Legalizing Torture? UCLA Scholar Asks If the Law Is Capable of Modifying the Power of the State

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Legalizing torture?

Professor Makau Mutua, Floyd H. and Hilda L. Hurst Faculty Scholar, and Professor Richard L. Abel of UCLA Law School.

The difficult and politically explosive issue of torture took center stage for the 12th annual Baldy Center Retreat, an annual celebration of the work of UB Law School’s interdisciplinary studies center. The retreat, held Dec. 14 at the Saturn Club in Buffalo, gathered nine Baldy Working Groups for planning purposes. Baldy Center Director Lynn Mather recognized such significant initiatives as the Arts Management Program, the Regional Institute, the Jaeckle Center for State and Local Democracy; and the Center for Urban Studies and its HUD Community Outreach Partnership.

Continuing a tradition of seeking out the best in challenging new scholarship, the center invited as its keynote speaker Richard L. Abel of UCLA Law School. Currently on sabbatical in New York City, working in the Center for Constitutional Rights, Abel was a founder of the journal Law & Policy, published by the Baldy Center. At UCLA, he also is faculty coordinator for the Public Interest Law Program.

Abel’s address, titled “Legalizing Torture,” sprang from his 58-page academic paper of the same name, a paper that begins: “The Bush administration’s reaction to 9/11 has profoundly compromised America’s fidelity to the core of political liberalism – the rule of law.

The power of the law has been tempered by “attempts by the Bush administration to redefine the legality of a wide variety of practices” in the years since the terrorist attacks of Sept. 11, 2001. For example, Abel said, a series of memos in the executive branch “declared that al-Qaeda and the Taliban were outside of judicial intervention.” Similarly, the claim was made that the American-run detention facility at Guantanamo Bay, Cuba, is outside the United States and therefore not subject to U.S. law.

The practice of detention, Abel said, has been particularly problematic with allegations of the use of torture against detainees at Guantanamo, in Afghanistan and at the Baghdad prison.

The president and his Cabinet and lawyers have embraced torture, kidnap ping and indefinite detention without the right to a trial, counsel or to confront accusers.” Abel began his remarks with a quotation from poet W.H. Auden:

The Ogre does what ogres can, Deeds quite impossible for Man, But one prize is beyond his reach, The Ogre cannot master Speech.

In other words, he said, we need to ask the question: “Under what circumstances, in what ways, and to what extent is the law capable of modifying the power of the state?”

Abel spoke of his experiences in South Africa, where he visited five times in five years in order to look at the ways lawyers and judges participated in governing during the first years following the fall of the apartheid regime.

“There was no written constitution or bill of rights. There was no judicial review. There were almost no black attorneys or advocates,” he said. “Nevertheless, law did make a difference.”

In the United States, he said, “it would seem as though law would be more and more capable of resisting tyranny in our country.” But, he said, the power of the law has been tempered by “attempts by the Bush administration to redefine the legality of a wide variety of practices” in the years since the terrorist attacks of Sept. 11, 2001.

At Guantanamo, Abel said, U.S. lawyers face enormous obstacles if they seek to provide representation to detainees. There is, for example, “the enormous difficulty of gaining the trust of detainees and their families.” Guards at the facility, he said, will approach a detainee after a lawyer visits and aver that the lawyer was Jewish — “and if word gets out that you, a Muslim, are being represented by a Jew, nobody will believe you.”

Some detainees, Abel said, have told their lawyers that “every time you come down here, when you leave we are punished.” Adding a further obstacle, he said, detainees have asked for access to an Arabic-English dictionary so they can read legal papers — but the request has been denied. “The reasonable,” he said, “is that, if their English improves, that is a security risk, because they will be able to understand more of what their guards are saying.”

Following Abel’s remarks, UB Law Professor Makau W. Mutua and Associate Professor Brenda L. Moore of UB’s Department of Sociology offered responsive comments.

Lynn Mather, Director of Baldy Center and Professor Claude E. Welch, Distinguished Service Professor, Political Science Brenda L. Moore, Associate Professor, Sociology
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At Guantanamo, Abel said, U.S. lawyers face enormous obstacles if they seek to provide representation to de-tainees. There is, for example, “the enormous difficulty of gaining the trust of detainees and their families. Guards at the facility, he said, will approach a detainee after a lawyer visits and aver that the lawyer was Jewish – and if word gets out that you, a Muslim, are being represented by a Jew, nobody will believe you.”

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