

BERKELEY JOURNAL OF INTERNATIONAL LAW



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at Berkeley Law

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Cover Image: Fernando Botero: Abu Ghraib 60, 2005: oil on canvas; 51-5/8 x 62-1/4 in.; University of California, Berkeley Art Museum and Pacific Film Archive, Gift of the artist. 2009.12.35
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Let's Talk about the Boteros: Law, Memory, and the Torture Memos at Berkeley Law

Laurel E. Fletcher*

What parts of their uncomfortable associations should universities remember, and how? Berkeley Law is revisiting an ongoing question about its link to the War on Terror: how should the school address its relationship to the Torture Memos of the Bush Administration in light of its employment of one of the Memos' principal authors, Professor John Yoo? The dean of Berkeley Law is considering whether to remove paintings by the world-famous artist Fernando Botero. The paintings, currently on prominent display inside Berkeley Law, depict US soldiers torturing prisoners at the Abu Ghraib prison. These artworks rebuke the US government and its decision to rewrite the foundational norms of the rule of law in the pursuit of national security after 9/11. The potential removal of these paintings raises questions of memory heuristics: why are the paintings there at all, what do they communicate about the past, and is this past worthy of commemoration? This Article examines the paintings as works of public memory and uses this lens to explore what the Boteros have come to mean to the Berkeley

* Clinical Professor of Law, University of California, Berkeley, School of Law. I am very grateful to many colleagues at Berkeley and beyond for their help and guidance. While this Article benefited from their engagement, I am solely responsible its contents. In particular, I would like to thank Christopher Edley, Jr. and Erwin Chemerinsky for their institutional insights. Many individuals shared their knowledge of relevant events or offered valuable comments including, Kathryn R. Abrams, Muneer Ahmad, Roxanna Altholz, Carolyn Patty Blum, Juliet Brodie, Seth Davis, Pablo de Greiff, Sandy Fredman, Eliza Garnsey, Amber Ginsburg, Sara Kendall, Alexa Koenig, Christopher Kutz, Emma Stone Mackinnon, Saira Mohamed, Melissa Murray, Sarah Nouwen, Nomfundo Ramalekana, Nikki Reisch, Bertrall Ross, Meg Satterthwaite, Jane Schacter, Jeff Selbin, Jonathan Simon, Eric Stover, Surabhi Ranganathan, Ruti Teitel, Kathleen Vanden Heuvel, Hedi Viterbo, Harvey M. Weinstein, and Mike Wishnie. This Article profited from feedback I gained presenting at the following institutions: Cardozo School of Law; Columbia Law School; The Dickson Poon School of Law, King's College London; SOAS, University of London; University of California, Irvine; University of Cambridge; University of Kent; University of Oxford; Ulster University; and Yale Law School. Thanks to Shaika Ahmed, Antonia David, Amanda (AJ) Jaramillo, Lauren Kelly-Jones, and Sanaz Payandeh for their excellent research assistance, the outstanding staff at the Berkeley Law Library for their expert support, and Olivia Layug Balbarin for preparing the manuscript. I also wish to thank the editors at BJIL for their helpful feedback and edits. I shared a draft of the manuscript with John Yoo, who declined to provide comments.

Law community. Understanding the Boteros as memory works enables us to see their representational economy in greater complexity and invests the deliberation about their future as a site for shaping institutional identity and values. By grounding discussion of how the law school should reconcile with this divisive past in memory theory, this Article provides insights into broader debates about how universities should reckon with their unsettling histories.

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INTRODUCTION

Berkeley Law is now revisiting a question about its institutional values and identity: how should the school address its relationship to the so-called Torture Memos of the Bush Administration in light of its employment of one of the Memos’ principal authors, Professor John Yoo? Since 2004, when the first photographs of US soldiers torturing Iraqi prisoners at Abu Ghraib became public, and journalists obtained the Department of Justice legal memorandum authorizing so-called “Enhanced Interrogation Techniques,” the document and the torture scandal have been indelibly linked in the public’s imagination.¹ The memorandum, written by Professor Yoo while he served as a high-level government attorney, was one of several legal opinions that interpreted domestic and international law as justifying a State policy of unprecedented coercive interrogation techniques.² These memoranda authorized US personnel to torture suspected terrorists and allowed the Bush Administration to defend the legality of its detention and interrogation policies.³

Later, President Obama acknowledged that the United States had committed torture, disavowed the policy, and reestablished US compliance with international standards.⁴ However, President Obama stopped short of holding anyone accountable for justifying or implementing a policy of torture. Consequently, questions linger about the legality and morality of the country’s interrogation and detention policies. The Torture Memos remain a subject of controversy because we as a country have not fully repudiated them.

The controversy over the Torture Memos put a spotlight on Professor Yoo, and public criticism also took aim at the university that employed him. There were public demands for the university to censure the controversial professor.⁵ How could a key architect of the legal scaffolding for a State policy of torture be allowed to educate the next generation of lawyers? Could or should the university censure a faculty member for conduct that fell outside his academic duties? What did Professor Yoo’s position on the law faculty signal about the values of the leading public law school in the State of California? Professor Yoo’s presence on the faculty raised narrow questions about permissible regulation of faculty

1. *See infra* notes 57–58.

2. *See infra* notes 42–43, 45.

3. *See infra* text accompanying notes 44–45.

4. President Barack Obama, Press Conference by the President (Aug. 1, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president> [hereinafter Press Conference by President Obama].

5. *See, e.g.,* Martin Lasden, *Mad About Yoo*, DAILY J. (Sept. 2, 2007), <https://www.dailyjournal.com/articles/303420-mad-about-yoo>; *see also infra* notes 93–94 and accompanying text.

conduct, as well as broad questions about legal education. These are sensitive and lingering questions, which have circulated, largely unresolved, in the public sphere, in legal academia, and at Berkeley Law for years.

University officials responded to demands for action by reference to law, invoking the academic rules that governed Professor Yoo's conduct solely as determinative of what the university could do.⁶ In so doing, administrators deflected more searching criticism of the institution. Dean Edley responded to pressure to sanction Professor Yoo by citing to the academic regulation on unacceptable faculty conduct, which provides for dismissal of faculty members who are convicted of a criminal offense that "clearly demonstrates unfitness" to serve as a faculty member.⁷ Because Professor Yoo was never convicted of an offense, the university considered the matter closed.⁸ By narrowing its focus to the question of illegality, Berkeley Law effectively absolved itself from recognizing the institutional and cultural challenges that the controversy over Professor Yoo provoked. If the university administration had understood the relevant policy was insufficient, it could have taken steps to change it.⁹

Furthermore, Berkeley Law could have taken nonlegal measures that would have explicitly affirmed the school's values in relation to the Torture Memos and the rule of law. The school could have publicly engaged with the broader questions that the controversy provoked about the role of lawyers in safeguarding liberal values and human rights in a democracy and about the mission of law schools in this regard. The school could have issued statements, revised the curriculum, or initiated research on these topics. Such communicative practices would have represented an *institutional* response to the crisis. Instead, the burden fell to faculty and students who acted in their individual capacities to raise important questions.¹⁰

Berkeley Law's single visible response to the Torture Memos was the decision by the Dean of the law school, Christopher Edley, Jr., to install four

6. Brad DeLong, *The Torture Memo and Academic Freedom*, THE TORTURE MEMO (May 8, 2008), https://delong.typepad.com/the_torture_memo/2008/05/the-torture-mem.html (response from William Drummond, Chair, Academic Senate, to UC Berkeley Economics Professor J. Bradford DeLong's May 6, 2008 letter).

7. PROVOST & EXEC. VICE PRESIDENT OF ACAD. AFFAIRS, UNIV. OF CAL., *General University Policy Regarding Academic Appointees: The Faculty Code of Conduct (Rev. 7/1/17)*, in ACADEMIC PERSONNEL MANUAL, at sec. I, APM-015, at 9 (Acad. Pers. & Programs Office, Univ. of Cal. ed., 2020) (ebook), [hereinafter UC Faculty Code of Conduct], https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-015.pdf.

8. Riya Bhattacharjee, *Dept. of Justice Clears UC Berkeley Professor John Yoo of Misconduct*, BERKELEY DAILY PLANET (Feb. 25, 2010), <http://www.berkeleydailyplanet.com/issue/2010-02-25/article/34705>.

9. See *infra* Section III.D.

10. In the years following the Abu Ghraib scandal, faculty members and student groups organized conferences and presentations at the law school, but the administration did not mount an institutional initiative explicitly to respond to the challenges that the controversy surrounding the Torture Memos posed to legal education. See *infra* Section IV.B.

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Fernando Botero¹¹ paintings that dominate a main corridor of the law school, just outside the Dean's offices. The paintings, which follow Botero's iconic style of voluminous, bulky human forms, depict detainees being tortured at the Abu Ghraib prison in Iraq. Botero created the works as a "permanent accusation"¹² of the violations committed by the United States.

Botero's paintings memorialize the United States' radical breach of its own human rights commitments. These are provocative paintings of political art; their exhibition at the law school is freighted with meaning. When the paintings were installed in the law school, then-Dean Edley introduced the exhibition as constructing a narrative condemning the breach of the rule of law that led to torture.¹³ Although none of the printed materials about the paintings that hang alongside them mention this link, their display in the law school at which Professor Yoo works forms part of the context for viewing the canvasses. The art exhibit thus has mnemonic significance above and beyond its relationship to abstracted rule of law values, since it serves as the *only* continuous visible sign or communicative practice acknowledging the link between the law school and State-sanctioned torture.

In October 2019, the current dean at Berkeley Law, Erwin Chemerinsky, initiated a review of the law school's exhibit of the Botero paintings ("the Boteros"). Prompted by a flood of complaints about the paintings from alumni, faculty, staff, and students, upon his arrival in the summer of 2017, Dean Chemerinsky appointed a committee to consider the fate of the paintings.¹⁴ The Dean told the author in January 2018 that, in his short time at the school, the topic on which he received the most negative comments was the Boteros. According to Dean Chemerinsky, stakeholders offered several reasons for requesting removal: the paintings are disturbing to viewers, unfitting to a law school setting, and an unfair reprimand to Professor Yoo. At the time of this writing, the committee has not concluded its work and the dean has not yet made a decision about what will happen to the canvasses. This ongoing deliberation of the Boteros offers an opportunity to revisit the question of how the school should address its relationship to the Torture Memos.

The Boteros' potential removal rekindles both immediate questions (why are the Boteros there at all?) and larger questions about institutional responsibility to

11. Fernando Botero is a Colombian painter and sculptor known for his "volumetric stylization of figures and objects." His subject matter often includes social critiques. Botero's "works are presently held in the collections of The Museum of Modern Art in New York, the Art Institute of Chicago, and the Museo Botero in Bogotá which is dedicated to the artist and his oeuvre." *Fernando Botero*, ARTNET, <http://www.artnet.com/artists/fernando-botero/> (last visited Sept. 17, 2019).

12. Louis Freedberg, *California Cultures: The Art of Abu Ghraib*, S.F. CHRON. (Jan. 22, 2007), <https://www.sfgate.com/bayarea/article/CALIFORNIA-CULTURES-The-art-of-Abu-Ghraib-2622260.php>.

13. E-mail from Christopher Edley, Jr. Dean, Univ. of Cal., Berkeley, Sch. of Law, to Berkeley Law Community (Aug. 13, 2012 12:01 PM PST) (on file with author).

14. In fall 2019, the dean formed the committee, named the Visual Art Display Committee, and appointed the author as a member.

respond to the school's association with the Torture Memos. This Article makes two contributions to this discussion. First, it provides a fuller record of the context of the exhibition. It reconstructs the history of the paintings and how they came to Berkeley Law, as well as the public controversy surrounding the Torture Memos, Professor Yoo, and the university's response to calls for action. This larger context is critical to understanding the complex meanings that the Boteros convey.

Second, this Article employs an analytical framework of public memory to unpack some of the meanings of the Boteros. Understanding the Boteros as imbued with various meanings or memories enables us to appreciate their rich, communicative value. While a memory analysis supports keeping the paintings, its greatest contribution is to change the terms of how the question is debated. Rather than decide simply whether the paintings should stay or go, the question suggested by public memory is *how* Berkeley Law should respond to its unique relationship to the breach of law that the paintings represent.

This Article does not advance a single interpretation of the Boteros. Rather it sketches several interpretative frames, each of which is progressively narrower in scope. The first interpretative frame explores the relationship between the paintings and the public-facing identity of Berkeley Law. Dean Edley intended the exhibition to communicate a reminder of the dark entanglement of law in the State use of torture during the War on Terror. This is the most general narrative frame that the exhibit communicates to the broadest audience. A second interpretive frame understands the exhibition as the result of the exclusively legal response that the university took to the controversy regarding Professor Yoo. This approach produced a false binary between imposing a legal sanction and doing nothing. Dean Edley pursued an alternate path: he acted on his own initiative to install the exhibition, which opened, through art, a further and continuous communication on the topic. The final interpretative frame examines the relationship between public memory and institutional identity, and the role of the faculty in shaping how Berkeley Law communicated its response. Faculty engagement on this topic is an important site of study to appreciate the economy of institutional identity and its production through public memory.

Berkeley Law has the opportunity to consider, through a reassessment of the Boteros, its institutional responsibility to produce and curate the school's public memory. The law school's association with the Torture Memos creates a moral demand to clarify the school's position on torture and on the role of legal educators. Contemporaneous with the protests against Professor Yoo, Berkeley Law could have expressed its views about the morality and optics of employing, as a senior member of the international law faculty, one of the lawyers who approved techniques that led to torture and immunized State agents from criminal prosecution. However, the university ducked its institutional responsibility by protecting the right of faculty to participate in public life and enjoy their employment rights as predominant values over all others. Against this backdrop, Dean Edley's decision to display the Boteros broadened the university's range of

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communicative practices. Art can be a moral intervention that conveys institutional values.

There will likely be a range of views offered regarding whether the Botero exhibit is an appropriate way to express institutional values. Some will argue that the Boteros should be kept because of their representational power depicting the abuse of power and law. The paintings have become symbols that denounce torture and the complicity of law in its practice. This reason alone might justify keeping the Boteros at the law school. However, those who believe that Professor Yoo provided exemplary public service, or who think that the school should not take a normative position about government service rendered by a faculty member, may see the paintings as an unwarranted rebuke of an accomplished professor.

Temporality is a challenge for how Berkeley Law considers its public memory of the Torture Memos. The continuous presence of Professor Yoo on the faculty makes it impossible to disaggregate the institution's communication of a substantive value judgment about his government work from the broader questions about what values the law school seeks to project. This temporality is what makes the topic especially sensitive and difficult to address, and what makes it imperative for Berkeley Law to do so.

In reconsidering the paintings, we also should ask whether these works should serve as the only mnemonic devices for these issues that the school cultivates. The school should consider various ways to promote engagement with the legal and moral questions provoked by the Torture Memos, in addition to art. Removal of the paintings without further institutional engagement with these issues reasonably will be interpreted as silencing deliberation on the matter.

This Article analyzes the memory work performed by the Boteros at Berkeley Law and considers how discussing the exhibit as public memory shapes community deliberation about the paintings in the context of the institutional identity of the school. Section I provides the conceptual and legal background for an analysis of the controversy surrounding the Abu Ghraib prisoner abuse and its link to Professor Yoo. It offers an overview of memory studies and identifies the key concepts and dynamics applicable to analyzing the Boteros. It then outlines the legal development of the US detention and interrogation program after 9/11 and Professor Yoo's role in it. Section II offers a brief history of how the Boteros came to Berkeley Law and what the artist and university intended by bringing the canvases to the school. Section III examines the public controversy surrounding Professor Yoo upon his return to the faculty, which coincided with the eruption of the Abu Ghraib scandal. In this Section, I review the public demands for Professor Yoo's censure and Dean Edley's defense of Professor Yoo as a member of the faculty. Section IV analyzes the paintings as memory works. This Section examines the school's public-facing communication about the works; how the institution used the paintings to balance competing institutional values of upholding a faculty member's due process rights while also signaling its rebuke of the legal advice he offered as a government lawyer; and how faculty norms of

collegiality shaped the public memory Dean Edley constructed. It then considers the institutional responsibility for memory. In particular, this Section revisits the mnemonics of the Boteros and considers what is at stake in their continued presence, removal, or replacement with other communicative devices.

I.

CONCEPTUAL AND LEGAL BACKGROUND

A. Memory Studies: Conceptual and Interpretive Tools

The field of memory studies offers several concepts and techniques for studying the Boteros as sites of meaning making about the Torture Memos and Berkeley Law's moral relationship to the memos and to the War on Terror. Broadly concerned with how the past is engaged and the consequences of this engagement, memory studies is an area of multidisciplinary work that includes the humanities and social and cognitive sciences.¹⁵ The field considers questions of how material objects and communicative practices transmit meaning across time; the role of social interactions, institutions, and political contestations in shaping discourse about the past; and the mental and cognitive processes involved in individual memory. The objects of study are varied. They may be tangible materials (texts, paintings, cultural artifacts, etc.); non-tangible objects (rituals, holidays, cultural practices and traditions, etc.); or intentionally created markers that remind us of past events (memorials and commemorations).¹⁶ The unit of analysis may be the individual, family, community, nation, and relationship or interrelationship of one unit of analysis to another unit(s).¹⁷ These approaches share a common understanding that memory is an inherently dynamic process that mediates between who is remembering and what is remembered.

In the context of memorials, museums, and other curated objects of public memory, institutional decision makers are instrumental in determining what is remembered, how, and for whom. Dean Edley's decision to bring the Boteros to Berkeley Law put them into a dynamic and immediate relationship with the Berkeley Law community, fundamentally changing the interpretative context for the works from that of an art museum.

Insights from scholars concerned with remembrance at the collective (rather than individual) level, as well as those interested in how public institutions create

15. See generally CULTURAL MEMORY STUDIES: AN INTERNATIONAL AND INTERDISCIPLINARY HANDBOOK (Astrid Erll, Ansgar Nünning & Sara Young eds., 2008); THE COLLECTIVE MEMORY READER (Jeffrey K. Olick ed., 2011); IWONA IRWIN-ZARECKA, FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY (1994).

16. See, e.g., CULTURAL MEMORY STUDIES, *supra* note 15; THE COLLECTIVE MEMORY READER, *supra* note 15; IRWIN-ZARECKA, *supra* note 15.

17. See, e.g., Jean-Christophe Marcel & Laurent Mucchielli, *Maurice Halbwachs's Mémoire Collective*, in CULTURAL MEMORY STUDIES, *supra* note 15, at 141–49; Jan Assmann, *Communicative and Cultural Memory*, in CULTURAL MEMORY STUDIES, *supra* note 15, at 109–18.

or use cultural artifacts that interpret and generate meaning about the past, are most pertinent to this analysis. Their work, like mine, investigates the “interplay of present and past in socio-cultural contexts.”¹⁸ Therefore, I apply several pertinent insights from these areas to situate my examination of the Boteros. These cluster around three dimensions of memory work: the contingent nature of memory, the relationship of memory to identity, and questions of perspectivity and the dynamics of how viewers experience mnemonic objects.

1. *Memory Heuristics*

Perhaps the defining feature of memory studies is its understanding of memory as socially constructed. What we remember of the past and how we interpret it is shaped by context: what materials are used to trigger recollections, how those are presented, for whom, for what purpose, and so on. The intellectual roots of memory studies date to the 1920s, when French sociologist Maurice Halbwachs developed the concept of collective memory to explain the transmission of ideas and values (“memory”) across generations.¹⁹ Halbwachs theorized that individual memories do not exist in a vacuum but are instead the product of social construction and exchange.²⁰ The concept of collective memory helped explain shared understandings and meanings that persist over generations and distinguish groups from one another.²¹ Scholars from various disciplines have expanded on Halbwachs’ insights into the ways that the construction of memory (also referred to as works of memory, or memory works) reflects important shared values and shapes identity.²² Often related to the stories that groups tell about their histories, construction of shared memory refers to processes that communities engage in to “transmit narratives about themselves and others across time.”²³

One strand of memory studies focuses on tangible objects, such as monuments, to examine the relationship between memory and identity. Often referred to as “memory sites” or “sites of memory,” these are locations, objects, or figures that “provide a placeholder for the exchange and transfer of memories

18. Astrid Erll, *Cultural Memory Studies: An Introduction*, in *CULTURAL MEMORY STUDIES*, *supra* note 15, at 2.

19. See MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* (1992).

20. *Id.* at 53 (“We can understand each memory as it occurs in individual thought only if we locate each within the thought of the corresponding group.”).

21. Halbwachs excluded from collective memory the sphere of culture, and scholars have extended the field to explicitly consider the sociocultural context—i.e. institutions, rituals, and practices—that plays a role in memory. See Assmann, *supra* note 17, at 110 (distinguishing Halbwachs’s social memory from cultural memory); ALEIDA ASSMANN, *CULTURAL MEMORY AND WESTERN CIVILIZATION: FUNCTIONS, MEDIA, ARCHIVE* (2011); IRWIN-ZARECKA, *supra* note 15; see also Erll, *supra* note 18, at 3–4.

22. For elaboration on the development of the field, see Erll, *supra* note 18, at 1.

23. Kris Brown, *Commemoration as Symbolic Reparation: New Narratives or Spaces of Conflict?*, 14 *HUM. RTS. REV.* 273, 275 (2013).

among contemporaries and across generations.”²⁴ In particular, the creation of monuments and memorials is one way in which nations and communities construct the past and regulate how it is remembered in the present.²⁵ There is a rich literature on monuments and memorials that focuses on these objects as processes of forming national identity and social memory,²⁶ their social evolution over time,²⁷ and their function as sites of meaning generation.²⁸ Sites of memory therefore reflect what those who create them want to convey about the past.

Public memory is constructed and maintained by institutions.²⁹ Moreover, the specific meanings that viewers may take from sites of memory are not stable or monolithic but are the product of interchange between the viewer and the social context in which the object is displayed. Institutional actors, like museum curators, librarians, and public officials, select the artifacts (including works of art, texts, and public memorials) available to the public, thereby making available or withdrawing mnemonic objects.³⁰ These decisions may be deeply contested initially or may become so at particular moments in time. At the same time, the experience of viewers is shaped by their individual perspectives: their sense of self and the social and political context in which they approach the memory site. The dynamic interaction between viewer and object is mediated by the context in which the viewing takes place and changes over time.³¹ In fact, one of the ironies of memory sites is that they need active intervention to maintain their power to evoke the past and not to fade into the landscape.³² Public memory is best understood as a dynamic process, which helps explain why the Boteros generate controversy at particular moments and why current Berkeley Law students may

24. Ann Rigney, *The Dynamics of Remembrance: Texts Between Monumentality and Morphing*, in CULTURAL MEMORY STUDIES, *supra* note 15, at 345, 346; *see also* JAY WINTER, SITES OF MEMORY, SITES OF MOURNING: THE GREAT WAR IN EUROPEAN CULTURAL HISTORY (1995); Eleanor Heartney, *An Iconography of Torture*, ART IN AM., Jan. 2007, at 128.

25. ALBERT BOIME, THE UNVEILING OF THE NATIONAL ICONS: A PLEA FOR PATRIOTIC ICONOCLASM IN A NATIONALIST ERA 11 (1998); *see also* Duncan Light & Craig Young, *Public Memory, Commemoration, and Transitional Justice: Reconfiguring the Past in Public Space, in LESSONS FROM TWENTY-FIVE YEARS OF EXPERIENCE* (Lavinia Stan & Nadya Nedelsky eds., 2015) (examining how public space under communist and postcommunist regimes particularly demonstrate the remaking of public memory, since public spaces were first molded to fit the narrative of the communist regime and later “cleansed” with the fall of the regime through the removal, renaming, rededication, and reuse of communist symbols).

26. *See* JAMES E. YOUNG, THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING (1993).

27. *See generally* WINTER, *supra* note 24; FRANÇOISE CHOAY, THE INVENTION OF HISTORY MONUMENT (2001).

28. *See* HALBWACHS, *supra* note 19; YOUNG, *supra* note 26; WINTER, *supra* note 24; Andrew M. Shanken, *Research on Memorial and Monuments*, 84 ANALES DEL INSTITUTO DE INVESTIGACIONES ESTÉTICAS 163 (2004); Brown, *supra* note 23.

29. *See* ASSMANN, *supra* note 21.

30. *See* Aleida Assmann, *Canon and Archive*, in CULTURAL MEMORY STUDIES, *supra* note 15, at 97; *see also* ASSMANN, *supra* note 21.

31. Rigney, *supra* note 24, at 345.

32. *See* Shanken, *supra* note 28, at 167–68.

not understand the reason for the paintings' continued presence. As one scholar observed, collective memory is "like a swimmer, [who] has to keep moving even just to stay afloat."³³

2. *Why the Boteros Are Memory Works*

Objects take on particular meanings, in part, as a result of the interpretive frame in which they are presented. As James Young observed in the context of memorialization of the Holocaust, individuals and communities can use all manner of objects and media—from family mementos to film—as "sites of memory."³⁴ Because of their links to or interpretations of past events, material objects communicate and trigger particular meanings. Works of art can also serve to commemorate and narrate past events through representation. Pablo Picasso's *Guernica* painting of the massacre of civilians in the Spanish Civil War is one of the most famous examples of modern art memorializing the horrors of war.³⁵

Like the attack on the village of Guernica, the 9/11 attacks on civilians by Al Qaeda hijackers came from the sky and ushered in a new era of warfare: the "War on Terror." Botero painted the horrors of this new war, depicting the torture of Iraqi prisoners by US soldiers in a series of paintings. The paintings symbolize how the Bush Administration abandoned the American commitment to human rights. The four paintings that hang at Berkeley Law feature naked detainees bound, blindfolded, and forced into degrading positions; one depicts prisoners stacked in a human pyramid, another shows a single prisoner doubled over on the floor with the boot of a guard pressing into his back. In a third, a menacing dog stands triumphant on the bloody back of a prostrate, caged inmate. The fourth canvass has two male figures. One is lying on his side wearing nothing but a woman's bra, and a second prisoner is sitting on his back arms raised to ward off the incoming kick from a guard; a stream of urine is hitting them both. The paintings capture the sadism and brutality of State violence. Emotionally powerful, the paintings elicit the viewer's revulsion. The message is an unequivocal denunciation of torture. Botero invoked Picasso to explain his own intention to yoke his art to memory as a moral and political intervention, stating "[p]eople would forget about Guernica were it not for Picasso's masterpiece. Art is a permanent accusation."³⁶

33. Rigney, *supra* note 24, at 345.

34. See YOUNG, *supra* note 26, at viii.

35. "Painted as a passionate protest against senseless violence," *Guernica* has been "elevated . . . to the status of moral exemplar" and "universal icon warning that unless we studied its lessons, history was doomed to repeat itself." GIJS VAN HENSBERGEN, *GUERNICA: THE BIOGRAPHY OF A TWENTIETH-CENTURY ICON I* (2004). While Picasso's painting marked the atrocities of modern war, Francisco Goya, the eighteenth- and nineteenth-century Spanish painter, is credited as the first to represent the horrors of war, breaking with the tradition of representing battle scenes as sites of heroism and glory. See Julian Freeman, *War Art*, in *THE OXFORD COMPANION TO MILITARY HISTORY* (2004).

36. See Freedberg, *supra* note 12; Sonia Fleury, *Abu Ghraib Art, Shunned Elsewhere, Debuts*

Memory works evolve as the meaning of an object changes with its sociocultural context. The setting in which the Botero paintings are displayed creates meaning. Viewed in a museum, the paintings would offer an interpretation of events at Abu Ghraib that accuses the United States of violating its commitments to the rule of law. But as they are now displayed inside Berkeley Law, the paintings stand in a new relationship to their surroundings. Here, the paintings invite critical assessment of the role of law and lawyers in deploying State power. The unspoken but widely understood association of Berkeley Law with Professor Yoo also colors the paintings' meaning in this context.

As James Young writes, interpreting the meaning of a memorial requires investigating a series of relationships between "time to place, place to memory, memory to time."³⁷ Taking the Boteros out of a museum and displaying them in Berkeley Law altered these relationships. The paintings in the central hallway speak directly to new generations of law students and to the faculty who train them, continually renewing the message of the Boteros. The placement of the paintings complicates temporality in other ways, as the institution communicates meaning to new law students about a past rupture of law involving a current faculty member. The paintings' relationship of place to memory brings the memory of the abuses committed in the War on Terror into a law school, linking law to the horrors of this new war.

In short, the paintings communicate new and multilayered meaning in the law school. The artist intended that his Abu Ghraib series would stand as a "permanent accusation."³⁸ Its display at a law school supplies one target for censure: law itself. By virtue of their location, viewers are asked to consider how law is linked to the violence depicted in the canvasses and to the torture perpetrated by the United States in the War on Terror. And because the exhibit is displayed in a law school, the paintings stand as an accusation to students and their educators: what is the role of lawyers in projecting or restraining State violence? How will you discharge your duties to your clients? What kind of lawyers will the institution turn out? As a memory work, the exhibition cannot be interpreted in isolation from the controversy at Berkeley Law over Professor Yoo and the Torture Memos. Interpreted against this background, the Boteros communicate an institutional response, one which simultaneously conveys respect for the rule of law and acknowledges law's insufficiency to attend to the episode. The university reasonably found that Professor Yoo's work on the interrogation memos did not violate its faculty conduct policy, and this result left unaddressed the challenge to the school's institutional values to which the Boteros speak. These various meanings—and how they are shaped and interpreted—make the Boteros memory works.

at UC-Berkeley Library, *DAILY CALIFORNIAN* (Jan. 30, 2007) ("Botero cited painters like Diego Rivera and Pablo Picasso as inspirations for the works, which he hopes will remain part of the collective consciousness long after the events themselves have been forgotten.").

37. See YOUNG, *supra* note 26, at 15.

38. See Freedberg, *supra* note 12.

Memories fade, and in university settings, the constant turnover of students causes memory to fade that much faster. When the Boteros were first brought to the Berkeley campus in 2007, the Abu Ghraib scandal, the US interrogation program, and the ongoing protests against Professor Yoo remained active topics of conversation at the law school and around the country.³⁹ Today, however, the interrogation program has been dismantled, and despite the lack of accountability, these conversations no longer command the same attention. The very fact that Dean Chemerinsky must now respond to complaints that the Boteros do not belong inside the law school (because the images are upsetting or unfairly critical of Professor Yoo) suggests that the sociocultural context has changed substantially. Perhaps the Boteros have lost some of their original power.

As the school considers what to do with the paintings, now is an opportune time to revisit what Dean Edley intended by displaying the Boteros in the first place. Now is also a time to assess what the paintings have come to represent and to consider whether and how Berkeley Law should continue to foster its relationship to a morally uncomfortable past. To provide a foundation for this analysis, the following Part offers a brief overview of the law and policy applicable to the US detention and interrogation program after 9/11. Subsequently, I introduce the controversy surrounding Professor Yoo's role in developing the legal justification for the program and its spillover effects on his status as a faculty member at Berkeley Law.

B. Legalizing Torture: US Interrogation Policy

In the wake of the September 11, 2001 Al Qaeda attacks, President Bush declared a "War on Terror." Law played a defining role in this new conflict. High-ranking officials, including Vice President Dick Cheney, made the case that the laws of war did not adequately meet the threat posed by a transnational non-State group capable of attacking the United States,⁴⁰ and that this threat required the United States to operate on "the dark side."⁴¹ These officials advocated for updated legal rules that would authorize new methods for gathering human intelligence. The March 2002 CIA capture of Abu Zubaydah, a high-ranking Al Qaeda suspect, brought questions about what interrogation techniques would be allowed. The agency turned to the Office of Legal Counsel (OLC) at the Department of Justice (DOJ) for guidance.

39. See *infra* Section III.A.

40. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. 1 (Jan. 22, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf> (Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees).

41. *Meet the Press* (NBC television broadcast Sept. 16, 2011), <https://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html> (Meet the Press Tim Russert interviews United States Vice President Dick Chaney).

Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo prepared memoranda that interpreted the federal anti-torture statute and established the legal standard that would govern both interrogations outside the United States⁴² and the specific interrogation plan utilized in questioning Abu Zubaydah.⁴³ The CIA sought legal clarification before interrogating Abu Zubaydah to ensure that interrogators could not be prosecuted for using “aggressive methods” of questioning that would “otherwise be prohibited by the torture statute.”⁴⁴ The August 2002 memorandum regarding applicable standards of conduct became explosively controversial when it was leaked almost two years later, and the document is now commonly referred to as the “Torture Memo.”⁴⁵ It came to define post-9/11 debates about what is or is not torture, whether torture can ever be justified, and what is the appropriate role of lawyers in validating the use of questionable techniques on detainees. The assumptions driving Bybee and Yoo’s legal advice rejected key elements of

42. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002) [hereinafter Torture Memo], <https://www.justice.gov/olc/file/886061/download> (Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A).

43. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency 1 (Aug. 1, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf> (Interrogation of al Qaeda Operative).

44. See SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 33–38 (2014) [hereinafter SENATE SELECT COMMITTEE REPORT], <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srt288.pdf>; see also JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 9 (2007) (explaining that the OLC opinion constituted a “get out of jail free” card for CIA officials involved).

45. The term “Torture Memos” has been used to refer to all legal memoranda authorizing harsh interrogation techniques written by government officials during the Bush Administration. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005). “Torture Memos” also refers to the narrower category of six primary memoranda written by OLC attorneys authorizing interrogation techniques to be used on CIA “high value” detainees. David Cole, *Introductory Commentary: Torture Law*, in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE, at 3 (David Cole, ed. 2009) [hereinafter THE TORTURE MEMOS]. The first two of these memoranda were written on August 1, 2002, and John Yoo was a principal author, although the memoranda are signed by his superior, Jay Bybee. OFFICE OF PROF’L RESPONSIBILITY, DEP’T OF JUST, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATED TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 1 (July 29, 2009) [hereinafter DOJ OFFICE OF PROF’L RESPONSIBILITY REPORT], <https://www.hsd1.org/?view&did=28555>; SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 34 (noting that Yoo advised that proposed CIA techniques would not violate US law in a July 2002 meeting with CIA and OLC representatives to discuss the proposed interrogation plan for Abu Zubaydah). The memorandum to Alberto Gonzales, which defined the severity of pain that must be reached to meet the definition of torture as being akin to death or organ failure, is generally understood as the central memorandum that contravened international law and legalized torture. Torture Memo, *supra* note 42. This Article will refer to the narrower group of six memoranda collectively as the “Torture Memos” and the August 1 memorandum to Gonzales as the “Torture Memo.”

decades of US global leadership promoting the international prohibition against torture.⁴⁶

The United States prides itself on being a world champion of human rights. Its long-standing legal and policy position was that the United States did not practice or condone torture.⁴⁷ The Convention Against Torture (CAT), the second international human rights convention the United States ratified,⁴⁸ codifies an absolute prohibition against torture and requires States that ratify the treaty to criminalize this conduct.⁴⁹ At the time of ratification, US officials made numerous statements reiterating that torture is anathema to US values and policy.⁵⁰ Yet 9/11 and the Bush Administration's response to the attacks severely tested that commitment. As Professor Yoo later explained, OLC intended to respect the legal prohibition against torture, not to authorize torture, and the memos were needed to clarify ambiguous legal terms and detail how, or if, the statute applied during the War on Terror.⁵¹ Acts that intentionally inflicted "severe" pain or suffering were prohibited by the statute.⁵² But what was "severe"? Given that these interrogations took place in a state of "war," could the President order torture

46. See FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TORTURE* 67–72 (2007).

47. See Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum, United States of America*, ¶ 6, U.N. Doc. CAT/C/28/Add.5 (2000), <https://2001-2009.state.gov/documents/organization/100296.pdf> (The US report—submitted to the United Nations Committee Against Torture in 1999, as required by the CAT—clarified that torture is "categorically denounced as a matter of policy and as a tool of state authority" in the United States); Press Release, Off. of Press Sec'y, The White House, *Statement by the President, United Nations International Day of Victims of Torture* (June 26, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/06/20030626-3.html> ("The United States is committed to the world-wide elimination of torture and we are leading this fight by example.").

48. The United States ratified the International Covenant on Civil and Political Rights in 1992, the Convention Against Torture in 1994, and the Convention on the Elimination of All Forms of Racial Discrimination in 1994. OFF. OF TREATY AFF., DEP'T OF STATE, *MULTILATERAL TREATIES AND OTHER AGREEMENTS* 520 (2019), <https://www.state.gov/wp-content/uploads/2019/07/2019-TIF-Multilaterals-7-31-2019-1.pdf>.

49. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

50. See *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Treaty Doc. 100-20 Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 1-4, 16 (1990) (statement of Sen. Jesse Helms); see also *id.* at 1–2 ("Nobody favors torture under any circumstance . . . this country just does not torture anyone, by law or in fact."); see also *id.* at 15 (statement of Mark Richard, Deputy Assistant Att'y Gen., Criminal Div., Dep't. of Justice) ("I note with some pride that torture, as understood by most persons, does not often occur within this country and when, if it does, the Department of Justice is committed to seeing that appropriate prosecutions are instituted. As a people we have established constitutional safeguards to protect our inhabitants against wanton and willful violence by public officials.").

51. JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 165–203 (2006).

52. 18 U.S.C. § 2340 (West 2004) (defining "torture" as an act intended to inflict "severe mental or physical pain or suffering"); see also 18 U.S.C. § 2340A (West 2004) (prohibiting "torture").

within his powers of commander-in-chief? Finally, if interrogation techniques were found to violate criminal law, could there be legal defenses to torture?

The advice from OLC on these points was sweeping and unprecedented. The memorandum interpreted the anti-torture statute to maximize the “coercive” methods interrogators could apply: it interpreted the severity threshold to be so high that only techniques that inflicted pain equivalent in intensity to the pain “accompanying organ failure . . . or even death” were prohibited.⁵³ It reasoned that the President’s authority to prosecute war was nearly absolute and allowed him to override federal statute and international law to order the torture of detainees. Furthermore, OLC opined that criminal defenses could immunize interrogators from criminal prosecution if a court concluded that the domestic anti-torture statute applied.⁵⁴

The memorandum provoked widespread criticism from scholars, policy makers, and the press.⁵⁵ Broadly speaking, the criticism focused on faulty legal

53. Torture Memo, *supra* note 42, at 1, 6.

54. *See id.* at 33–35, 39–46.

55. *See, e.g.*, Statement of Harold Hongju Koh Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law Yale Law School before the Senate Judiciary Committee regarding The Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States January 7, 2005, at 5. <https://law.yale.edu/sites/default/files/documents/pdf/KohTestimony.pdf>

(“A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described—as my predecessor Eugene Rostow described the Japanese internment cases—as a disaster.”); Memorandum from William H. Taft, IV, Legal Adviser, US Dep’t of State, to John Yoo, Deputy Assistant Attorney Gen., Dep’t of Justice Office of the Legal Counsel 1–2 (Jan. 11, 2002) (regarding Your Draft Memorandum of January 9) (asserting that John Yoo’s arguments were both legally and procedurally flawed); GOLDSMITH, *supra* note 44, at 148 (criticizing the OLC legal memoranda on interrogations for “the unusual lack of care and sobriety in their legal analysis.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005); (“That views and proposals like these should be voiced by scholars who have devoted their lives to the law, to the study of the rule of law, and to the education of future generations of lawyers is a matter of dishonor.”); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department’s Legal Contortions on Interrogation*, WASH. POST (June 20, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A54025-2004Jun19.html>; Dan Eggen & Josh White, *Memo: Laws Didn’t Apply to Interrogators: Justice Dept. Official in 2003 Said President’s Wartime Authority Trumped Many Statutes*, WASH. POST (Apr. 2, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/04/01/AR2008040102213_pf.html (quoting Thomas J. Romig, the Army’s former judge advocate general) (“[The memorandum is] downright offensive . . .”); Jeffrey R. Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive’s Power*, WASH. POST (July 4, 2004), http://www.washingtonpost.com/wp-dyn/articles/A26431-2004Jul3_2.html (quoting Abraham D. Sofaer, a State Department legal adviser from 1985–90) (“We in the Reagan and Bush administrations intended that deliberate violations of the Convention [Against Torture] should lead to the criminal prosecution.”); Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J. (June 8, 2004), <https://www.wsj.com/articles/SB108838039091548750> (“This diminished definition of the crime of torture will be quoted back at the United States for the next several decades. It could be misused by al Qaeda defendants in the military commission trials and by Saddam’s henchmen. It does not serve America’s interest in a world in which dictators so commonly abuse their people and quash their political opponents.”); *cf.* Adam Liptak, *The Reach of War: Penal Law; Legal Scholars Criticize*

reasoning and conclusions of law that the memorandum reached on three issues: (1) the standard of severity for torture and the failure of the memorandum to consider contrary relevant and extensive international and domestic jurisprudence on what conduct constitutes torture; (2) separation of powers doctrine and disregard for domestic case law restraining the Commander-in-Chief powers to violate a statute; and (3) the misapplication of criminal defenses to preemptively immunize interrogators from prosecution as a matter of policy.⁵⁶

The public was mostly unaware of this sweeping new legal authority until April 2004, when shocking photos of US soldiers abusing Iraqi prisoners at the Abu Ghraib facility in Iraq became public.⁵⁷ On the heels of this disclosure, the *Washington Post* published a leaked copy of the OLC August 2002 memorandum on interrogation standards of conduct.⁵⁸ While the Abu Ghraib prisoners were abused outside of interrogation and were not subjected to the methods outlined in OLC memoranda, critics inside and outside of government nevertheless attributed the abuse in the facility to the environment that the Torture Memos, with their loosened standards of treatment, had created.⁵⁹ International law is unequivocal

Memos on Torture, N.Y. TIMES (June 25, 2004), <https://www.nytimes.com/2004/06/25/world/the-reach-of-war-penal-law-legal-scholars-criticize-memos-on-torture.html> (“Charles Fried, a law professor at Harvard and the solicitor general in the Reagan administration, said it was important to analyze legal questions fully and dispassionately. ‘There’s nothing wrong with exploring any topic to find out what the legal requirements are,’ he said.”); Eric Posner & Adrian Vermeule, *A ‘Torture’ Memo and Its Tortuous Critics*, WALL ST. J. (July 6, 2004), <https://www.wsj.com/articles/SB108906730725255526>.

56. Compare Waldron, *supra* note 55, at 1682 (arguing that any attempt to loosen the torture standard would deal a traumatic blow to our legal system and affect our ability to sustain the law’s commitment to human dignity); Scott Horton, *The Woes of a Torture Lawyer*, HARPER’S MAG. (Mar. 21, 2009), <https://harpers.org/blog/2009/03/the-woes-of-a-torture-lawyer/> (asserting that “aside from the ethics and criminal law problems, Yoo’s work is troubling just from the perspective of professional competence.”); David Luban, *David Margolis Is Wrong: The Justice Department’s Ethics Investigation Shouldn’t Leave John Yoo and Jay Bybee Home Free*, SLATE (Feb. 22, 2010), <https://slate.com/news-and-politics/2010/02/john-yoo-and-jay-bybee-shouldn-t-be-home-free.html>; Jordan J. Paust, *Waterboarding is Decidedly and Manifestly Torture*, JURIST (Apr. 23, 2016), <https://www.jurist.org/commentary/2016/04/jordan-paust-waterboarding-torture/> (“[A]dequate research during the erroneous 2002 memos would have easily demonstrated that several tactics authorized and abetted in violation of human rights law, the customary and treaty-based laws of war and the Convention Against Torture were torture.”); JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 29 (2006); with YOO, *supra* note 51, at 181–82, 184–88.

57. See Rebecca Leung, *Abuse of Iraqi POWs by GIS Probed*, 60 MINUTES II (Apr. 27, 2004), <https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/>; Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far up Does the Responsibility Go?*, NEW YORKER (May 10, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

58. Dana Priest, *Justice Dept. Memo Says Torture ‘May Be Justified’*, WASH. POST (June 13, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>.

59. Military police guarding the detainees at the prison had been instructed by interrogators to “set physical and mental conditions favorable to interrogation. . . .” MG Antonio M. Taguba, *Findings and Recommendations*, in ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 18 ¶ 10 (May 2004) [hereinafter *Taguba Report*], <https://fas.org/irp/agency/dod/taguba.pdf>. The interrogation techniques permitted at the facility mirrored those in the August 2002 OLC memo to Gonzales, as in March 2003, OLC provided the Department of Defense with the same interpretation

that torture can never be justified, and UN experts agreed that the abuse at Abu Ghraib crossed the line.⁶⁰ In the public's imagination, Abu Ghraib and the Torture Memos were inextricably linked.⁶¹ The Abu Ghraib photographs have become the visual public record of what it looks like when the US government operates on "the dark side."⁶²

Initially, the rules of the detention and interrogation program applied to a small number of captured terrorist suspects in CIA custody.⁶³ Over time, the application of these rules—and the abuses of detainees—spread to military operations in Afghanistan, Guantánamo, and Iraq.⁶⁴ Moreover, although the Bush

of the federal torture statute that it had provided to the CIA. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense (Mar. 14, 2003) [hereinafter March 2003 OLC Memo], <https://fas.org/irp/agency/doj/olc-interrogation.pdf> (Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States). When the March 2003 OLC memo became public in 2008, Democratic members of Congress reportedly attributed the abuses at Abu Ghraib to the permissible legal standards governing interrogations of security detainees at the facility. David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES (Apr. 3, 2008), <https://www.nytimes.com/2008/04/03/washington/03intel.html>.

60. See *UN Seeks to Access Prisoners of US Forces*, SYDNEY MORNING HERALD (June 26, 2004), <https://www.smh.com.au/world/un-seeks-access-to-prisoners-of-us-forces-20040626-gdj7qb.html> (quoting Theo Van Boven, then-UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on the subject of Abu Ghraib) ("The whole picture being drawn up is a matter of great concern . . . [t]he prohibition of torture and inhuman and degrading treatment is an absolute one. It may not be derogated from in any circumstances."); Warren Hoge, *U.N. Says Abu Ghraib Abuse Could Constitute War Crime*, N.Y. TIMES (June 4, 2004), <https://www.nytimes.com/2004/06/04/international/middleeast/un-says-abu-ghraib-abuse-could-constitute-war-crime.html> (quoting Bertrand Ramcharan, then-High Commissioner for Human Rights) ("willful killing, torture and inhuman treatment . . . might be designated as war crimes by a competent tribunal."). In addition, without specifically mentioning Abu Ghraib, the Committee Against Torture expressed concern about the US creation of secret detention facilities, depriving detainees of legal safeguards, and allegations of torture or cruel, inhuman or degrading treatment. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee Against Torture, United States of America, ¶ 17, U.N. Doc. CAT/C/USA/CO/2 (2006), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f2&Lang=en.

61. See YOO, *supra* note 51, at 182; see generally PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008).

62. *Meet the Press*, *supra* note 41.

63. Torture Memo, *supra* note 42.

64. OFFICE OF THE INSPECTOR GEN. OF THE DEF. DEP'T, 06-INTL-10, REVIEW OF DoD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (2006), <https://fas.org/irp/agency/dod/abuse.pdf>; CIA OFFICE OF INSPECTOR GEN., SPECIAL REVIEW – COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (2004), <https://fas.org/irp/cia/product/ig-interrog.pdf>; STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008) [hereinafter S. COMM. INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY], https://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf; ADMIRAL ALBERT T. CHURCH III, *Executive Summary*, in REVIEW OF DEPARTMENT OF DEFENSE DETENTION OPERATIONS AND DETAINEE INTERROGATION TECHNIQUES (Mar. 11, 2005), <http://hrlibrary.umn.edu/OathBetrayed/Church%20Report.pdf> (reviewing detention operations and detainee interrogation techniques in Guantánamo, Afghanistan, and Iraq); JAMES R.

Administration rescinded the leaked August 2002 memorandum in December 2004, the subsequent legal standards for interrogations did not fundamentally change.⁶⁵ The interrogation techniques approved in August 2002 remained valid until 2009, when President Obama rescinded all the relevant legal memoranda and executive orders on interrogation adopted by the Bush Administration.⁶⁶

SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS (2004), <http://www.dtic.mil/dtic/tr/fulltext/u2/a428743.pdf> (reviewing detention operations in Guantánamo, Afghanistan, and Iraq); Memorandum from David Margolis, Assoc. Deputy Att'y Gen., Dep't of Justice, to Eric Holder, Att'y Gen. 75 (Jan. 5, 2010), <https://fas.org/irp/agency/doj/opr-margolis.pdf>

(Subject: Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of 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) [hereinafter Margolis Report]; JANE MAYER, THE DARK SIDE 248 (2008); *see also* SANDS, *supra* note 61.

65. OLC lawyers determined that, under the new interpretation of the federal torture statute, all of the previously approved techniques were permissible. *See* Definition of Torture Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297 (2004), <https://www.justice.gov/file/18791/download> [hereinafter Opinion on the Definition of Torture]. The new standard also survived subsequent review by OLC, which considered whether it violated international obligations or whether the interrogation techniques violated domestic law if they were applied in combination. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), <https://fas.org/irp/agency/doj/olc/techniques.pdf> (Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee) [hereinafter Memorandum on Certain Techniques that May Be Used in Interrogation of a High Value al Qaeda Detainee]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), <https://fas.org/irp/agency/doj/olc/combined.pdf> (Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees) [hereinafter Memorandum on Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees]; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency (May 30, 2005), <https://fas.org/irp/agency/doj/olc/article16.pdf> (Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees) [hereinafter Memorandum on the Application of U.S. Obligations Under CAT Article 16 to Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees].

66. Press Release, Off. of the Press Sec'y, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), <https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-release-olc-memos> (“In one of my very first acts as President, I prohibited the use of these interrogation techniques by the United States . . . through an Executive Order.”). Of the five memoranda released, only one had been in the public domain: the leaked August 2002 memo to Gonzales. The four new memoranda included a second memorandum dated August 1, 2002 to Acting General Counsel for the CIA, John Rizzo, approving the interrogation techniques for Abu Zubaydah and three memoranda from May 2005. The May 2005 memoranda resulted from the changing legal landscape after the Abu Ghraib scandal. In December 2004, OLC rescinded the 2002 memorandum to Gonzales and replaced it with a memorandum that reaffirmed that the applicable standard for torture in the US criminal statute conformed to the definition of torture in the international torture convention, subject to US understandings. However, the memorandum did not specifically define prohibited conduct. Opinion on the Definition of Torture, *supra* note 65. OLC issued three more memoranda in 2005, which evaluated the approved interrogation techniques for

We now know that the United States held more than a hundred detainees as part of the CIA detention and interrogation program.⁶⁷ The CIA subjected thirty-nine detainees to “enhanced interrogation techniques” and abused or used unapproved techniques on others.⁶⁸ What is in the public record is shocking. Abu Zubaydah was the first subject of the new “coercive” interrogation techniques.⁶⁹ His treatment included “walling, attention grasps, slapping, facial hold, stress positions, cramped confinement, white noise and sleep deprivation,” which continued in “varying combinations, [twenty-four] hours a day” for seventeen straight days.⁷⁰ When left alone during this period, Abu Zubaydah was placed in a stress position, left on the waterboard with a cloth over his face, or locked in one of two confinement boxes.⁷¹ According to the cables, Abu Zubaydah was also subjected to the waterboard “2–4 times a day . . . with multiple iterations of the watering cycle during each application.”⁷²

Scores of other CIA detainees experienced similar treatment, and one detainee died in custody after being subjected to coercive interrogation methods.⁷³ The Senate investigation confirmed the CIA waterboarded three detainees.⁷⁴ The agency subjected at least five detainees in its custody to rectal rehydration without documented medical necessity,⁷⁵ which one interrogator explained as an effective method of inducing cooperation.⁷⁶ The CIA subjected detainees to sleep deprivation, a practice that the United Nations has condemned as torture.⁷⁷ Sleep deprivation, as practiced by the United States, “involved

high-value detainees under the standard for torture set out in the December 2004 memorandum and considered whether the approved techniques violated a separate international prohibition against cruel, inhuman or degrading treatment or punishment when the techniques were used singly or in combination. Memorandum on Certain Techniques that May Be Used in Interrogation of a High Value al Qaeda Detainee, *supra* note 65; Memorandum on Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees, *supra* note 65; Memorandum on the Application of U.S. Obligations Under CAT Article 16 to Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees, *supra* note 65 .

67. See SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xxi, 96, 101–08.

68. See *id.* (finding that, of at least 119 CIA detainees at CIA Detention Facilities, thirty-nine were subject to the CIA’s enhanced interrogation techniques).

69. See *supra* notes 43–45, and accompanying text.

70. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 42.

71. *Id.*

72. *Id.* at 40–42, 67.

73. *Id.* at 54 (detailing the death of Gul Rahman in November 2002 at a CIA facility after being subjected to interrogation that included “48 hours of sleep deprivation, auditory overload, total darkness, isolation, a cold shower, and rough treatment.” CIA personnel found Rahman dead in his cell, having spent the night sitting bare-skinned on a concrete floor and shackled to the wall, and determined that the likely cause of death was hypothermia.).

74. *Id.* at 389. Khalid Sheikh Mohammed received 183 applications of waterboarding. *Id.* at 85–96. Abu Zubaydah received at least eighty-three applications of waterboarding. *Id.* at 118 n.698.

75. *Id.* at xiii, 100.

76. *Id.* at 83 (internal citations omitted).

77. See Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Rep. of the Special Rapporteur on Torture and Other*

keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads.”⁷⁸ Reportedly, at least five detainees in CIA custody experienced hallucinations during prolonged sleep deprivation and, “in at least two of those cases, the CIA nonetheless continued the sleep deprivation.”⁷⁹ The chief of interrogations at the CIA’s lead facility favorably compared the environment they had created—keeping detainees in total darkness, shackled to the walls, with a bucket for their human waste⁸⁰—to dungeons as a means to control captives and extract information.⁸¹ CIA officials relied on legal approval of enhanced interrogation techniques to develop a program designed to break detainees through physical and psychological torment. That is the essence of torture.

It is now widely acknowledged that the approved interrogation techniques throughout this period permitted torture and violated international law.⁸² Early in

Cruel, Inhuman, or Degrading Treatment or Punishment, ¶ 31, U.N. Doc. A/69/387 (Sept. 23, 2014) (“[M]any torture methods are becoming increasingly sophisticated and designed to be as painful as possible without leaving physical marks. These methods comprise, inter alia, asphyxiation; electric shocks; *sleep deprivation*. . .” (emphasis added)); Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention*, ¶ 55, U.N. Doc A/HRC/13/39/Add.5 (Feb. 5, 2010) (“The establishment of psychological torture methods is a particular challenge [and]. . . sleep deprivation. . . [is] equally destructive as physical torture methods.”).

78. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xii.

79. *Id.*

80. MAYER, *supra* note 64, at 276 (explaining that the detention facility had perfected the “art of interrogation” due to its comprehensive environment); SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 49 (internal citations omitted).

81. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 50 n.240.

82. Senator Diane Feinstein, chair of the Senate Select Committee on Intelligence which conducted a five-year review of the CIA interrogation and detention program, wrote in her forward to the report that it was her “personal conclusion” that CIA detainees were tortured. *See id.* at vii; Comm. Against Torture, Concluding Observations on the Third to Fifth Periodic Reports of the United States of America, ¶ 11, U.N. Doc. CAT/C/USA/CO/3–5 (Nov. 20, 2014) (“The Committee expresses its grave concern over the extraordinary rendition, secret detention and interrogation programme operated by the [CIA] between 2001 and 2008, which involved numerous human rights violations, including torture, ill-treatment and enforced disappearance. . .”); Comm’n on Human Rights, Situation of Detainees at Guantánamo Bay, ¶¶ 51–52, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), <http://undocs.org/E/CN.4/2006/120>; EUR. PARL. ASS., *Lawfulness of Detentions by the United States in Guantánamo Bay*, 10th Sess., Res. 1433 (2005), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17318> (concluding that many Guantánamo detainees had been subjected to ill treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States government); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES (Nov. 30, 2004), <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html> (describing a confidential report by the ICRC, which concluded that US treatment of detainees at Guantánamo rose to torture). *See also* SANDS, *supra* note 61, at 175–77; Smith, *supra* note 55; Jon Wiener, *Prosecute John Yoo, Says Law School Dean Erwin Chemerinsky*, THE NATION (Dec. 12, 2014), <https://www.thenation.com/article/prosecute-john-yoo-says-law-school-dean-erwin-chemerinsky/> (reporting that Erwin Chemerinsky, then Dean of the Law School at the University of California, Irvine, stated that John Yoo’s memorandum directly led to the torture policy and called for Yoo’s criminal prosecution).

his tenure, President Obama strongly repudiated the CIA interrogation program⁸³ and limited questioning techniques by all US officials to those established by the Army Field Manual.⁸⁴ Yet the new President rejected calls for criminal prosecutions and announced in 2009 that those who had relied on legal advice from the DOJ would not be prosecuted for their actions.⁸⁵ Nonetheless, the legislative branch initiated its own examination as the Senate Select Committee undertook an extensive review of the CIA detention and interrogation program. Its 2014 report, only the executive summary of which has been released, cast new light on those initial decisions.⁸⁶ The report suggests that the CIA misled Congress, the public, and members of the executive branch about the factual

83. President Obama's acknowledgement that "we tortured some folks" was particularly noteworthy in this regard. Press Conference by President Obama, *supra* note 4.

84. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009). The standards for interrogation by the US military are contained in the Army Field Manual and prohibit torture. US DEP'T OF THE ARMY, *Human Intelligence Collection Operations*, in FIELD MANUAL, FM 2-22.3 (FM 34-52) (Army Publ'g Directorate ed., 2006), <https://fas.org/irp/doddir/army/fm2-22-3.pdf>. In 2006, Appendix M was added to the manual, which permits physical and sensory separation of detainees (use of blindfolds) in certain circumstances to prevent collusion among detainees. However, critics charge that Appendix M creates a loophole that may be exploited and could be used to subject detainees to torture or ill treatment. See Beth Van Schaack, *Torture Convention and Appendix M of the Army Field Manual on Interrogations*, JUST SECURITY (Dec. 5, 2014), <https://www.justsecurity.org/18043/torture-convention-appendix-army-field-manual-interrogations/>.

85. President Obama reasoned that policymakers had made hard decisions, but to pursue legal action against decisionmakers would be a "witch hunt" that would further divide the country. In April 2009, Obama stated that now is "a time for reflection, not retribution," that "nothing will be gained by spending our time and energy laying blame for the past," and that we must, instead, "move forward with confidence." Press Release, *supra* note 66. Even during his campaign, Obama stated he wanted to avoid "a partisan witch hunt," despite stating that he would want an immediate review of officials involved in torture or other potential crimes as "nobody is above the law." Will Bunch, *Obama Would Ask His AG to 'Immediately Review' Potential Crimes in Bush White House*, THE PHILA. INQUIRER (Apr. 14, 2008), https://www.inquirer.com/philly/blogs/attytood/Barack_on_torture.html?arc404=true.

86. The 480-page Executive Summary and twenty Findings and Conclusions of the Senate Select Committee Report have been released. The full 6200-page report and six million pages of material collected from the CIA, the Department of State, the Department of Justice, and the Department of Defense related to the interrogation program remain classified. Press Release, Sen. Dianne Feinstein, Intelligence Committee Votes to Declassify Portions of CIA Study (Apr. 3, 2014), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=de39366b-d66d-4f3e-8948-b6f8ec4bab24/>. In August 2009, Attorney General Eric Holder initiated an investigation into more than one hundred instances of severe abuse of detainees in CIA custody. By June 2011, Holder announced that further investigation in the vast majority of those cases was not warranted, but that he would continue to investigate the brutal deaths of two detainees held in CIA custody in Afghanistan and Iraq in 2002 and 2003. However, on August 20, 2012, Holder announced the closing of these two final cases without any charges being brought, effectively foreclosing the possibility of any criminal charges against those involved in the torture programs. Press Release, Dep't of Just., Statement of Att'y Gen. Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>; Ken Dilanian, *Most CIA Interrogation Cases Won't Be Pursued*, L.A. TIMES (June 30, 2011), <http://articles.latimes.com/2011/jun/30/nation/la-na-cia-interrogations-20110701>. The Senate Select Committee Report remains the most searching review into the CIA's detention and interrogation program in Afghanistan and Iraq.

predicate for the program, its operation, and its efficacy.⁸⁷ There was some internal review of the government lawyers involved, which shed light on the shaky legal foundations of the program. The initial internal ethics review completed by the Department of Justice in 2009 found that the Torture Memos of August 2002 were not the product of good faith legal reasoning, but rather were written to justify a predetermined policy outcome: legalized torture.⁸⁸ Nevertheless, the Obama Administration did not file criminal charges, and there is no reasonable possibility that the Trump Administration will undertake any further effort to examine abuses that occurred during this period.

C. *The Role of Professor Yoo*

Perhaps no Department of Justice attorney involved in the CIA interrogation program has garnered as much attention as former Deputy Assistant Attorney General John Yoo, the primary author of the August 2002 memorandum.⁸⁹ Before working at the Office of Legal Counsel, Yoo was a tenured professor at Berkeley Law. He resumed his post at the law school in 2004, just before the Abu Ghraib scandal broke. A former Supreme Court clerk and scholar writing on executive powers, he worked on several of the memoranda that defined not just new legal standards for interrogation, but controversial interpretations of applicable international law to the conflict.⁹⁰ Professor Yoo is a high-profile and prolific

87. SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xi–xviii.

88. DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 45 (concluding that the memoranda were “drafted to provide . . . a legal justification for an interrogation program that included the use of certain” enhanced interrogation techniques). However, the Department of Justice did not adopt the report’s findings of misconduct. Margolis Report, *supra* note 64. For further assessment of the legal validity of August 2002 memo, see SENATE SELECT COMMITTEE REPORT, *supra* note 44, at xiii–xiv, 33–34 (stating that, at a July 12, 2002 meeting that included CIA general counsel and OLC attorneys, Yoo advised “that the criminal prohibitions on torture would not prohibit the methods proposed by the interrogation team” even though, at that time, he did not know the CIA’s specific proposed interrogation techniques and would not provide the full legal analysis regarding those proposed interrogation techniques until August 1). See also Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1566 (2009) (“[I]t is obvious that the memo was not written for independent professional legal advice, but to provide possible cover for tactics already approved and to facilitate their use in the future.”); Jose A. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2006); see Statement of Harold Hongju Koh *supra* note 55 at 5. (“The August 1 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client. If a client asks a lawyer how to break the law and escape liability, the lawyer’s ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act.”); Luban, *supra* note 56 (“Yoo cited legal authorities (often with dubious interpretations) to support his conclusions. . . [y]et somehow he managed to omit all the authorities on the other side—dissenting judicial opinions, later opinions by the same courts he did cite, and even Supreme Court decisions.”).

89. See *supra* note 55 and accompanying text.

90. In addition to the memoranda on interrogation, John Yoo authored several other legal opinions on questions of the scope of presidential powers as well as the application of international law to the War on Terror. See The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Opin. O.L.C. 188 (2001), https://www.justice.gov/sites/default/files/olc/opinions/2001/09/31/op-olc-v025-p0188_0.pdf;

academic and public figure. He has written a book about his role in the Bush Administration and has authored scores of op-eds on the War on Terror and the detention and interrogation program.⁹¹ His outspoken defense of his work in the Bush Administration made him a lightning rod for critics of the government's interrogation and detention program, and his position on the Berkeley Law faculty brought protests to the law school.⁹²

Berkeley Law has defended Professor Yoo's presence on the faculty on the grounds of academic freedom and due process. Regardless of one's feelings about Professor Yoo's role in drafting the Torture Memos, he offered legal advice in his role as a government lawyer and did not violate the university's faculty conduct policy. In the university's view, Professor Yoo's conduct as Deputy Assistant Attorney General has no bearing on his employment status at Berkeley Law. Critics decry this defense as a political feint and an act of moral cowardice on the part of the university.⁹³ These critics argue in effect that the law school should not allow an unindicted war criminal to teach the next generation of legal professionals.⁹⁴ At the same time that Berkeley Law stood behind Professor Yoo,

Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, and Patrick F. Philbin, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Dec. 28, 2001), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011228.pdf> (Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Dep't of Justice Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Dep't of Justice Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), <http://hrlibrary.umn.edu/OathBetrayed/Yoo-Delahunty%201-9-02.pdf> (Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees).

91. Professor Yoo worked to maintain his public visibility, even as this added to his notoriety in some circles. Unlike many of his former colleagues in the Bush Administration, Professor Yoo vigorously and publicly defended his legal work, authoring eight books, over sixty-four academic articles, and over 176 op-eds, as well as appearing at over 362 talks and presentations since returning to Berkeley Law in August 2004. John Yoo, *BERKELEY LAW*, <https://www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/> (last visited Sept. 3, 2018).

92. See *infra* Section III.

93. See Opinion, *Torture and Academic Freedom*, N.Y. TIMES (Aug. 20, 2009) <https://roomfordebate.blogs.nytimes.com/2009/08/20/torture-and-academic-freedom/> ("To protect [Yoo's] work in the Justice Department under the guise of 'academic freedom' is to protect the yelling of 'fire' in a crowded theater."). See also Phillip Carter, *Blame Berkeley*, SLATE (Apr. 14, 2008), <https://slate.com/news-and-politics/2008/04/blame-berkeley.html>; Robert Gammon, *The Torture Professor*, E. BAY EXPRESS (May 14, 2008), <https://www.eastbayexpress.com/oakland/the-torture-professor/Content?oid=1089823> ("[I]f UC Berkeley fails to investigate and fire Yoo, it will send an unmistakable — and perverse — message. If you're a professor, and you cross the line with a coed, it will cost you your job. On the other hand, you can violate moral, ethical, and legal standards. You can hurt the reputation of your university and your country. You can bring shame upon the nation and harm its standing in the world. You can put our soldiers at risk unnecessarily. You can enable people to be humiliated, tortured, and possibly even killed. And, apparently, you can do it all in the name of 'academic freedom.'"); Robert Gammon, *John Yoo, War Criminal?*, E. BAY EXPRESS (Jan. 28, 2009), <https://www.eastbayexpress.com/oakland/john-yoo-war-criminal/Content?oid=1176349> ("Any assertion that academic freedom justifies his authorization of war crimes is ethically bankrupt.")

94. For example, Berkeley's City Council passed a measure in December 2008 calling on the federal government to prosecute Professor Yoo for war crimes and, in the event of conviction, calling

its formal response could not adequately address the moral crisis that his presence provoked. The school not only had to confront protestors outside the institution but also had to grapple with challenges to its institutional identity and values.

The opportunity to display the Boteros was the result of a fortuitous set of circumstances, and the paintings work on multiple symbolic levels to externalize the school's struggle with its relationship to Professor Yoo and his role in the War on Terror. The Boteros serve to acknowledge that the university's application of the rule of law to Professor Yoo was only a partial response to his presence on the faculty. The art communicates a fuller acknowledgment that adherence to rule of law values requires the school to denounce torture as the perversion of these central principles. The following Section tells the story of Fernando Botero's work to create the series and how the paintings came to Berkeley Law.

II. THE BOTEROS

A. *The Abu Ghraib Series*

The artist Fernando Botero became riveted by the US torture scandal that followed the publication of the Abu Ghraib photos. He was particularly moved by Seymour Hersh's *New Yorker* article detailing the abuse as documented by US Major General Antonio M. Taguba.⁹⁵ Known as the Taguba Report, the general's investigation revealed the devastating extent of the "sadistic, blatant, and wanton criminal abuses" at the prison in Abu Ghraib.⁹⁶ General Taguba found that guards had, among other crimes: beaten prisoners, used dogs to "intimidate and frighten" detainees, and sodomized a detainee with a foreign object.⁹⁷ Soldiers stripped prisoners naked, forced them to wear women's underwear, hooded them, and posed them in humiliating positions to be photographed. Guards heightened the degrading treatment by exploiting the cultural opprobrium of public nudity and homosexuality: they forced naked inmates to masturbate and then photographed them in poses that made it appear as if the detainees were performing fellatio.⁹⁸ The Taguba Report and the Abu Ghraib photos revealed a bacchanal of horror perpetrated by US soldiers, and together they deeply undermined Bush

on UC Berkeley to dismiss him from the faculty. Carolyn Jones, *Berkeley Council Urges War Crimes Prosecution*, S.F. CHRON. (Dec. 10, 2008), <https://www.sfgate.com/bayarea/article/Berkeley-Council-urges-war-crimes-prosecution-3181171.php>.

95. *Fernando Botero: The Abu Ghraib Series, September 23, 2009 – February 7, 2010*, BAMPFA, http://archive.bampfa.berkeley.edu/exhibition/botero_2009.

96. Hersh, *supra* note 57.

97. *Taguba Report*, *supra* note 59, ¶¶ 6, 7, at 16-17.

98. KRISTIAN WILLIAMS, AMERICAN METHODS: TORTURE AND THE LOGIC OF DOMINATION 7 (2006); *Taguba Report*, *supra* note 59, ¶ 6(f), at 16.

Administration claims that it was conducting the War on Terror consistent with American values and the rule of law.⁹⁹

Botero channeled his anger at the revelations through his art: “[F]or months I felt this desire to say something because I thought it was an enormous violation of human rights. . . . [T]he United States has been a model of compassion and human rights. That this could happen in a prison administered by the Americans was a shock.”¹⁰⁰

Over fourteen months, Botero created over eighty paintings and sketches,¹⁰¹ each titled “Abu Ghraib” and numbered sequentially,¹⁰² based on photographs and reports of the abuse.

Botero’s art interpreted the experience of the victims. His Abu Ghraib series contains dozens of large paintings capturing the prisoners in moments of terror and degradation.¹⁰³ Several paintings in the series show naked prisoners stacked on the floor and posed into human pyramids, or being urinated on by guards as they lie bound and helpless.¹⁰⁴ The faces of the perpetrators are rarely seen, and instead soldiers’ boots or a latex-gloved hand holding a leash of a menacing guard dog appear on the periphery.¹⁰⁵ Botero’s prisoners are captured in all their excruciating vulnerability—their injuries are vivid, their mouths distorted by pain and agonizing humiliation.

Despite the gruesome scenes, the paintings convey a certain reverence for the victims in ways that the actual photographs cannot. Botero’s interpretation of the torture through his iconic, voluminous style¹⁰⁶ converts the inmates from the pornographic objects of the photos to victims of US criminal violence perpetrated

99. George W. Bush, President of the United States, On U.S. and Canada Relations and the War on Terrorism (Dec. 1 2004), <https://americanrhetoric.com/speeches/gwbushhalifax.htm> (asserting that the United States has “accepted important global duties . . . for the good of mankind” in the War on Terror, which include advancing human rights and the rule of law); SENATE SELECT COMMITTEE REPORT, *supra* note 44, at 115–16.

100. *Botero at Berkeley: A Conversation with the Artist*, BERKELEY REV. LATIN AM. STUD., Spring 2007, at 2, [hereinafter *A Conversation with Botero*], <https://clas.berkeley.edu/research/botero-berkeley-conversation-artist>. Speaking by phone from Mexico City, Botero said “he wasn’t intending to ‘shock people or accuse anyone’ with his Abu Ghraib depictions. He didn’t do them for commercial reasons (they’re not for sale). ‘You do it because it is in your gut, you are upset, you are furious, you have to get it out of your system.’” Freedberg, *supra* note 12.

101. *Id.*

102. *Boalt Helps Bring Dramatic Abu Ghraib Exhibit by Fernando Botero to Berkeley*, BERKELEY L. NEWS (Jan. 10. 2007) [hereinafter *Berkeley Law Helps Bring Abu Ghraib Exhibit to Berkeley*], <https://www.law.berkeley.edu/article/boalt-helps-bring-dramatic-abu-ghraib-exhibit-by-fernando-botero-to-berkeley/>.

103. Few of the pieces in the series are directly based on the photographs. DAVID EBONY, BOTERO ABU GHRAIB 15 (2006). As the artist explained: “[T]here was no point in just taking a photograph and making a copy in oil like they did during the hyperrealist movement in America in the sixties . . . [I]n this case it didn’t make any sense.” *A Conversation with Botero*, *supra* note 100.

104. EBONY, *supra* note 103, at 31, 32, 77, 78.

105. *Id.* at 24, 25, 91.

106. *Id.* at 9.

in the name of national security. The artist sought to portray the emotional state of the prisoner and embed these emotions into a moral narrative.¹⁰⁷ He wanted to “visualize the atmosphere described in the articles, *to make visible what was invisible*.”¹⁰⁸ While the actual victims did not have the heft that Botero gave to their reimagined forms, the painted figures “suggest a psychological and moral weightiness that commands, if it does not overwhelm, their confined spaces.”¹⁰⁹ The artist explained that, struck by the “nobility” of some of the victims in the photographs, he sought to paint some of them as “prophets, to show that these people in their poverty had a tremendous dignity and were treated in a terrible way.”¹¹⁰ Art critic Roberta Smith observed that the paintings “restore the prisoners’ dignity and humanity without diminishing their agony or the injustice of their situation.”¹¹¹

The giant scale of the paintings is particularly attuned to the unique characteristics of torture. A universally condemned practice, State torture is conducted out of public view and denied when accusations are launched. The public is not supposed to know of the State’s violence. The Abu Ghraib photographs were trophy snapshots taken by soldiers to record their exploits and only came into the public domain because of a whistleblower in the unit.¹¹² Not only did their publication expose hidden violence, but the clandestine origins of the photos paradoxically evidenced the invisibility of torture.¹¹³ The series pulls back the veil of secrecy surrounding the violent methods that the United States used to conduct this new war; it makes the invisible foundations of State torture visible.¹¹⁴ It also places the Abu Ghraib scandal into a larger frame, which invites examination of the cultural and legal context that produced the abuses. In so

107. Botero explained: “Because the artist doesn’t have to be there; he can imagine the scene and create something that has this power, as if it were actually an immediate vision of the thing. The concentration of energy and emotion that goes into a painting says more than the click of a photo.” *A Conversation with Botero*, *supra* note 100.

108. *Id.*

109. EBONY, *supra* note 103, at 10.

110. *A Conversation with Botero*, *supra* note 100.

111. Jesse Hamlin, *Abu Ghraib Paintings Find Welcome at Cal*, S.F. CHRON. (Aug. 28, 2007), <https://www.pressreader.com/usa/san-francisco-chronicle/20070828/281517926733548> (citing Roberta Smith, *Botero Restores the Dignity of Prisoners at Abu Ghraib*, N.Y. TIMES (Nov. 15, 2006), <https://www.nytimes.com/2006/11/15/arts/design/15chan.html>).

112. A reservist serving as a member of the military police at Abu Ghraib prison, Specialist Joseph Darby, gave a statement to the Army criminal investigative unit about the photographs. Another MP who participated in the photo sessions gave Darby a CD containing the images. Some of these were shown on the 60 Minutes broadcast. *See* Hersh, *supra* note 57. On April 28, 2004, CBS News published investigation details, and some of the photographs, in a 60 Minutes II broadcast. *See* MAYER, *supra* note 64, at 258–59.

113. Hedi Viterbo, *Seeing Torture Anew: A Transnational Reconceptualization of State Torture and Visual Evidence*, 50 STAN. J. INT’L L. 281, 317 (2014).

114. *See* Press Release, *supra* note 4.

doing, Botero opens up possibilities for reclamation by creating an accusation of injustice that demands response.¹¹⁵

*B. Bringing the Abu Ghraib Series to the University of California,
Berkeley*

The immediate audience for Botero's accusation was limited. Upon completion, only two museums (in Germany and Italy) exhibited the series in 2005 and 2006. Then, in fall 2006, the Marlborough Gallery in New York mounted a show to critical acclaim.¹¹⁶ UC Berkeley professor and Chair of the Center for Latin American Studies Harley Shaiken read a review of the New York exhibition and, disappointed to learn that there were no further opportunities to see the paintings in the United States, reached out to Botero to bring the series to Berkeley.¹¹⁷ Reportedly, museums in the United States did not want to show political art so unabashedly confrontational to US foreign policy.¹¹⁸ Shaiken anticipated that similar criticism would be leveled at UC Berkeley, and he deliberately financed the show exclusively with private funds.¹¹⁹ The Dean of Berkeley Law, Christopher Edley, made it a point to associate the law school with the show and contributed financially to the exhibit.¹²⁰

Because the UC Berkeley Art Museum did not have exhibit space for the series available for the next two years, Shaiken and his colleagues worked quickly to identify an alternative location on campus. They secured Doe Library, the university's central library in the heart of the campus.¹²¹ A large thoroughfare in the main library was converted into a gallery to display forty-seven paintings in

115. See Freedberg, *supra* note 12; Fleury, *supra* note 36 ("Botero cited painters like Diego Rivera and Pablo Picasso as inspirations for the works, which he hopes will remain part of the collective consciousness long after the events themselves have been forgotten.").

116. See Heartney, *supra* note 24; Smith, *supra* note 111.

117. Hamlin, *supra* note 111 (citing Smith, *supra* note 111).

118. See Freedberg, *supra* note 12 ("Some museums may have rejected the Abu Ghraib series for artistic reasons (even though Botero's less serious works are in the permanent exhibitions of many US museums) . . . Botero's paintings got the cold shoulder here despite favorable reviews in a range of respected publications."); Heartney, *supra* note 24. (Botero explained that he offered the exhibit to US museums through a booking service, Arts Service International (ASI), and was informed that ASI had not received any requests for the show.). Daniel Coronell, *Botero at Berkeley: Figures in Light and Shadow*, *BERKELEY REV. LATIN AM. STUD.*, Spring 2007, at 38, <https://clas.berkeley.edu/research/botero-berkeley-figures-light-and-shadow>.

119. Hamlin, *supra* note 111 (reporting that the \$120,000 cost for the show came entirely from private donations).

120. See *Berkeley Law Helps Bring Abu Ghraib Exhibit to Berkeley*, *supra* note 102.

121. Hamlin, *supra* note 111.

the collection.¹²² The exhibit ran for almost two months and drew fifteen thousand viewers.¹²³

C. *Bringing the Boteros to Berkeley Law*

During a 2007 interview, Botero expressed that he saw UC Berkeley as a fitting site to display his Abu Ghraib series because of the campus's history in the free speech movement and its "intellectual reputation" associated with civil rights.¹²⁴ Earlier, the artist had made clear that the paintings were not for sale and reportedly stated that he wanted the paintings to be on view in either Baghdad or the United States.¹²⁵ Less than six months after the show closed, Botero donated the entire Abu Ghraib collection, valued at \$10–15 million, to UC Berkeley.¹²⁶

With the terms of the gift ironed out and any internal misgivings overcome,¹²⁷ the university art museum mounted a four-month exhibition of the Boteros from September 2009 until early February 2010.¹²⁸ Once the show closed, the question arose regarding what pieces from the series would be on permanent display. According to Dean Edley, who was involved in the discussions, the museum initially took the position that the answer was "none."¹²⁹ Concerned that the works would disappear from public view, Edley proposed that selected pieces in the collection be displayed in buildings across campus and

122. Jean Spencer, *Botero at Berkeley: Bringing Botero to Berkeley*, BERKELEY REV. LATIN AM. STUD., Spring 2007, at 24, <https://clas.berkeley.edu/research/botero-berkeley-bringing-botero-berkeley>; Judith Scherr, *UC Berkeley Displays Botero Images of Abu Ghraib Brutality*, THE BERKELEY DAILY PLANET (Jan. 26, 2007), <http://www.berkeleydailyplanet.com/issue/2007-01-26/article/26178?headline=UC-Berkeley-Displays-Botero-Images-of-Abu-Ghraib-Brutality>—By-Judith-Scherr.

123. Kathleen Maclay, *Botero's Abu Ghraib Exhibit Closes After 15,000 Visitors View His Images of Torture and Humiliation*, UC BERKELEY NEWS (Mar. 27, 2007), https://www.berkeley.edu/news/media/releases/2007/03/27_botero.shtml.

124. Coronell, *supra* note 118.

125. Hamlin, *supra* note 111 (Botero turned down an offer from a German museum to build a wing to house the canvasses.).

126. *Botero Gives Abu Ghraib Art to Berkeley*, N.Y. TIMES (Aug. 30, 2007), https://www.nytimes.com/2007/08/30/arts/design/30arts-BOTEROGIVESA_BRF.html. Chancellor Birgeneau sought opinions from people on and off campus before accepting the gift. Hamlin, *supra* note 111.

127. Reportedly, Kevin Consey, the director of the university art museum, was not in favor of accepting the gift. However, former Museum Director and UC Art History Professor Peter Selz wrote the chancellor urging him to decide otherwise: "These are major, meaningful works of art . . . I feel it's very important for future generations to see these paintings chronicling the cruelty in our time." Hamlin, *supra* note 111. See also Associated Press, *Artist Offers Abu Ghraib Works to Berkeley*, CHI. TRIB. (Sept. 17, 2007).

128. Kathleen Maclay, *Fernando Botero Exhibit Exploring Abu Ghraib Abuses Opens at Berkeley Art Museum*, UC BERKELEY NEWS (Sept. 17, 2009), https://www.berkeley.edu/news/media/releases/2009/09/17_botero2009.shtml.

129. Interview with Christopher Edley, Jr., Former Dean, Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Apr. 3, 2018) [hereinafter Interview with Christopher Edley, Jr.].

volunteered the law school to accept a few.¹³⁰ However, it proved difficult to find a location inside the law school which met the museum's requirements for security and public accessibility.¹³¹ Subsequent renovations to the law school library offered a new space that fit the bill: it happened to be located in the hallway immediately outside the dean's offices.¹³² Four paintings were installed just ahead of the 2012–13 academic year and remain there today.

III.

THE JOHN YOO CONTROVERSY AT BERKELEY LAW

Dean Edley's statement that accompanies the paintings introduces the Boteros as a form of important social commentary on law and the War on Terror.¹³³ This statement does not mention the years of controversy that

130. Email from Christopher Edley, Jr., *supra* note 13 (a revised version of this statement is posted as a wall plaque adjacent to the display at Berkeley Law, *see infra* note 133 for full text); Interview with Christopher Edley, Jr., *supra* note 129.

131. For example, the law school's reading room, while centrally located, did not have walls that were strong enough to hold the paintings and the Plexiglas cases needed to protect them. Other large hallways did not provide enough security to permit installing the works there. Interview with Kathleen Vanden Heuvel, Adjunct Professor of Law, Dir., Law Library, Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Apr. 13, 2018).

132. Email from Christopher Edley, Jr., *supra* note 13 (*see infra* note 133 for full text). The museum and the law school ultimately agreed to hang four paintings there, chosen by museum staff. The Berkeley Art Museum had agreed to loan out most of the paintings to exhibits starting in spring 2012. The museum staff selected the four paintings now displayed at the law school because those paintings were not committed to international loans and so were available to install at the law school in summer 2012. Email from Kathleen Vanden Heuvel, Adjunct Professor of Law, Dir., Law Library, UC Berkeley, Sch. of Law to author (Apr. 13, 2018) (on file with author).

133. The statement from Dean Edley posted adjacent to the paintings reads in full:

To the Berkeley Law Community:

I was honored to support the first UC Berkeley Exhibition of artist Fernando Botero's Abu Ghraib series at the Doe Library in 2007. A few years after that remarkable show, the Berkeley Art Museum (BAM) exhibited all of the Abu Ghraib paintings that Botero donated to the university. However, BAM can display only a fraction of its holding at any one time. While some of its most important works are on loan to other institutions, many remain in storage for extended periods. For works as central to the ongoing debate about war and the rule of law, relegating the Abu Ghraib series to storage seemed unfortunate.

I decided that our recent renovation projects presented an opportunity to address this problem—by using our expanded wall space to create a venue for art lovers on campus and an enriching experience for our own legal community. I approached BAM with a proposal to exhibit a select few of Botero's paintings at the law school, and the museum agreed.

The Abu Ghraib paintings are a compelling choice for us because Botero's images raise powerful, universal, and timeless questions about the interrelationships of human nature, war, and the law. When I first saw these images, 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

surrounded Berkeley Law regarding Professor Yoo's presence on the faculty and which included public calls for his dismissal.¹³⁴ The university's response sounded in the legal register and looked to the application of faculty conduct rules to address a situation for which they were ill-suited. This narrowed the debate and sidestepped larger questions about the law and morality which the Boteros addressed.¹³⁵ Without this critical background, the display of the Boteros can be interpreted as little more than the result of a fortuitous opportunity to bring legally themed art to the school. To appreciate the relationships that texture public memory is to see the paintings in relation to place and time.

To do so, this Section begins by outlining how the Abu Ghraib scandal became associated with the Torture Memos and Professor Yoo, and how this controversy, in turn, played out within Berkeley Law. The Boteros are in dialogue with this discussion, but it is a mistake to interpret their meaning solely in this light. In Section IV, this Article addresses how the law school exhibit speaks to the broader questions about institutional responsibility in preparing the next generation of legal practitioners. In other words, the paintings speak on multiple levels. The memory work of the Boteros negotiates with both the narrower questions regarding Professor Yoo as well as the broader sociolegal questions of institutional responsibility.

A. The Abu Ghraib Scandal and Professor Yoo's Legal Memoranda

The 2004 Abu Ghraib scandal coincided with Professor Yoo's return to the law school after his time serving in the Bush Administration, and preceded the arrival of Christopher Edley as the new dean at Berkeley Law.¹³⁶ School was in session in late April 2004 when CBS aired the *60 Minutes* program on torture at Abu Ghraib, and public commentary appeared linking the August 2002 Torture Memo to the Iraqi prisoner abuse.¹³⁷ At commencement that year, students wore

void created when we have no law.

The Botero paintings displayed in the law school lobby will be rotated over time. In the months ahead, I hope this project will stretch beyond Botero to include a wide range of art that can be exhibited in our second-floor corridor as well. Among other ideas, I plan to invite alumni who have distinguished art collections to consider making short-term loans to the law school.

Christopher Edley, Jr.
Dean and Orrick Professor of Law

"Art has the capacity to make us remember a situation for a long time. When the newspapers stop talking, and the people stop talking, the art is there." Artist, Fernando Botero

134. See *infra* Section III.A and note 171.

135. See *infra* Section IV.B.

136. The prisoner abuse at Abu Ghraib was made public in late spring 2004, after Edley had accepted the Berkeley Law deanship, but before he arrived on campus. Interview with Christopher Edley, Jr., *supra* note 129.

137. See *supra* Sections I.B and I.C for discussion of Abu Ghraib and the Torture Memos. For

“Guantánamo” armbands to protest Professor Yoo’s presence on the faculty and called on him to resign.¹³⁸ That summer, as Dean Edley moved into his new job, over one hundred law professors around the country and leaders of the legal profession signed an open letter to President Bush condemning the legal memorandum.¹³⁹ Thus began a public debate that persisted for the better part of the next decade about the legal justifications for and the implementation of the Bush Administration’s detention and interrogation program. Because the Department of Justice continued to affirm the legality of the interrogation techniques authorized by Yoo’s initial memoranda, Professor Yoo remained a relevant public figure in the torture controversy and attracted criticism of the law school. Critics of the Torture Memos framed Professor Yoo’s presence on the faculty as Berkeley Law’s approval of his role.¹⁴⁰ Others defended Professor Yoo, his legal opinion, and his continued position on the faculty.¹⁴¹ In short, debates within the law school community mirrored debates outside of it.

The War on Terror was a watershed event for the nation and for the international Community. During the Bush Administration, public attention on the legal aspects of the War on Terror was a constant, but the context for Berkeley Law’s engagement with the topic was defined by the controversy surrounding Professor Yoo. Abu Ghraib was a defining moment in the national debate on the interrogation and treatment of captives in US custody; photographic evidence had a powerful influence. The impact of the photos was wide-reaching: the judicial and legislative branches weighed in and established new legal parameters on the executive’s power to detain, interrogate, and prosecute suspected Al Qaeda members.¹⁴² The debates over the detention and interrogation program were part

further discussion regarding how the interrogation techniques initially approved for use by the CIA spread to Guantánamo, then to Afghanistan, and finally to Iraq, see S. COMM. INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, *supra* note 64, at xx–xxii.

138. Lasden, *supra* note 5. I remember flyers in the law school appearing just before graduation that adapted the popular 1990s California milk producer *Got Milk?* ad campaign: the flyers had Professor Yoo’s picture with a milk mustache superimposed on his upper lip and the words *Got Rights?*

139. *Id.*

140. See Christopher Edley, Jr., *The Torture Memos and Academic Freedom*, BERKELEY LAW NEWS (Apr. 10, 2008), <https://www.law.berkeley.edu/article/the-torture-memos-and-academic-freedom/> [hereinafter Edley April 2008 Statement].

141. See Lasden, *supra* note 5. Professor Yoo states he feels “very much at home at [Berkeley Law], where he counts as friends a number of colleagues.” *Id.* However, he has also faced strong criticism from the student body and his colleagues.

142. The first Supreme Court rulings curbing the Bush Administration’s detention policy came down weeks after the Abu Ghraib photos became public. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (holding that US citizen detainees have due process rights, including the ability to challenge their enemy combatant status before an impartial tribunal); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that foreign national detainees have the right to have their habeas corpus petitions heard in federal courts). Further judicial and legislative limitations soon followed. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that detainees are entitled to due process protections, including judicial proceedings in regularly constituted courts); *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding that foreign national detainees have a constitutional right of habeas corpus);

of a more general and active legal debate about the appropriate balance between protecting domestic civil liberties and safeguarding national security after 9/11.¹⁴³ Law schools around the country were steeped in these discussions, regularly hosting academic conferences, debates, policy makers, and legal advocates to inform, educate, and stimulate thinking about the role (and rule) of law in response to terror in general, and in the interrogation and detention of War on Terror detainees in particular.¹⁴⁴

Public criticism of the Bush Administration's detention and interrogation program targeted Professor Yoo and implicated Berkeley Law. Professor Yoo was named in lawsuits alleging his responsibility for the torture of individuals subject to interrogation under the standards he drafted;¹⁴⁵ he was subjected to a Department of Justice ethics investigation;¹⁴⁶ and he was widely criticized for his legal advice immunizing torture.¹⁴⁷ It is hard to imagine a law student in the United States during this period who was not exposed to the topic, or a Berkeley Law student who did not know that one of their professors was a leading figure in these legal debates. The public controversy surrounding Professor Yoo also led to

Detainee Treatment Act of 2005, 42 U.S.C. §§ 2000dd (2005) (establishing provisions related to the treatment of DOD and Guantánamo detainees); Military Commissions Act of 2009, 10 U.S.C. § 948 (2009) (addressing the Supreme Court's concerns in *Boumediene v. Bush* and amending a 2006 act that had unconstitutionally suspended the right of habeas corpus for detainees).

143. See, e.g., Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002); Kelly R. Cusick, *Thwarting Ideological Terrorism: Are We Brave Enough to Maintain Civil Liberties in the Face of Terrorist Induced Trauma?*, 35 CASE W. RES. J. INT'L L. 55 (2003); Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CALIF. L. REV. 2203 (2007); Erwin Chemerinsky, *Civil Liberties and the War Terror: Seven Years after 9/11 History Repeating: Due Process, Torture and Privacy during the War on Terror*, 62 SMU L. REV. 3 (2009).

144. See e.g., Neil Katsuyama, *Panel Explores Nuances of Fighting Terrorism*, YALE DAILY NEWS (Jan. 30, 2004), <https://yaledailynews.com/blog/2004/01/30/panel-explores-nuances-of-fighting-terrorism/>; Jonathan P. Abel, *Conservative Panel Defends War on Terror*, THE HARV. CRIMSON (Sept. 17, 2003), <https://www.thecrimson.com/article/2003/9/17/conservative-panel-defends-war-on-terror/>; Ana Diaz-Hernandez, *Olshansky Says Rights Subverted*, THE STAN. DAILY ARCHIVES (Nov. 26, 2007).

145. *Padilla v. Yoo*, 678 F.3d 748, 750, 753–55 (9th Cir. 2012) (alleging that, as one of the principal authors of the torture memos, Yoo formulated unlawful policies that caused plaintiff's unlawful military detention and interrogation; the judge held that Yoo was entitled to qualified immunity as a DOJ attorney and dismissed the case). There was an unsuccessful attempt by former detainees to bring a criminal case in Germany against Yoo and other US officials for torture. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 14, 2006, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] [Decisions of the Federal Court of Justice of Civil Matters] (Ger.). See also *Criminal Complaint Against Donald Rumsfeld et. al.*, Federal Supreme Court Karlsruhe, Case No. 3 ARP 156/06-2 (Apr. 5, 2007), <https://ccrjustice.org/sites/default/files/assets/ProsecutorsDecision.pdf> (reasoning that, though the statute allowed for universal jurisdiction, other jurisdictional requirements were not met; the prosecutor declined to initiate proceedings in April of 2007, and again on appeal in April of 2009).

146. Margolis Report, *supra* note 64; DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 45.

147. See *supra* note 55; THE TORTURE MEMOS, *supra* note 45, at 5, 37–38.

calls to fire him—from both students and the public.¹⁴⁸ I remember several informal conversations with Dean Edley and members of his staff in which they conveyed the many calls and emails the dean's office received from alumni and members of the public. Reportedly, opinions were divided. Many agreed with critics of the Bush Administration, but many also supported Professor Yoo. My memory is that those who supported Professor Yoo defended him on any of several grounds, arguing that: his legal opinion was correct; he provided critical public service during an unprecedented national security crisis; and he was being unfairly targeted for legal advice when criticism, if any, should be directed toward the elected officials. These competing demands for action fell on Berkeley Law.

Given Professor Yoo's high profile,¹⁴⁹ it may strike some as surprising that Berkeley Law had relatively little to say about his work in the Bush Administration or whether that work impacted his ability to teach at the law school. The dean framed the issue primarily as a matter of due process addressed by faculty regulations, elevating a legal response over other forms of institutional or cultural action.¹⁵⁰ Asserting a normative position in other spheres would have required Berkeley Law to take a side in the substantive debate about the memos, which, in turn, would have raised a host of uncomfortable questions.¹⁵¹

The most comprehensive public record of the law school's views on the matter comes from two statements issued by Dean Edley, which serve as the background against which the Botero exhibit is understood. Dean Edley issued these statements in response to public controversy aimed at the school prompted by new revelations about the Torture Memos: the first was in 2008, four years after Professor Yoo returned to the faculty, and the second was in 2009. There was no public faculty or community discussion of either statement.

B. Dean Edley's April 2008 Statement

In April 2008, the US government released another OLC memorandum, signed by John Yoo and dated March 14, 2003.¹⁵² This memorandum considered whether federal criminal statutes applied to the actions of military officers who detained or interrogated terrorism suspects in military custody outside the United States.¹⁵³ Consistent with the 2002 memorandum on interrogation techniques

148. See *supra* note 5, *infra* notes 150, 171.

149. See *supra* note 91 and accompanying text.

150. See Edley April 2008 Statement, *supra* note 140; see also Christopher Edley, Jr., *The Torture Memos, Professor Yoo, and Academic Freedom*, BERKELEY LAW NEWS (Aug. 20, 2009), <https://www.law.berkeley.edu/article/the-torture-memos-professor-yoo-and-academic-freedom/> [hereinafter Edley August 2009 Statement].

151. See *infra* Section IV.A.1.(c).

152. Eggen & White, *supra* note 55.

153. March 2003 OLC Memo, *supra* note 59, at 1. See also *Memos Provide Blueprint for Police State*, MARJORIE COHEN (Mar. 4, 2009), <http://marjoriecohn.com/memos-provide-blueprint-for-police-state/>.

approved for use by the CIA, John Yoo reached the same legal conclusions regarding interrogations by the military.¹⁵⁴ But by the time this legal memo became public, the climate had shifted.¹⁵⁵ Public disclosure of the legal justifications authorizing the US to administer “enhanced interrogation techniques”—now widely denounced as torture—led to renewed calls to hold the lawyers who provided this advice accountable.¹⁵⁶ Citing public criticism of Berkeley Law for retaining Professor Yoo on its faculty, Dean Edley issued a public statement that criticized Professor Yoo’s government legal work, but defended his continued employment.¹⁵⁷

In this statement, Dean Edley framed Professor Yoo’s presence on the faculty in the context of the university’s educational mission to foster a culture of debate and to have students argue about difficult problems with the “intensity and discipline these crucial issues deserve.”¹⁵⁸ At the same time, Dean Edley clarified that Berkeley Law did not recruit Professor Yoo because of his service as a political appointee in the DOJ. Rather, Professor Yoo was a “prolific (though often controversial) scholar” who had earned tenure at Berkeley Law before serving in the Bush Administration.¹⁵⁹ While acknowledging his own and many of the faculty’s disagreement with Professor Yoo’s legal advice, Dean Edley posited that academic freedom and due process rights constrained what the school could and should do in response. In Dean Edley’s view, faculty disagreement with the legal judgment of a colleague could not be the basis for firing or sanctioning. Otherwise, “academic freedom would be meaningless.”¹⁶⁰

154. March 2003 OLC Memo, *supra* note 59, at 14–19.

155. Johnston & Shane, *supra* note 59 (“Congressional Democrats used the 2003 memorandum on Wednesday to renew their criticism of the administration for policies that Senator Patrick J. Leahy of Vermont, chairman of the Judiciary Committee, said threatened ‘our country’s status as a beacon of human rights.’”). As one commentator noted, public attention focused on the fact that the administration had rescinded the August 2002 OLC memorandum, but largely overlooked the fact that the superseding OLC memorandum held that the prior techniques were, and remained, valid, and thus in the eyes of DOJ authorities continued to immunize interrogators from criminal sanction. THE TORTURE MEMOS, *supra* note 45, at 4, 17–18.

156. See, e.g., Editorial, *There Were Orders to Follow*, N.Y. TIMES (Apr. 4, 2008), <https://www.nytimes.com/2008/04/04/opinion/04fri1.html> (criticizing the memorandum and its author, John Yoo, “who inexplicably, teaches law at the University of California, Berkeley”); *National Lawyers Guild Calls on Boalt Hall to Dismiss Law Professor John Yoo, Whose Torture Memos Led to Commission of War Crimes*, MARJORIE COHN (Apr. 9, 2008), <http://marjoriecohn.com/national-lawyers-guild-calls-on-boalt-hall-to-dismiss-law-professor-john-yoo-whose-torture-memos-led-to-commission-of-war-crimes/>; Jennifer Van Bergen, *The High Crimes of John Yoo*, COUNTERPUNCH (Apr. 24, 2008), <https://www.counterpunch.org/2008/04/24/the-high-crimes-of-john-yoo/>; Carlos Villarreal, *Professor John Yoo Should Be Dismissed from Boalt Law School—And Prosecuted*, COUNTERPUNCH (Apr. 22, 2008), <https://www.counterpunch.org/2008/04/22/professor-john-yoo-should-be-dismissed-from-boalt-law-school-and-prosecuted/>; Jones, *supra* note 94; see also SANDS, *supra* note 61, at 224–32.

157. See Edley April 2008 Statement, *supra* note 140.

158. *Id.*

159. *Id.*

160. *Id.*; see also Richard B. McKenzie, *In Defense of Academic Tenure*, 152 J. INSTITUTIONAL

Dean Edley pulled no punches when it came to criticizing how Professor Yoo exercised his role as a government lawyer. Dean Edley chastised Professor Yoo for rendering legal opinions that “reduce[d] the Rule of Law to the Reign of Politics.”¹⁶¹ Rather than providing a check on the abuse of government power, Dean Edley argued, Professor Yoo gave legal cover to political operatives to implement their anti-terrorism agenda. At the same time, Dean Edley insisted that Professor Yoo was not among the individuals who were most culpable for the torture program, stating that “no argument . . . makes [Professor Yoo’s] conduct morally equivalent” to that of Secretary Rumsfeld or “comparable to the conduct of interrogators.”¹⁶² Nevertheless, Dean Edley addressed whether Professor Yoo’s conduct as a government lawyer breached a duty that made him eligible for sanction by Berkeley Law. Citing the university rules governing faculty conduct, Dean Edley stated that Berkeley Law could only initiate removal if Professor Yoo were convicted of a crime which “clearly demonstrates unfitness to continue as a member of the faculty.”¹⁶³ At the same time, Dean Edley expressed his personal view that the appropriate standard was not whether Professor Yoo’s conduct was strictly criminal, but whether it breached a “comparable statute” or ethical rules for government attorneys.¹⁶⁴ Dean Edley concluded that there was no substantial evidence that even this more relaxed standard had been met.¹⁶⁵

C. *Dean Edley’s August 2009 Statement*

The dean’s statement did not prevent public protest at graduation that year.¹⁶⁶ However, the election of Barack Obama renewed hope among critics of the Bush presidency that the new administration would take decisive action against those responsible for the torture program.¹⁶⁷ After all, President Obama campaigned on a promise to close Guantánamo and repair the United States’ reputation as a champion of human rights.¹⁶⁸ In the early months of his

& THEORETICAL ECON. 325, 335 (1996) (tenure protects independence and minimally shields academics from the effects of internal infighting with their colleagues).

161. Edley April 2008 Statement, *supra* note 140.

162. *Id.*

163. *Id.* Edley later reiterated the university’s “unfitness” standard in his second public statement. *See* Edley, August 2009 Statement, *supra* note 153; *UC Faculty Code of Conduct*, *supra* note 7, at 9.

164. Edley April 2008 Statement, *supra* note 140; *UC Faculty Code of Conduct*, *supra* note 7, at 9.

165. Edley April 2008 Statement, *supra* note 140.

166. Asaf Shalev, *Protesters at Boalt Commencement Call for Yoo’s Removal*, DAILY CALIFORNIAN (May 19, 2008), <https://archive.dailycal.org/article.php?id=101711> (reporting that about fifty protesters dressed in orange jumpsuits assembled outside the law school’s commencement ceremony to “demand that UC Berkeley fire controversial professor John Yoo”).

167. The Berkeley City Council passed a measure calling for the federal government to prosecute Professor Yoo for war crimes and to demand that UC Berkeley dismiss him if he were convicted. Jones, *supra* note 94.

168. Transcript, *The Democratic Debate*, N.Y. TIMES (Nov. 15, 2007),

administration, the new President reversed his predecessor's interrogation policy, withdrew the OLC memoranda authorizing "enhanced interrogation techniques," and published four previously unreleased OLC legal memoranda that had governed the torture program.¹⁶⁹ In his statement accompanying the release of the OLC memoranda, President Obama made clear that officials who relied on this legal advice in good faith while carrying out their duties would not be prosecuted, but he made no representation about the fate of those who had drafted the legal memoranda.¹⁷⁰

Official disclosure of the legal underpinnings of the Bush Administration's detention and interrogation program again revived attention on Professor Yoo and Berkeley Law. High-profile figures inside and outside the university called for action against Professor Yoo,¹⁷¹ and demonstrators staged protests in front of his

<https://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html> (Then-Senator Obama stated: "I am going to want to go before the entire world and say, America's back, we are ready to lead . . . We're going to lead by shutting down Guantanamo and restoring habeas corpus in this country so that we offer them an example.").

169. See *supra* note 45 for a discussion of the released memoranda. The announcement referred to six OLC memoranda, but two of these, the August 2002 memorandum to Alberto Gonzales and the December 2004 memorandum rescinding that earlier opinion, were already in the public domain.

170. Press Release, *supra* note 66.

171. Terence Chea, *Authors of 'Torture' Memos Face Backlash*, NBC NEWS (May 6, 2009), http://www.nbcnews.com/id/30609351/ns/politics-white_house/t/authors-torture-memos-face-backlash/#.XEEHlxKhnJ ("California Attorney General Jerry Brown, a likely Democratic candidate for governor, said the memos raised questions about whether Yoo should be allowed to teach law at UC Berkeley and called for a full accounting."). UC Professor J. Bradford DeLong requested that the Chair of the Academic Senate on the Berkeley campus investigate whether Professor Yoo violated legal ethics, principles of scholarly integrity, or criminal statutes in his work at the Department of Justice. DeLong, *supra* note 6 (letter dated May 6, 2008, from UC Berkeley Economics Professor J. Bradford DeLong, to Chair of the UC Academic Senate William Drummond). The Chair of the Academic Senate declined to do so, stating that it would be up to university administrators, not the Academic Senate, to initiate such proceedings. *Id.* (response from William Drummond, Chair, Academic Senate, to UC Berkeley Economics Professor J. Bradford DeLong). See also David Glenn, *'Torture Memos' vs. Academic Freedom*, CHRON. HIGHER EDU. (Mar. 20, 2009), <https://www.chronicle.com/article/Torture-Memos-vs-Academic/3236>. The UC Berkeley faculty senate received requests to sanction Professor Yoo. Martin Syjuco, *Some at UC Berkeley Are Scrutinizing Yoo's Tenured Position*, THE PANTHER (Mar. 29, 2009), <http://www.thepantheronline.com/news/some-at-uc-berkeley-are-scrutinizing-yoos-tenured-position>. Many others also called for the university to investigate Professor Yoo. See, e.g., Bhattacharjee, *supra* note 8 (stating that a Berkeley Law student group against torture was "sending petitions to the Justice Department, the Pennsylvania Bar Association, and the University of California Faculty Senate, urging investigations of Yoo and Bybee."); Riya Bhattacharjee, *District Attorney Drops Charges Against John Yoo Protesters*, BERKELEY DAILY PLANET (Sept. 28, 2009), <http://berkeleydailyplanet.com/issue/2009-09-24/article/33826?headline=District-Attorney-Drops-Charges-Against-John-Yoo-Protesters-> ("The group of 60 or so activists, community members, current and former law school students voiced their desire for a comprehensive criminal investigation into Yoo's role in the writing of interrogation memos while he was serving as legal counsel for the US Department of Justice from 2001 to 2003."). See also Brett Miller, *Chancellor's Choice of Fellows Draws Criticism*, NEW U., UC IRVINE (Jan. 17, 2005), https://www.newuniversity.org/2005/01/17/chancellors_choice_of_fellows101/; Scott Jaschik, *Protest During Poli-Sci Meeting*, INSIDE HIGHER ED (Sept. 1, 2017), <https://www.insidehighered.com/news/2017/09/01/critics-berkeley-professor-stage-protest-during->

home.¹⁷² Protestors entered Professor Yoo's classrooms, interfering with his ability to teach and prompting Dean Edley to issue a new statement.¹⁷³

This statement, released on August 20, 2009, reiterated the arguments Dean Edley made in his earlier open communication, including the standard for academic sanction or dismissal.¹⁷⁴ Dean Edley promised to review the forthcoming DOJ ethics report on Professor Yoo's performance while at the OLC for findings that might trigger university action under the academic conduct standards.¹⁷⁵ Dean Edley was more forceful about the possibility of criminal sanctions, given the changed political circumstances. As a board member of the Obama Presidential Transition, Edley had argued in favor of criminal investigations of Bush Administration officials, on the grounds that only judicial proceedings could provide authoritative and conclusive determinations of law's boundaries. "We need to know where the boundaries of lawful conduct are in combating national security threats. We need to know when legal advice and advocacy become criminal," Edley wrote of the opinions he voiced when assisting in the Obama transition.¹⁷⁶ As a nation, we are still waiting for answers to those questions.

D. Legal Accountability and the Berkeley Faculty Conduct Rules

In retrospect, the early days of the Obama Administration appear to have been the high-water mark for reckoning with the Bush Administration's detention and interrogation program. The DOJ released its final report on Professor Yoo in January 2010.¹⁷⁷ The determination of the investigation by the DOJ Office of Professional Responsibility (OPR) was that as a Deputy Attorney General, Yoo had committed "intentional professional misconduct" in rendering legal opinions in connection with the detention and interrogation program.¹⁷⁸ A designated career attorney at DOJ, David Margolis, reviewed the negative findings along with Professor Yoo's response; he found that Professor Yoo had not breached duties as a DOJ lawyer that would warrant referral to the state bar for disciplinary proceedings.¹⁷⁹ Margolis offered a somewhat equivocal assessment of the findings of the OPR. He prefaced his evaluation by referencing the narrow scope

his-talk-political-science-meeting.

172. Diana Newby, *Guess We're Not The Only Ones Who Find Yoo Puns Hoomorous*, DAILY CLOG (June 30, 2009), <http://clog.dailyca.org/2009/06/30/guess-were-not-the-only-ones-who-find-yoo-puns-hoomorous/#more-11660>.

173. Edley, August 2009 Statement, *supra* note 153.

174. *Id.*

175. *Id.*

176. *Id.*

177. Margolis Report, *supra* note 64.

178. DOJ OFFICE OF PROF'L RESPONSIBILITY REPORT, *supra* note 45, at 1.

179. Margolis Report, *supra* 64, at 67-69.

of his review, which constrained his analysis.¹⁸⁰ Margolis noted that this “decision should not be viewed as an endorsement of the legal work that underlies those memoranda.”¹⁸¹ Nevertheless, he concluded that Professor Yoo did not commit misconduct while working on the interrogation memoranda of August 2002.¹⁸²

Dean Edley embraced the DOJ decision as putting an end to any further questions about whether the university could sanction Professor Yoo. The university’s rules specify that unacceptable conduct meriting sanction includes crimes that “clearly demonstrate[] unfitness” to continue as a faculty member.¹⁸³ Although “unacceptable conduct” may include activities beyond criminal conviction,¹⁸⁴ university officials considered a determination by DOJ that Professor Yoo had committed a serious ethical violation as a necessary prerequisite for action.¹⁸⁵ When the DOJ cleared Professor Yoo of a sanctionable breach of government rules of ethics, Dean Edley issued a statement making clear that the matter of university sanction against Professor Yoo was closed:

DOJ’s conclusion underscores why it was important that the university not rush to judgment . . . I hope these new developments will end the arguments about faculty sanctions, but we should and will continue to argue about what is right or wrong, legal or illegal in combating terrorism. That’s why we are here.¹⁸⁶

Efforts to secure legal accountability for the DOJ lawyers and political appointees similarly failed. President Obama rejected the pursuit of legal accountability as a “witch hunt.”¹⁸⁷ The DOJ did not initiate criminal proceedings against anyone involved in the interrogation program; civil suits against the individuals involved were dismissed.¹⁸⁸ Consequently, there was no criminal conviction or comparable violation that would trigger application of the university rules of sanction. Those looking to federal review to enable university action against Professor Yoo were disappointed. Perhaps ironically, the release of

180. *Id.* Margolis reviewed the OPR misconduct findings against Jay Bybee and John Yoo for their preparation of legal memoranda on interrogation of suspected terrorists and did not consider legal work outside of this context. *Id.* at 2. Margolis concluded that to find misconduct, OPR had to identify the existence of a “known, unambiguous obligation or standard” that had been violated. *Id.* at 2, 68–69. Margolis found that OPR had failed to identify such a standard in this case. *Id.* However, he did make a finding of “poor judgment,” a finding of lesser seriousness that did not warrant referral to state bars for disciplinary action. *Id.*

181. *Id.* at 2.

182. *Id.*

183. *UC Faculty Code of Conduct*, *supra* note 7.

184. *Id.* at 2 (“The examples of types of unacceptable faculty conduct set forth below are not exhaustive. It is expected that case adjudication, the lessons of experience and evolving standards of the profession will promote reasoned adaptation and change of this Code.”).

185. *Id.*

186. Bhattacharjee, *supra* note 8.

187. Bunch, *supra* note 85.

188. Press Release, *supra* note 66 (President “assur[ing] those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution.”); *supra* note 145.

Margolis' report coincided with the ending of the Berkeley Art Museum's Botero exhibition.

The conclusion of the DOJ investigation did not settle questions about the detention and interrogation program or the role of government lawyers, and the legalistic approach of Berkeley Law and the broader university created a moral gap rather than a resolution. First, by framing Professor Yoo's ongoing employment as an issue covered by the faculty conduct code, university officials artificially narrowed public concerns and made law *the only* realm through which the institution would address the challenges to its institutional identity.¹⁸⁹ Yet the faculty conduct code was not designed to address a challenge like the one Professor Yoo's employment posed. The regulations were written to *protect* faculty members' ability to participate in public life, not to adjudicate the substance or value of their activities.¹⁹⁰ Treating the code as the universe of possible action meant ignoring potential nonlegal responses. For example, Berkeley Law could have issued a statement about the ideals of moral fitness appropriate in professional schools in general, and how these ideals are discharged in the sphere of public service in particular. The university read the faculty conduct code as requiring *external* regulators to make a finding of serious misconduct. Because Professor Yoo did not violate the faculty conduct code, a gap emerged between what the university thought that it *could* do and lingering questions about what it *should do*.

Unable to rely on the conduct code to take action, Berkeley Law concluded that *no action* could be taken. Essentially, Dean Edley's decision made clear that when faculty provide legal advice that justifies illegal or unethical conduct, so long as they avoid prosecution, then no wrong has been done to the law school. Alternatively, Berkeley Law could have used the conclusion of the OPR investigation as an occasion to debate reform of the faculty conduct code, which would have opened up a discussion about whether public service by faculty needed to meet any substantive standards to avoid conflict with the university's mission and values. Although any change to the faculty conduct code likely would not have applied retroactively, taking up this issue would have signaled that regulations on faculty conduct could be used to reevaluate the university's role in thinking about how its faculty members served political power.

Finally, Dean Edley's narrative equivocated on the ultimate question: whether Professor Yoo's work at the DOJ was blameworthy *with respect to his fitness to serve in the academy*. The moral challenges that Professor Yoo posed to Berkeley Law could not be adequately captured by the binary determination of whether he had committed a legal offense and violated the faculty conduct rules.

189. In 2008, UC Berkeley Vice Provost for Academic Affairs and Faculty Welfare Sheldon Zedeck asked Vice-Chair of the Faculty Senate and law faculty member Professor Christopher Kutz to analyze whether the faculty conduct policy applied to Professor Yoo's professional service at DOJ. Interview with Christopher Kutz, Professor, Univ. of Cal., Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Oct. 9, 2019) [hereinafter Interview with Christopher Kutz].

190. See generally *UC Faculty Code of Conduct*, *supra* note 7.

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Such arguments about moral fitness raise broader concerns than strict legality: they provoke consideration about what ends law schools serve by educating students and whether faculty should emulate a particular vision of public service.

Stepping outside of the legalistic possibilities for individual sanction would have required the university to acknowledge that other values and judgments were at stake. Instead of accepting that the faculty rules of conduct extinguished all university action, Dean Edley could have used this moment to observe that the only issue settled by the DOJ ethics report was that law provided an inadequate solution. Berkeley Law could have considered other means of confronting the narrow question of how to treat an individual faculty member—whether via informal administrative measures regarding what courses Professor Yoo taught and what committees he served on, or a broader discussion about how the school teaches legal ethics,¹⁹¹ or how to project Berkeley Law's institutional identity and rule of law values. Any of these actions would have signaled an institutional assessment of the legitimacy of the OLC memoranda.

Dean Edley seemingly closed the debate about Professor Yoo, but these larger issues continued to circulate. Dean Edley believed that the community would continue to debate right and wrong—but through what means and to what end? Law does not provide the vocabulary for ongoing community deliberation. The installation of the Boteros two years later offered one potential answer.

IV.

THE BOTERO EXHIBIT AT BERKELEY LAW AS MEMORY WORK

In exercising his decanal authority to install the Boteros, Dean Edley opened a dialogue about Berkeley Law's relationship to the Bush Administration's detention and interrogation program. This includes, but is larger than, the controversy over Professor Yoo. However, the minimal explanatory materials currently posted alongside the paintings make no reference to the controversy over Professor Yoo, and therefore hinder the communicative value of the paintings.

The first part of this Section articulates the public memory of the Boteros and the socio-institutional communicative practices that shaped this memory by analyzing three levels of meaning that the installation conveys. Dean Edley intended the exhibition to communicate a reminder of the dark entanglement of law in the State use of torture in the War on Terror. The painting's mnemonic link to Berkeley Law's association with John Yoo is not obvious and requires understanding how the law school and its faculty addressed the controversy. Thus, the memory work of the Boteros is multilayered. The publicly posted materials communicate a universal message about the value of the rule of law, while the

191. For example, the law school might have considered adopting a pervasive approach to teaching ethics, which would mean integrating ethical instruction across courses rather than condensed into a single-subject class. See Thomas L. Shaffer, *Using the Pervasive Method of Teaching Legal Ethics in a Property Course*, 46 ST. LOUIS U. L.J. 655, 656 (2002); David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485, 487 (1989).

paintings' location at Berkeley Law—for those observers who are aware of the recent history—serves to acknowledge the institution's moral relationship to the Torture Memos.

Next, this Section examines the memory work of the Boteros in light of the school's reconsideration of their display. Dean Edley, and not the university or faculty, made the initial decision to exhibit the paintings. Until now, the institution has not created a mechanism for community deliberation about Berkeley Law's relationship to the Torture Memos.

Dean Chemerinsky's decision to initiate discussion about the paintings opens up new possibilities for dialogue on this question. The Berkeley Law community should reconsider the exhibit and its meanings to make a deliberate decision about the continued display of the Boteros—or any other response to the Torture Memos that the community might deem appropriate. The interplay between the current audience for these communicative materials and their intended narrative is context-specific, dynamic (changes over time), and operates in multiple registers (individual and collective). I consider the value of continuing to display the paintings to acknowledge law's role in the War on Terror and to offer alternative cultural responses to mark the law's imbrication in war and torture.

A. Three Dimensions of the Berkeley Boteros as Memory Works

I develop three dimensions for analysis, or interpretative frames, to explore the meaning of the Boteros. These interpretations are not exclusive of other understandings: this analysis accepts and acknowledges that individuals exposed to the paintings will draw their own unique meanings. But this analysis develops plausible interpretations and explores their implications to illustrate the payoff of memory analytics.

The first interpretative frame explores the relationship between the paintings and the public-facing identity of Berkeley Law. Here, the Boteros operate at the broadest level of public memory, constructing a moral narrative about the need to acknowledge the human destruction of torture and the role of lawyers in enabling its practice. A second interpretative frame understands the exhibition as the external representation of the constricted institutional response to the controversy regarding Professor Yoo. It considers the university's legalistic approach to demands to censure Professor Yoo and argues that Dean Edley's decision to install the exhibition created a cultural, as opposed to a legal, response to the Torture Memos. The final dimension examines the role of the faculty in the production of public memory and institutional identity. This dimension of public memory considers the interplay between internal norms of communication and the public memory the law school communicated. It alerts us to the often-complicated dynamics of internal discourse within institutions surrounding public controversy and public memory.

1. *The Law School Boteros as Public Memory*

Public framings of communicative materials, like works of art, are important in mediating between those materials' intended narrative and viewers' private experience. Viewers negotiate their interpretation of the paintings individually but rely on interpretive texts and social context to inform their experience.¹⁹² Public frames, in other words, cannot dictate private understandings, but rather seek to "establish the likely range of meanings."¹⁹³ Thus, Dean Edley's statements are instructive as to the message the law school wanted the Boteros to convey.

a. *The Message Dean Edley Intended the Boteros To Convey*

Dean Edley constructed the Boteros as public memory of the breakdown of the rule of law in the War on Terror. There are two temporal aspects to Dean Edley's framing: one that looks to the past and sees torture as the breakdown of the rule of law, and a second that speaks to the present and prompts reflection on the extent to which injustice has been rectified. Each of these narratives asks questions about what justice requires. The absence of a definitive account of the detention and interrogation program, including the lack of legal accountability, casts the exhibit as a distinct provocation; the exhibit thereby entangles the law school in political debates, but with the critical distance that representational art provides. Thus, the deployment of the Boteros as a strategic intervention enabled Dean Edley to frame the exhibit as consistent with the school's educational mission—as a moral heuristic rather than as a legal or political judgment.

Dean Edley's public statements about why he brought the Boteros to the law school expressly linked the prisoner torture at Abu Ghraib to the human horror that comes from abandoning the rule of law in wartime.¹⁹⁴ Dean Edley wrote that the paintings depict "law that has failed. It has failed to protect, and it has failed to teach the basic morality that underlies human rights."¹⁹⁵ This framing posits the Boteros as vivid heuristics that aid viewers' understanding of law as a moral force.

By August 2012, when the paintings were installed, the images could also be interpreted as a tribute to the failure of law to address its past errors. Dean Edley linked the Botero exhibit to his disappointment with the decision of President Obama's top advisors to forego a searching investigation into the Bush Administration's detention and interrogation program.¹⁹⁶ A careful examination

192. See generally YOUNG, *supra* note 26.

193. IRWIN-ZARECKA, *supra* note 15, at 4.

194. Dean Edley acknowledged the exceptional nature of his intervention with the Boteros and suggested that it was, in part, the role of government lawyers in providing "legal cover" for political judgments to authorize torture that pushed him to act. Edley April 2008 Statement, *supra* note 140; Edley August 2009 Statement, *supra* note 150.

195. Email from Christopher Edley, Jr., *supra* note 13 (see *supra* note 133 for full text).

196. Christopher Edley, *Art and Law in a Time of Torture*, BERKELEY REV. LATIN AM. STUD., Fall 2012, at 38, <https://clas.berkeley.edu/sites/default/files/shared/docs/tertiary/BRLAS-Fall2012->

of this program would have enabled the nation to debate the morality of the decisions made in light of a full record, and so to learn from the past.¹⁹⁷ In the absence of accountability, Dean Edley argued that art could provoke the necessary social deliberation about the meaning of torture and the breach of the rule of law that the detention and interrogation program constituted:

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 And I will be eternally grateful.¹⁹⁸

Dean Edley thus framed the Boteros as pedagogical tools.¹⁹⁹ This softened the impact of his judgment about the wrongfulness of the detention and interrogation program and broadened the conversation to consider the limits of law to prevent evil.

The exhibition stands out as a cultural intervention designed to raise questions about accountability in light of President Obama's decision not to pursue prosecutions. In a speech in Chile at an exhibition of Botero's Abu Ghraib paintings, Dean Edley posed a series of questions to illustrate the difference between the role of law in establishing rules of treatment and the role of morality in guiding our values. In response to the statement that "torture is illegal," Dean Edley asked: "Are all forms of abuse torture? Are there gradations of torture and circumstances in which some forms of torture may be permissible?"²⁰⁰ These were questions that had circulated in legal circles and the popular press for years, and the paintings offered answers to these questions.²⁰¹ Thus, Dean Edley framed the paintings as a provocation to consider the relationship of law to torture, and the agency of lawyers in directing the ends to which law is deployed.

b. The Alternative Public Memory Communications of the Boteros

There are additional interpretations of the memory work that the paintings advance in the context of their display at Berkeley Law. These interpretations do not rely on Dean Edley's statements but come from the larger political context in which the paintings were installed. Rather than a representation of law that has failed, the paintings can also be interpreted as representing law that worked as

Edley.pdf.

197. *Id.* See SENATE SELECT COMMITTEE REPORT, *supra* notes 44 and 86 and the accompanying text for the DOJ investigation into the CIA detention and interrogation program.

198. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

199. *Id.* Dean Edley moderated the sting of his critique by qualifying his views as being those of "a lawyer" rather than those of a representative of the law school: "To me, as a lawyer, the images show what happens in the moral void created when we have no law." *Id.* But by addressing the audience as a lawyer, rather than as a dean, he muddles the communicative force of the exhibit. See Nancy Illman Meyers, *Painting the Law*, 14 *CARDOZO ARTS & ENT. L.J.* 397, 398 (1996).

200. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

201. *Id.*

violently as intended.²⁰² Thus, the paintings are a form of transgressive truth telling. They are an amplified representation of what the US government had intended to remain invisible: the practice and effects of torture.²⁰³

Botero's *Abu Ghraib* series centers on representations of victims of torture. Torture victims are marginalized and demonized in anti-terrorism rhetoric, compounding their injuries and often stymying their quests for accountability. The paintings thus remind us of the unanswered calls for justice that victims require of a nation committed to the rule of law. States not only hide acts of torture, they hide law's complicity in its practice.²⁰⁴ Indeed the Torture Memos point to the considerable effort of the Bush Administration to define so-called "enhanced interrogation" techniques as distinct from torture.²⁰⁵ Furthermore, States perform torture out of the public eye and tightly control evidence of its occurrence. The Abu Ghraib photographs were not official records and were never supposed to have been published. Botero's paintings, based on the photographs, unmask legal rationalizations and narrate the experiential truth of a system of legalized torture. The "accusation" of the Boteros is that the State's claim to legality of its treatment of detainees was based on the manipulation and perversion of law. In this interpretation, law did not fail, as Dean Edley suggested: lawyers and politicians did.

c. The Politics of the Boteros as Public Memory

In light of the alternative interpretation described above, Dean Edley's statement deserves closer scrutiny. Although his characterization of law's relationship to torture elided law's complicity, Dean Edley assumed an unequivocal moral stance in his rejection of the torture to which the images of prisoner abuse bear witness. In so doing, he took a side on the central issue in the debate about the detention and interrogation program: its claim to legality. The Torture Memos have been forcefully condemned on the grounds that government lawyers provided legal cover for a State policy to torture.²⁰⁶ Pushback against this

202. Viterbo, *supra* note 113, at 301–02, 304.

203. Lisa Hajjar, *Wikileaks the Truth about American Unaccountability for Torture*, 7 SOCIETIES WITHOUT BORDERS 192, 197–98 (2012) ("Classification and secrecy have functioned in tandem as a shield to block public knowledge about prosecutable offenses in the 'war on terror'. . . . The war on whistleblowers, to which the harsh treatment of [Chelsea] Manning is an extreme example, is one means of preventing such information from getting out by deterring would-be leakers.").

204. Hedi Viterbo pointed out that the United States sought to use law to withhold information and images of torture by asserting the state secrets privilege, prosecuting individuals who allegedly leaked information, and defending suits seeking legal accountability for the CIA rendition program. Viterbo, *supra* note 113, at 302.

205. *Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012) (holding that Yoo was entitled to qualified immunity because, while Padilla's treatment may have risen to the level of torture, "we cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.").

206. See, e.g., Margolis Report, *supra* note 64; THE TORTURE MEMOS, *supra* note 45, at 5, 37–38.

accusation persists; as recently as 2014, former Vice President Dick Cheney continued to defend the program, discrediting the Senate investigation as “full of crap.”²⁰⁷ Cheney defiantly asserted that OLC lawyers’ opinions settled the legality of interrogation techniques, that the authorized techniques worked, and that he would “do it again in a minute.”²⁰⁸

Dean Edley’s installation of the exhibit instantiates a powerful counter to such defenses of the program. Obama-era policy rejected the legal interpretations of the Torture Memos,²⁰⁹ and the Trump Administration has not reversed these corrections. But the comments of Cheney and other defenders of the program, along with the continued secrecy around it, suggest that as a country we have not come to a common understanding of the justness or injustice of our methods. The past remains unsettled. Therefore, it remains important to harness the past to remind lawyers of their power to project or restrain violence. The Boteros are a reminder.

Dean Edley curated the exhibit to symbolize Berkeley Law’s affirmation of the ideal of law as capable of facilitating and cultivating humanity’s highest aspirations and virtues.²¹⁰ How we get there requires lawyers to wrestle with the complexity of drawing boundaries and interpreting principles in the face of competing demands. Law schools train students to engage in this process of reasoning and argumentation to reach just results. But Dean Edley argued that law alone cannot achieve the moral ends toward which we should strive, commenting that “we make a serious mistake if we expect too much of law.”²¹¹ He compared this misguided faith that law will prevent torture to the false belief that traffic laws will prevent car accidents.²¹² Dean Edley’s framing suggests that lawyers must be morally awake and must ensure that they deploy their legal skills in a way that steers society toward fulfilling its moral ambitions. The Boteros are a cautionary tale about what happens when we forget this lesson, and practicing this type of instruction is necessary to help lawyers fulfill their social role of safeguarding the rule of law in a democracy.

Abu Ghraib, and the breach of our nation’s values brought on by the detention and interrogation program, resulted from human action by government lawyers and officials.²¹³ Botero’s works make this breach visible and provoke remembrance of its legal foundation and evolution. Displayed in Berkeley Law,

207. Maya Rhodan, *Dick Cheney Says Senate Torture Report Is ‘Full of Crap’*, TIME (Dec. 10, 2014), <http://time.com/3629383/dick-cheney-cia-senate-torture-report/>.

208. Zeke J. Miller, *Dick Cheney on CIA Interrogation Orders: “I’d Do It Again in a Minute,”* TIME (Dec. 14, 2014), <http://time.com/3632875/dick-cheney-cia-interrogations-senate-report/>.

209. Exec. Ord. No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

210. “[L]aws can stand as instruction” which means that laws inculcate “higher values, higher social aspirations.” Edley, *Art and Law in a Time of Torture*, *supra* note 196.

211. *Id.*

212. *Id.*

213. SENATE SELECT COMMITTEE REPORT, *supra* note 44; *see generally*, MAYER, *supra* note 64; SANDS, *supra* note 61.

the paintings prompt viewers to yoke their efforts as law students, faculty, and administrators to the service of justice. Thus, the paintings can be understood as a narrative intervention—one which represents the horrors of torture and abuse, but still offers the possibility that lawyers can redeem this past failure by refuting these depredations of humanity through their work.²¹⁴ Art works in ways that law cannot.

Dean Edley's argument for sponsoring the installation rests on two key and implicit assumptions. The first is that the law school should engage in moral instruction even when this touches on divisive, politically partisan debates. This assumption stands in tension with another common assumption of law schools and universities: institutions of higher education should value ideological diversity and encourage debate on issues of the day.²¹⁵ To adhere to the latter premise, universities generally stand apart from partisan politics. Even as Dean Edley framed the moral instruction of the paintings in rule of law values, the arguments about the detention and interrogation program were inextricably bound up in debates about the political judgments that led to the choice to torture prisoners. These judgments, by their nature, are politically contingent and therefore raise questions about whether the law school should, even implicitly, take a position on what had been a crucial national security policy.²¹⁶

The second assumption is that the public record regarding Professor Yoo's role in the detention and interrogation program justified the school's instigation of a cultural intervention that communicated public rebuke of a faculty member. The absence of a definitive moral or legal judgment about the detention and interrogation program implied that the law school was taking sides in this debate and remonstrating Professor Yoo for his role. These assumptions are contested and form the gravamen of some of the complaints about the exhibit. I will revisit these assumptions and their implications in Section IV.B. The subsequent Sections provide additional context for Dean Edley's decision to use the Boteros as public memory by shedding light on the internal and external pressures on Berkeley Law.

2. *Institutional Values and the Production of Public Memory*

A second dimension of memory work focuses on institutional values. Berkeley Law's response to the Torture Memos exposed the school to criticism

214. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 116 (2000).

215. *Principles of Community*, UC BERKELEY DIVISION OF EQUITY & INCLUSION, <https://diversity.berkeley.edu/principles-community> (last visited Sept. 18, 2019). Such formal neutrality may explain, in part, why law schools boast about high-profile, powerful alumni even if they are politically controversial. Links to powerful institutions and actors signal prestige and access that can benefit the school, its students, and its alumni.

216. Indeed, Dean Edley gave a nod to this norm by justifying the need to issue statements about Professor Yoo with reference to Yoo's conduct as a *legal* professional, implying that otherwise opining on faculty's moral conduct would be improper. Edley April 2008 Statement, *supra* note 140; Edley August 2009 Statement, *supra* note 150.

that it had compromised its moral principles. Because the law school treated law as its exclusive option for action, any university-level response became contingent on a judicial sanction against Professor Yoo. Such sanctions were always unlikely and were foreclosed entirely by the conclusion of the DOJ investigation and the Obama Administration's decision not to pursue legal accountability. Perhaps predictably, Berkeley Law's reliance on legal positivism did not satisfy critics who argued that the principal author of the Torture Memos should not be teaching at the law school. The university administration failed to acknowledge that if law was unsuited to address the challenge that Professor Yoo's continued appointment posed, the institution still had other options. In this light, Dean Edley's decision to act on his own authority and install the Abu Ghraib paintings was morally courageous. While none of his statements about the Botero exhibit mentioned Professor Yoo by name, the timing of the installation made its association with the controversy a reasonable conclusion.

The symbolic significance of the Botero exhibition should not be underestimated: it implicitly rebukes a faculty member. In fact, it is this message of opprobrium which contributes to the controversy over whether the canvasses are appropriate for the law school to display. At the same time, the paintings symbolically perform the law school's public commitment to the rule of law as applied to Professor Yoo. Berkeley Law rightly defended the employment rights of Professor Yoo. University faculty conduct policy protects the rights of professors to participate in public life regardless of their political views.²¹⁷ But the policy, as written, applied awkwardly because Professor Yoo had not acted in a private capacity: the controversy involved allegations that he failed to uphold his ethical duties as a *government lawyer*.²¹⁸

Nevertheless many—and likely most—Berkeley Law faculty supported the university's interpretation of the rule and its application in the case of Professor Yoo.²¹⁹ In many informal conversations with faculty over the years, I remember very few faculty members who disagreed with this content-neutral rule of protection. And I do not remember anyone, myself included, who advocated that these protections should not apply to Professor Yoo. A few colleagues cautioned against pushing the university administration to make an institutional judgment about the moral boundaries of extramural activism in the case of Professor Yoo, lest officials take aim at faculty critical of the war or the use of torture. In fact, at

217. "Faculty members have the same rights and obligations as all citizens. They are as free as other citizens to express their views and to participate in the political processes of the community." *UC Faculty Code of Conduct*, *supra* note 7, at 9.

218. Interview with Christopher Kutz, *supra* note 189.

219. Glenn, *supra* note 171 (Professor Yoo's defenders raised the specter of McCarthy era censorship and the danger of ignoring the bright line rule which requires criminal conviction before a professor can be disciplined for outside work.). However, one UC Berkeley professor argued that Professor Yoo's memoranda were not only immoral, but amounted to professional misconduct. *Id.* (Academic freedom should not protect "those whose work is not the grueling labor of the scholar and the scientist but instead hackwork that is crafted to be convenient and pleasing to their political master of the day.").

least one faculty member reminded me that intervention by the regents of the university could have unintended consequences. During the Free Speech Movement on campus, the regents interfered with Berkeley faculty's teaching on politically charged topics.²²⁰

The university's policy on faculty conduct reflects principles of legal liberalism and protects the freedom to pursue political engagement outside of academic duties without regard to the content of that activism. Dean Edley refused to yield to critics on this point.²²¹ Nor did he challenge the faculty rules of conduct. Dean Edley's adherence to and inaction on this policy illustrate the way legal logic leads to predictable contradictions of values. This instance also highlights the contradictions inherent in Dean Edley's attempts to defend Berkeley Law's values that support human rights values while simultaneously adhering to his duty to follow university regulations.

Dean Edley went out of his way to defend Professor Yoo's presence on the faculty. In his final community statement on the issue, Dean Edley maintained that despite "thousands" of messages criticizing Professor Yoo's employment at Berkeley Law, Professor Yoo's legal advice was protected by academic freedom.²²² To illustrate this principle, Dean Edley drew an analogy between Professor Yoo's actions and the actions of a pro-choice professor teaching at a conservative college.²²³ Despite the negative public attention a pro-choice professor might garner by speaking at "weekend rallies," that professor would be protected from adverse action by the college.²²⁴

In making this argument, however, Dean Edley elided the distinction between academic freedom and extramural faculty conduct.²²⁵ Academic freedom applies to activities undertaken as a faculty member, while the faculty conduct provision at issue regulated faculty behavior undertaken outside of academic duties.²²⁶ By analogizing Professor Yoo's government service to academic freedom, Dean Edley cast this as an issue about the neutral application of rules to protect civil liberties. After all, academic freedom protects socially progressive as well as conservative views. Critics of Professor Yoo argued that he should be removed from the faculty not because of his views as a scholar or

220. The UC Board of Regents sent a formal letter of censure to Jan Dizard, an untenured Berkeley professor, for co-teaching an off-campus course in the 1968–69 academic year that featured Black Panther leader Eldridge Cleaver. Interview with Jan Dizard, Professor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Nov. 12, 2018). See CHARLES P. HENRY, BLACK STUDIES AND THE DEMOCRATIZATION OF EDUCATION 63–65 (2017).

221. Edley April 2008 Statement, *supra* note 140; Edley, August 2009 Statement, *supra* note 150.

222. *Id.*

223. *Id.*; *UC Faculty Code of Conduct*, *supra* note 7, at 9.

224. Edley, August 2009 Statement, *supra* note 150.

225. *UC Faculty Code of Conduct*, *supra* note 7, at 3–4, 9 (Part I: Professional Rights of Faculty, Part II.E: The Community).

226. *Id.*

private citizen, but because his service in the Bush Administration.²²⁷ In the end, the distinction made no difference as the faculty conduct policy did not cover morally objectionable or professionally questionable government service.²²⁸

Dean Edley's support of Professor Yoo's rights as a faculty member signaled that Berkeley Law would not entertain efforts to interfere with Professor Yoo's tenure, regardless of the optics. For example, Dean Edley fought to treat Professor Yoo just like any other faculty member of his rank. At Berkeley Law, it is the custom to award the academic distinction of a named chair to tenured faculty on the basis of academic rank and seniority.²²⁹ The dean confers with current faculty chair holders annually on eligible candidates. According to several chair holders at the time, Dean Edley urged chair holders to support honoring Professor Yoo based on his university record, despite opposition within the group. Dean Edley argued that Professor Yoo had earned the distinction and that his work as a government lawyer should have no bearing on the question. According to faculty involved in these discussions, there were sharp but respectful disagreements about the equities and optics of awarding Professor Yoo a chair, which might imply institutional approval of his government service. In 2014, Dean Edley unilaterally recommended that Professor Yoo be approved for a chair.²³⁰ When the announcement of new chairs came out, I remember individual faculty members expressing their frustration over the matter. Several expressed concern that in its defense of due process and academic freedom, Berkeley Law appeared tone deaf or indifferent to how this move would be interpreted by the public.

Thus, when Dean Edley announced the display of a few of the Boteros at the law school as his own initiative, the paintings communicated a strong and public counter-torture response.²³¹ This interpretation is confirmed by the many remarks I have heard from community members who approve of the exhibit in part because it communicates the law school's condemnation of torture.

The paintings were a form of cultural and institutional intervention. I have also heard from faculty, staff, and students that they or others saw the paintings only as a condemnation of Professor Yoo—a sanction by art. That is too simple. The university's failure to formally sanction Professor Yoo did not extinguish the university's ability to respond to the challenge that Professor Yoo's continued employment presented to the institution's values. Dean Edley undertook this

227. *Id.* at 9–10, *see supra* note 171.

228. *UC Faculty Code of Conduct*, *supra* note 7, at 9; *see also* Interview with Christopher Kutz, *supra* note 189.

229. This description of the procedure for naming chairs is drawn from accounts of several chair holders at the time of these discussions and in the years following.

230. According to some participants, the debate among chair holders echoed the public debate over the propriety of Professor Yoo's law school affiliation. Apparently, the chairs had not reached an agreement on the matter before Dean Edley, in the final days of his deanship, advanced Professor Yoo's name to the outgoing UC Berkeley's chancellor, who then approved the appointment.

231. Email from Christopher Edley, Jr., *supra* note 13.

institutional work on his own, by opening up what Rudi Teitel calls a “poetics” of justice through art.²³²

As Dean Edley explained, law and morality differ.²³³ With its unique rules of argumentation and evidence, law cannot address all the problems that society confronts.²³⁴ Hosting the Boteros allowed the art to speak as a rebuke not just of torture, but of the fiction that the university’s response to the controversy fully occupied the field of institutional possibilities. Art speaks in a different register than law and enables the school to communicate in a different but powerful medium. The Boteros conveyed a more forceful institutional denunciation of torture than the university’s legalistic approach.

3. *Silence and the Parameters of Deliberation*

The final level of interpretation is internal to Berkeley Law, and it speaks to the representational economy of public memory. The fact that the Botero exhibit is the symbol of the school’s association with, and response to, the Torture Memos speaks to the interplay between internal, ad hoc conversations among faculty and the public memory that Dean Edley promoted. Law schools, like the legal profession,²³⁵ place a high value on civil, collegial discourse.²³⁶ This interpretation highlights the role of academic norms of collegiality and how these powerfully shaped Berkeley Law’s public-facing communications.

Collectively, the faculty observed norms on collegiality and behaved consistently with Dean Edley’s public response to criticism of Professor Yoo’s continued employment. These norms, which incorporate particular ideas about fairness, moral opprobrium, and political judgments, promote respectful discourse among professors.²³⁷ While this prevented potentially divisive debate within the faculty and maintained respectable faculty politics, it also meant that Dean Edley

232. TEITEL, *supra* note 214, at 175.

233. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

234. *Id.*

235. Jayne R. Reardon, *Civility as the Core of Professionalism*, ABA (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2014/09/02_reardon/ (“[C]ivility is central to the ethical and public-service bedrock of the American legal profession.”); CAL. R. CT. 9.7, http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_7 (The California Supreme Court “Civility” oath requires lawyers to pledge they “will strive to conduct [themselves] at all times with dignity, courtesy, and integrity.”).

236. See, e.g., Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 359, 359–60 (2001). At the University of California, Irvine, School of Law, for example, incoming law students have been asked to take a “Civility Oath.” *UCI Law Class of 2015 takes Civility Oath*, YOUTUBE (Sept. 19, 2012), <https://www.youtube.com/watch?v=B89wX173Rrc&t=2s>. See also Sandra Day O’Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998) (“More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public’s perception of lawyers.”).

237. See generally Michael L. Seigel & Kathi Miner-Rubino, *Measuring the Value of Collegiality Among Law Professors*, 1 FAULKNER L. REV. 257 (2009).

spoke for the entire faculty, without incurring the burden or benefit of formal faculty deliberation and input. As a result, faculty silence shaped Berkeley Law's institutional identity in response to the moral challenge Professor Yoo's presence provoked. This allowed Dean Edley, unencumbered by formal faculty input, to unilaterally forge public memory using the Boteros. The installation of the paintings leaves unspoken, if not unresolved, how the faculty, as a collective, views this sensitive issue. Dean Chemerinsky's plan to reconsider the placement of the paintings will invite organized faculty deliberation about the meaning of the exhibit for the first time.

Because Dean Edley framed Berkeley Law's relationship to Professor Yoo in purely legalistic terms, he constrained acceptable faculty discourse on the topic. Dean Edley effectively postponed the relevance of faculty views on the legal or moral consequences of Professor Yoo's work at OLC until external authorities had issued a legal determination on the consequences. Until such time, faculty members voicing opinions on the matter were not commenting on authoritative judgments; but they would be offering their own views on the conduct of another faculty member outside of that member's academic duties. Such commentary would come uncomfortably close to crossing a line of collegiality. Even in his statements to the community on Professor Yoo and the Torture Memos, Dean Edley tempered his condemnation of the memos by emphasizing that he was speaking only for himself.²³⁸ In effect, Dean Edley's frame collapsed moral questions into legal ones, which the law school faculty was in no position to adjudicate and upon which it was in no position to opine.

Many faculty members were shocked and disagreed with Professor Yoo's legal analysis.²³⁹ Nevertheless, faculty members did not issue any collective public statements, either defending or condemning Professor Yoo, in response to various calls for his censure.²⁴⁰ Disagreeing, even vigorously, with the scholarly views of a fellow faculty member is acceptable. *Ad hominem* attacks are not. Individual faculty members could exercise their academic prerogative to associate the school with alternative views of the detention and interrogation program, or the War on Terror more generally. Many wrote articles, issued reports, organized conferences, and gave speeches that challenged the legal reasoning of the Torture Memos and their impacts.²⁴¹ Thus, the norms of faculty collegiality channeled

238. Edley, April 2008 Statement, *supra* note 140 (stating that UC Berkeley's "restrictive standard" regarding unacceptable conduct warranting dismissal of a faculty member "is binding on me as dean, but I will put aside that shield and state my independent and personal view of the matter"); see Edley, August 2009 Statement, *supra* note 150.

239. *See id.*

240. The deliberations of chair holders about Professor Yoo's candidacy may have been the closest the faculty came to a collective discussion, but this gathering was restricted in membership and its discussion cannot be shared with the larger faculty.

241. One-time academic initiatives like workshops and presentations hosted at Berkeley Law also communicate institutional values. However, unlike the Botero paintings, these events do not have a continuous mnemonic presence in the physical space of the school.

faculty dissent into traditional and individualized academic outlets lest they transgress the unspoken, cultural expectations of the institution.

Self-censorship is a property of collegiality, and it operated to prevent faculty from criticizing Professor Yoo directly and from debating whether Professor Yoo's association with Berkeley Law called for alternative action.²⁴² This left the faculty outside any process to consider what, if anything, the institution should communicate about the apparent contradiction between the Berkeley Law's values pertaining to the rule of law and its association with the perversion of those values. An institutional response could have taken the form of a statement denouncing torture, calling for the university to reconsider the moral fitness rules governing faculty, offering a legal assessment of the OLC memoranda, or revisiting the legal ethics curriculum—to name just a few possibilities. Faculty likely held a range of views on this topic, and it is not possible to know what the outcome of such a deliberation would have been, whether any consensus could have been reached, or how formal debate would have impacted faculty morale. But without a formal process of consultation, Dean Edley was left to construct the school's response to these critiques alone.

In summary, this Section deconstructs the broader social and institutional context in which Dean Edley installed the four Botero paintings at Berkeley Law. The dean's action communicated a meaning beyond what was inscribed on the wall plaques. Individuals looking for the school to offer a moral condemnation of the Torture Memos could interpret the installation as the acknowledgment they had hoped to hear: Berkeley Law rejected torture and decried law's complicity in its practice. But the implicit message of the paintings also left room for ambiguity. This ambiguity allowed Dean Edley to speak symbolically for Berkeley Law and to rebuke the role of government lawyers in the detention and interrogation program, while still channeling faculty discourse into traditional academic outlets. This strategy dampened vocal criticism of the school and of Professor Yoo within the law school, but it meant that the institution did not create explicit mechanisms for the community to address these issues collectively. Perhaps now the Berkeley Law community has an opportunity to consider a wider range of communicative practices as it revisits the public memory of the Boteros.

B. Institutional Responsibility for Public Memory

The material consequences of loosening the prohibition against torture came blaring through the photos of detainee abuse in Iraq and the subsequent investigations. This linked Berkeley Law with the international controversy over the nation's policies in its War on Terror. Now that Dean Chemerinsky has opened

242. I remember one private conversation in which a faculty member and self-described friend of Professor Yoo opined that while it was "obviously right" that Professor Yoo should not be removed or censured by the university, gonzo student civil disobedience and protests of his presence should be tolerated. I remember this person remarking, "I don't understand why students aren't splattering his office door with pig's blood."

up space to reconsider the placement of the Boteros, that conversation should address Berkeley Law's institutional responsibility to curate the school's public memory.

Before considering what institutional responsibility for public memory entails, it is important to revisit briefly the institutional identity and values that are at stake. Berkeley Law is a civil society institution with a distinct role to play in stimulating discussion on important issues affecting the community. Berkeley Law's association with the Torture Memos creates a moral demand to clarify the law school's position not just on torture, but on the role of legal educators and the values of legal education. To prospective students, academics, and the general public, Berkeley Law's defense of Professor Yoo's position on the faculty made little sense.²⁴³ Berkeley Law was home to one of the legal architects of the detention and interrogation program, which led the United States to offer an unprecedented rebuke of international law, contributed to horrific acts of torture, and damaged US credibility as a champion of democratic values—yet the law school had nothing to say about what Professor Yoo's presence meant for its identity as California's leading public law school.

The disaggregation of Professor Yoo's work as a DOJ lawyer—which contributed to a policy of torture—and his role as a law professor indirectly signaled that students were free to emulate Professor Yoo's lawyering. How did this square with Dean Edley's condemnation of the Torture Memos as the distortion of law to serve political ends? The message seemed to be that there was no price to pay for pursuit of legal prestige and power so long as one avoided prosecution; the legal academy was indifferent to the moral ends to which one put a legal degree.

Even if the university had no grounds for removing Professor Yoo, Berkeley Law could have expressed its views on the topic. I offer this observation as a description of possible actions the institution could have taken, and not as a prescription of what it should have done. For example, Berkeley Law could have issued a statement about the morality and optics of having the lead lawyer who approved techniques that led to torture and immunized State agents from criminal prosecution as a senior member of the faculty. Dean Edley's statement sent an important signal in this regard, but the dean emphasized that he offered his views in his personal capacity only,²⁴⁴ thereby disavowing any institutional responsibility. The chancellor of the university could have issued a statement about the professional values that lawyers should embody and uphold or convened a committee to issue a collective legal opinion on the Torture Memo.

But issuing any such statement posed institutional and political risks. Defenders of the Bush Administration's interrogation policies might well have accused the university of scapegoating a government attorney for carrying out his

243. Editorial, *supra* note 156.

244. Edley, April 2008 Statement, *supra* note 140.

job.²⁴⁵ Within the law school community, the university faculty might have objected that the chancellor was illegitimately sidestepping the faculty conduct policy and making legitimate, though controversial, extramural activities relevant to fitness to serve as a faculty member.²⁴⁶

The university's failure to respond to the moral crisis of its association with the Torture Memos stands in contrast to its response to a subsequent sexual harassment scandal involving then-Dean Sujit Choudhry.²⁴⁷ Unlike Professor Yoo, Dean Choudhry engaged in violative conduct while in his role as a university employee. Faculty rapidly voiced strong disapproval of Dean Choudhry's actions. I attended the faculty meeting that the law school convened within hours of the community learning that Dean Choudhry had violated the university's sexual harassment policy. The university chancellor and vice chancellor addressed the faculty and listened to our concerns. Law school administrators quickly issued a public statement repudiating Dean Choudhry's conduct and affirming that his behavior was antithetical to the core values of the school.²⁴⁸ Because Dean Choudhry's misconduct occurred while carrying out his decanal responsibilities, swift, public condemnation by the faculty seemed uncontroversial, if not necessary.

In the case of Professor Yoo, the university ducked its institutional responsibility by elevating faculty's right to participate in public life and to enjoy their employment rights above all other values, including the right not to be tortured. The university gave no weight to factors such as the harm caused by a

245. See, e.g., Josh Gerstein, *Obama's Lawyers Set to Defend John Yoo*, POLITICO (Jan. 28, 2009), <https://www.politico.com/story/2009/01/obama-lawyers-set-to-defend-yoo-018063> (Referring to DOJ lawyers under the Obama Administration who argued in favor of dismissing cases brought against the authors of the Torture Memos, the author opines that the lawyers "have to stand by a prior administration's legal work — whether they agree with it or not — merely in the interest of protecting U.S. government prerogatives.").

246. Edley, April 2008 Statement, *supra* note 140; Edley, August 2009 Statement, *supra* note 153.

247. See generally, Chantelle Lee, Jessica Lynn & Pressly Pratt, *UC Board of Regents Reaches Settlements with Sujit Choudhry, Tyann Sorrell*, DAILY CALIFORNIAN (last updated April 18, 2017), <https://www.dailycal.org/2017/04/14/tyann-sorrell-settles-lawsuit-against-sujit-choudhry-uc-regents/>.

248. See *Message from the Associate Deans and Senior Administrators of Berkeley Law*, BERKELEY LAW (Mar. 11, 2016), <https://www.law.berkeley.edu/article/message-associate-deans-senior-administrators-berkeley-law/> ("We are looking forward, as a community, to confronting and addressing the concerns raised by this conduct . . . Berkeley Law has been through other crises in its 100-plus years as a public law school. As before, we know that our students, faculty, staff, and alumni will hew to our strong core values of community and justice and demonstrate the resilience and strength that will allow us to emerge stronger than before."). See also Susan Svrluga, *Berkeley Law School Dean Resigns After Sexual Harassment Complaint*, WASH. POST (Mar. 10, 2018), https://www.washingtonpost.com/news/grade-point/wp/2016/03/10/berkeley-law-school-dean-resigns-after-sexual-harassment-complaint/?utm_term=.4785dc30cf55 (quoting a further message from Berkeley Law faculty to the law school community) ("We learned today about allegations that have been made against Dean Choudhry and University administrators involving both sexual harassment and the institution's response. We take these disturbing allegations extremely seriously. We emphatically condemn the type of conduct alleged in the complaint.").

State policy of torture, its mixed messages about the appropriate roles of lawyers and law professors, and the value of teaching justice. Neither the university nor the law school invited exploration of other institutional measures in response to demands for moral, as opposed to legal, action—with the sole exception of the Boteros.

The contrast between the university's attitude toward Professor Yoo and its studied consideration of abandoning the name "Boalt Hall" is likewise instructive. Universities are developing sophisticated communication practices to work through challenges to their values provoked by symbols and other associations with figures who are long gone, and whose ideas, like racism, are unquestionably antithetical to the mission of educational institutions.²⁴⁹ For example, Berkeley Law itself, after a lengthy consultative process, recently abandoned the historic name "Boalt Hall" in response to the revelation that the school's colloquial namesake, John Boalt, held racist views and supported the Chinese exclusion policy.²⁵⁰ However, Berkeley and other universities are not similarly skilled in articulating and responding to challenges that can arise from public engagement by the faculty.²⁵¹ It is beyond the scope of this article to determine the cause of this variance, but it is worth considering whether lack of accountability for the detention and interrogation program, the persistence of anti-terrorism discourse, and the political climate that stokes it means that we have not reached social consensus condemning the Torture Memos.²⁵²

Berkeley Law should keep in mind the meaning and purpose of public memory as it reconsiders the display of the paintings. Public memory is constructed and nurtured by institutional actors, and its meanings may change over time. Berkeley Law must ask what values the Boteros serve now. It has been nearly two decades since the 9/11 attacks, over sixteen years since the Abu Ghraib photos became public, and more than seven years since the Botero paintings came to Berkeley Law.

249. Report of the Comm. on the Use of the Boalt Name, to Erwin Chemerinsky, Dean, Univ. of Cal., Berkeley, Sch. of Law (revised Oct. 10, 2018), https://chancellor.berkeley.edu/sites/default/files/boalt_hall_building_name_review_committee_proposal.pdf; Letter from the Comm. to Establish Principles on Renaming, to Peter Salovey, President, Yale Univ. (Nov. 21, 2016), https://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf.

250. Report of the Comm. on the Use of the Boalt Name, *supra* note 249, at 4–5 (discussing the terms of Elizabeth Boalt's, John Boalt's wife, substantial gift honoring her husband and the extent to which the law school or a building that housed it was to be named for John Boalt).

251. See Julia Jacobs, *Elizabeth Lederer, Prosecutor of Central Park Five, Resigns From Columbia Law*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/arts/elizabeth-lederer-central-park-five.html>; see also Kate Taylor, *Harvard's First Black Faculty Deans Let Go Amid Uproar Over Harvey Weinstein Defense*, N.Y. TIMES (May 11, 2019), <https://www.nytimes.com/2019/05/11/us/ronald-sullivan-harvard.html> (relating a similar faculty controversy).

252. See *supra* notes 89–94, Section III.D, Section IV.B.

Faculty, staff, and alumni who object to the Boteros may think that this is an opportune moment to press their case. Berkeley Law has a new dean. Like his predecessor, Dean Chemerinsky has had a distinguished career championing progressive causes.²⁵³ Dean Edley's defense of Professor Yoo may have surprised some of his left-leaning supporters, but it provided him with a measure of political cover when he decided to install the paintings. Given that Dean Chemerinsky publicly called for Professor Yoo's prosecution before becoming Dean of Berkeley Law,²⁵⁴ those who oppose the law school's display of the Boteros may believe that Dean Chemerinsky should remove the paintings to show that he is not biased against Professor Yoo.

Reactivating discussion about the Boteros as public memory will prompt reevaluation of Berkeley Law's relationship to government abuses in the War on Terror. Deliberations will likely include arguments by people who interpret the paintings as unjustly condemning a faculty member and people who believe the school has a moral duty to condemn Professor Yoo. Some will undoubtedly object to the aesthetics of the images, while others may feel that the paintings' scale is appropriate to the representational challenges of torture. But this moment creates the opportunity for all of us to consider what responsibility Berkeley Law has to address this uncomfortable association and what values the school wants to signal. Discussing the Boteros as public memory enables us to consider them in a broader and more nuanced context. This approach suggests a different process for deliberation.

1. *What Memories Are Valued?*

Does Dean Edley's public frame of interpretation still resonate with the law school community and the public at large? Should Berkeley Law continue to cultivate and nurture the mnemonics of the failure of law to protect core values of human dignity in the War on Terror? Is the installation's implicit rebuke of Professor Yoo's work on the Torture Memos an argument to keep the paintings or to take them down?

Dean Edley intended the Boteros to remind lawyers of the breakdown of the rule of law in times of crisis. This is a timeless message, and one worthy of holding in our consciousness as legal academics and professionals. To date, the United States has not conducted the searching investigation required to fully excavate how this country came to endorse a policy of torture, apportion responsibility for that debacle, and adopt the measures needed to ensure that these atrocities are not repeated. The United States' response to the 9/11 attacks has reverberated across the legal and geopolitical landscape and indelibly has defined our era. The use of torture in the War on Terror goes to the heart of what it means to be a nation of

253. See *Erwin Chemerinsky*, BERKELEY LAW, <https://www.law.berkeley.edu/our-faculty/faculty-profiles/erwin-chemerinsky/> (last visited Nov. 21, 2019).

254. Wiener, *supra* note 82.

laws. It is hard to argue that the relevance of the communicative message of the Boteros has faded. The paintings also remind viewers of the victims of torture; the size and scale of their representation render the victims hypervisible and emphasizes the urgency of their message. Art is a moral intervention that communicates institutional values. Art cannot, on its own, prevent law's failure in the future or take action to remedy law's failure in the past. It does, however, have the power to remind the audience of the importance of the rule of law to inspire action. This mnemonic power alone justifies keeping the Boteros hanging at the law school.

However, the paintings also highlight the continued absence of an independent accounting of this episode in America's and in Berkeley's history. In so doing, the exhibit speaks to the possibility that human action can and will correct these past failures. Despite reforms instituted under the Obama Administration and more recent disclosures primarily focused on the CIA interrogation and detention program,²⁵⁵ the country still has not, as Dean Edley wrote, "applied the rule of law to the full extent" in reviewing the country's detention and interrogation program.²⁵⁶ We have been deprived of a full accounting and debate about the legality and morality of the methods the United States employed in the War on Terror. Democracy demands this much. Nothing that has happened since the Torture Memo became public has diminished the value of memorializing this failure of law to achieve its higher purposes. And there is much to be learned about the complicity of law and lawyers in facilitating this breach. The Boteros symbolically erase the gap between the past and present, reminding the audience of the unfinished account we are due.²⁵⁷

2. *The Contemporary Relevance of the Boteros: Temporality and Professor Yoo*

The Boteros symbolize a conflict in values that has persisted at Berkeley Law for sixteen years: how to reconcile the law school's mission "to create a more just society"²⁵⁸ with the continued presence of Professor Yoo on the faculty. It seems impossible to disaggregate substantive value judgments about Professor Yoo's government work from broader questions about what values the law school seek to represent and instill in its students. Such judgments are what make the topic especially sensitive and difficult to address. It also creates an imperative for the school to do so. It is hard to envision a public discussion about the Boteros that

255. See, e.g., SENATE SELECT COMMITTEE REPORT, *supra* note 44.

256. Edley, *Art and Law in a Time of Torture*, *supra* note 196.

257. Moreover, in the present political climate, the current administration is dismantling legal protections for many vulnerable populations—including immigrants, LGBT communities, and the poor—and there is an argument for the premier public law school in the State of California to remember the human rights consequences of such rule of law failures.

258. *Mission and Learning Outcomes*, BERKELEY LAW, <https://www.law.berkeley.edu/about-us/mission-learning-outcomes/> (last visited Nov. 21, 2019).

does not mention Professor Yoo. Thus far, the faculty norm of maintaining collegiality has contained and channeled disagreement and avoided open conflict. From an institutional standpoint, this has facilitated smooth administration of the school, but this norm silences debate on an important topic. Dean Chemerinsky's decision to open up the question of the continued exhibition of the Boteros to the law school community will potentially change this practice. Are we resilient enough to talk about our differences on this issue without igniting painful divisions?²⁵⁹

Temporality should be a pressing concern when we discuss the Boteros. First, the time horizon for Berkeley Law students is much shorter than for faculty, staff, or alumni. Students cycle through the school every three years, and in that limited period of time, the Boteros provide one powerful tool of symbolic public memory to expose students to the issue of torture. The Berkeley Law faculty, the curriculum, and even the artworks must continually communicate to students the values of the institution, its rich history, and its mission. Second, the practice of State torture is rooted in institutional structures and cultures. Like practices of discrimination and violence, continual education about and attention to the structural dimensions of these practices are part of working to prevent the harm.²⁶⁰ Thus, even if there were a definitive legal determination about individual responsibility for the detention and interrogation program, the need for prevention would remain. Art and other cultural symbols uniquely acknowledge injustice and challenge us not to repeat the past.

The Boteros are a *continual* communication—a permanent accusation—that conveys the importance of countering the illegal State violence of the War on Terror. Currently, the paintings provide the only institutional narrative scaffolding for the law school community to discuss this topic. Employing public memory as a framework to debate the Boteros shifts the focus of the deliberation from seeing the paintings as a narrow normative judgment of Professor Yoo to acknowledging that the controversy surrounding his role raises broader questions of institutional identity. Through the Botero exhibit, Dean Edley performatively joined the liberal contradictions between the law school's simultaneous embrace of Professor Yoo

259. During the years when the US torture policy was actively debated, referring to the OLC legal memoranda as the "Torture Memos" was itself a normative and political act. This nomenclature seems less controversial today. Acknowledging that Professor Yoo's work authorized torture after a sitting President expressed this view does not cross the discursive boundaries which restrained faculty members from commenting on Professor Yoo's legal work during the Bush Administration. See Press Release, *supra* note 66 ("We have been through a dark and painful chapter in our history That is why we have released these memos, and that is why we have taken steps to ensure that the actions described within them never take place again."); Press Conference by President Obama, *supra* note 4 ("[W]e tortured some folks."). Nevertheless, acknowledging Professor Yoo's role runs up against the value of maintaining faculty harmony.

260. See Susan Marks, *Apologising for Torture*, 73 NORDIC J. INT'L L. 365, 380 (2004) (noting that international human rights' general tendency to decontextualize violations contributes to viewing the Abu Ghraib photos as exceptional, horrific images, rather than focusing on the underlying policies and factors that led to their production).

as a *faculty* member and its moral repudiation of the harms to which his legal advice as a *government lawyer* contributed. This is a complex acknowledgment, as required by a complex moral challenge.

3. *Removal of the Boteros*

The Boteros continue to perform important memory work for the Berkeley Law community and the general public. On this basis alone, the continued presence of the canvasses is justified. As exemplified by the debate over whether Berkeley Law should discontinue using the “Boalt” name,²⁶¹ the decision to discontinue a practice once it has begun takes on a different meaning than a decision to initiate a practice in the first place. In the context of the Boteros’ contribution to public memory, what would it mean to take them down?

I have heard several arguments in favor of removal over the years. One argument is that the torture debate in the War on Terror is no longer a pressing issue. There are many urgent social justice issues involving Berkeley Law, including its aforementioned association with John Boalt, so why should the school continue to prioritize this one?

While there will always be questions about the relevance and significance of any subject matter displayed, the removal of the Boteros must be considered not in light of what else the school could display, but in light of whether marking the school’s association with the Torture Memos remains important. To the extent that it does remain important, there may be a need for more education and outreach around the intended purpose behind the paintings. For example, the very small, explanatory wall plaques could be updated to include greater context that would acknowledge the controversy over the Torture Memos, and Dean Chemerinsky could circulate a new statement about why they are displayed and their importance for the community.

In addition, community dialogue with the works could be deepened by providing an opportunity for viewers to share their reactions to and interpretations of the paintings.²⁶² A record of these differing reactions could be cataloged to form a living archive. The paintings are visual spectacles, and if they are to continue serving as public memory, they require interpretation.²⁶³ Encouraging

261. See *supra* notes 249 and 250.

262. For example, Georgetown University has established an initiative “to engage the historical role of . . . [the] University in the institution of slavery and its legacies in our nation.” GEO. U. SLAVERY MEMORY & RECONCILIATION, <http://slavery.georgetown.edu/> (last visited Feb. 14, 2020). The project includes an expanding archive on slavery and solicits information from descendants of “people owned and sold” by the Jesuits of Maryland Providence to include and share with the public. THE GEO. SLAVERY ARCHIVE, <http://slaveryarchive.georgetown.edu/about> (last visited Feb. 14, 2020).

263. See Shanken, *supra* note 28, at 169 (“Many memorials become as common as curbs, fences, traffic lights, and commercial storefronts In this way, memorials, which were meant to be exceptional, to stand outside of ordinary time and space, have too often become seamless parts of that space. One wonders if this neglect is not tantamount to a form of passive iconoclasm, or if it is the

the law school community to participate actively in this interpretation would strengthen the pedagogic aims of public memory.

A second argument in favor of removing the paintings is that some viewers reportedly find the images upsetting.²⁶⁴ Those who wish to see the Abu Ghraib series exhibited in a museum can choose to do so, but students have to enter the building and the school should take care not to display images that cause students pain. This concern requires further investigation to determine the nature of such objections and to seek accommodation if possible. The location of the paintings already minimizes involuntary viewing—they are not hung in or adjacent to any classroom or within the library but are seen by those passing by the dean's administrative offices. For some, adding context for the canvasses may ameliorate the visual shock. Berkeley Law could also commission a bespoke installation that engages with law and the detention and interrogation program but employs nonrepresentational forms to do so. Berkeley Law is not the only law school to find itself engulfed in controversy over its choice of political art,²⁶⁵ and the school may profit by looking to examples of public memory at other universities.²⁶⁶

natural order of things: forgetting.”).

264. Representational art of human rights abuses has powerful significance for victims. Artists often pursue abstract representations in creating memorials as both works of remembrance and public art, yet survivors may demand a more literal interpretation: “We weren't tortured and our families weren't murdered in the abstract . . . it was real.” YOUNG, *supra* note 26, at 9 (quoting a Holocaust survivor commenting on the Warsaw Ghetto Memorial).

265. In 2004, the dean of the law faculty at the University of Pretoria, South Africa hung an exhibit of etchings, “Disasters of Peace” by South African artist Diane Victor, in the school's new building. The works included sketches graphically depicting many social problems afflicting post-apartheid South Africa: child abuse, sexual violence, and the indifference of law and public institutions to these plights. The exhibit stirred controversy within the school over whether it was appropriate for the law school to use art intended to “horrorify” the audience in an effort to endorse substantive human rights values at a time of societal transformation. Two faculty members debated these questions in a published volume. DISASTERS OF PEACE: AN EXCHANGE - PULP FICTIONS NO. 1 (Christof Heyns, & Karin van Marle eds., 2005), <http://www.pulp.up.ac.za/pulp-fictions/disasters-of-peace-an-exchange-pulp-fictions-no-1>. In response to protest, the dean removed two etchings in the series from their original display to his office, leaving blank space on the walls to mark their absence. Elizabeth Rankin, *Human Rights and Human Wrongs: Public Perceptions of Diane Victor's Disasters of Peace*, 2 S. AFR. J. ART HIST. 85, 87, n.7 (2011), [https://repository.up.ac.za/bitstream/handle/2263/20052/Rankin_Human\(2011\).pdf?sequence=1](https://repository.up.ac.za/bitstream/handle/2263/20052/Rankin_Human(2011).pdf?sequence=1).

266. In December 2013, a group calling itself “Wissen im Widerstand” (Knowledge in Resistance) “kidnapped” the portrait of Adolf Butenandt, a former teacher at Humboldt University in Berlin and winner of the Nobel Prize for chemistry in 1939, that had been exhibited in a university gallery. Luisa Hommerich, *Studierende Entführen Forscher-Portrait* [*Students Kidnap Researcher Portrait*], DER TAGESSPIEGEL [The Daily Mirror] (Dec. 6, 2013), <https://www.tagesspiegel.de/berlin/protestguerilla-aktion-an-der-hu-studierende-entfuehren-forscher-portrait/9183710.html>. The group demanded that the university stop honoring people related to Nazism, colonialism, and racism as well as engage in dismantling various relationships and institutions that continue to contribute to racism and oppression. *Nazi und Kolonialverbrecher in HU Berlin entführt* [*Nazi and Colonial Criminal was Kidnapped in HU Berlin*], ANTIFA-BERLIN (Dec. 6, 2013), <https://www.antifa-berlin.info/news/429-nazi-und-kolonialverbrecher-in-hu-berlin-entfuehrt>. In November 2014, approximately one year after the “kidnapping,” the university held a panel discussion on Butenandt's Nazi ties as well as the university's image and relations to its Nazi past. Harald Olkus, *Butenandt und die Folgen: Podiumsdiskussion aus Anlass der “Entführung” des Poträts von Adolf*

A final set of objections contends that it is inappropriate for Berkeley Law to convey public memory on this issue. However, the paintings are the only ongoing acknowledgment of Berkeley Law's unique and complex connection to the Torture Memos. To remove the paintings in this context would signal a deprioritization or silencing of this history. While critics of the paintings may see this as a way to put this past behind the institution, the importance and unresolved nature of the questions surrounding the Torture Memos and the detention and interrogation program make it unlikely that this controversy will simply fade away. Recent examples of other schools responding to students' demands for corrective action due to the legal work undertaken by faculty²⁶⁷ provide an additional reason to think that Berkeley Law will continue to be asked what Professor Yoo's employment means for the law school.

In reconsidering the paintings, we should also ask whether these works should serve as the only mnemonic devices for these issues that the school cultivates. Dean Edley acted on his own to maintain a public memory of the values at stake in the school's association with the detention and interrogation program, but the parameters of communicating public memory lie beyond the Botero installation.

Berkeley Law could also consider various ways to promote engagement with the legal and moral complexity of the Torture Memos in addition to art. A thorough treatment of alternatives is beyond the scope of this Article, but I introduce a few ideas to illustrate the range of options. For example, the work of government attorneys to deploy law to authorize torture techniques raises questions about what law schools are doing to prevent this scenario from recurring. Berkeley Law has not changed its substantive curriculum in response to the Torture Memos. It could incorporate systemic discussion of the memoranda through curriculum in required legal ethics courses. In addition, Berkeley Law could include international law as a graduation requirement, on the theory that greater exposure to international law is an important check on weakening of human rights protections in general and of the absolute prohibition against torture

Butenandt aus der Nobelpreisträgergalerie [*Butenandt and the Consequences: Panel Discussion on the Occasion of the "Kidnapping" of the Portrait of Adolf Butenandt from the Nobel Laureate Gallery*], HUMBOLDT, Dec. 2014, at 8, https://www.humboldt.de/pr/medien/publikationen/humboldt/2015/201412/humboldt_201412.pdf. Panelists considered various forms of remembrance that the university could facilitate, including exhibiting portraits of individuals who were part of the resistance from 1933–45 or who provided innovative scientific advancements without receiving Nobel Prizes during the same period; a rotating exhibit was discussed. *Id.* Following the panel discussion, the President of the university agreed that the Butenandt portrait would not be re-installed. *Id.* As a temporary solution, the portrait would be replaced by an empty frame accompanied by a plaque titled "Eine Leerstelle schafft Raum für Kritik" (a gap creates space for criticism), with German and English explanations contextualizing the empty frame as a space for critique of the university's relationship with its past. Haushaltsantrag 2017, Historische Kommission der Verfassten Studierendenschaft in Berlin [Budget Proposal of the Student Body Historical Commission 2017].

267. *See id.*

in particular.²⁶⁸ Outside of curricular reform, Berkeley Law could sponsor targeted programming to raise community awareness about the relationship of law to torture. This could be specific to the impact of the US detention and interrogation program. For example, Berkeley Law might organize an annual lecture or event to commemorate the victims of torture in the War on Terror each January 11, the day that the US detention center at Guantánamo Bay opened.

Public memory may assume a variety of forms. Law was not the exclusive province for the university and law school to act on demands for action in response to revelations about Professor Yoo and the Torture Memos. But the institution behaved as if it were. This belief deflected criticism and controlled institutional discourse, but questions persist about the institutional response to Professor Yoo's role in the detention and interrogation program and what this means for the school. Sensitivities around public discussion of the extramural work of this faculty member continue to inhibit institutional collective consideration. Now Berkeley Law has a new opportunity to supply a structure for discourse. In so doing, it can assume institutional responsibility for acknowledging and addressing the law school's complex association with the War on Terror. Whether the Boteros remain or are removed, we have to contend with what meaning they provoke for the law school. This is unfinished business to which we must attend.

CONCLUSION

Dean Chemerinsky has invited deliberation about whether Berkeley Law should continue to exhibit paintings from Fernando Botero's Abu Ghraib series. The canvasses are important works of political art about the breach of the rule of law committed by the United States in the War on Terror. In addition, their installation in the law school conveys other meanings in light of Professor John Yoo's ongoing presence on the faculty. The paintings symbolically express moral opprobrium of the Torture Memos and distance the institution from Professor Yoo's legal work in preparing those memos. Balancing the school's internal commitments to academic freedom and collegial relations on the one hand, and public demands to take a moral stand on torture on the other, has been fraught. Former Dean Edley took the initiative to install the Boteros without a formal process for community input. The Boteros have served, symbolically, as the only permanent acknowledgment of the school's link to the Torture Memos, and thus

268. Some law schools, including Harvard, UC Irvine, and Michigan, already include international or comparative law as a required course. See *International and Comparative Law*, HARV. L. SCH., <https://hls.harvard.edu/dept/academics/programs-of-study/international-and-comparative-law/> (last visited Feb. 14, 2020); see also *International and Comparative Law*, UCI L., <https://www.law.uci.edu/academics/curriculum/international-law.html> (last visited Feb. 14, 2020) (providing an overview of UCI Law's International Law curriculum requirements); Degree Requirements & the Degree Audit Report, MICH. LAW (Jan. 31, 2020), <https://www.law.umich.edu/currentstudents/registration/Documents/Degree%20Requirements.pdf> (Michigan Law's degree requirement overview including the International or Comparative Law requirement).

mark the absence of a collective consideration of what Berkeley Law's relationship to this past should be. It remains to be seen how this conversation will unfold. However, given the past controversy over the Torture Memos and Professor Yoo, it is reasonable to expect that there will be strong views on both sides. Divisions will likely be exacerbated if the central question is framed as whether or not to remove the Boteros.

An alternative framing is to ask whether and how the institution should acknowledge its unique relationship to the Torture Memos. This framing normalizes a historically fraught topic for discussion. Employing the analytic tools of public memory captures the collective social meanings of Berkeley Law's relationship to the Torture Memos that have circulated within the law school. This framework provides a context in which the Berkeley Law community can acknowledge that the paintings commemorate more than just the breakdown of the rule of law. It provides a vocabulary to discuss what the Boteros mean to the community, what values they symbolize, and how best to preserve these memories. Whether the Boteros stay or go, the questions their presence raise about our past and how we relate to it deserve collective reflection.