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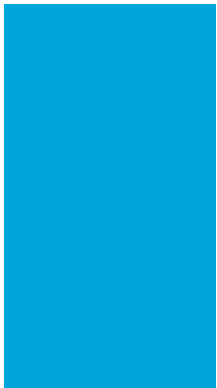
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**Torture, Human Rights, and  
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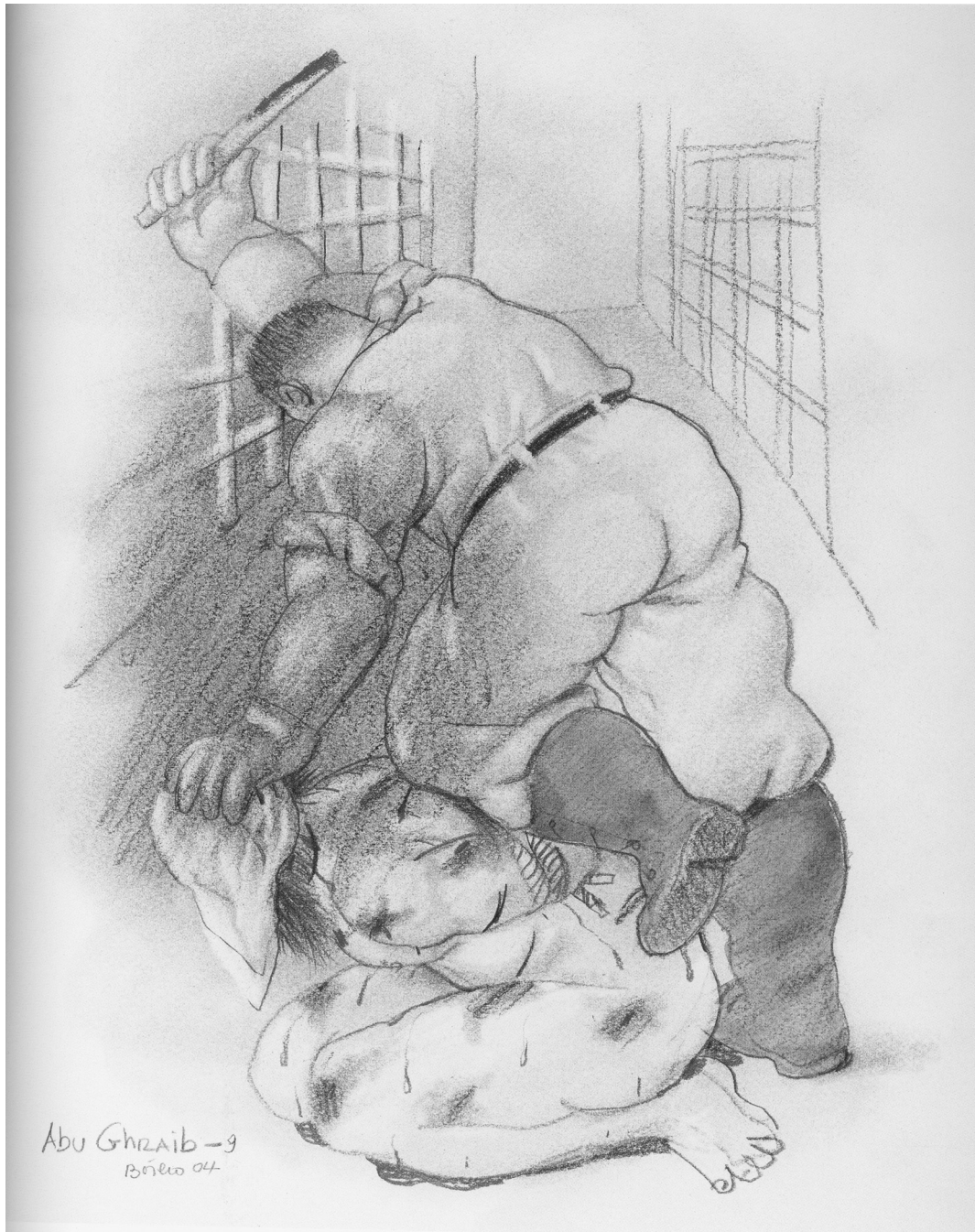
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*During the spring semester of 2007, the Center for Latin American Studies hosted an exhibit of Fernando Botero's Abu Ghraib series of paintings and drawings which depict the abuses committed by American troops at that notorious Iraqi prison. In addition to holding a public conversation with the artist, the Center also organized a series of lectures to elaborate on the themes evoked in the artworks. The following essays were originally prepared for the panel discussion "Torture, Human Rights, and Terrorism" held on March 7, 2007.*



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Counsel for Jose Padilla in *Rumsfeld v. Padilla*



# **Absolute Power**

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President, Open Society Institute  
Founding Executive Director, Human Rights Watch





Like others who have conducted human rights field work, I have spent a certain amount of time interviewing witnesses or victims of torture. However, that experience never gave me an actual visual impression of what torture is like because almost all of those I interviewed were very reticent in describing what had happened to them. It was clear in most cases that they felt humiliated by the experience. When I saw the photos of Abu Ghraib it helped make clear to me why they felt that way. The photos show the victims, submissive and terrified, in the most humiliating postures imaginable.

I was reminded of a book—*The Body in Pain*—that was published more than twenty years ago by Elaine Scarry. In that book she had written that the ability to inflict torture is the ability to exercise absolute power over others. For me, that is the connection between what took place at Abu Ghraib and what has taken place generally since September 11, 2001. If there is a connection between various events, it is that interest in exercising absolute power.

There have been many theories as to why the United States went to war in Iraq, and there have been varying rationales that were provided by the Bush Administration at different times for the invasion. I'm sure that all of them have some element of truth. But my own view at the time, and it remains my view today, was that September 11 was an extraordinary demonstration of American vulnerability. Here were these enormous buildings that were destroyed by 19 men, armed with box cutters. The Pentagon was seriously damaged. It's possible that if United Airlines 93 had not been forced down in Pennsylvania, the White House or the Congress would also have been hit.

It seems to me that the need to engage in a demonstration of American power was the most significant reaction that took place to September 11. Saddam Hussein, who had been thumbing his nose at the United States, seemed a very good candidate for that demonstration of American power.

There have been other efforts to demonstrate power. Some of the famous, or infamous, memoranda that circulated within the Justice Department and the White House, which contributed to what took place at Abu Ghraib, also reflected a preoccupation with power.

The member of the faculty at this law school who has become somewhat notorious for his memos, John Yoo, was not so much justifying torture *per se*; rather he was arguing that any attempt to limit what is done is an improper intrusion on presidential power. In his line of reasoning, the president has plenary powers and, if they are not specifically abrogated by the Constitution, the president can do what the king could do. As the king had absolute authority over those who were taken prisoner, so the king was able to torture and the president is able to torture. If laws are adopted by Congress that seek to restrict torture, then those laws can be overridden by the president. If there are international treaties—such as the Geneva Conventions—which seek to restrict torture, the president has the power to suspend them. And then, at the very low level of the guards at Abu Ghraib, there also seems to have been an effort to demonstrate absolute power over the prisoners.

The Botero images capture this by portraying the helplessness and powerlessness of the torture victims. However, they don't tell us very much about the torturers. Their faces are rather blank in the paintings, and the young women who were participants are omitted. But if you want to see an example of that exercise of absolute power, think of the photograph of Lynddie England with a prisoner with a leash around his neck. Here is this tiny woman exercising absolute power over this prisoner. Or think of the other woman soldier who is smiling over the bodies of those who are stacked up in a pyramid. If we are to deal with the torture, and with many of the other things that have taken place since September 11, we have to above all question and reject this idea of absolute power. We have to reject the idea that the president has unilateral power to

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take the country into war or to disregard a resolution of the Congress that opposes the increase in U.S. troops in Iraq. Above all we have to reject the idea that the president has the power to ignore U.S. commitments in treaties like the Convention against Torture, the Geneva Convention, and the statutes that prohibit torture.

Since we have only a short period, let me end by calling your attention to one of the significant literary works that deals with the subject of torture, Franz Kafka's "In the Penal Colony." In the story, a man is about to be tortured because he has questioned the authority of a superior officer and, thereby, he has insulted that officer. In Kafka's description, the man who is about to be tortured already seems as submissive as a dog who might be left to run free on the hills that surrounded the place where the torture machine was situated, and who simply could have been whistled to and brought to lie there and receive the torture. He lies face-down and naked while the torture machine works on him. Kafka wrote that he would only fully understand the torture he was undergoing after it had been underway for a certain amount of time. That's what torture is, an effort to secure absolute submission. We have tried to secure that kind of submission in Iraq. It has not worked. People don't like to be treated as submissive dogs. They tend to rebel when they have the opportunity. The effort to exercise absolute power is ultimately frustrated. That seems to me the struggle that is taking place.



# **The Law of Torture**

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The topic of my remarks today is the law of torture. The exhibit of Fernando Botero's paintings of Abu Ghraib and the previous speakers have focused our attention on visual representations of torture, but what I am going to talk about is legal representations of torture. Last night I heard a disturbing story about one person who had visited the Botero exhibit. After looking at the images, the person was silent for some time and then, when pressed for a response, said that he thought the real problem with Abu Ghraib was not that it had happened but rather that there had been photographs taken of it. The problem was not what occurred but rather the permanent, visual representations of what had occurred.

I disagree with that individual's perception of the problem of Abu Ghraib, since I consider the fact that the United States has engaged in torture to be quite a serious problem. But I would like to make something of a parallel argument about the legal representations of torture that we have seen since September 11. It is not simply the fact of torture or that fact that the United States has engaged in torture since September 11 that makes this a particularly dire situation, but rather the fact that the United States has attempted to legalize, justify, and represent permanently in our law the practice of torture.

Legalizing torture in this way goes against hundreds of years of progress in Anglo-American jurisprudence and international law. If I had been giving a talk about the law of torture in the year 2000, I would have been talking about the law *prohibiting* torture, the law that had evolved since the 1400s, both in domestic legal systems around the world as well as in international law, to create an absolute prohibition on torture and also on cruel, inhuman, and degrading treatment.

The prohibition of torture is one of the strongest norms in international law today. It is a rule from which there is no derogation or exception permitted, both under international human rights law and under the laws of war. There is no emergency, no state of warfare that can legally justify the practice of torture. Nevertheless, we know from human rights groups' estimates that torture has, in fact, recently been practiced in something like two-thirds of the countries around



the world. Given that torture is a common practice, why is it so troubling that the United States has, since September 11, attempted to legally justify torture? I contend that legally sanctioning torture—rather than having it simply happen somewhere out of sight in a way that once discovered is disavowed and condemned—is more dangerous and more degrading to a nation and a legal system than for the thing simply to happen. Having torture permanently represented in law is worse than having it occur as a violation of the law.

Why is it worse when torture is legally sanctioned? There are at least two reasons. The first is what I call the “loaded gun” argument: providing even very narrow legal sanction for torture expands the possibilities for future abuse of government powers. The second argument is that torture debases those who practice it, both the individuals who carry it out and the society that endorses it.

Justice Jackson (who was on the U.S. Supreme Court and was the chief prosecutor at the Nuremburg tribunal) wrote a very famous dissent in the case of *Korematsu*. *Korematsu*, of course, was the case in which the U.S. Supreme Court upheld the Japanese internment camps in the United States during World War II, finding that it was constitutional to intern Japanese Americans on the basis of their race. Justice Jackson dissented from that decision saying that the problem with the Court’s decision was not simply that the internment camps had happened, although that was a terrible thing. If the internments had happened based solely on a military order, they would have been something that would pass away and would not have continuing effect as a legal precedent. But the fact that the Supreme Court had upheld the Japanese internment camps meant that this violation of human rights was not merely something terrible that had happened, but something that was lawful, that was constitutional, that was not something for the nation to be ashamed of or to repudiate but rather something that had the imprimatur of law. This, in Justice Jackson’s view, was what made the Supreme Court’s *Korematsu* decision such a tragedy. Justice Jackson warned that decision would lay about like a loaded gun, there for government officials to reach for and abuse in the future.

The attempt to legally justify torture since September 11, like the *Korematsu* decision, is a loaded gun that remains not only at the disposal at the United States in some future crisis but also stands as a precedent for countries around the world. Other countries can now point to the United States as an example of why torture might be legal in some circumstances; they can call upon our experience to say, “See even the most powerful country in the world needs these extreme methods in order to fight terrorism or fend off other dangers.” Even if we believe (against all evidence) that our own government *always* acts in good faith and *always* finds the right people and *never* makes mistakes, certainly we cannot say that same about all governments around the world that might invoke this precedent.

But even beyond this idea of the loaded gun, the second troubling thing about representing torture in the law is that it degrades us. The government and the society that weaves the degradation of human beings into the fabric of its law is demoralized, degraded, and vulnerable. What country can be proud to say, “We engage in cruel, inhuman, and degrading treatment of the people under our control”? What citizens will be willing to make the sacrifices necessary to support, defend, and preserve such a debased society?

In explaining why this is such a dramatic departure from our traditions, I want to talk just a little bit about what the law of torture was prior to 2000. For more than 600 years in Anglo-American legal tradition (and I refer to Anglo-American tradition because the U.S. legal system was descended from that of Britain), torture had been prohibited. Going back as far as the 1400s, the common law of England prohibited torture. That made English law stand apart from the law of continental Europe, which at that time not only allowed but actually encouraged the use of torture. The rules of evidence in Europe at that time required the confession of the accused, and this was an incentive for torture. English common law, on the other hand, prohibited torture as early as the 1400s. At first, this was not any sort moral statement against cruelty but simply a product of the rules of evidence and the jury system in England, which did not require a confession in an open court and relied on more circumstantial evidence.

But within a few centuries, the English had become justly proud of the prohibition on torture that was part of their law. To be sure, torture was occasionally practiced in England outside the common law. In the sixteenth and seventeenth centuries it was admitted that torture was illegal, but it nevertheless sometimes occurred outside the law as an exercise of the king's special prerogative or emergency powers, that is the king's powers to override the common law.

The situations in which the king would invoke this power to authorize torture and violation of the common law are quite evocative of the circumstances that we have seen used to justify torture during the past six years. The people who were tortured presented threats to the security of the state; they included those who planned to engage in acts of sabotage or treason or otherwise plotted against the stability of the government—people who today we might call terrorists.

The king's abuse of his special powers was one of the causes of the English Civil War, which represented a fundamental reallocation of the power between the king and parliament. Thus, one of the first acts of parliament in 1640 at the conclusion of that war was to abolish the Court of Star Chamber, the court in which torture warrants had been used. The last torture warrant was issued in England in 1640. When Scotland united with England in 1707, it also prohibited torture. And so, by the time the government of the United States was born in 1776, there was already an absolute prohibition against torture in English law.

The United States inherited the English legal system, and throughout the first two centuries of our jurisprudence the prohibition against torture became embedded in U.S. constitutional law through interpretations of the Eighth Amendment and the Due Process Clause. Indeed, the practice of torture is so condemned that you rarely see the word in U.S. legal decisions. Instead, the cases talk of things like police brutality, involuntary confession, or coerced interrogation. Our constitutional law prohibits the use of involuntary confessions and evidence obtained through coercive interrogation. That type of evidence has been found by the courts to be inadmissible not only because it is unreliable, but also because it degrades the court and the legal system to receive it into evidence.

At the same time that this Anglo-American constitutional law was being developed, a parallel development was occurring in international law beginning with the laws of war. Here again we have something precisely parallel to the situation we face today. The Anglo-American prohibition of torture developed as a rejection of the king of England's invocation of the right to torture people we would today call terrorists, while the prohibition against torture in international law developed specifically in the context of warfare. During the American Civil War, President Lincoln invoked many extraordinary powers which are sometimes used today in support of the argument that emergency situations justify extreme government actions. Nonetheless, President Lincoln's government also promulgated something called the Lieber Code, which is the predecessor of the modern international laws of war.

The Lieber Code contained many exceptions for military necessity that are no longer part of the law of war. However, it did not allow cruel treatment of prisoners or extortion to coerce confessions, even if those things might be deemed expedient or necessary under the circumstances. And this was in a war that was fought against a rebel army that many would have called unlawful combatants.

This prohibition in the laws of war became internationalized in the Hague regulations of 1899 and 1907 and was carried forward to the Geneva conventions of 1929 and 1949, which also included the absolute prohibition of torture and cruel, inhumane, and degrading treatment of prisoners. Following World War II, the prohibition of torture in international law expanded beyond the realm of the law of war to encompass international human rights law, which applies in peacetime as well as war.

Both the Nuremberg war crimes trials and the United Nations charter made protection of human dignity a fundamental goal of the international legal system. The Universal Declaration of Human Rights, which was unanimously adopted by the U.N. General Assembly in 1948, absolutely prohibits torture and makes the protection of human dignity one of its core values. This promise was carried forward in other international instruments like the European

Convention on Human Rights in 1950, the International Covenant on Civil and Political Rights in 1966, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that was opened for signature and ratification in 1987. The United States has ratified the Convention against Torture, along with the International Covenant on Civil and Political Rights, and of course the Geneva Conventions. Under our Constitution, that makes these treaties the supreme law of the land.

Over the past 600 years we have witnessed a universal movement in the law toward the absolute prohibition of torture in all circumstances, even when the executive believes that it is necessary because of an emergency or because of terrorism, even in wartime, even against unlawful combatants.

Thus, what is so remarkable about what has happened in the United States in the past six years is not simply that we have tortured, but the fact that we have gone against six centuries of legal progress and attempted to claim that torture is lawful. Here I refer specifically to the Torture Memos written by the Office of Legal Counsel at the Justice Department, which no doubt many people here at Boalt Hall are familiar with because they were reportedly written by Professor John Yoo.

These memos make two arguments that are especially troubling. The first is that they propose a definition of torture so narrow that it evokes the worst stereotype of lawyers proposing technical constructions and looking for loopholes that anyone with common sense would see were not what the drafters of the law meant. Unless you feel like you are experiencing major organ failure, the memo argued, you haven't been tortured. But even more troubling than the ridiculously narrow definition of torture was the less-noticed argument that the president actually has the absolute power to order torture. The memos claimed that, under the Commander-in-Chief Clause of the Constitution, the president has the absolute power to override the will of Congress, to override the international treaties the Senate has ratified, to override the statutes that Congress has passed and previous presidents have signed into law under the Constitution, and to determine on his own that torture should be carried out in the name of the United States.

This was an argument that was rejected in 1640 in Great Britain, and it was certainly not a power that the framers of the U.S. Constitution thought they were granting the president.

Following the Supreme Court's decision in the *Hamdan* case striking down the president's military commissions as unconstitutional, we saw yet another unfortunate attempt to make torture a part of our law in the Military Commission Act. This act was hailed by many as something of a restraint on the president, as a result of the efforts of Senators McCain and Graham and others. While the act certainly removed some of the worst things that were in the drafts proposed by the White House, it was by no means a good law.

Specifically, the Military Commissions Act embeds the practice of torture in the law. It departs from the rules of evidence applicable in courts martial by allowing the admission of evidence obtained through coercion, something that is not allowed constitutionally even in our military justice system and has not been allowed anywhere in Anglo-American law for many hundreds of years. Moreover, if the coercive interrogation took place prior to December 30, 2005, the new law would allow the use of that evidence even if the methods used included cruel, unusual, or inhuman treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The law might not say "torture," but cruel, unusual, and inhuman treatment is nothing for a legal system to be proud of.

The Military Commissions Act also amends the War Crimes Act by removing the provision criminalizing all violations of Common Article 3 of the Geneva Conventions, including the prohibition of outrages on personal dignity, humiliating, and degrading treatment. It replaces this with a much narrower provision, and it applies retroactively so as to immunize individuals in the U.S. government who might have engaged in practices that were cruel, inhuman, or degrading during the past few years. This retroactive immunity embeds torture in our law, giving it legal endorsement, authorization, and sanction.

Other countries that have in recent years confronted the threat of terrorism and the question of torture have gone in the other direction in terms of their legal rulings. I will mention two

briefly. The first is the decision of the British House of Lords in December 2005 in the case of *A and others*. That case concerned whether evidence obtained through torture by other countries would be admissible in immigration proceedings in the United Kingdom. The House of Lords rejected this practice. They referred to the inherent unreliability of evidence obtained through torture. They referred to the cruelty and injustice for those who were wrongfully tortured and who had never been convicted of any crime and might have been taken by mistake. And they also referred to the notion that torture degraded all those who participated in it, as well as the nation that sanctioned it. They cited the decisions of other high courts around the world, including the high court of Ireland which spoke of the moral defilement of a legal system that endorses torture, and to similar decisions of courts in Canada and Australia.

The second decision I want to refer to is that of the Israeli Supreme Court in its decision on coercive interrogation and practices that constitute cruel, inhuman, and degrading treatment. The Israeli court also rejected the idea of giving legal sanction to those practices. In so doing, the court explained that:

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

What the Israeli Supreme Court meant was that by staying true to its values, a country preserves the way of life it seeks to defend in time of war or crisis. Or as our own U.S. Supreme Court said in a free speech case during the Cold War, in protecting the security of a nation, one must not at the same time destroy those very things that make the nation worth defending.

In conclusion, as you think about the visual representations of torture in the Botero exhibit, remember the argument made by the visitor to the exhibit who believed that the problem with Abu Ghraib was not that it had happened but that someone took a photograph. I disagree,

because I believe that torture should not happen, period. But I do believe a serious problem with United States security policy since September 11 is not simply that torture has happened, but the fact that our government officials have sought to embed the practice in our law. In a decent society, a lecture about the Law of Torture should be about the law prohibiting torture, not the law authorizing it.



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