

COLLABORATION AND RESISTANCE IN THE PUNISHMENT OF TORTURE IN IRAQ: A JUDICIAL SENTENCING EXPERIMENT*

JOHN HAGAN**, GABRIELLE FERRALES*** & GUILLERMINA JASSO****

James Harding (Financial Times): "Mr. President, I want to return to the question of torture. What we've learned from these memos this week is that the Department of Justice lawyers and the Pentagon lawyers have essentially worked out a way that U.S. officials can torture detainees without running afoul of the law. So when you say you want the U.S. to adhere to international and U.S. laws, that's not very comforting. This is a moral question: Is torture ever justified?"

President Bush: "Look, I'm going to say it one more time. . . . Maybe I can be more clear. The instructions went out to our people to adhere

* This article is dedicated to the thirty-one judges and 179 lawyers who have been assassinated since the invasion of Iraq. Four of the judges killed participated in this study.

** John Hagan is John D. MacArthur Professor of Sociology and Law at Northwestern University and Co-Director of the Center on Law and Globalization at the American Bar Foundation. His most recent books are *DARFUR AND THE CRIME OF GENOCIDE*, co-authored with Wenona Rymond-Richmond (Cambridge University Press, 2009) and *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES AT THE HAGUE TRIBUNAL* (University of Chicago Press, 2003). He is the recipient of the 2009 Stockholm Prize in Criminology.

*** Gabrielle Ferrales received her law degree from Georgetown University Law Center. She is currently an Assistant Professor in the Department of Sociology at the University of Minnesota Twin Cities. She was recently awarded the Best Graduate Student Paper Prize, 2005, by the American Sociological Association's Sociology of Law Section for her paper, "Domestic Violence Crime Control Policy and Practice: Implications for Arguments Concerning Penal Theory". Her article, co-authored with John Hagan and Ron Levi, "Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia", appeared in 2006 in *Law and Social Inquiry*. Her article, co-authored with John Hagan and Guillermina Jasso, "How Law Rules: Torture, Terror, and the Normative Judgments of Iraqi Judges", was recently published in *Law & Society Review* and is the recipient of the 2009 Law & Society Association's Best Article Prize.

**** Guillermina Jasso PhD, Johns Hopkins) is Silver Professor and Professor of Sociology at New York University and Research Fellow at IZA Bonn. Recent work includes: "Distributive Justice and CEO Compensation" (with E. M. Meyersson), *Acta Sociologica*, 2008; "A New Unified Theory of Sociobehavioral Forces," *European Sociological Review*, 2008; "Two Types of Inequality" (with S. Kotz), *Sociological Methods and Research*, 2008; "Shall We Kill or Enslave Caesar?" *Advances in Group Processes*, 2008; "From Illegal to Legal: Estimating Previous Illegal Experience among New Legal Immigrants" (with D. S. Massey, M. R. Rosenzweig, and J. P. Smith), *International Migration Review*, 2008; "A New Model of Wage Determination and Wage Inequality," *Rationality and Society*, 2009; and "Linking Individuals and Societies," *Journal of Mathematical Sociology*, in press.

to law. That ought to comfort you. We're a nation of law. We adhere to laws. We have laws on the books. You might look at these laws, and that might provide comfort for you. And those were the instructions . . . from me to the government."¹

I. INTRODUCTION

In the months following the invasion of Iraq, President George W. Bush emphasized the role of democracy and the rule of law as justifications for the American occupation. Through the National Security Council, he cited the independence of Iraq's judiciary as a success of his new *National Strategy for Victory in Iraq* stating that "hundreds of judges have been trained." He further declared that "[a]s Iraq's political institutions mature, its judicial system has become an independent branch, better able to promote the rule of law."² Progress towards a strong, independent Iraqi judicial branch of government is a key condition for the success of the U.S. effort to democratize Iraq. However, the Bush Administration's optimistic assessment of the Iraqi judiciary was questionable given how little was known about it.³

In 2004, the authors were invited by a European legal institute⁴ to evaluate a program entitled "Judging in a Democratic Society," which was developed with the support of the U.S. Department of State to provide legal education for groups of Iraqi judges. This program was part of the State Department's broader efforts to establish and maintain the rule of law during the occupation of Iraq.⁵ Given that there are few in-depth studies of how local actors respond to external efforts to introduce legal reforms in war-torn and unstable settings, the invitation presented a rare opportunity. We developed a sentencing experiment designed to evaluate the response of Iraqi judges to challenges to their judicial

¹ MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 45-46 (2004).

² See NAT'L SEC. COUNCIL, NATIONAL STRATEGY FOR VICTORY IN IRAQ 16-17, 33 (2005) http://georgewbush-whitehouse.archives.gov/infocus/iraq/iraq_national_strategy_20051130.pdf (citing Attorney General Alberto Gonzales' claim that Iraq is working to overcome the effects of tyranny by "building a legal system that instills confidence in a new government, ensures that every person accused of a crime receives due process – including fair, public, and transparent trials – and a prison system that complies fully with international standards.").

³ See, e.g., AM. BAR ASS'N, JUDICIAL REFORM INDEX FOR IRAQ 2, 10, 17, 19-20, 35 (2006), <http://www.abanet.org/rol/publications/jri-iraq-2006.pdf>.

⁴ The human subjects' restrictions regarding confidentiality and anonymity for this study prevent identifying the research institute and its exact location.

⁵ For some examples of these efforts, see NAT'L SEC. COUNCIL, *supra* note 2, at 16-17.

independence. During the closing sessions of the program in 2004 and 2005, we asked groups of Iraqi judges to issue sentences based on hypothetical cases of torture of suspected terrorists. This study focused on contradictory patterns of collaboration and resistance in the sentencing decisions of individual Iraqi judges.

The larger aim of the institute was to help the United States more effectively democratize and institutionalize rule of law in Iraq. However, our goal was to determine whether individual judges accepted or resisted the legal philosophy embodied in the Bush Administration's interpretation of the international legal prohibition of torture.⁶ We wanted to know whether the Bush Administration's permissive interpretation of torture law created confusion about how to punish individuals convicted of torturing others, for example, Coalition soldiers convicted of torturing suspected Al Qaeda terrorists.⁷ We find that confusion in the law led Iraqi judges to sentence torture cases in disparate ways, with some of these judges accepting and others resisting the Bush Administration's interpretation of torture law that deemed torture justified in some circumstances.

Our study was guided by a critical legal studies perspective that emphasizes the problems associated with the indeterminacy of law.⁸ In Iraq, indigenous legal actors had to decide whether they would collaborate with the occupying authority. Yet there is no body of empirical research in occupied settings to reveal when or how this happens. Our study begins to fill this void.

Our analysis demonstrates how the indeterminacy thesis can be tested quantitatively and thereby used to increase our understanding of the conflicted role that the judiciary plays not only in Iraq but also in other potential sites of regime change and nation building. It is

⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 8 C.F.R. § 208.18, 1465 U.N.T.S. 85 (entered into force for the United States November 20, 1994) (provides that "no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

⁷ At the time of this study, U.S. soldiers were immune from prosecution and punishment in Iraq's courts. See Coalition Provisional Authority, Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004/17 § 2, http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf (stipulating that coalition forces, diplomatic personnel and contractors working for coalition forces or for diplomats "shall be immune from Iraqi legal process").

⁸ See, e.g., Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. POL. PHIL. 99, 105, 108 (2005) (discusses how from the mid-1970s to the late 1980s, critical legal scholars advanced the thesis that legal doctrine is indeterminate).

noteworthy that critical legal studies theories considered in this paper are rarely if ever advanced through systematic quantitative empirical analysis. The methodology applied in this research bridges the gap between the insights of critical legal studies and conventional legal scholarship by investigating how individual judges make sentencing decisions.

Part II of this article describes the political climate surrounding the issue of torture at the time when media reports began to surface regarding the Abu Ghraib prison abuses. Part III of this Article discusses how training the Iraqi judiciary became integral to the State Department's plan to impose legal order in the aftermath of the invasion and ensuing occupation of Iraq, and how we obtained unprecedented access to Iraqi judges receiving this training. Part IV explicates the indeterminacy of torture law both in Iraq and internationally and its role in the "global war on terror." In Part V, we outline three hypotheses about the ways in which indeterminacy in torture law may influence outcomes in judicial decision making. Parts VI and VII discuss the progress of our research design and the use of hypothetical fact patterns to study the sentencing decisions of individual Iraqi judges. Part VIII outlines our findings and demonstrates how Iraqi judges, in response to the indeterminacy in torture law, individually calibrate their sentencing decisions. We specifically consider how these sentencing decisions reflect acceptance or resistance of the Bush Administration's interpretation of torture, focusing in particular on the hypothetical sentencing of troublesome or "hard" cases – for example, scenarios wherein Coalition guards are convicted of torturing Al Qaeda prisoners. In Part IX, this Article analyzes the findings of our research.

II. TORTURE AT ABU GHRAIB

The early phases of the occupation when this study took place were especially tumultuous with regard to torture. Media reports stunned the American public in the spring of 2004 by revealing in photographic detail the abuse of Iraqi prisoners by U.S. soldiers at Abu Ghraib prison. A fifty-three page document completed earlier in February by Major General Antonio M. Taguba was leaked to Seymour Hersh of the *New Yorker* magazine.⁹ The report indicated numerous instances of "sadistic,

⁹ ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> [hereinafter Taguba Report]; see

blatant, and wanton criminal abuses” that U.S. soldiers of the 372nd Military Police Company and members of the American intelligence community perpetrated on detainees at Abu Ghraib prison between October and December of 2003.¹⁰

These abuses included: breaking chemical lights and pouring the phosphoric liquid they contained on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch without anesthetic the gaping wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick; using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance biting a detainee.¹¹ Not only did the American media¹² broadcast the degrading and sexually explicit photographic evidence of this torture, but perhaps more significantly these photos appeared throughout the Middle East, including in Iraq, in the press and on Al Jazeera and other Arab satellite television channels.¹³ The torture of detainees accused of terrorism at Abu Ghraib prison caused shock and outrage around the world.

Further outrage followed from subsequent reporting that CIA interrogators at other overseas sites in secret prisons were using “harsh interrogation methods” on Al Qaeda detainees.¹⁴ These “enhanced interrogation techniques” again included noise, stress positions, and isolation, as well as waterboarding. Videotapes showing the use of these interrogation techniques by C.I.A. personnel on top operatives of Al Qaeda since 2002 were destroyed by C.I.A. officials in November

also Seymour M. Hersh, *Annals of National Security: Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 43, available at http://www.newyorker.com/archive/2004/05/10/040510fa_fact; Seymour M. Hersh, *Annals of National Security: The General's Report*, NEW YORKER, June 25, 2007, at 58, available at http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?currentPage=1.

¹⁰ Taguba Report, *supra* note 9, at 16-18.

¹¹ *Id.* at 17-18.

¹² See, e.g., Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

¹³ See Interview by Alhurra TV with President George W. Bush (May 5, 2004), www.gpoaccess.gov/wcomp/v40no19.html (condemnation by President George W. Bush appearing on Arab television, stating “This is not America”); see also David Paul Kuhn, *Damage Controon Abu Ghraib*, CBS NEWS, May 5, 2004, <http://www.cbsnews.com/stories/2004/05/05/politics/main615811.shtml>.

¹⁴ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01. Dana Priest won a Pulitzer Prize for a series of articles about this and other CIA activities in the war on terror.

2005.¹⁵ Before and after this, charges and commentary about use of these techniques on Al Qaeda detainees again were heard throughout the Middle East and in Iraq on Al Jazeera and other Arab satellite television channels, adding to the international outrage and encouraging the view that these practices were based on policies imposed from top levels downward through the chain of command of the United States government.¹⁶

This research moves beyond the immediate perpetrators and victims of this torture. Instead, we investigate the broader radiating effects of the Bush Administration's interpretations of torture law on important individual legal decision makers. In particular, we are interested in the impact of legal indeterminacy on the thinking of Iraqi judges about the meaning and acceptability of torture. As noted, these judges were among the primary targets of American efforts to bring the rule of law to Iraq. The issue of torture is an important arena in which individual Iraqi judges form their own early and distinct impressions about application of the rule of law in a modern democratic nation. Each of these judges must either collaborate or resist interpretations of the rules of torture law associated with the American occupation of Iraq.

The actions of the Bush Administration made it reasonable to ask whether a meaningful set of legal norms existed about human rights violations such as the torture of prisoners in post-Baathist Iraq. For example, in the aftermath of Abu Ghraib becoming international news and reports surfacing about the torture of terrorist suspects in clandestine prisons around the world, the question remained whether individual Iraqi judges would collaborate with or resist the interpretations of the Bush Administration about forceful interrogation in punishing Coalition soldiers for torturing suspected Al Qaeda terrorists. If we are to learn from the experiences of Iraq and the larger Global War on Terror, we need to understand how our own use of law impacts those we wish to influence - such as Iraqi judges. Specifically, can we expect judges in such circumstances to collaborate or resist the importation of American legal norms? We break new ground in answering this question by

¹⁵ Mark Mazzetti & David Johnston, *Justice Dept. and C.I.A. Watchdog Start Inquiry of Interrogation Videos' Destruction*, N.Y. TIMES, Dec. 9, 2007, at A28 (three detainees who were tortured include: Abu Zubaida, who helped run a training camp in Afghanistan; Abd al-Rahim al-Nashiri, chief of Al Qaeda operations in the Arabian peninsula; and Ramzi Bin al-Shibh, an Al Qaeda leader).

¹⁶ On the origin of interrogation policies, see SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 16-17, 20 (2004).

systematically examining the decision-making of individual Iraqi judges confronting relevant cases.

III. PROGRAMMING IRAQI JUDGES

The Bush Administration's focus on developing democracy and the rule of law through support for an independent judiciary reflects a core element of rule of law theory. Albert Venn Dicey's principles of the rule of law proposed at the end of the nineteenth century are now widely regarded as an essential foundation for modern democracy.¹⁷ When considering how to reshape Iraq in 2003, the Administration focused on reeducating members of the Iraq judiciary.¹⁸ The Coalition Provisional Authority (CPA) increased the salaries of judges from approximately 100 to 1000 dollars per month in order to lower their incentives for financial corruption.¹⁹ More importantly, American authorities developed a "judge's school" for Iraqi judges, in which the judges could be indoctrinated with democratic norms.²⁰

Our opportunity to conduct research during this extraordinary period of history occurred through unexpected access to an American-organized and British-subsidized central European legal research institute which had been training judges and lawyers from the post-communist states of eastern and central Europe. For security reasons, the institute requested anonymity in this research and we honor that request in this article.²¹

With the support of the U.S. Department of State, the institute brought in for training more than one hundred judges from across Iraq (see Map 1). Successive groups of Iraqi judges attended two-week

¹⁷ Dicey's principles are equality before the law, no crime without law, and generality of the courts. See A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198-99 (8th ed. 1915), available at http://www.constitution.org/cmt/avd/law_con.htm.

¹⁸ NAT'L SEC. COUNCIL, *supra* note 2, at 17.

¹⁹ See U.K. FOREIGN AND COMMONWEALTH OFFICE, IRAQ (2007), <http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Front%3fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1075299384650> (stating that in order to rebuild the Iraq judiciary, judicial salaries were increased to reduce the temptation to accept bribes).

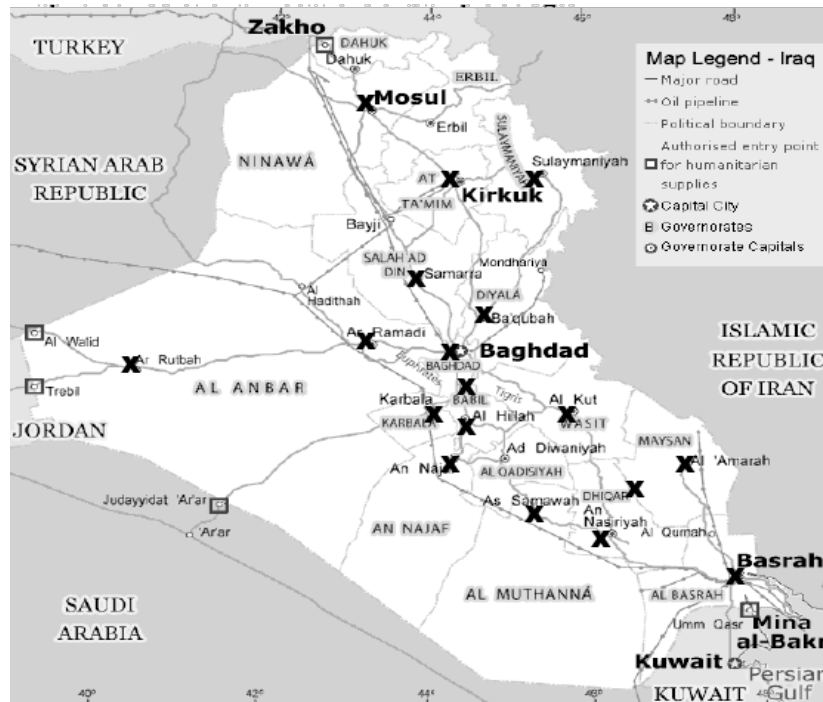
²⁰ See e.g., AM. BAR ASS'N, JUDICIAL REFORM INDEX FOR IRAQ, *supra*, note 3.

²¹ In August of 2003, the bombing of the U.N. headquarters in Baghdad by suspected Al Qaeda terrorists killed the U.N. High Representative to Iraq Sergio De Mello and also abruptly ended a post-invasion introductory meeting between the leadership of the Iraqi Bar and representatives of Coalition countries. As the security situation in Baghdad deteriorated, attention turned to opportunities outside Iraq to train judges.

programs, taught on a pro bono basis by judges and lawyers from the United States and other countries. Instruction focused on the role of judges in a democratic society, including the importance of judicial independence, court and case management, sources of law with an emphasis on international human rights and humanitarian law, judicial ethics, media and the courts, community outreach, and judicial leadership.

For these meetings, we chose to develop an experimental survey design around hypothetical torture cases that judges were asked to individually consider and sentence. Before presenting this design, we first provide a brief discussion of indeterminacy and the interpretations of torture law by the Administration at the time of the study.

MAP 1: JURISDICTIONAL LOCATIONS OF SAMPLE JUDGES



IV. INDETERMINACY AND TORTURE LAW

A core principle of critical legal theory is that law is indeterminate.²² According to strong statements of the indeterminacy thesis, “the existing body of legal doctrines—statutes, administrative regulations, and court decisions—permits a judge to justify any result she desires in any particular case.”²³ In other words, legal doctrines generally are susceptible to varied interpretations and “a competent adjudicator can square a decision in favor of either side in any given lawsuit. . . .”²⁴

Of course, this assertion of indeterminacy is easily overstated. Mark Tushnet reprises the brief but controversial trajectory of this school of thought by stating:

[B]old and overstated claims that *all* results were underdetermined were replaced by more defensible ones, to the effect that many results were underdetermined, or that results in many interesting cases were, or . . . that enough results were underdetermined to matter. One or another of these revised versions of the indeterminacy argument is, I think, accepted by nearly every serious legal scholar in the United States.²⁵

Beyond this, Tushnet suggests that “major components of critical legal studies have become the common sense of the legal academy,

²² For example, H.L.A. Hart writes that “[i]n every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.” H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961). For a comprehensive bibliography of critical scholarship, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

²³ Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); see also George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 558 (1994) (citing Richard A. Posner, *THE PROBLEMS OF JURISPRUDENCE* 23 (1990) (“Moreover, the American Legal tradition is now so rich, variegated, conflicted, and ambivalent that a strand of it can easily be found to support either side in difficult cases.”)); David Kairys, *Freedom of Speech in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 140, 160-61 (David Kairys ed., 1982) (“[S]ince precedents and reasoning can be distinguished, modified, or discarded, they do not require any particular rule or result. . . [T]he law merely provides a variety of bases for justifying choices made on other grounds.”); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983) (arguing that prior decisions cannot constrain present decisions because “it turns out that the limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1766-67, 1776 (1976) (describing how law is infused with irreconcilably opposed principles and ideals).

²⁴ Solum, *supra* note 23, at 462.

²⁵ Tushnet, *supra* note 8, at 108.

acknowledged to be accurate by many who would never think of identifying themselves as critical legal scholars.”²⁶

In addition to the indeterminacy thesis, critical legal scholars also maintain the widely accepted and related thesis that legal discourse obscures and reinforces relations of power and domination.²⁷ Through indeterminacy, the legal system allows powerful interests to dominate outcomes, while retaining the appearance of neutrality and autonomy.²⁸ That is, indeterminacy frees legal actors from the apparent constraints imposed by existing rules through the use of legal arguments. Critical theory therefore does not assume that the indeterminacy of law is simply random, but that resulting legal outcomes are patterned in response to powerful interests and perceived threats to these interests by judges.

Memos written by Bush Administration lawyers demonstrated the indeterminacy of torture law doctrine. On August 1, 2002, the Office of Legal Counsel (OLC) issued a memorandum entitled “Standards of Conduct for Interrogation Under 18 U.S.C. Section 2340A,”²⁹ now commonly known as the “Torture Memo.”³⁰ Assistant Attorneys General Jay Bybee and John C. Yoo³¹ drafted the opinion to explain the

²⁶ *Id.* at 100.

²⁷ Solum, *supra* note 23, at 463; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612, 614 (1958) (when legal rules do not dictate, judicial decisions are made in light of social policies).

²⁸ Solum, *supra* note 23, at 470.

²⁹ 18 U.S.C. sec 2340A (2008) provides in pertinent part:

(a) Offense. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. - There is jurisdiction over the activity prohibited in subsection (a) if - (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. - A person who conspires to create an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

³⁰ Memorandum from Jay Bybee, Office of Legal Counsel (“OLC”) Dir. and Asst. Att’y Gen., to Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. § 2340-2340A (Aug. 1, 2002) [hereinafter Torture Memo].

³¹ While Bybee signed the memo, Yoo has been identified as drafter by the Department of Justice’s Office of Professional Responsibility. OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, REPORT – INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 251 (2009) (stating Yoo’s direct responsibility).

restrictions imposed by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), as implemented in U.S. law.³² The memo greatly broadened the actions and circumstances that would allow interrogation techniques to avoid being classified as torture:

18 U.S.C. section 2340A does not prohibit as “torture” merely cruel and inhuman interrogation techniques, but only those interrogation techniques that inflict pain akin in severity to death or organ failure. But if we are wrong, to the extent 18 U.S.C. section 2340A prohibits interrogation techniques the President approved, the law would violate the American Constitution. This is because it is inherent in the Presidential office to determine what interrogation techniques shall be used, and neither Congress nor the Supreme Court has a greater power than the President on the subject. However, if the President’s commands were found subject to 18 U.S.C. section 2340A without violating the Constitution, then, nevertheless, the President’s endorsement of such interrogation techniques could still be justified as a matter of necessity and self-defense, being the moral choice of a lesser evil: harming an individual enemy combatant in order to prevent further Al Qaeda attacks upon the United States.³³

Written in the aftermath of the September 11 attacks on the United States, Yoo claimed there was a legal distinction between torture and “merely” or “extremely” cruel and inhuman interrogation practices.³⁴ This distinction dated to a decision by the Reagan Administration specifically not to ask for Senate ratification of the “cruel and inhuman” language of the CAT. Undefined torture instead became the basis of ratification.³⁵ Torture, the Yoo memo therefore reasoned, could refer only to those interrogation techniques that it specified as causing pain similar to “death or organ failure.”³⁶ According to Yoo, although the CAT prohibits both “cruel, inhuman or degrading treatment” as well as torture, there is a distinction between the two.³⁷ Yoo asserted that the Senate ratification of the CAT explicitly prohibited only torture and that certain acts may be cruel, inhuman, or degrading, but still not produce enough pain and suffering of the requisite intensity to fall within section

³² United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 JLM 1027 (1984), *modified in* 24 JLM 535 (1985) (entered into force for the United States Nov. 20, 1994, (providing that “no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment”).

³³ Michael Hadfield, Fear, Legal Indeterminacy, and the American Lawyering Culture, 10 LEWIS & CLARK L. REV. 511, 514 (2006).

³⁴ *Id.* at 514-15.

³⁵ Torture Memo, *supra* note 30, at 18.

³⁶ *Id.* at 46.

³⁷ *Id.* at 17

2340A's proscription against torture.³⁸ In the alternative, Yoo claimed that the President of the United States nevertheless has Constitutional authority to determine which interrogation techniques shall be used as a matter of national necessity and self-defense against further Al Qaeda attacks.³⁹

By the beginning of 2002, John Yoo publicly opined that "treaties do not protect members of the Al Qaeda organization,"⁴⁰ Donald Rumsfeld stated that "unlawful combatants do not have any rights under the Geneva Convention,"⁴¹ and Alberto Gonzales observed that "this new paradigm renders obsolete Geneva's strict limitations."⁴² The Torture Memo and the resulting policies employed by Coalition forces in Iraq made the indeterminacy of the U.S. ratification of the CAT explicit – despite the *jus cogens* prohibition against torture, the Administration's policies had created a "coherent" doctrinal framework in which torture was ostensibly permissible in all relevant circumstances.

And yet it could hardly be said that OLC's reasoning reflected *opinio juris*. The Torture Memo and the Administration's opaque policies regarding the legality of torture undermined the scope and force of the Geneva Conventions in the United States and purported to place the final authority in the hands of the U.S. President to determine what torture means under U.S. law, and specifically in the context of Al Qaeda. Articles of the United Nations International Covenant on Civil and Political Rights, ratified by both Iraq and the United States,

³⁸ *Id.* at 16-17, 46.

³⁹ *Id.* Finally, Yoo argued for a legal distinction between protected prisoners of war and unlawful enemy combatants to justify the use of torture. *Id.* (determining that the Taliban and Al Qaeda prisoners were not entitled to prisoner-of-war status under the Geneva Conventions, a finding necessary to shield U.S. officials from being prosecuted under the War Crimes Act).

⁴⁰ See Memorandum from Jay S. Bybee, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Dep't of Def., Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [hereinafter Bybee Memorandum] (concluding that the Geneva Conventions do not protect members of Al Qaeda or the Taliban).

⁴¹ See Katharine Q. Seelye, *A Nation Challenged: The Prisoners; First "Unlawful Combatants" Seized in Afghanistan Arrive at U.S. Base in Cuba*, N.Y. TIMES, Jan. 12, 2002, at A7 (citing Defense Secretary Donald H. Rumsfeld calling the prisoners unlawful combatants, distinguishing them from prisoners of war).

⁴² See Memorandum from Alberto R. Gonzales, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban to the President (Jan. 25, 2002), available at <http://msnbc.msn.com/id/4999148/> ("In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges . . .").

specifically criminalize the torture of war criminals.⁴³ Iraqi law also prohibits the use of torture by any public servant.⁴⁴ Yet, following the terrorist attacks on September 11th, coercive interrogation techniques were authorized at the highest levels of the Administration, legally certified by attorneys in the White House and Department of Justice, conveyed to the Pentagon and Central Intelligence Agency, and presumably filtered down the chain of command to prison guards and interrogators. The government's interpretation of law thus can often become de facto law in the breach of uncertainty.⁴⁵

Thus, we hypothesize that Iraqi judges, educated in part by American lawyers, confronted an indeterminate legal understanding of the laws of torture while the Bush Administration continued to debate internally which interrogation methods were protected by the Geneva Conventions. While the bulk of international law and past U.S. practice and *opinio juris* suggested that torture was illegal and morally repugnant, recent interpretations of torture law offered ways to rationalize its use when applied in certain contexts.

V. HYPOTHESES

The indeterminacy of torture law in Iraq during the period of our research, in 2004 and 2005, created the circumstances for a variable impact on the normative judgments of active judges in Iraq concerning the punishment of torture. We anticipated that indeterminacy in torture law could produce three different patterns of sentencing by individual Iraqi judges that we treat as testable hypotheses.

⁴³ Article 7 of the International Covenant on Civil and Political Rights states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, *available at* <http://www2.ohchr.org/english/law/ccpr.htm#art7>. The European Convention on Human Rights uses a similar formulation in its Article 3 stating, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

⁴⁴ See Iraqi Criminal Procedure Code, art. 127 ("The use of "any illegal method to influence the accused and extract a confession from him. . . Mistreatment, threats, injury, enticement, promises, psychological influence, or use of drugs or intoxicants [are] considered illegal methods."); See also Iraqi Penal Code, art. 333 ("Any public official or agent who tortures or orders the torture of an accused, witness or informant in order to compel him to confess to the commission of an offence or to make a statement or provide information about such offence or to withhold information or to give a particular opinion in respect of it is punishable by imprisonment or by detention. Torture shall include the use of force or menaces.").

⁴⁵ See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

A. HYPOTHESIS 1: UNIFORM LENIENT SENTENCING

We first predicted that the interpretation of torture law reflected in the Bush Administration memos, particularly Yoo's thesis that even if interrogation practices constitute torture, they may be justified,⁴⁶ would create a climate of leniency in which Iraqi judges would impose short sentences for guards convicted of torturing prisoners in Iraq. The fact that there was no critical discussion of Yoo's thesis in the institute training program further reinforces our confidence in our prediction.

The prediction of leniency came from our expectation that judges would be influenced by the revelation of abuse of prisoners at Abu Ghraib and the lenient sentences U.S. military courts imposed on those responsible. Only about a dozen soldiers were convicted of charges related to the torture at Abu Ghraib,⁴⁷ and most of these received minor sentences. Specialist Charles Graner received the most severe punishment, ten years in federal prison.⁴⁸ However, the highest-ranking officer, Lieutenant Colonel Steven Jordan, was acquitted of all charges of prisoner maltreatment against him and received only a technical reprimand.⁴⁹ Janis Karpinski was merely demoted from Brigadier General in the aftermath of the scandal, for dereliction of duty, making a material misrepresentation to investigators, and failure to obey a lawful order.⁵⁰ In fact, the Final Report of an Independent Panel for the Department of Defense absolved all senior U.S. military and political leadership of responsibility, concluding that "[t]he Panel finds no evidence that organizations above the 800th MP Brigade-or the 205th MI Brigade-level were directly involved in the incidents at Abu Ghraib."⁵¹

Despite the extensive media coverage around the world of the Abu Ghraib abuse, neither the abuse nor torture law was openly

⁴⁶ See *supra* note 30 and accompanying text.

⁴⁷ See Associated Press, *Highest Ranking U.S. Soldier Convicted in Abu Ghraib Paroled*, TRIB., Oct. 1, 2007, available at <http://www.iht.com/articles/ap/2007/10/01/america/NA-GEN-US-Abu-Ghraib-Frederick.php>.

⁴⁸ See Kate Zernike, *Ringleader In Iraqi Prisoner Abuse is Sentenced to Ten Years*, N.Y. TIMES, Jan. 15, 2005, at A1.

⁴⁹ See Paul Von Zielbauer, *Army Colonel is Acquitted in Abu Ghraib Abuse Case*, N.Y. TIMES, Aug. 29, 2007, at A8.

⁵⁰ See Ralph Blumenthal, *Private will Face New Charges over Abuse of Prisoners in Iraq*, N.Y. TIMES, May 6, 2005, at A13.

⁵¹ JAMES SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 43 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

discussed at the institute where this study took place. We hypothesized that the American presence, both at the institute program and in Iraq, and the silence in the program about U.S. involvement in the use of torture would lead to uniform lenience among the individual judges in prescribing sentences for the case vignettes described below. Similarly, concerns about career advancement could logically be expected to influence judgments; Iraqi judges may have been reticent to challenge the guiding theories of those who they saw as able to help them find improved placements in the new judiciary. Thus, we expected that individual Iraqi judges would assign lenient sentences to prison guards convicted of torture and thereby assume a relatively uniform collaborative role in the occupation and its use of torture. The silence of both the American lawyers and Iraqi participants on such a provocative issue suggested an atmosphere of broad collaboration, although other factors may have been at work as suggested next.

B. HYPOTHESIS 2: SELECTIVELY LENIENT SENTENCING

Alternatively, we hypothesized that Iraqi judges might reserve lenient sentences for Coalition guards who are convicted of torturing Al Qaeda prisoners. Coalition soldiers are unaccountable to Iraqi authorities and therefore wield unique power in Iraq. The critical legal perspective emphasizes the role of power in shaping judicial decisionmaking and explains how law is used selectively to protect the powerful.⁵² Jack Goldsmith candidly called the interpretation of torture law “an exercise of sheer power.”⁵³

Given the power dynamic between Coalition soldiers and foreign terrorists, we estimated that this leniency based on the Bush Administration’s sanction of torture would be especially prominent in these troublesome or “hard cases.”⁵⁴ The power dynamic involved in the conflict between the U.S. occupying forces and Al Qaeda members, as well as insurgent Sunnis and Shiites, provoked intense conflict and confusion. Hierarchical power implies the capacity of group members to

⁵² See *supra* Part IV, at 11-12.

⁵³ JACK GOLDSMITH, *THE TERROR PRESIDENCY* 150 (2007).

⁵⁴ SALLY MERRY, *The Criminalization of Everyday Life*, in *EVERYDAY PRACTICES AND TROUBLE* CASES 14, 15 (Austin Sarat et al. eds., 1998) (noting that “[i]t is at these moments of trouble that the systems of law that regulate social life are laid bare, raised into the domain of the explicit”).

influence outcomes in troublesome ways.⁵⁵ The law of torture could be a legal vehicle through which the power of Coalition forces was channeled in responding to the threat posed by Al Qaeda.⁵⁶ Our second hypothesis is therefore that Iraqi judges would specifically collaborate with the occupying forces by imposing selectively lenient sentences in the “hard cases” involving Coalition guards torturing Al Qaeda prisoners.

C. HYPOTHESIS 3: POLARIZED LENIENT AND SEVERE SENTENCING

Alternatively, we also considered the possibility that the foregoing reasoning was too cynical and simplistic in its application of a critical legal perspective. Indeterminacy in the law of torture also left open an opportunity among the individual judges for severity in sentencing convicted torturers, as well as leniency. Individual Iraqi judges’ severe sentencing of Coalition guards torturing Al Qaeda could be understood as resistance to the Bush Administration’s implementation of harsh interrogation methods, for example, against suspected Al Qaeda. These judges might “resist” judicial support for harsh interrogation by imposing severe punishment for its use particularly if these harsh methods were believed to be ineffective or even counterproductive by some judge. Our third hypothesis therefore predicted a highly polarized sentencing pattern in which some judges collaborated with the authorities by imposing lenient sentences for Coalition guards convicted of torturing Al Qaeda, while other judges resisted and imposed severe sentences for the same exact fact pattern. However, the means by which collaboration and resistance happen could only be fully revealed by examining the decisions made in specific case circumstances by each of the individual judges. This attention to the specific decisions of individual judges is the unique contribution of this research.

⁵⁵ See, e.g., U.S. DEP’T. OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM (Apr. 28, 2006), available at <http://www.state.gov/s/ct/rls/crt/2006/82738.htm>.

⁵⁶ At the time of our study, concern about Al Qaeda in Iraq was close to its peak because of the extreme violence involving attacks by this faction. See, e.g., Chris Suellentrop, *Sy Hersh Says it is Okay to Lie (Just not in Print)*, NEW YORK, Apr. 11, 2005, available at <http://newyorkmetro.com/nymetro/news/people/features/11719/index3.html>.

VI. STUDYING RULE OF LAW IN IRAQ USING HYPOTHETICAL FACT PATTERNS

In order to understand Iraqi judges' normative judgments about torture during the occupation of their country, we used the factorial survey method developed by Peter Rossi, which joins features of survey methodology and experimental design and has been widely applied.⁵⁷ In our study, each Iraqi judge was asked individually to respond to hypothetical case fact patterns or "vignettes" by assigning prison sentences to prison guards accused of torturing prisoners who are suspected terrorists.⁵⁸ The vignettes contain fact patterns that are randomly varied, which allows factual elements of the hypotheticals to be examined independently of one another. The factorial survey method

⁵⁷ See, e.g., Peter Rossi et al., *Measuring Household Social Standing*, 3 SOC. SCI. RES. 169 (1974); William Sampson & Peter Rossi, *Race and Family Social Standing*, 40 AM. SOC. REV. 201 (1975); RICHARD BERK & PETER ROSSI, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997); Guillermina Jasso & Peter Rossi, *Distributive Justice and Earned Income*, 42 AM. SOC. REV. 639 (1977); Wayne Alves & Peter Rossi, *Who Should Get What? Fairness Judgments in the Distribution of Earnings*, 84 AM. J. OF SOC. 541 (1978); Steven Nock & Peter Rossi, *Ascription versus Achievement in the Attribution of Social Status*, 84 AM. J. OF SOC. 564 (1978); Christine Bose & Peter Rossi, *Gender and Jobs: Prestige Standings of Occupations as Affected by Gender*, 48 AM. SOC. REV. 316 (1983); Guillermina Jasso, *Whom Shall We Welcome? Elite Judgments of the Criteria for the Selection of Immigrants*, 53 AM. SOC. REV. 919 (1988); Guillermina Jasso & Karl-Dieter Opp, *Probing the Character of Norms: A Factorial Survey of the Norms of Political Action*, 62 AM. SOC. REV. 947 (1997); Guillermina Jasso & Murray Webster, *Assessing the Gender Gap in Just Earnings and its Underlying Mechanisms*, 62 SOC. PSYCHOL. Q. 367 (1999); Michael Hechter et al., *Do Values Matter? An Analysis of Advance Directives for Medical Treatment*, 15 EUR. SOC. REV. 405 (1999).

⁵⁸ Because U.S. soldiers were at the time of our study immune from prosecution in Iraqi courts, our design cannot represent actual sentencing practices in Iraq. These cases, however, could be tried in Iraqi courts. This issue has been debated in the context of the security agreement regarding the presence of U.S. troops in Iraq. There are a number of cases whose facts recently have pressed the boundaries of U.S. immunity. See, e.g., Mark Sherman, *US Wants Iraq to Try American Suspected of Aiding Militants*, BOSTON GLOBE, February 9, 2006, available at http://www.boston.com/news/world/middleeast/articles/2006/02/09/us_wants_iraq_to_try_american_suspected_of_aiding_militants/ (explaining that the U.S. government wants Iraqi court to handle criminal charges against a naturalized American citizen being held in Iraq on suspicion that he is a senior operative of insurgent leader Abu Musab al-Zarqawi); Neil Lewis, *Lawyers Seek to Free U.S. Citizen Held in Iraq*, N.Y. TIMES, Oct. 15, 2006, at A18 (American citizen tried in an Iraqi court on kidnapping charges sentenced to death); see also Michael Moss, *American Recalls Torment as a U.S. Detainee in Iraq*, N.Y. TIMES, Dec. 18, 2006, at A1 (series examining the problems with the legal system and law enforcement in Iraq). Still, it is also noteworthy that such cases will for the foreseeable future be rare in Iraq, so that our hypothetical case approach is the best available means at present for studying sentencing norms involving Coalition forces and Al Qaeda in Iraq. Given current political constraints, our survey experiment may be the *only* immediately available way to capture and learn about sentencing from the historical experience of occupied Iraq, although because it is hypothetical it is inevitably limited for purposes of understanding actual case outcomes.

also systematically widens the range of circumstances or conditions that in practice complicate normative situations and judgments. In the context of punishment, a factorial survey design presents evidence of rule breaking and mitigating evidence, and in this way is designed to mimic the reasoning that judges individually apply.⁵⁹

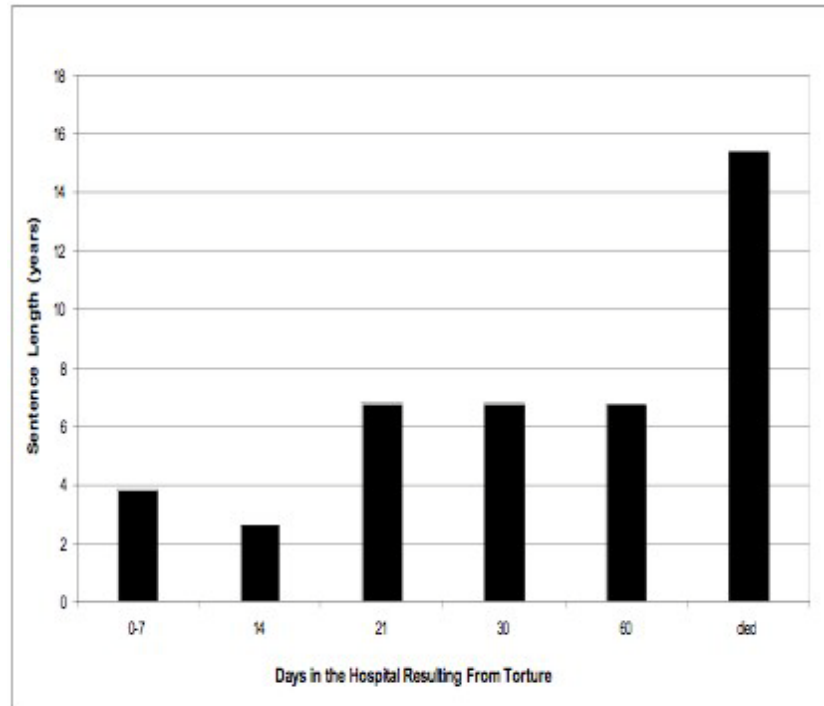
An important feature of the factorial survey method is that the randomization of the fact patterns in the hypothetical cases diminishes highly spurious correlations among the case characteristics, or the possibility of strong systematic associations among the facts. In practical terms, this means that after we identify the important case facts in the multivariate analyses below, we can then use simpler graphs to display the influence of specific variables. A unique feature of our application of the factorial survey method in this paper is that we are able to examine results for each judge individually, as illustrated by Figures 3, 4, and 5 below.

Before moving to the fully individualized presentation, however, we first introduce a summary table, Figure 1, that aggregates the judges' sentencing decisions in relation to the degree of victim injury and resulting hospitalization. This table not only reveals the effect of victim injury on sentencing, but also illustrates the importance of randomization in our design. Thus Figure 1 indicates that injuries leading to one to two weeks of hospitalization result in average sentences in the study in the range of two to four years; injuries causing three weeks to two months or more of hospitalization result in average sentences of nearly seven years; and injuries causing death result in sentences of about 15 years in prison. As a result of the randomization, this effect is net of other influences, such as the group membership of the prison guard or prisoner.⁶⁰

⁵⁹ Carroll Seron et al., *How Citizens Assess Just Punishment for Police Misconduct*, 44 CRIMINOLOGY 925, 931 (2006).

⁶⁰ As a result of the randomized design of the factorial survey method, the degree of injury is not notably associated with group membership. In contrast, if the fact situation in a sample of actual court cases involved an Al Qaeda prison guard torturing an Iraqi prisoner, one might assume that the degree of injury would be greater than when a Coalition member tortures another Coalition member. However, randomization minimizes the likelihood of any systematic associations of this type among the case characteristics.

FIGURE 1: MEAN IRAQI JUDGE PRISON SENTENCES BY DAYS OF HOSPITALIZATION REQUIRED FOR TORTURED PRISONER



VII. DESIGNING HYPOTHETICAL TORTURE CASES

A. AUGUST 2004, PILOT PHASE

The pilot phase of our research involved an initial meeting with fifty of the highest ranking judges from Iraq, one of whom was subsequently selected to preside over, and later resigned from, the trial of Saddam Hussein.⁶¹ The groups that made up our pool included eighty-two Iraqi judges, who attended subsequent training courses in November of 2004 and April of 2005. This represented about ten percent of the

⁶¹ For the sake of anonymity, we cannot provide the name or identifying information of this judge in a citation.

approximately 700 judges in Iraq, and three of the only seven women judges in Iraq are included in the sample.⁶²

B. NOVEMBER 2004 GROUP

The period from 2004 through 2005 was turbulent in ways that may have influenced our research and therefore merit brief description. Several of the judges who took part in institute sessions were subsequently assassinated. Security was a constant concern in the transportation and housing of the judges for the programs. Further security issues emerged when the head of the Coalition Provisional Authority, L. Paul Bremer, and the Deputy Secretary of State, Richard Armitage, paid courtesy visits to the institute program. Media coverage of the issue of torture at Abu Ghraib prison continued from early 2004 throughout the institute programs. Just prior to and during the November 2004 program at the institute, Coalition forces mounted a major counter-offensive producing heavy loss of life in the city of Fallujah. In January 2005, voters in Iraq selected representatives to the Transitional National Assembly to write Iraq's constitution.

In November 2004, when violence and crime rates were high,⁶³ all forty-three Iraqi judges attending the institute program were asked to impose hypothetical sentences on prison guards accused of torturing imprisoned suspected terrorists.⁶⁴ At this program session, both the prison guard and the prisoner in our vignettes were described as "Iraqi." This held the statuses of the torturer and terrorist constant and eliminated from the design the power and conflict dynamics involved in Coalition forces torturing Al Qaeda. We remedied this design decision in the April phase of the research described in the next section.

The November vignette reads as follows in English:

The offender, a PRISON GUARD, was convicted of ordering the torture of a PRISONER in violation of the International Covenant on Civil and Political Rights. At the time of the offense, the state had

⁶² Judges were selected in Iraq at random to attend the institute after the initial meeting during the pilot phase of this research.

⁶³ Felony case dispositions, including torture, were rising rapidly, for example, increasing by forty percent between November 2003 and November 2004. See Nina Kamp et al., *The State of Iraq: An Update*, N.Y. TIMES, Dec. 14, 2005, at A35, available at <http://www.nytimes.com/2005/12/14/opinion/14opchart.html?hp>.

⁶⁴ As compensation for their involvement in the study, the judges each received a phone card with about \$20 in credit for phone calls from the institute to Iraq.

declared a public emergency because of terrorist activities, including a string of bombings in major cities. The PRISONER and GUARD are from the same ethnic group. The PRISONER was also a known low-ranking terrorist. The offending PRISON GUARD is female; the PRISONER is male. At the time of the offense, the offending PRISON GUARD was forty years old; the PRISONER was thirty years old. The offending PRISON GUARD was married with no children; the PRISONER was also married with no children. The PRISONER required hospitalization for three weeks as a result of his injuries. Prior to this offense, the offending PRISON GUARD had no prior record of misconduct involving prisoners.⁶⁵

Case characteristics were systematically varied in the November 2004 design, as described more fully in Table 1: the guards' age, gender, command responsibility, family background, and prior record; the prisoners' age, gender, family background, injury, and terrorist involvement; and whether the guard and prisoner were from the same or different ethnic groups.

The inclusion of variable characteristics of the situations in the vignette template was a key step in the factorial survey method. Each dimension (e.g., length of hospitalization resulting from torture) contained levels or categories. The vignette template was based on descriptions of torture situations discussed in human rights reports, the media, and actual military cases. Once illogical or unnecessary levels or categories of variables were eliminated, vignettes were randomly generated as a sequence of events in the order reported in the sample template, including random omission of information. The vignettes vary considerably but were systematic in evaluating how situational or mitigating factors affect the judges' responses to the cases, as measured by the question, "What do you believe is a just sentence for this case?" The judges were instructed to assign a sentence in number of months or years of incarceration, or assign a sentence of "zero" if they believed no prison time was warranted.

⁶⁵ A sample vignette from the November 2004 administration is reproduced in Arabic:

[illegible]

C. APRIL 2005 GROUPS

For the subsequent April group surveys, we could not ignore the concerns now increasingly expressed, namely that Coalition torture tactics were in themselves inciting violence and could ignite intensified sectarian conflict. In response to the reality of increased conflict during this time,⁶⁶ incited in part by the pervasiveness of the Abu Ghraib images, we made the exogenous power dynamics of Coalition, Al Qaeda, and other national/military affiliations explicit in our design. A critical legal perspective, with its assumptions that legal indeterminacy allows for incumbent powers to influence the direction of doctrine, was becoming increasingly salient in our understanding of these events, and we could no longer ignore its obvious implications.

We tested the validity of this analysis in April 2005, when another group of thirty-nine Iraqi judges came to the institute and participated in the study. We modified the design by dividing the judges into two roughly equal groups and adjusting the vignette experiment. The first group engaged in essentially the same exercise as the earlier November group of judges. The second group of judges was asked to engage in identical sentencing tasks as the first group, with the exception that the case characteristics now included the nationality/military group affiliations of the guards and their prisoners, including the Coalition forces and suspected Al Qaeda operatives.⁶⁷

Legal indeterminacy in the definition of torture, as in all indeterminate doctrines, widens the opening for decisions based on the influences of power.⁶⁸ The Torture Memo expressed an official U.S. government interpretation of the indeterminacy of torture law that it resolved in favor of allowing “harsh” interrogation techniques and asserting their special necessity in response to a fear and perceived need for protection from Al Qaeda.⁶⁹ The indeterminacy of the law of torture, however, also gave the individual Iraqi judges the latitude to respond to

⁶⁶ After our first study, the daily average of inter-ethnic attacks increased fifteen-fold. Nina Kamp et al., *The State of Iraq: An Update*, N.Y. TIMES, Dec. 20, 2006, at A29, available at <http://www.nytimes.com/2006/12/20/opinion/20ohanlon.html>.

⁶⁷ This procedurally simple but theoretically salient modification involved inserting into the vignette this sentence: “The PRISON GUARD is a member of the Coalition forces while the offending PRISONER is Iraqi.” Phone cards again were provided as compensation to both groups in April.

⁶⁸ Solum, *supra* note 23 at 43.

⁶⁹ The number of foreign fighters in Iraq nearly doubled between November 2004 and November 2006. See Kamp, *supra* note 66, at A29.

the power of the occupying Coalition forces and to fears of Al Qaeda with varying degrees of punishment, as reflected in the three hypotheses introduced above. Our analysis demonstrates how the indeterminacy thesis of the critical legal studies perspective can be explored with individual judges in a quantitative experimental design. The significance of this type of hypothetical investigation is that it can advance our knowledge of how individual judges become important participants in processes of potential regime transformation and institutional change.

VIII. THE FACTORIAL SURVEY RESULTS

First, we examine differences in average sentences across the three groups of judges surveyed in November 2004 and April 2005. Next, we consider sentencing decisions of the individual judges. Finally, we focus in greatest detail on the second group of April judges who sentenced cases that included the experimental variation in the nationality/military affiliations of guards accused of torturing suspected terrorists, paying particular attention to cases where Coalition forces were hypothesized to have tortured members of Al Qaeda in Iraq. Overall, the Iraqi judges were asked to sentence a total of 4,150 hypothetical cases.⁷⁰

Table 1 describes the case facts randomly assigned in the vignettes or hypothetical cases considered by all eighty-two judges. For example, it describes ten different levels of the “injury to prisoner” as considered in Figure 1.⁷¹ This table also includes the national/military affiliation that is introduced as the experimental variable in the second April group.

The average sentences imposed by judges in each of the three groups are indicated in Figure 2, and range from four years to six years. Of course, overall averages can conceal great variation, and this variability among individual judges is the unique defining feature of this article. Nonetheless, a notable preliminary finding in Figure 2 is that in contrast to our first hypothesis, the *average* sentences were more than

⁷⁰ The population of hypothetical criminal cases consisted of all the logically possible combinations of characteristics. Logically impossible combinations were deleted.

⁷¹ Cases were grouped in packets of 50. To summarize the results for this variable, we collapsed the first five values in Figure 1. Thus, if the victim was either “released from the hospital the same day” or “required hospitalization” for one three, five or seven days, this was reflected in Figure 1 as 0-7 days in the hospital resulting from torture.

four years in prison, and this does not appear lenient.⁷² Furthermore, even though the average sentence length in the first April group in Figure 2 modestly declined after the elections and the accompanying upsurge in violence between November 2004 and April 2005, the decrease was only from 4.51 to 4.01 years. These are still relatively long average sentences. This trend suggests that the Bush Administration memo and the presence of the American judges in the institute program did not uniformly convince Iraqi judges to leniently sentence convicted torturers. Below in Figures 3, 4, and 5, we examine with greater specificity the distribution of severity and leniency in these sentences by individual judges.

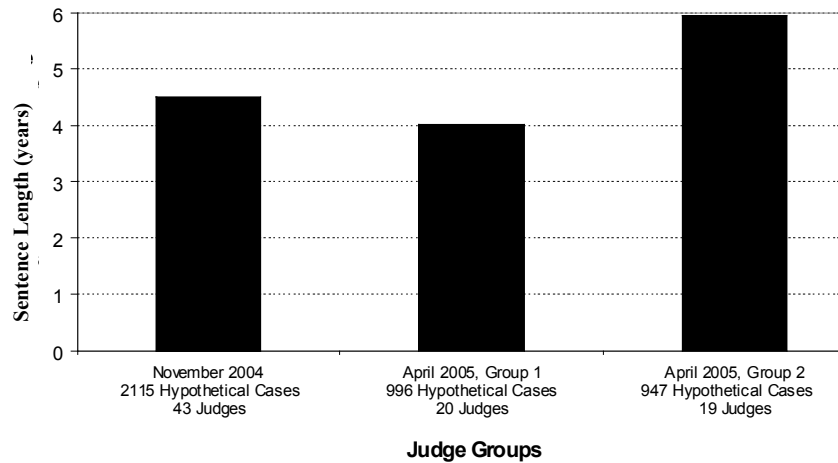
⁷² In the United States, most states divide their crimes into two major categories: misdemeanors and felonies. Which category a crime typically falls into depends on the length of punishment. A misdemeanor crime is usually defined by a more lenient sentence or the maximum length of time a person can be incarcerated for the crime, usually no more than one year. Crimes with a minimum jail time of over a year are usually characterized as felonies. *See* 18 U.S.C. § 3559 (2006).

TABLE 1: DESCRIPTIONS OF VARIABLES USED IN HYPOTHETICAL CASES

Independent Variables	Variable Description
Age of Prison Guard & Prisoner	Eight Levels, in increments of five years (18, 20, 25, 30, 35, 40, 45, 50).
Ethnicity of Prison Guard & Prisoner	Prison Guard & Prisoner from “the same ethnic group” or from “different ethnic groups.”
Prison Guard & Prisoner’s Family Background	Single, Married with no children, or Married with children.
Command Responsibility	Prison Guard was “ordered to commit offense” or “not ordered to commit the offense” or “ordered commission of the offense only.”
Prison Guard’s Prior Record	The offender has “a prior record of misconduct involving prisoners” or “no prior record of misconduct involving prisoners.”
Injury to Prisoner	The victim was “released from the hospital the same day”; or “required hospitalization” for one, three, five, or seven days; or for two weeks, three weeks, one month or two months; or the victim “died as a result of the offense.”
Gender of the Prison Guard & Prisoner	Prison Guard: Prisoner (1) Male: Female (2) Female: Male (3) Male: Male (4) Female: Female
Group Affiliation of the Prison Guard & Prisoner (Included only for April Group 2)	Prisoner: Prison Guard (1) Coalition: Iraqi (2) Iraqi: Coalition (3) Coalition: Coalition (4) Iraqi: Iraqi (5) Al Qaeda: Iraqi (6) Iraqi: Al Qaeda (7) Al Qaeda: Coalition (8) Coalition: Al Qaeda
Terrorist Information	(1) “The prisoner is a suspected terrorist.” (2) “The prisoner is a known high-ranking terrorist.” (3) “The prisoner is a known low-ranking terrorist.” (4) “The prisoner is not a terrorist.”

We note first, however, that even more striking in Figure 2 is the notably higher average sentence from the second group of Iraqi judges in April 2005 over the first group.⁷³ This means that when the specific affiliations of the respective combatant parties were included in the hypotheticals in our second April experimental group, the Iraqi judges became notably more severe on average. This abrupt change is consistent with our second hypothesis that torture convictions involving Coalition forces and Al Qaeda suspects represent “troublesome” or “hard cases” for these Iraqi judges, but this change is again inconsistent with our first hypothesis that there would be uniform leniency. In Figure 3 below, which considers the judges individually, we will demonstrate more precisely how the inclusion of this specific hypothetical combination of guards and prisoners in the second April experimental group accounts for the unexpected severity in the overall mean sentences above.

FIGURE 2: MEAN SENTENCE LENGTH FOR IRAQI JUDGE GROUPS



Tables 2 and 3 indicate how selected case facts in Table 1 affected the sentencing decisions in the three groups of judges overall. Tables 2 and 3 summarize these effects by presenting the mean regression coefficients for individual case characteristics in judge-

⁷³ Recall that the only change in the hypothetical cases presented to the second group of judges in April was that we specified the nationality/military group affiliations of the prison guards and prisoners labeling, for example, whether they were members of the Coalition forces, Al Qaeda, and/or Iraqi.

specific equations. These regression coefficients indicate the average independent impact of particular case facts on the sentencing decisions of the respective groups of judges, whom we consider individually in Figures 3, 4, and 5.⁷⁴ Distinctive results emerge in Table 2 with the introduction of the nationality/military affiliations in the second April group. That is, the coefficients in the first two columns are more similar to one another than they are to the coefficients in the third column. This means that when the fact pattern in the hypothetical case identifies specific affiliations of the torturers and the suspected terrorists, this information turns these cases into “trouble” or “hard” cases for the judges. The implication is that the judges’ responses to the affiliations produce disparities in sentencing decisions on the basis of those affiliations.⁷⁵ However, to reveal how this occurs, we next examine the sentencing decisions of the nineteen individual judges in the second April 2005 group.

⁷⁴ One specific comparison of effects across the three groups in Table 2 is potentially important before we focus on the nationality/military group affiliations in the second April experimental group in Table 3. This comparison involves the variable indicating whether the accused guard and suspected terrorist are from the same or different ethnic groups. When the guard and prisoner ethnicities differ, the coefficients are negative in all three groups (mean $b = -.825, -1.072, -1.171$). The increase in the negative coefficients in April suggests that, if anything, over this time period the judges on average increased their willingness to tolerate cross-group torture. We also explored the interaction of the ethnicity difference variable and the nationality/military group characteristics (to be discussed below), but the results were not statistically significant. Recall that these results precede the upsurge of inter-ethnic sectarian violence that emerged in 2006.

⁷⁵ More generally, the data above indicate substantial similarities in the Iraqi judges’ imposition of sentences across the November and the first April group - the groups whose vignettes of hypothetical cases omitted information, for example, about Coalition and Al Qaeda involvement respectively as guards and prisoners. These results replicate well over time despite remarkable in country turbulence and change. When the nationality/military affiliations are introduced into the cases for the second April experimental group, the decision-making changes markedly.

TABLE 2: MEAN REGRESSION COEFFICIENTS FOR JUDGE-SPECIFIC SENTENCE EQUATIONS, NOVEMBER 2004 AND APRIL 2005 GROUPS⁷⁶

		November 2004	April 2005 Comparison Group	April 2005 Experimental Group
Case Characteristics		Mean	Mean	Mean
Prison Guard	Prisoner			
—	Suspected Terrorist	-1.539	-1.424	2.239
—	Low Level Terrorist	-.211	.051	.457
—	High Level Terrorist	-.009	1.438	-1.574
Ordered to Torture Prisoner	—	-.429	-.559	-.028
Gave Command to Torture	—	-2.063	-.859	.344
Female	Female	-1.918	-1.760	3.714
Male	Female	-1.988	-2.808	3.754
Female	Male	-1.640	-3.027	4.940
Different Ethnicity		-.825	-1.072	-1.171
Age	—	-.055	-.069	.018
—	Age	.004	.028	-.030
Married without Children	—	-.272	-1.166	-1.485
Married with Children	—	-.007	.029	-2.976
—	Married without Children	-1.152	-2.823	.563
—	Married with Children	-.248	-1.315	.682
—	Days in the Hospital	.130	.134	.010
Prior Record	—	1.212	.879	.329
R-squared		.688	.747	.761
Adjusted R-squared		.511	.610	.529
# of Judges		43	20	19
Judgments		2115	996	947

⁷⁶ The regression coefficients are drawn from the judge-specific equations which include the full set of vignette characteristics; the omitted reference categories are: Terrorist Level – Prisoner not a terrorist; Gender – Prison Guard: Male, Prisoner: Male; Command Responsibility– Prison Guard not given command to torture; Group Affiliation – Prison Guard: Coalition Member, Prisoner: Iraqi ; Marital Status- Prisoner Guard: Single, Prisoner: Single. The April Group 2 equations also include the nationality/military affiliation variables (described in the text and summarized in Table 3).

Table 3 reveals the relationship between the combinations of nationality/military group affiliations and sentence severity in the second April experimental group of Iraqi judges. Note first in Table 3 that the guard-prisoner combination we highlighted as most likely to be troublesome for the judges stands out in terms of the standard deviation of its effect.⁷⁷ The largest standard deviation, 16.1 years, involves Coalition guards who tortured Al Qaeda prisoners. The smallest standard deviation, 2.85 years, involves Iraqi guards who tortured Iraqi prisoners. The sentencing range for the latter group is about thirteen years, while the range for the former group quadruples to about sixty years.⁷⁸ The torture of Al Qaeda suspects by Coalition guards clearly provokes disagreement among these judges, which we investigate in the next section.⁷⁹

⁷⁷ No coefficients are reported in the first row of Table 3 for Coalition guards convicted of torturing Iraqi prisoners, which reflects that this is the comparison group for the other guard-prisoner combinations in the further regression results this table summarizes. The standard deviation of this effect indicates the extent to which the individual judges vary in the length of the sentences they give to this combination of torturer and suspected terrorist.

⁷⁸ The coefficients in Table 3 represent years of imprisonment. Note that there are both negative and positive coefficients in this table. This is because the coefficient for each combination of guard and prisoner in the table is calculated in comparison to the omitted reference combination of Coalition guard and Iraqi prisoner. For example, the minimum sentence given by the judges in the experimental April group 2 to Coalition guard for torturing an Al Qaeda prisoner is 12.1 years less than for a Coalition guard torturing an Iraqi prisoner. The maximum sentence given by these judges to the latter guard-prisoner combination is 48.2 years. Thus the range of the difference in imposed sentences is 60.3 years.

⁷⁹ While our experimental design provided generic consideration of inter-ethnic conflict with the inclusion of a variable indicating whether the torturer and suspected terrorist were from the same or different ethnic groups, the effect of ethnic variation between the torturer and the suspected terrorist was actually in the unexpected direction of lenience, although this effect was never statistically significant. The ethnicity variable was also insignificant in its influence when we interacted this variable with the Iraqi-Iraqi prisoner-guard combination.

TABLE 3: SUMMARY OF REGRESSION COEFFICIENTS OF THE GUARD-PRISONER NATIONALITY COMBINATION IN THE JUDGE-SPECIFIC SENTENCE EQUATIONS, EXPERIMENTAL GROUP, APRIL 2005⁸⁰

Prison Guard	Prisoner	Regression Coefficients			
		Mean	S.D.	Min	Max
Coalition	Iraqi	—	—	—	—
Coalition	Al Qaeda	4.89	16.1	-12.1	48.2
Coalition	Coalition	3.17	5.13	-4.85	16.5
Iraqi	Iraqi	1.18	2.85	-1.35	11.5
Iraqi	Al Qaeda	.437	3.55	-4.01	11.8
Iraqi	Coalition	1.70	4.41	-4.69	15.4
Al Qaeda	Iraqi	2.70	9.51	-5.02	30.8
Al Qaeda	Coalition	.802	4.85	-4.29	13.6

IX. INDIVIDUAL JUDICIAL DECISION-MAKING

We now further investigate the results for each of the nineteen individual judge regression equations⁸¹ from the second April experimental group that underlie Table 3. We first describe these results and then present graphs that visually summarize the source of sentence disparity. Even though each judge sentenced only fifty hypothetical cases, the Coalition-Al Qaeda coefficients are significant at the one tailed .10 level⁸² in fourteen of nineteen judge specific equations. It is of further note that in nine of these instances the coefficients are negative, reflecting the sentence leniency initially anticipated in our first hypothesis. In contrast, in five instances the coefficients are positive, reflecting sentence severity. These results indicate, as anticipated in our third hypothesis about group differences, that Iraqi judges are sentencing

⁸⁰ The regression coefficients are drawn from the judge-specific equations ($n=19$), which include the full set of vignette characteristics; the omitted reference category is the Coalition-on-Iraqi combination.

⁸¹ The results are not shown but available on request from the authors.

⁸² “One-tailed” hypothesis tests are appropriate when the direction of deviation from the null value is clearly specified; that is, a specific predicted outcome is stated.

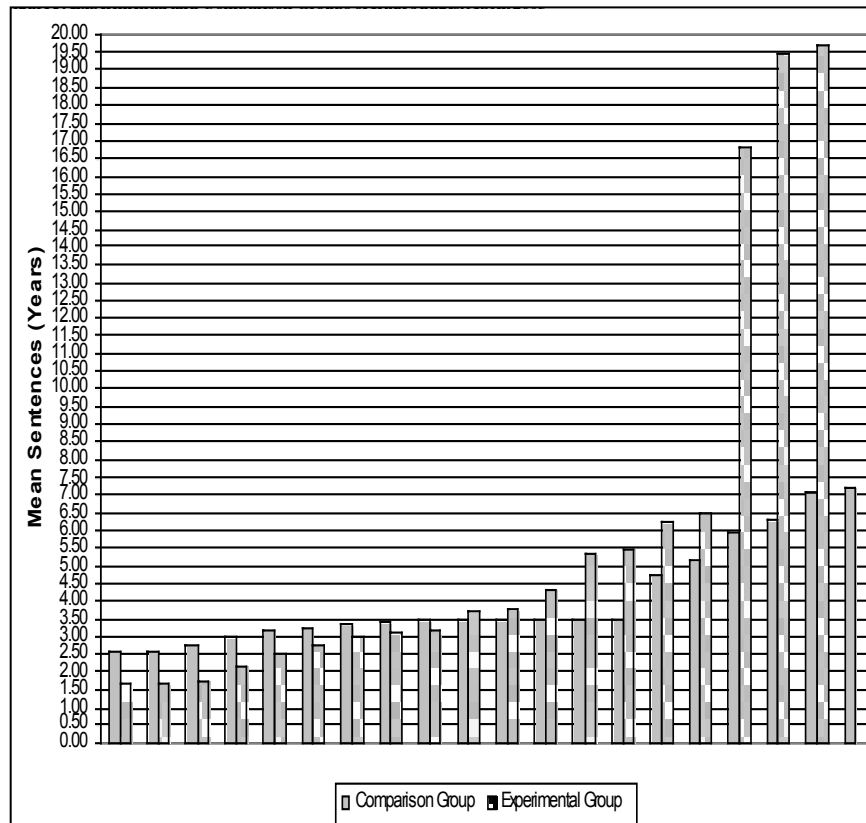
the Coalition-Al Qaeda combination in a highly variable and polarized fashion, with *both the expected leniency but also pronounced severity* in the sentencing of these trouble cases.

To clarify the results just described, we present several additional bar graphs that further detail the results for individual judges within the second April experimental group. First, we present in Figure 3 the individual judge results for the two April groups of Iraqi judges: the comparison group and the experimental group. Well over half of the judges in the April experimental group are either more lenient or more severe than the least and most severe judges in the comparison group.⁸³ As suggested by the relative group means in Figure 2 above, the greatest change is in the direction of sentence severity.⁸⁴ Nonetheless, this graph suggests that there is also an overall polarization—leniency as well as severity—that results from the experimental introduction of the military/national affiliations in the second April experimental group. We demonstrate next in Figure 4 how the *same fact patterns*—specifying Coalition guards torturing either Al Qaeda or Iraqi suspected terrorists—simultaneously produced both the most severe and most lenient sentences in the experimental group of judges.

⁸³ The comparison group consists of one additional judge as compared to the experimental group.

⁸⁴ See Figure 2 (there is an approximate 50 percent increase from four to nearly six years in sentence length).

FIGURE 3: MEAN SENTENCES IN APRIL 2005 EXPERIMENTAL AND COMPARISON IRAQI JUDGE GROUPS



We focus our attention in Figure 4 again on only the nineteen judges in the second experimental April group. This figure focuses on the specific effects of the above mentioned guard-prisoner combinations. Figure 4 reveals that nine of the judges gave shorter sentences to Coalition guards for torturing Al Qaeda prisoners than to Coalition guards for torturing Iraqi prisoners. As illustrated below in Figure 5, these Iraqi judges treated this group of Coalition torturers of Al Qaeda leniently. The U.S. military tribunals imposed similarly mild punishment on officers associated with torture at Abu Ghraib.⁸⁵

⁸⁵ See Zielbauer, *supra* note 49.

However, in stark contrast to this pattern of leniency, the last seven judges in Figure 4 gave longer average sentences in general, and specifically to Coalition guards who tortured Al Qaeda prisoners. The sentences of six of these judges ranged from ten to more than forty years, and, as noted, the most severe sentences were imposed on Coalition guards who tortured Al Qaeda prisoners. These judges appear not to have accepted the Bush Administration's assertion that certain circumstances justify torture. Figure 4 reveals how disparate and polarized the judges were in their decisions when sentencing cases involving Coalition guards and Al Qaeda prisoners.

FIGURE 4: MEAN IRAQI JUDGE PRISON SENTENCES BY GUARD-PRISONER COMBINATIONS, EXPERIMENTAL GROUP (ALL JUDGES), APRIL 2005

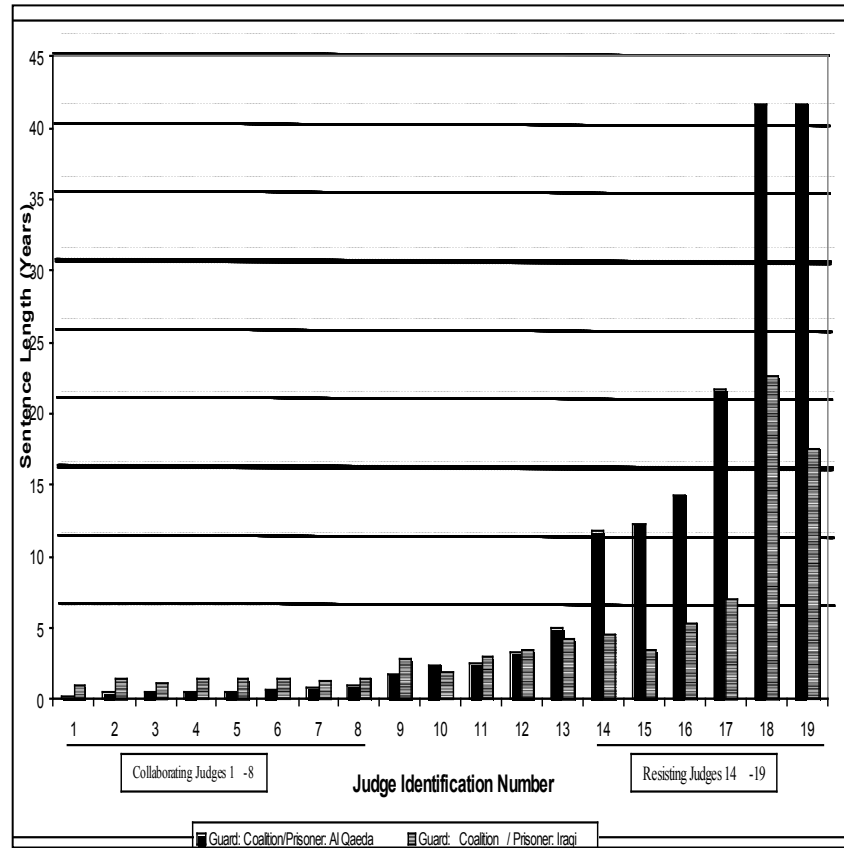
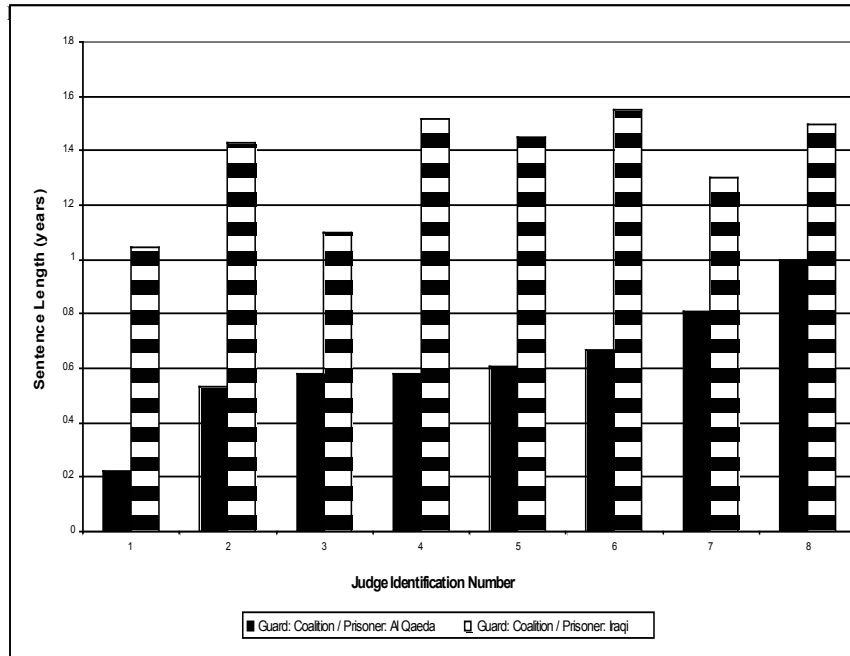


FIGURE 5: MEAN LENIENT IRAQI JUDGE PRISON SENTENCES
BY GUARD-PRISONER COMBINATIONS, EXPERIMENTAL GROUP
(COLLABORATING JUDGES), APRIL 2005



Finally, Figure 5 magnifies the dimensions of the lower end of the sentence length scale to better illuminate the lenient sentences given by the first eight judges in Figure 4. All eight of the judges in Figure 5 gave *shorter* sentences to Coalition guards for torturing Al Qaeda rather than Iraqi prisoners, assigning sentences from about twelve to eighteen months in length in these cases.

These results clearly reveal inadequacies in our first and second hypotheses and unequivocally support our third hypothesis. Rather than simple uniform or selective leniency, the pattern of sentences in the experimental group of judges indicates a polarized pattern of leniency and severity reflecting both collaboration and resistance in relation to the Bush Administration's interpretation of torture law. The focus on individual judges allows us to fully observe the form and dimensions of the collaboration and resistance.

X. CONCLUSION

A critical legal perspective highlights how indeterminacy in the rule of law permits abuses of power. Efforts to impose democracy by force may inherently compromise the rule of law, and the indeterminacy of law may be a primary means by which this occurs. In Iraq, indigenous legal actors are confronted with choices about collaborating or resisting abuses in response to indeterminate interpretations of torture laws. Yet there is no body of empirical research in occupied settings to reveal when and how this happens among individual judges in response to torture or other abuses.

Without the type of analysis presented here, the kinds of collaboration and resistance we observed remain hidden and undocumented. Our research provided the opportunity to advance a critical legal understanding of processes of collaboration and resistance in a methodologically unique way: through a systematic quantitative empirical analysis of the behavior of individual judges in a judicial sentencing experiment.

Overall, we found little support for an idealized conception of the rule of law in occupied Iraq. The Bush Administration's post-9/11 memos exported indeterminate and permissive interpretations of torture law to Iraq. Although Iraq's judges had lived through a brutal Baathist regime in which torture was routine, Iraq, like the United States, had also ratified the Geneva Conventions on torture and had passed its own legislation banning torture. The Bush Administration's new interpretations of torture law presented a difficult dilemma for Iraqi judges. They could collaborate with the American dominated Coalition or resist its normative imperatives.

To understand the response of Iraq's judges to a new era of torture associated with the occupation, we designed a factorial survey experiment that included consideration of the indeterminacy of torture law and the hierarchical position of Coalition prison guards in relation to convicted Al Qaeda suspects. It is important that we were able to conduct the experiment at a critical historical moment: immediately after the media disseminated graphic images around the world of torture by Coalition forces at Abu Ghraib Prison.

We first hypothesized that Iraqi judges would simply collaborate with the new American dominated Coalition Provisional Authority by uniformly treating torture leniently. Alternatively, we hypothesized that the disparity in power between Coalition forces and Al Qaeda would

result in Iraq judges more selectively collaborating by imposing lenient sentences in these “trouble” cases, specifically, Coalition guards convicted of torturing Al Qaeda. Finally, we alternatively predicted a polarized sentencing pattern in which some judges would collaborate with the authorities through lenient sentences of Coalition guards for torturing Al Qaeda, while other judges would resist and impose severe sentences on the same combination of guards and prisoners.

We found that there was little support for our first hypothesis of a “pervasive climate of leniency” in the punishment of torture. Overall, relatively long average sentences were imposed, with mean sentences ranging from four to six years. Nonetheless, some of the judges did impose short sentences, partially supporting our second hypothesis. However, the sentences were polarized, as predicted in our third hypothesis, resulting in both short and long sentences for Coalition guards specifically convicted of torturing Al Qaeda prisoners.

This variability in sentencing reflects the indeterminacy of the law in the Bush Administration advisory memos on torture. While nearly half of the Iraqi judges in our experimental group sentenced Coalition guards to less than a year in prison for torturing Al Qaeda prisoners, about a third severely sentenced Coalition guards to more than ten years in prison in the same kinds of cases. *The polarized variation in sentencing severity in itself is confirmation of important effects anticipated by a critical legal perspective on the indeterminacy of law.*⁸⁶ The lenient sentencing reflects a collaborative attitude toward the American occupation of Iraq, and severe sentencing indicates resistance.

Iraqi judges who sentenced Coalition guards severely for torturing Al Qaeda prisoners exercised a degree of judicial autonomy in resisting the occupying powers’ permissive interpretations of torture law that we did not originally anticipate. On the other hand, the Iraqi judges who sentenced these same cases leniently did not demonstrate the same judicial autonomy and, therefore, agreed with the Coalition leadership’s position that the way to drive Al Qaeda from Iraq was to torture them into leaving and informing on their peers. Even if these judges did not fully condone the torture of Al Qaeda, they expressed a tolerance for its

⁸⁶ It may further indicate some judges’ collaboration with the occupying power. It also bears noting that the Iraqi judges did not completely abandon conventional sentencing norms by responding to the degree of injury and harm indicated by days in the hospital resulting from the torture of suspects. It is noteworthy that in all three columns of Table 2 presented above, days in the hospital had a persistent impact on sentence severity with overall mean sentences of .130, .134 and .010 respectively for each of the three distributions.

use by punishing the Coalition torturers less severely. They were more inclined to accommodate and collaborate with the powerful Coalition occupiers.

What would ultimately be useful, of course, is a non-experimental design based on actual cases that are tried in the Iraqi courts. The opportunity for this kind of research may finally emerge with the implementation of the new Status of Forces Agreement in Iraq.⁸⁷ This Agreement requires the review of cases involving Coalition soldiers that in the future may be tried in the Iraqi courts. The results of our research and concerns about indeterminacy in law suggest the need for further documentation and analysis of sentencing decisions in such cases. We hope to have contributed important data demonstrating that, in the case of Iraq, judges were neither uniformly persuaded to the occupying regime's legal ideology, nor uniformly opposed to it.

⁸⁷ The "Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of their Activities During Their Temporary Presence in Iraq", also referred to as the Status of Forces Agreement in Iraq (SOFA) was approved by the Iraqi government in late 2008 between Iraq and the United States. It establishes that U.S. combat forces will withdraw from Iraqi cities by June 30, 2009, and all U.S. forces will be completely removed from Iraq by December 31, 2011, subject to possible further negotiations; *See* Agreement On the Withdrawal of U.S. Forces from Iraq and the Organization of their Activities During their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081127-2.html>.