

ABU GHRAIB

# Art and Law in a Time of Torture

by Christopher Edley

*The following is an edited transcript of Dean Edley's talk at the opening of an exhibit of Fernando Botero's Abu Ghraib series of paintings and drawings at Chile's Museo de la Memoria.*

It's a privilege to be here representing Berkeley. We are so proud that Señor Botero gave us these paintings and the honor of stewardship for decades, and we hope centuries, to come. Let me make three brief points. First, a little something about God. When I was studying for my confirmation — I was about 11 or 12 years old — I had a bit of an argument with the minister. I said to him: "You say that God made man in His image."

He said, "Yes."

"And God is perfect."

"Yes."

"But man is not perfect. Can you explain that?" So he called my parents and complained that I asked too many questions.

Forty thousand years of religion have not managed to remove evil from humanity. In a sense, it is not surprising, then, that 4,000 years of law have failed to remove evil or even prevent its consequences. And too often, law even fails to punish it. But my law school was excited to be able to support the Botero exhibition at Berkeley and to support this show here in Santiago. It's because of that old saying, "If you have a hammer, every problem you see looks like a nail." So when I took a helicopter ride into the Andes and saw the retreating glacier, I thought, "Law could do something about this. We need law to tackle the problem of climate change." When I study the inequalities in schools, I think that law can play a role in helping to address these problems of inequality, injustice. When I first saw the images of Botero, I thought, "Here is law that has failed. It has failed to protect, and it has failed to teach the basic morality that underlies human rights." To me as a lawyer, the images show what happens in the moral void created when we have no law. And it is for this reason that my law school has supported this exhibit, and it is for this reason that we will be displaying four of the Botero paintings on a permanent basis at my law school. Hopefully those images will haunt and instruct law students for generations to come.

So God did not make us perfect in his image. Religion has not cured us. Law has not cured us. But both religion and law help us to try to overcome and grapple with the evil within us.

The second point I want to make is that as important as law is, it is deeply flawed in certain respects. There is

an internal tension, an inherent and internal incoherence, that makes law imperfect, which of course is to be expected given who creates it. There are three basic ways to think about the realms of law: One is that law can create what we call "rules of the road." The law says that green means go and red means stop, and we find this very convenient because it helps order society. Law also plays that function in business. The law helps structure the way businesses interact with each other.

Law also plays a role in deterrence and in punishment. That is obvious, and I won't belabor this point, but this, too, is an effort to create order. If the laws are legitimate in the political sense and in the moral sense, then this legal ordering is all to the good of society.

But the third role of law is actually to teach. For example, during the Civil Rights Movement in the United States, when Martin Luther King, Jr. and many others argued that the Congress should enact antidiscrimination statutes, many people objected and said, "We can't legislate morality." Well, to a lawyer that's just wrong, because law has a pedagogical function. You can pass an antidiscrimination statute, and you can pass an anti-torture statute. Even if it is not welcomed immediately and accepted by the general public, over time, such laws can stand as instruction, perhaps even as a beacon, so that people grow to understand the normative impulse, and it begins to help order society. In that sense, you are legislating morality through a process of instruction and an inculcation of higher values, higher social aspirations.

So those are the three functions of law, and yet when we go to apply the law and live under the law, a lot of problems arise. For example, it is part of the discipline of law to try to make everything as complicated as possible. This is how lawyers manage to be fully employed and why we can charge such high fees — because we are experts at complicating.

You say that torture is illegal. So let me ask you: At what point does degradation become torture? Does it require physical pain? Is there a distinction between abuse and torture? Are all forms of abuse torture? Are there gradations of torture and circumstances in which some forms of torture may be permissible? I could go on for days about how complicated this simple proposition is — that torture is illegal. That is my disability as a lawyer.

The interesting point I want to emphasize is that law tries to reflect morality, but law is not really driven by the same kind of calculus as moral discourse. Law is informed by moral discourse, but it has its own rules of argument, its



Photo by Jim Block.

Botero's "Abu Ghraib 57" hangs outside the library of the Berkeley Law School.

own rules of evidence. And for that reason, law alone can never do the job we fully want in a moral sense. In some respects, I am offering an excuse for my profession and discipline, an excuse for the law. But I am also stating this as a challenge. We make a serious mistake if we expect too much of the law, just as we make a serious mistake if we expect that the traffic lights, the traffic laws, will protect us from all automobile-related injuries. The law is not enough.

The third point I want to make is a bit more complicated. During the presidential transition in the U.S. in 2008, I was among a small group of people who were responsible for helping President Obama plan the beginning of his administration. Although my responsibility was to worry about health care, immigration, and education, when his board of advisors was meeting and the principal national security advisor was talking about her team's priorities for the first two months of the administration, I raised a question. I asked: "Well, tell me, what are you planning in the way of investigation or prosecution of Bush administration officials with regard to issues of torture and abuses of human rights?"

And she said in response: "We are not going to do that. We are not going to go on a witch hunt."

I said: "Well, I am not interested in a witch hunt either, but I am interested in the rule of law." If we don't explore both the facts of what happened and the legality and

morality of what happened, if we don't debate where to draw the lines, then how will we learn for the future? Even if no one ends up going to prison, it's important for the American people to know, to understand, to argue. But this was a very smart and savvy group of advisors. We all understood the legal argument, but also the stakes in terms of partisan politics and morale in the national security agencies. Not surprisingly, the group quickly went on to talk about the budget and the economy.

So, when I look at the Botero paintings... I realize that here is a respect in which art offers the possibility of serving a need that law has failed to serve. Because we have not applied the rule of law to the full extent, I believe, we should have. Therefore, how can we be sure that we will remember? How can we be sure that we will continue to debate what is right and what is wrong? I believe that the answer lies in part in art. That is what Señor Botero has done for us. That's what he's done for my university and my law school. And I will be eternally grateful.

Christopher Edley is The Honorable William H. Orrick, Jr. Distinguished Chair and Dean of the Berkeley Law School. He spoke for CLAS at the Museo de la Memoria in Santiago, Chile, on March 16, 2012. He has since installed four of the Abu Ghraib paintings in a highly visible corridor of the law school, between the Dean's Office and the library.