

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 unambiguously 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