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Law, Economics, and Torture

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Law, economics, and torture

By James Boyd White

The following essay, which appears here with the permission of the University of Michigan Press, is the text of a talk given by Professor White at a conference held at the Law School last year, entitled "Law and Democracy in the Empire of Force." (An interview with White in which he discussed the conference appeared in the Spring 2007 issue of Law Quadrangle Notes *on pages 27-28.) In more complete form the essay will appear in a book of conference proceedings, edited by Professor White and Professor Jefferson Powell of Duke Law School, to be published by the University of Michigan Press in early 2009. The participants at the conference were invited to speak about their own sense of the ways in which law and democracy have been changing in recent decades and what these changes mean.*

The phrase "empire of force" comes from a famous essay by Simone Weil on the Iliad, *where she uses it to refer not only to brute force of familiar kinds, then and now, but more importantly to all the ways in which the habits of thought and expression at work in our culture tend to trivialize other people and deny their full humanity.*

In our invitation to you as speakers at this conference, Jeff Powell and I encouraged you to talk about the state of law and democracy in whatever way seemed to you best, whether or not it happened to comport with usual styles of academic thought and expression. Today I plan to take advantage of our own invitation, and speak a little differently from the way I usually do, about what I take our culture of law and politics 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, your own thinking, is like or unlike my own.

I. Making the rich richer

As I think about the ways in which 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.

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 which has taken place in our lives. I grew up under Eisenhower, when there was a 90 percent tax on incomes over $100,000 ($1 million 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 transfer of wealth to a class of super-rich began modestly under Kennedy and has taken off in the past decade. It is I think a deliberate goal of the present 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.

A. 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 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.

It seems that the rules of the game have somehow shifted over the past 20 years or so: 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 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 a language of democratic government—for that requires action, judgment, participation, not mere consumption.

This way of imagining life not only creates 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, as 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 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 not shaped or guided by law and democracy. Corporate owners and managers are not elected by the people, not subject to the constitution, not supposed—or even allowed—to be motivated by any ideal other than the acquisition of wealth and power, and usually not responsive to argument or complaint.

This arrangement is implicitly—and sometimes explicitly—defended by the argument that this power 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. Those who argue for "getting the government off our backs" are mainly arguing for removing power from law and democracy and transferring it to a regime that has no democratic values or authority.

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 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 planet upon which everything we are and do depends.

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.

B. 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.

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 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 and no capacity for critical thought. A world is created where thought is not possible. 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.

C. 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 $60 million 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. 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 merely 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 in this room—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 expensive 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 sections on "Arts and Leisure" and "Style," let alone "Travel & Escapes," 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.

D. 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 nor in the ways politicians and officials talk about it nor 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.

II. 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. There are exceptions, but too many 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.

A. 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. 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 40 or 50 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, when I was in law school—like Black, Frankfurter, Douglas, Clark, Warren, Harlan, Brennan, Stewart, and White—was to invoke a different world.

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 and 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. 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.

B. My sense of what has been happening is well exemplified in a brief passage by Judge Richard A. Posner. Here 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." [In "Pragmatism versus Purposivism in First Amendment Analysis," 54 *Stanford Law Review* 737, 739 (2002)]

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.

C. 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.

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, which has no basis in democratic authority, but rests 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 power 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 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.

III. 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: It is written in mechanical 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. 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.

A. 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 writing none of those had been convicted of any crime.

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.

B. 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 know 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. 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 ground, that "national security" or the "safety of the nation" require it.

C. 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.

For 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 question—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 justified torture. But of course such a bomb may exist but be 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? 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.

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 or turns a blind eye to what he should know is happening. 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.

D. 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 both economically and politically.

The empire cannot work on democratic principles that recognize the equal humanity and value of all people, or under a legal regime that has the same law for all. And its deep injustice, which opposes it to the principles of law and democracy alike, makes it fundamentally irrational. It becomes a single value system devoted to the perpetuation of its own power. Everything must be sacrificed to its own continuing existence.

I am reminded here of Thucydides' account of another empire, that of Athens, in his *History of the Peloponnesian War*—which is to my mind the first and best account of international law, seen not as the command of some supranational sovereign, but as the product of convention and agreement among the relevant states. Thucydides shows us how this system of law works in a real way, without any sovereign power; how it can be destroyed by a state that has amassed so much power that it believes it can disregard the law, and all questions of justice; 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.

As Thucydides tells the story it is a true tragedy, for Athens has no real alternative. The international legal system of that day presumed 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 reaffirm their allegiance to law, and to the fundamental equality that law and democracy together assert. For it is ultimately upon law and justice—both among nations and within our nation—that our strength, our very identity, depends. ■