dollars in our terms) and a general sense that our country was committed to fundamental equality. This was perhaps in part the result of World War II, of which people at every economic level bore the cost, even unto death. It was clear to almost everyone that we were somehow all in this together. The sense of solidarity I mean was expressed both in Truman's desegregation of the military and in his proposed civil rights bill, and perhaps it underlies *Brown v. Board of Education* as well.

The transfer of wealth to a class of super-rich began modestly under Kennedy and has taken off in the past decade. It has been I think a deliberate goal of the Bush administration, but its roots are much deeper in our world than that. What concerns me is that in recent years, aside from a few harmless op-ed pieces, and a few more substantial articles in progressive journals, there has been little real concern about this transfer of wealth—certainly not the mass outrage one might have expected. I include law school faculties and students among those unconcerned.

The Consumer Dream and the Ideology of the Market

My question is this: why has this transfer not been instantly and unanimously resisted by the enormous majority of people at whose expense the rich are multiplying their wealth—a majority most of whom are not doing well economically, some of whom are doing very badly?

This is a matter of mass psychology, and of course I am no expert, but I sense here a feeling of helplessness in the face of overwhelming force. I think that the concentration of wealth is not in the eyes of most people a good thing; they feel rather that nothing can be done about it and that, in a world like this, one had better simply look to his or her own welfare, not large questions of law and democracy.

The rules of the game have somehow shifted over the past twenty years or so: it seems that one is not to expect equality, or fairness, or compassion, from our society or its government; one is not to expect decent social and medical services, or clean air, or a mature response to the immense problems of global warming; one is not to expect lawyers and judges to talk in an earnest and serious way about what justice requires. These things are not going to happen, so don't waste your energy complaining. It is a kind of learned helplessness.

Obviously I cannot wholly explain this shift, but one factor seems to me to lie in the way we have come to talk about the nature and purpose of our country, and of human life itself, which is largely in economic terms. For the society as a whole the dominant motive is assumed to be the powerful but empty desire for wealth, without regard to what good or evil that wealth might do; for the individual, felicity is defined largely in terms of ownership and consumption. The "American Dream" is no longer a dream of escape from totalitarian rule and lawless government, as it once was, but a dream of expansive, seemingly unlimited, getting what you want. Of course this way of talking has no place for democratic government—for that requires action, judgment, responsibility, not mere consumption.

This way of imagining life is not only an empty and trivializing image of human experience; it hides the crucial truth that what the consuming economy in fact creates is not just more opportunity for consumption but power, power in the form of wealth. And great wealth gives great power. As the government withdraws from the regulation of the economy, which it has been doing for decades now, its place is taken by private individuals or private organizations which have immense power over the lives of all of us.

The rhetoric supporting this movement speaks of government as the enemy, and of the market as freedom for us all. But the power that is created by the disparity of wealth is real power, and unlike governmental power, it is for the most part not shaped or guided by law and democracy. The owners and managers are not elected by the people, not subject to the

Constitution, not supposed—or sometimes even allowed—to be motivated by any ideal other than the acquisition of wealth and power, and usually not responsive to argument or complaint.¹

This arrangement is implicitly—and sometimes explicitly—defended by the argument that this power actually is subject to the control of the people, not through government, but through what is called the discipline of the market, which, the argument runs, is both more efficient and fairer than regulation through law. But the market cannot be a substitute for democratic government: it has no place or role for any of the institutions through which government works, or for the kind of public deliberation, thought, and argument by which those institutions live; it works not by the principle of “one person, one vote” but by the very different principle of “one dollar, one vote”; and it simultaneously generates and obscures immense imbalances in wealth and power. The market contains no check on the drive to unlimited economic expansion, a drive that is proving to be suicidal, threatening the living planet upon which everything we are and do depends.

Those who argue for “getting the government off our backs” are really arguing for the transfer of power from a democratically responsible government to a regime without any democratic legitimacy at all, indeed without any governing rationality.

The consumer dream of our culture teaches us that we have no responsibility, no capacity for action, no right to demand meaning in our work and lives, and no obligation for the welfare of others. It induces the sense of learned helplessness I referred to earlier—which is exactly the opposite of the kind of vigorous independence and competence upon which democracy depends.

Advertising and Propaganda

One particularly strong feature of the culture of consumption is an immense and relentless campaign, so pervasive and so normalized as to have become invisible, to persuade the public to accept and act on its premises. I refer here to the world of consumer advertising, especially to its apotheosis in television. This kind of advertising persuades people not only to buy this or that item but more importantly, to accept and live by the whole infantile dream of the consumer economy. It is only in a narrow sense that advertisements compete with each other; in a deeper way they reinforce one another constantly.²

Even more disturbingly, this kind of advertising has a direct analogue

in the way in which national politics proceeds, for it has become accepted that a political campaign is run like an advertising campaign—though a better word for this cultural form, given its connection with state power, would be *propaganda*.

Both propaganda and advertising are marked by the desire to manipulate others through the use of slogans and clichés and images, sound bites and buzzwords. As they become widespread—active and present in our minds and speech—both forms of speech tend to destroy in us the capacity for independent thought and expression upon which self-government depends.

One characteristic of both forms is that nothing is meant, everything is said for the moment, all on the assumption that the people who make up the audience have no memory, no capacity for critical thought. We are invited to join a world where thought is not possible.³ In neither domain—the consumer economy or the world of politics and government—are we defined as responsible participants in a world of shared life and action. Rather, we are manipulated objects of an empire.

The Fact of Empire 6

So here is my rather glum conclusion: My intuition is that the reason we do not rebel at the immense and unfair transfer of wealth, and all that is associated with it—from golden parachutes for failed CEOs to sixty-million-dollar bonuses for successful investment bankers—is that in some sense we do not believe that we really have democracy at all any more, at least in the sense in which we once thought we did.⁴ Democracy and its law are based on a vision of fundamental equality among human beings, and neither can survive in a world in which equality is systematically denied by such disparities of wealth and power. Under these conditions the best we can have is a series of contests among the powerful resolved by plebiscites.

I believe we have become to a large degree the subjects of an oligarchy, an internal empire. By *empire* here I do not mean just the cultural forces, strong as they are, that make up what Simone Weil calls an “empire of force,” but an actual political reality in which unelected people rule much of our lives. Their object is to extract as much economic value as possible from the earth and the oceans and the air, and from the labor—and unemployment—of billions of people.

This empire has co-opted many of us—perhaps all of us—who might be its critics, because we to a large degree benefit, though in a relatively small way, by the same policies that enrich the super-rich. We eat at ex-

pensive restaurants, and take trips to Europe, and buy expensive suits. So do the reporters for the *Washington Post* and the *New York Times*. There is in our world almost no voice for the poor, which is perhaps a third of our nation. The *New York Times* does of course take positions of concern for the poor on its editorial pages. But its "Arts," "Style," "Escapes," and "Travel" sections, and the advertising in its Sunday magazine, all with one voice affirm the value of wealth and consumption and the world of radical inequality they create.

Democracy at Work 63

Having painted this distressing picture, I want to affirm that in my experience there is a remarkable force of another and opposed kind in American life—not much seen in the media or in the world of national politics—which I would call a natural readiness for self-government. We see it in local politics all the time, in elections for the school board, say, and in homeowner associations and other private groups. This is the world where we know how to create an organization—with president, vice president, treasurer, secretary—which is subject to bylaws and a statement of purpose, and whose meetings follow *Robert's Rules of Order*. We know how to live in the space it defines: how to hold meetings and reach decisions and live with them even when we disagree; how to define our common values and purposes and try to live by them.

But this capacity for self-government—perhaps our greatest national treasure—is simply not much visible either in the ways I see the nation described in the media or in the ways politicians and officials talk about it or in the way I see the national government functioning. Congress, for example, does not seem to work as I describe the school board working, in a real way, with real debates and real decisions: all too often it seems to be only an image or phantasm of itself, a pretense of government, in which almost nothing is ever said that anyone means. What one hears is almost always calculated and shaped, as a piece of advertising is shaped, by asking what will work with the audience one is simultaneously flattering and manipulating. This is sometimes even true of judicial opinions.

THE ABANDONMENT OF LAW

My second phenomenon—perhaps you perceive it too—is the experience of reading certain Supreme Court opinions which seem evidently written

by clerks and not much rewritten by the justices.⁵ These opinions seem to speak in no one's voice, without seriousness, without a sense of responsibility for what is done or said, as though deciding the case and explaining the decision were empty exercises.

The Courts and the Law Schools

Such opinions do not seem to me in any way to reflect, as I was taught an opinion should, a deep struggle to determine the meaning of the relevant legal authorities—and in the process to find one's own mind growing and learning—but rather express a largely unexamined judgment one way or the other as to the result of the case, often based on rather crude previous commitments of a political kind, which are not tested in the crucible of thought and argument.⁶ This kind of formulaic jurisprudence does not expose the true reasons and thinking of the Court, and subject it to criticism; and it does not produce texts that can be read with the kind of care and attention we are used to giving texts in the law.

For a comparison, let me suggest you look through a volume of Supreme Court reports from forty or fifty years ago. The difference is striking: here we have distinctive voices, distinctive minds working seriously, responding to each other, trying to say the truth as they see it. Of course they are subject to frailty, as we all are, but at their best they are engaged in a process of self-education, and the education of the public as well. Just to list the names is to invoke a different world. (In 1962, for example, when I was in law school, the justices were Black, Frankfurter, Douglas, Clark, Warren, Harlan, Brennan, Stewart, and White. These are respectable people by any measure.)

I also see a turning away from the law in law schools themselves, which have in some ways become closer to "think tanks" or public policy institutes than the schools of professional training I once knew. In casebooks the cases are often reduced to paradigms meant to facilitate argument about theory, rather than seen, as they occur in practice, as complex challenges to the mind, in which law interacts with facts, facts with law, different laws with different laws, and all these things with our developing sense of justice. Rather, the main interest seems to be in questions of policy and theory abstracted from the life of the lawyer or judge.

I was taught that the central legal questions, for lawyer and judge alike, are these: What texts should count as authoritative, and why? What do they mean, and why? What weight should be given to the judgment a text

reflects, and why? How in the light of all these things, and in the context of the present, should the case be decided? Of course lawyers will disagree on the merits of all these questions, but they will agree in affirming a world in which power is distributed, regulated, reviewed.

The tendency I mean is manifest perhaps particularly in what is called “law and economics,” but not only there. It runs through the ways in which scholarship is evaluated and it shows up in our almost total silence about law teaching. When I went into law teaching it was with great doubt about whether I would ever write anything, but with great confidence that the teaching of law was itself an activity—an art with a meaning—that could occupy a mind and justify a life. I wonder if anyone thinks that today.

A system of policy critique of the kind that is at work in our law schools may make useful discoveries, but such a system cannot perform the functions of law itself. Neither economics nor sociology nor psychology nor any other field can address, let alone resolve, the distinctive legal questions about the identity and meaning of authoritative texts and about the degree of deference due the judgments of others.⁷ Taking economics as my example—though the same point could be made about any other field—I would say: One cannot do law in the language of economics, or economics in the language of the law. To try to do either would be as ludicrous as trying to do science in the language of religion, or religion in the language of science.⁸

Cost-Benefit Analysis

My sense of what has been happening is well exemplified in two brief passages by Judge Richard A. Posner. In the first, discussed in another context by Jed Rubenfeld, Posner is writing in favor of what he calls “pragmatism,” meaning the decision of legal cases by a judicial balancing of costs and benefits. The only reason for attending to prior legal texts, in his view, is that to disregard them would have social costs, and these costs should be taken into account by the person with power.

The point is not that the judge has some kind of moral or even political duty to abide by constitutional or statutory text, or by precedent; that would be formalism. It is merely that continuity and restraint in the judicial function are important social goods, and any judge proposing to innovate must consider not only the benefits of the innovation but also the costs in injury to those goods.⁹

To me this misunderstands the nature of both law and democracy, including the obligation—moral, political, and legal—to respect the authority of legal texts and the fundamental principle of separation of powers. In the world called into being by this passage law would lose its essential meaning.

More recently, in a letter to the *New York Review of Books*, responding to a critical review by Professor David Cole of his book *Not A Suicide Pact*, Judge Posner said that Cole must realize that his civil libertarian principles “are not the product of ‘text, tradition, and reason’ since equally capable legal thinkers hold opposite views.” Posner continues:

This is possible because there is no consensus on what methodology to use to resolve constitutional disputes and because text, tradition, precedent, and reason so often tug in different directions. . . . Realism requires recognition that constitutional decision-making at the highest level (The US Supreme Court) in the most difficult cases is driven in the main by policy judgments based usually on just the kind of balancing that Cole deplors. Or pretends to deplore; for I imagine *au fond* the reason he dislikes the administration’s counterterrorism measures is that he thinks they impose greater costs, in harm to civil liberties, than the benefits they confer in reducing the risk of further terrorist attacks. The rest is rhetoric.¹⁰

This passage adds to the misunderstanding expressed in the first. Together they represent with great clarity the state of affairs I am trying to define. Of course the meaning of the authoritative texts of the law is often highly arguable in a range of cases. But that does not mean that we can dismiss them as useless, or that in the zone of disagreement we are free to apply whatever version of cost-benefit analysis, or other method or theory, happens to appeal to us. What Posner contemptuously dismisses as “rhetoric” is nothing less than the entire world of law: its structure of authority, its democratic basis, its creation of a constituted government based upon separation of powers. In its place he proposes a view that all that matters is power, a view in which not only is there no need to respect the opinion of another, there is no way in which this can be done.

Indeed there is something deeply incoherent in Posner’s view, for how is the question to be answered, Whose calculation of costs and benefits is to count? Apparently the judge’s; but the position that the judge occupies, and upon which Posner relies, does not reflect some present judgment of costs and benefits, but rests upon law in the sense in which I have been de-

scribing it: the democratic allocation of function to decide, within limits and subject to guidance and review. To say that some judgment of better and worse lies behind this legal structure—including the obligation to respect the judgments of others and to engage in good-faith legal debate when, as often, the meaning of the texts is arguable—is to say nothing at all.

What Law Can Be

I have a sense, then, that law itself is being eroded and transformed, just as I said earlier democracy is being eroded and transformed, and in both cases in the service of what I have called the empire. This fact has a tragic quality for me because the law by its nature should be a strong force of resistance to the principles of empire, a strong force of defense for democracy.

For the law is built at its foundations upon the principle of separation of powers, not their merger into a single force. In this, it is the opposite of empire. In our law every institutional actor must acknowledge and respect judgments made by others: the legislature must respect the judgments expressed in the constitution, the courts the judgments of the legislature, lower courts the judgment of higher courts, and so on. This means that the lawyer never addresses a person who has all the power. Both lawyer and judge constantly turn to other texts, composed by other persons, who have made judgments on the questions in the case which they are bound to respect.

It is crucial that the texts that our law invokes as authoritative, and to which the judges and lawyers pay respect or deference, all rest in some way upon the authority of democratic institutions. They are statutes passed by elected legislatures, or opinions issued by judges appointed by elected governors, or contracts written by the parties themselves, and so on. In affirming the value and validity of its own processes the law is thus always affirming democracy.¹¹

The law is not a closed system, operating behind locked doors, but is connected in hundreds of ways to our democratic culture. To disregard this structure of authority and to replace it with a theory—whether philosophical, political, or economic in kind—is to erode our democracy at the root. For in the world of theory the rightness of the result depends upon its congruence with the theory in question, necessarily a theory without any basis in democratic authority but resting solely upon the commitments of those who are persuaded by it: the community of believers.

At the simplest level, what the law teaches is that we live in a world in which different people can have different, decent, and reasonable views; that we need a way to respect these views and judge among them fairly, that is, openly and honestly; that the world constructed by the law is one that distributes the power to decide such questions differentially to various public and private agents—so that even if we lose this case, or this issue, we have a residue of autonomy and freedom; and that, all this being true, we cannot fairly and rightly decide disputes by reference to theory, or to our own estimate of costs and benefits, or to the sorts of clichés and buzzwords and slogans that characterize much political talk. The law, at its best, improves our thought and our language. What has been happening to law, however, is that it is becoming an instrument of empire, and in the process losing its essential character.

TORTURE

My third phenomenon is the public response—or once more, the nonresponse—to the recent efforts of the administration to legalize what any sensible person would call torture—certainly if he or she were subjected to it—and the related effort to remove from all protections of the law a class of human beings selected by officials as “enemy combatants.” Of course, there are honorable exceptions in the bar and in the public world, but there has not been what there should have been, a universal public outcry of a sort that would have driven the beast of torture off the field of our shared life.

This has haunted me more than anything else. Not so much because American soldiers have on occasion beaten, abused, tortured, and killed people they have captured. Those are terrible things, but war always includes them, just as it includes the incineration of little children, the rape of women, the purposive destruction of life itself. What is new here are the efforts to make torture part of the approved business of government, claiming for it the authority of law, and to establish the existence of a class of persons under the control of the government who are completely beyond any protection of law.

To connect this image with what I said about the state of legal thinking, I think we hear an all-too-familiar voice in the famous “torture memorandum” composed by Jay Bybee, now a federal judge:¹² it is written in me-

chanical and conclusory terms, as though a routine legal analysis of a rather empty kind could simply be used without thought and without question to justify human torture. There is no sense of a person in the prose, no one making judgments for which he is responsible. It troubles me to think, as I do, that this is a voice for which we who teach in law schools may be especially responsible.

The Propaganda of Torture

Part of the reason for our supine lack of response is our habituation to the sort of advertising and propaganda I have mentioned, for which the fears generated by the events of 9/11, and unceasingly stimulated since, provide strong nourishment. According to this thin and inadequate form of thinking, there is an ineradicable line between “us”—the good people of America under unjustified and aggressive threat—and “them,” those others whose torture or “severe interrogation” is in question. Why should we care about what happens to them? They are the enemy, or at least irredeemably “other.”

But of course they are not these things in fact: they are fellow human beings, some of them citizens of our country. They are selected for torture or abuse not by some foolproof process that will identify without error the “bad,” whoever they are, but by who knows whom, acting on who knows what information, and with who knows what motives, with all this happening behind a deliberate screen of secrecy.

The central principle of democratic government is official responsibility, and here that is entirely erased. No one stands up as the one who has made the crucial decisions; no one in the public even knows that most of them have been made.

The fate of Guantanamo prisoners who were returned to their own countries is instructive. Almost all of them were released after investigation by their home governments, it turning out that many of them had been seized without any justification at all by persons seeking a bounty offered for the identification of “terrorists.” Only a handful were tried in their home countries and at the time of this writing none of those had been convicted of any crime.¹³

Even if someone is in fact an “enemy,” that of course does not justify his torture. Maybe he has to be killed, if he is shooting at you, but when captured, he should be treated humanely and with dignity, as we hope our soldiers will be treated when they are captured.

The "Need for Information" ❧

It is sometimes argued that torture is justified by the need for "information." This argument works by another specious form of thought, which, when added to the first, seeks to establish a sense of necessity that will remove torture from the moral sphere almost completely. The form of thought I mean is captured in this question, repeated endlessly in the media and even in classrooms: if you knew that there was an atom bomb somewhere downtown with a timer ticking wouldn't you torture the people who knew about it to make them tell you where it was, or how to disarm it?

The question seems to pose a serious problem of moral thought, but, like many such hypotheticals, it is not real. You can never "know" there is an atom bomb, or a timer ticking; and you can never "know" that you have one of the "people who know about it." The facts assumed by the hypothetical never exist in any individual case. And even if there were one such case that would do nothing to justify the hundreds or thousands or tens of thousands of cases in which we have engaged in torture. The question about the ticking bomb invites us to live in a false world—the world ultimately of advertising and propaganda—not the real world.

The unreal hypothetical is used not to support the proposition that it might possibly support, namely, that in a wildly rare and dramatic case one would use torture, but something very different, namely, that torture itself should be evaluated simply by weighing the costs and benefits of the practice. "You believe in torture in one case in a million," we are being told, "therefore you can have no objection to our regular use of torture as an instrument of policy, under whatever procedures and standards we choose."

The logic of cost-benefit analysis is epitomized in the ticking-bomb case, but it runs far more widely and deeply in our culture than that hypothetical. All of the practices of abuse and inhumanity rest upon the same claim, that "national security" or the "safety of the nation" require it, an invocation of "cost-benefit analysis" that typically reflects no analysis whatever.

Irrationality ❧

Despite its claims to a high degree of rationality, the kind of cost-benefit analysis that is so often offered as an alternative to legal thought in fact tends not to the rational but to the irrational.¹⁴ It is a long-standing truism in the critique of "balancing," for example, that the outcome is often de-

terminated by the way in which the interests are articulated. Are we to define the question as the “safety of the nation” versus “this person’s desire to keep this piece of information to himself”? Or as “the value of this piece of information” versus “our system of government under law”? The outcome-shaping characterization is of course often driven by desire, perhaps unconscious desire, for a certain result. In this sense the designation of costs and benefits, seemingly so rational, is often in the end not that at all.

And who is to quantify the danger that terrorism presents? The incantation of the phrase “national security” is offered as a universal acid that will erase everything except the fear that it stimulates. This talk about overwhelming necessity fails to address the obvious questions—obvious to a lawyer, that is: Who shall determine whether such a necessity exists? Under what procedures and standards? Subject to what review? These are the core questions of legal thought, and they are by this logic erased. For to take those questions seriously would be to invoke the whole apparatus of law as we know it. This cannot be allowed to happen, if one agrees that the importance of national security—as defined by whom?—is of infinite importance, because it would limit the power of the government to “protect us.”

It cannot be allowed for another reason, I think: namely, that torture cannot in the end be legalized. It cannot bear the light of day, but must go on behind locked doors in unmarked buildings, in mysterious and unknown places reached by darkened airplanes, and carried out by anonymous interrogators and their anonymous assistants. The cost-benefit analysis must not include, because it cannot do so, the reality of the torture itself, the evil it does to the tortured and to the torturers alike.

The corrosive effect of “cost-benefit analysis” here is even worse than I have said. The question presented by the ticking-bomb case is whether the “known” existence of the ticking bomb would justify torture. But of course such a bomb may in fact exist though unsuspected by us; if so, it presents exactly the same real-world danger as if it were known; does that not justify the use of what is euphemistically called “extreme measures” to find out? Indeed anyone may know something that is of comparable value, perhaps without even knowing how important it is. The true need for information is just as great in those cases as in the ticking-bomb case itself. To think in terms of a single value that trumps all others, here “national security,” is a form not of rationality but irrationality, ultimately a kind of insanity.¹⁵

The logic at work here leads to universal spying, universal wiretapping,

universal torture, limited only by whatever costs are perceived by the perpetrator—or, more accurately, by the superior officer who in the comfort of his or her own office orders the perpetrator to torture. And this line of thinking not only justifies torture; it would justify anything. It erases not only protective legal rules, but the inherent protections of legal thought itself.

Once you start on a process of interest balancing in which one of the items is of potentially infinite value you have committed yourself to an impossible world of paranoia, not law—a world like the world of human slavery—in which one value cancels all others, in which appetite, as Shakespeare says, becomes a universal wolf and at last eats up itself.¹⁶

Democracy and Empire

The spring from which I think all these evils flow, including our incapacity to resist them, is the fact that at some level we know that we in this country are running an empire—an external one as well as the internal one I described earlier. And we know, I think rightly, that it is not possible to run an empire on the assumptions and aspirations of democracy under law. The very idea and existence of the empire depends upon a line between “us” and “them”—we, the rulers who have the power, and they, including our own citizens, the ruled, who are subject to it. In the eyes of the empire the ordinary people of this country have no different status from foreign nationals: all are subject to the same imperial regime. Our nation is on its way to becoming a third-world country politically as well as economically.

But the fact that we have become an imperial nation, internally and externally, is something no one can bear to admit, for it contradicts our deepest principles. It is I think at bottom our need to deny this fact that makes us so ready to submit ourselves and our judgments to slogans, clichés, and falsehoods—to live in the false world of advertising and propaganda.

This perception about empire, if I am right, connects my three themes: the concentration of wealth in the hands of the few, the transformations in what we mean by law, and the acceptance of torture. The anti-democratic principles necessary to the functioning of the empire with respect to the outer world also become the principles by which it functions internally, and if these are inconsistent with law, we are implicitly told or shown, law itself must change its character. To try to be democratic at home and function as an empire abroad would make a mockery of the principles of equality and justice under law that are essential to what we

mean by democracy. An empire by its nature denies the fundamental principle of human equality and requires dominance and subjugation, wherever it reaches.

Although this is not often said explicitly, I think that in both its forms the subjugating power of the empire is supported by the same implicit argument, namely, that the simple fact of immense power imbalance not only justifies empire but requires it. As a nation we are so powerful, the argument runs, that we are simply not subject to the constraints of law and justice; likewise the rich and the super-rich—individuals and corporations alike—are so powerful that we cannot imagine demanding fairness from them or insisting upon equality with them. In both cases the fact of gross disparity overwhelms the hope of equality by declaring it impossible.

This is a modern version of a very old argument, seen (and rejected) in both Plato and Thucydides, namely, that justice is a proper topic of thought and argument only among equals. Where there is disparity of power those who have it will do what they want, the Athenians tell their victims in the famous Melian Dialogue; the rest must submit or die, and there is no point in pretending otherwise. The Athenians in this way seek to justify their refusal to recognize any constraint upon their power to kill and enslave all those who have rebelled against them. They claim to be beyond the reach of justice or its language.

I see in our own empire a similar claim—externally, on behalf of the nation with respect to other nations; internally, on behalf of the rich with respect to the people. The very fact of power of this scale and magnitude is implicitly said to make law and democracy impossible; and, as I have been arguing in this essay, we tend to believe the claim, without quite knowing that we do so.

In this context what Thucydides himself shows and says is of real interest. He demonstrates that the world of city-states in fifth-century Greece is regulated by a genuine international law, seen not as the command of some supranational sovereign but as the product of convention and agreement among the relevant states. He shows us how this system works in a real way, without any sovereign power; how it can be destroyed by a state (Athens) that has amassed so much power that it believes it can disregard the law and justice itself; and how this destruction leads eventually to the destruction of the superpower in question—which without law and justice cannot think rationally or sensibly about its own character, its own interest, even its own ambitions.¹⁷

As Thucydides tells the story it is a true tragedy, for Athens has no real alternative. The international legal system of that day presumed the equality of the states, which the power of Athens itself destroyed. For us, however, there is a solution, for in the intervening centuries humanity has invented the rule of law—equality under law, equality as an achievement of law. Instead of claiming immunity to law, the strong in our world should make every effort to affirm their allegiance to law, and to the fundamental equality that law and democracy together assert. To make the affirmation meaningful, they should accede to law especially where they have the economic or military power to repudiate it. For it is ultimately upon law and justice—both among nations and within our nation—that our strength, our very identity, depends.

This history teaches us that where there are immense imbalances of power the powerful should not reject with contempt the claims of law and justice, as the Athenians do, but quite the reverse. It is precisely at the point where one nation or group has the power to disregard such claims that it is most important, for the powerful themselves and for the rest of the world, that they cheerfully submit to them. In the end, it is not just the weak who need the rule of law and the claims of justice; all of us do.

NOTES

1. For discussion of the debate at the American Law Institute on corporate purposes in the 1980s, see my “How Should We Talk about Corporations?” in *From Expectation to Experience* III–23 (2001).

2. It is worse even than that. As I was preparing this essay, I saw references in the newspaper to the fact, if it is a fact, that virtually all the ads in the broadcast of the Super Bowl contained violence against human beings. To connect this theme with my next, the torture of human beings, I am told that the number of incidents of torture on mainline television programs has escalated enormously since our government began its campaign to legalize torture.

3. Here I think of President Bush’s to me astonishing remark when he was challenged about Guantanamo on a trip to Europe. He said that “he would like to close the camp and put the prisoners on trial”—as though there were some other person, say the president of the United States, who had created Guantanamo in the first place and was now keeping him from closing it (*New York Times*, 8 May 2006, A17). A similar effect is achieved by the arguments of government lawyers that such practices as the repeated suffocation known as “waterboarding,” electrical shocks, deafening noise, sleep deprivation, threatened attack with dogs on naked prisoners, and so on are not “torture” but only “cruel, inhuman, and degrading,” which enables

them to say, with all apparent sincerity, and as if we could possibly believe such a thing, that they are opposed to torture too.

4. I think here of the response of the public and the media to the 2000 election and the Supreme Court case *Bush v. Gore*. Whatever one's view of the merits of the election and of the judicial case, there was at stake here the integrity of the electoral process itself, raising the question whether, and in what sense, we live in a democracy. I would have thought nothing would have engendered more alarm and criticism and conversation than such a crisis, especially among lawyers. (Compare the popular resistance seen recently in Mexico to a challenged national election.) But we seemed simply to accept what we were told, as if it did not matter much to us. I include most law schools and law teachers in that "we." Of course there were some articles on the subject, but I hardly heard the matter discussed, and certainly not as an important matter on which we as lawyers and law teachers had a special responsibility to speak. Why was this? Was it because in a deep sense we did not think we had a democracy any longer?

5. I should say that I do not include all opinions or all justices in this criticism. Justice Souter in particular seems to me to adhere to high standards of legal thinking and judging. Likewise, I do not mean to criticize the clerks by what I say: they are not deciding the cases and cannot be expected to explain with any authenticity why someone else is doing so. All they can do is what they do, which is to produce a set of canned arguments, like those in a typical law review note, in such a way as to tilt the balance in the direction their justice has ordered.

6. For one example, see the opinion of the Court in *Free Speech Coalition v. United States* (535 U.S. 234 (2002)), discussed in my *Living Speech: Resisting the Empire of Force* 143–60 (2006). This opinion, by Justice Kennedy, seems to me very poor; but some of his other work is distinguished, especially the joint opinion in *Planned Parenthood v. Casey* (505 U.S. 833 (1992)), analyzed in my *Acts of Hope: Creating Authority in Literature, Law, and Politics* 153–86 (1994). I would also include the bombastic and bullying tone of some opinions, full of self-certain contempt for those who think differently. Both kinds of opinions seem to me to move in the direction of abandoning a central principle of law, the principle of responsibility.

7. My colleague Philip Soper has built a whole ethical theory on what he has learned from the law's practices of deference. See his *An Ethics of Deference* (2002).

8. Not to say that there is no place for economics, or other disciplines, in the law. Of course there is, whenever the discipline has something to teach the law, which is very often indeed, from the use of expert testimony on questions of engineering, for example, or matters of historical fact, to the way in which psychology can illuminate anti-social conduct or the nature of insanity, to the way in which sociology can demonstrate the existence of social conditions that call for our response. But in no case can the language of the external discipline substitute for that of the law; it must be translated into it, an activity that requires its own complex art.

What economics should do is to accept and welcome its place as one language among many, one way of thinking among many, each of which has its own contribution to make. A central task in addressing any serious problem is that of assessing the resources and limits of each available method. In the law, it is the law that has this task, just as in history, it is history, in psychology, psychology, and so on. The

problem of economics as practiced in law schools is in this sense a problem of writing and translation. For elaboration of this point, see my *Justice as Translation* 76–79 (1990).

9. Richard A. Posner, “Pragmatism versus Purposivism in First Amendment Analysis,” 54 *Stanford Law Review* 737, 739 (2002). See Rubinfeld’s response in *id.* at 753.

10. Richard A. Posner, letter to the editor, *New York Review of Books*, 11 January 2007, 63.

11. The law is a system of thought and language that is open to others—in principle to all others—and is in this way as well deeply democratic in nature. In any legal case a whole field of knowledge and expertise may become relevant, from engineering to sociology or psychology to history or medicine. The law is committed to learning what it can from these systems of knowledge. Likewise, especially under our jury system, our law has a commitment to the validity and value of ordinary language, the language of the citizen as such, for it must always be ready to be translated into that language, particularly in jury instructions and in closing arguments. The awareness that at some time the law will have to make sense to ordinary people is a discipline that erodes what might otherwise be the hermetically sealed overconfidence in the specialized language of the law and undermines the tendency to professional hierarchy.

12. Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. Sections 2340–2340A, 1 August 2002, in Mark Danner, *Torture and Truth: America, Abu Graib, and the War on Terror* (2004). For a fine analysis of the legal issues addressed, and not addressed, in this memorandum, see Jose Alvarez, “Torturing the Law,” 37 *Case Western Reserve Journal of International Law* 175 (2006).

13. See the Associated Press story by Andrew O. Skelsky in the *Detroit Free Press*, 16 December 2006, 6A.

14. In this context I would like to call attention to one of the most systematic and extensive efforts to use cost-benefit analysis to decide what to do about a social problem, namely, the *Report of the Commission on the Third London Airport* (1971). The question at issue was where the third major airport near London should be located, and the matter was subject to exhaustive analysis of social costs and benefits. To the extent possible these were determined not by fiat but by market transactions, which were used to establish the cost of travel time to the West End, the value of green spaces to a local community, and so on. The Commission concluded that the airport should be located in the only green area between London and Birmingham. This result depended, as the dissenter pointed out, upon a particular calculation of the value of travel time, which if modified only slightly would have sent the airport to estuary lands east of London.

So which calculation was right? And how do you determine the value of green land to a neighboring community or of a Norman church to be destroyed by the bulldozers? The study was defective in another way, the dissenter argued, for it failed entirely to address the social benefits of locating the airport to the east that would arise from investment and expenditure in this relatively poor area, and contribute at least in some measure to the righting of the imbalance between East London

and West London. What the majority said in response amounted to an expression of fear, that the longer travel time to the eastern location might lead American travel agents to skip England altogether and pour their customers, and their money, into Germany or France—a fear that was not given a number, as could not rationally have been done. The final fillip is that it was finally decided that there was no need for such an airport at all. (Actually in recent years the airport at Stansted, one of the original candidates, has been more widely used, mainly for European travel.)

In the context of what faces us today, this kind of analysis may lead, as perhaps it has, not only to conduct that is immoral and wrong, as in the torture carried out by our government or with its consent, but to conduct that actually has the opposite of the intended effect, as our torture and abuse may indeed also have done. All this is done in the name of national security, but it may well be that our lawlessness is making us less secure—as well as having the “social cost” of turning us into a nation that tortures. (Unless the real reason for the program of torture is not to get information at all, but to define us as a lawless and torturing nation in the hopes that this will make people fear us.)

15. *Dennis v. United States* (341 U.S. 494 (1951)) shows this process at work, as does *Barenblatt v. United States* (360 U.S. 109 (1959)).

16. I mention slavery because something similar is at work in the logic of the torture cases, including a repudiation of the essential principle that our law is neutral as to persons. We now have a class of persons who are not persons under the law, without a right to lawyers, judges, or appearances in court, without a right to any regular proceeding, presided over by a neutral judge, in which they can see and question the evidence against them. They may be tortured or killed, in the government's view, without any recourse other than that which happens to be afforded, or not, by the administration in its mercy. This is an image of power that is profoundly imperial, restoring at a stroke a vision of a king beyond law that precedes the Magna Carta, a vision that may have no formal antecedents in European or American history except those of the totalitarian states of the twentieth century. These people are “enemy combatants” because some unnamed person, on the basis of unrevealed evidence or rumor, has decided they are. They are the juridical equivalent of slaves, but without even the few protections granted by the law of Mississippi or Alabama in the early nineteenth century.

17. For fuller discussion, see my *When Words Lose Their Meaning* 59–92 (1984).