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The Garden

James Bacchus

Abstract

An essay about the importance of human rights in American foreign policy, framed through the work of Thomas Jefferson. Inspired by the author's visit to the Jefferson Memorial and the American garden in Washington D.C.

THE GARDEN

*James Bacchus**

In the center of our national capital is the garden of our national memory. On the day before I took the oath for the first time as a Member of the Congress of the United States of America, I walked along the forking paths of that garden.

Along those green and winding paths in Washington, D.C. are memorials to all that we, as Americans, choose to cherish, to all we claim to serve, to all we hope to preserve. In that garden are marble monuments that remind us of all that we, as Americans, are supposed to remember, and all that we, as Americans, are supposed to be. To the American people, the Mall in the midst of our capital city is “sacred space.”¹

On that bright, cold January morning, I followed the paths of our national garden from green lawn to green lawn, from flower bed to flower bed, from reflecting pool to reflecting pool, and from memorial to memorial. Along a last paved path in the garden, around a last green turn, I arrived at last at the solemn majesty of the Jefferson Memorial.

America’s memorial to Thomas Jefferson stands all alone as a “shrine to freedom”² in a corner of the garden on the south bank of the capital’s Tidal Basin. The white marble of the memorial forms an open, circular, neoclassical colonnade. In the center of the memorial is a bronze statue of the author of the American Declaration of Independence³ — the “Founding Father” whose words inspired us in 1776, and whose words can still inspire us today. Nineteen feet high, the statue faces out from the colonnade toward the far end of the garden, and toward the

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1. JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 10 (1996).

2. *Id.* at 8 (quoting President Franklin Delano Roosevelt’s speech on April 13, 1943 dedicating the Jefferson Memorial on the Tidal Basin).

3. THE DECLARATION OF INDEPENDENCE (U.S. 1776), available at <http://www.law.indiana.edu/uslawdocs/declaration.html> (last visited Nov. 8, 2004).

shining White House that has long been home to Jefferson's successors.

Above the statue is a shining circular dome. Carved on the interior of the walls that surround and support the dome, are inscriptions of some of Jefferson's noble words about human rights. On that memorable morning, I emerged from the green of the garden, climbed up the white steps, walked between the white columns, and went into the memorial. I stopped, looked up, and read some of the noblest of those words: "I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."⁴

I read those words silently. Then, I read them aloud. And, as I stood there reading those words, as I stood there reflecting on those words, as I stood there reaffirming my own commitment to the spirit of those words in the midst of the garden of our national memory, I noticed for the first time that I was not alone in the memorial.

Others were there as well. Others, too, had followed the forking paths of the garden to pay homage to the memory of Mr. Jefferson. Others, too, had made the pilgrimage through the garden to see his statue and read his noble words. Those other pilgrims were all around me. They were talking among themselves as they, too, pondered the meaning of the words carved into the marble of the memorial. As they, too, read those words aloud, I realized that their pilgrimage, unlike mine, was from afar.

For not a single one of them was speaking English.

As I stood there beneath the sheltering dome of the memorial, I heard Jefferson's words about human rights translated into many languages: Chinese, French, German, Japanese, Spanish. I heard a jumble of languages from all over the world. I heard what seemed to me that morning to be almost every language in the world *except English*.

I may very well have been the only American in the Jefferson Memorial that morning.

Although some who were there with me may have been Americans who happened to be speaking another language, it seems likely that most, if not all, of them must have come from

4. Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 1082 (Merrill D. Peterson ed., 1984).

afar to stroll through America's national garden. They must have been foreigners who had come to visit an American shrine that has long symbolized the American commitment to freedom. They must have come from around the world to visit the Jefferson memorial, and to read, in a number of languages, his noble words about the human rights that form the foundation of freedom.

I still heard their voices as I raised my hand and took the oath of office the next day.

That was in January, 1991. Some years later, and some time after I chose to leave the Congress, I found myself in the center of another national capital, in another national garden of memory. Far from Washington D.C. (and farther still from my abandoned political career), I sat in the back seat of a taxi in a traffic jam in the Plaza de Mayo, a place that has long served as the symbolic center of Buenos Aires, Argentina.

From the window of the taxi, I saw what was causing the traffic jam. I happened to be passing by the plaza on a Thursday afternoon at 3:30. Every Thursday afternoon at 3:30 in Buenos Aires, the mothers of the "disappeared"⁵ march in support of an honest reckoning with Argentina's national memory.⁶ They march in support of human rights in the Plaza de Mayo.

On this Thursday afternoon, the mothers of the "disappeared" were marching in the plaza, as they always did. There were perhaps two dozen of them. They marched around the small pyramid in the center of the plaza, in front of the pink presidential palace.⁷ They wore white handkerchiefs tied around their heads.⁸ They carried placards adorned with faded photographs. They did not say a word.

5. See Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina's "Living Disappeared"*, 27 HARV. WOMEN'S L.J. 235, 239 (2004) ("From these abductions [in the early days of the Argentine *Junta*], a new word came into common usage: *desaparecidos*, the 'disappeareds.' *Desaparecido* was the word used by the *Junta* to deny the kidnapping, torture, and slaying of thousands of Argentines.").

6. See María-Victoria Castro, *La mujer Argentina que soy yo [The Argentinean Woman That I Am]*, 9 CARDOZO WOMEN'S L.J. 321, 336 (2003).

7. See Avery, *supra* note 5, at 247. Every Thursday, the *Madres* gather to participate in the "ritual circling of the Pyramid of Mayo monument [which] grew out of pressure from the police to circulate because the regime prohibited public assembly; the *Madres* walked counterclockwise to show their defiance." *Id.*

8. See *Asociación Madres de Plaza de Mayo, Historia de las Madres de Plaza de Mayo*, at <http://www.madres.org> (last visited Nov. 20, 2004) ("Y, bueno, el primer día, en esa marcha a Luján, usamos el pañuelo blanco que no era otra cosa, nada más ni nada menos, que un pañal

The mothers of Argentina began marching there silently many Thursdays ago.⁹ They did so in a display of courage during the torturous time when a military *junta* ruled Argentina, from 1976 to 1983.¹⁰ Their courage was born of despair. They began meeting together, and then marching together because they did not know the fate of their children who had “disappeared” during the “Dirty War” waged by the *junta* against various guerrilla groups in Argentina. They grew weary of meeting together in the waiting rooms of police stations, and so they began marching together in the Plaza de Mayo.

The very word “disappearance” speaks volumes to advocates of human rights. At least one leading human rights advocate maintains that, of all the many crimes against humanity,

the most evil and most poignant of modern examples is causing a “disappearance” — a process by which a citizen suspected of harbouring subversive sentiments is kidnapped, detained and tortured for some time before finally being killed, all within a secret police or military operation which is utterly unlawful but none the less agreed in outline by the government.¹¹

This “most evil” and “most poignant” of crimes against humanity has cruel consequences:

For the victims, and for their society, disappearance at the hands of police or military forces amounts to the most complete abnegation of human rights imaginable: arbitrary arrest, detention without trial, inhumane and degrading treatment and torture, followed by murder and secret disposal of the body. For friends and relations, the continuing horror of not knowing any details of the victim’s fate adds a special layer of cruelty, driving them either to despair or to the courage displayed by the Mothers of the Plaza del Mayo . . .¹²

So it was in Argentina under military rule. During those dark days of Argentina’s history, more than ten thousand citi-

de nuestros hijos. [“And well, the first day, on that march to Lujan, we used the white hankerchief that wasn’t much more or much less than our children’s diapers.”].

9. See Avery, *supra* note 5, at 247 (“Fourteen women assembled in the main square of Buenos Aires on April 30, 1977 for the first of many silent demonstrations.”).

10. See *id.*

11. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 245 (1999).

12. *Id.*

zens of Argentina “disappeared.”¹³ They simply vanished. The death squads of the military dictatorship came and took them away during the dead and the dark of the night.¹⁴ There was a sudden and fateful knock on the door — and then they were gone. They became prisoners without names in cells without numbers.¹⁵

Torture was commonplace then in Argentina, and it was often the first destination of those who were taken away. In a special section of the Navy Mechanics School in Buenos Aires, and in other dark corners of the country, were torture chambers that were the sordid scenes of unspeakable crimes.¹⁶ Many of those who were tortured in those secret chambers were taken away afterwards, dropped from airplanes over the sea, or buried in mass graves.¹⁷ They “disappeared” forever.

It has been said that the weekly demonstrations of the mothers of the “disappeared” in the Plaza de Mayo “on behalf of their lost children did more than anything else to expose the wickedness of the Argentinian *junta*.”¹⁸ Now, all these years later, democracy has been restored in Argentina.¹⁹ Today, the people of Argentina are trying their best to sustain their democ-

13. See Thomas C. Wright, *Human Rights in Latin America: History and Projections for the Twenty-First Century*, 30 CAL. W. INT'L L.J. 303, 311 (2000) (“The harvest of the dirty war was nearly 10,000 people disappeared according to the official inquiry conducted after the restoration of civilian government, but according to human rights groups the figure was some 30,000.”).

14. See Avery, *supra* note 5, at 236 (“The military regime practiced a method of repression likened to Hitler’s *Nacht und Nebel Erlass* (Night and Fog Decree), in which subversive citizens were made to disappear without a trace. Men, women, and children from all social classes were abducted, as were the elderly, the infirm, and the disabled. Thousands of people went missing, ‘never to be seen again.’”).

15. See JACOBO TIMERMAN, *PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER* (Toby Talbot trans., 1980).

16. See Avery, *supra* note 5, at 241; see also Wright, *supra* note 13, at 311 (“The armed forces [during the Dirty War] set up some 340 secret detention centers across the country, most of them equipped for torture; one of the favored methods of killing leftists was dropping them, still alive, into the ocean from airplanes. Pregnant women prisoners were often held until they gave birth, then were killed and their babies given to childless military couples.”).

17. See Laura Oren, *Righting Child Custody Wrongs: The Children of the “Disappeared” in Argentina*, 14 HARV. HUM. RTS. J. 123, 124 (2001) (“These victims were kidnapped, tortured, and killed; their fate was hidden from their families and the world by burying their bodies in mass graves or throwing them into the sea.”).

18. ROBERTSON, *supra* note 11, at 245.

19. See Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 288-92 (1999).

racy and to secure their hard-won freedoms.²⁰ The Argentines are trying their best to create a new prosperity through the exercise of their democratic freedoms, and to come to terms with those dark days of their past.²¹ More than most, the people of Argentina know the necessity of giving primacy always to respect for human rights.

But, all these years later, the fate of many of the “disappeared” of Argentina is still unknown.²² So the mothers of the “disappeared” continue to march once a week in the Plaza de Mayo.²³ The names of the “disappeared” are on the handkerchiefs they wear.²⁴ The faces of the “disappeared” are on the placards they carry. The mothers still march every Thursday afternoon at 3:30 in the garden of Argentina’s national memory.²⁵

They march in a silent showing of public outrage. They march in dutiful display of their refusal to forget. They march in memory of what happened, and in the hope that, by marching, they can help keep it from happening ever again.

Watching them march from the window of my taxi on that particular Thursday afternoon, I recalled something a friend of mine from Argentina told me once about what it had been like growing up under a military dictatorship during that grim time in his Nation’s history. He knew that, in my youth, I had served in the administration of U.S. President Jimmy Carter during the years when the military ruled Argentina. President Carter was — and is — a champion of human rights. My friend from Argentina told me, “Every time President Carter gave a speech in favor of human rights, fewer people would disappear in Argentina.” He added, “Even today, that remains for me the best evidence I have ever seen of the vast potential of America as a force for human rights in the world.”

In the eyes of my Argentine friend, this vast potential has

20. *See id.*

21. *See id.* *See generally* Avery, *supra* note 5.

22. *See* Avery, *supra* note 5.

23. *See* THE MOTHERS OF THE PLAZA DE MAYO, at http://lacc.fiu.edu/events_outreach/fulbright/argentina_web/BackgroundMadres.htm (last visited Nov. 1, 2004).

24. *See id.*

25. *See* MARGUERITE GUZMÁN BOUVARD, *REVOLUTIONIZING MOTHERHOOD: THE MOTHERS OF THE PLAZA DE MAYO 2* (1994); *see also* *Asociación Madres de Plaza de Mayo*, *supra* note 8.

often been fulfilled. In his eyes, the ghost of Jefferson marches in silence alongside the mothers of the “disappeared.” In his eyes, too, there was a time when all Americans marched alongside them in the Plaza de Mayo. In his eyes, we Americans were true — when Jimmy Carter was President — to Thomas Jefferson’s noble words about human rights. We knew then that Jefferson’s words are not words only for Americans. They are words for all the world. We were worthy then of all the marble monuments in our national garden.

But are we, in the eyes of others throughout the world, still worthy of the monuments in our gardens today? Are we still true to Jefferson’s noble words? Are we still fulfilling the vast potential of America as a force for freedom in the world by marching alongside all those throughout the world who are seeking to secure basic human rights?

The day after I watched the mothers of the “disappeared” march in the Plaza de Mayo, I boarded an airplane for the long flight home from Argentina. Next to me on the plane was a young Argentine couple. They were reading a magazine. They spoke heatedly in Spanish — one of the many languages I had heard all those years ago on that bright January morning at the Jefferson Memorial. They pointed angrily at one appalling photograph in the magazine.

It was a photograph that has become all too familiar lately to all Americans, and to all the rest of the world. It was a photograph of an Iraqi prisoner of war in the prison near Baghdad called Abu Ghraib.²⁶ The prisoner stands on a wooden box, his legs bare, his arms outstretched, his hands connected to electrical wires, his torso shrouded by a dark cape, his head completely covered by a black hood.²⁷ He seems to be beseeching his captors for compassion. He seems to be pleading for pity. He is a portrait of utter and complete vulnerability. He is a statue of another kind.

What could I possibly have said to that couple from Argentina to make that appalling photograph go away? I do not speak Spanish. But even if I did, what could I possibly have said to them? That photograph — and all the many others like it that have been “leaked” to the media from behind the prison walls at

26. See Seymour M. Hersh, *Torture at Abu Ghraib*, *NEW YORKER*, May 10, 2004, at 42.

27. See *id.*

Abu Ghraib — tells the rest of the world something about America that words alone — however noble — can never erase.

I gazed at the photograph for a moment. I listened to the angry words. Then, silently, I turned my head. I looked the other way. Framed by the clouds floating outside, my reflection in the window of the airplane seemed to rebuke me for my silence.

Arriving home from Argentina, I chanced to read the anonymous comment of one of my fellow Americans in the column that serves as a forum for airing public complaints in my hometown newspaper. The column is called “Ticked Off.” The comment I read in the column that day was offered in response to the photographs and other media revelations of American actions at Abu Ghraib. In the view of this one red-white-and-blue American patriot who happens to live in my hometown:

When I see 3,000 Islamist terrorists jump from the 130th floor from any building in New York City to their death, I’ll shed a tear for those Iraqis who were abused by our soldiers in Baghdad. I think those soldiers who operated under direct orders of superiors deserve a Silver Star and commendations — certainly not courts-martial.²⁸

If this were only an isolated view, then perhaps it could be overlooked. If this were only an exceptional expression of venom and vengefulness, then perhaps it could be ignored. Sadly, it is not. Sadly, this view is widespread among Americans, and, sadder still, it is still spreading throughout America.²⁹

Because this view is not isolated, because this view is not exceptional, because this view is still spreading, because this view seems to me to be becoming more and more an accepted view in

28. *Ticked Off*, ORLANDO SENTINEL, May 25, 2004.

29. See Elisabeth Bumiller, *White House Letter; Filmmaker Leans Right, Oval Office Swings Open*, N.Y. TIMES, Sept. 8, 2003, at A19 (“That was also the day that Mr. Bush flew to New York to see Ground Zero, where he came face to face with the chanting of rescue workers demanding revenge. He said ‘I was lifted up by a wave of vengeance and testosterone and anger . . . it made your head spin.’”); see also Jane Moore, *We Must Root Out the Terror Sympathisers*, SUN (N.Y.), Sept. 8, 2004 (“Forget the ‘human rights’ of those who commit atrocities on the scale of 9/11 . . . the terrorist cells ‘sleeping’ in various countries have to be flushed out and dealt with. In short, it is time for zero tolerance. Then, only then, will the world even start to feel a safer place.”); Brian Suntken, *We’re Called to Forgiveness Not Revenge*, CHARLOTTE OBSERVER, Sept. 6, 2004 (“Three years after the horrific events of Sept. 11, our [N]ation is still breathing revenge and retribution.”).

America even though several years have passed since the shock of the tragic events of September 11, 2001, I can no longer look the other way.

And I can no longer remain silent.

Consider these excerpts from a report of the International Committee of the Red Cross on the “Treatment During Arrest” of the Iraqi prisoners in Abu Ghraib.³⁰ The report speaks of arrests in the dead and in the dark of night. It speaks of a fateful and unexpected knock on the door. It explains:

In almost all instances . . . , arresting authorities provided no information about who they were, where their base was located, nor did they explain the cause of arrest. Similarly, they rarely informed the arrestee or his family where he was being taken and for how long, resulting in the de facto “*disappearance*” of the arrestee. . . . [M]any [families] were left without news for months, often fearing that their relatives unaccounted for were dead.³¹

The italics are not in the report of the Red Cross. The italics are mine. The italics are added because the mind cannot help but pause in this passage on the word “*disappearance*” The eye lingers there as the mind conjures the terrible images in the photographs from Abu Ghraib: the hoods, the capes, the dogs, the prods, the lights, the sleepless nights. All of the horror we have seen and heard about Abu Ghraib are contained in this one solitary word, “*disappearance.*”

It does not go away. It scars. It sears. It shivers. It stays.

We Americans must begin to come to terms with the staying power of this word. We must begin to realize just how much of what we most cherish about America may have “disappeared” because of the atrocities at Abu Ghraib. We must begin to understand the consequences of the photographs from Abu Ghraib — and the consequences of the policies those photographs represent — for ourselves as well as for others.³² We must begin to

30. INT’L COMM. OF THE RED CROSS, REPORT OF THE INT’L COMM. OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PERSONS PROTECTED BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT, AND INTERROGATION (Feb. 2004) [hereinafter REPORT OF THE INT’L COMM. OF THE RED CROSS].

31. *Id.* (emphasis added).

32. See Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES MAG., May 23, 2004, at 25, available at <http://donswaim.com/nytimes.sontag.html> (“[T]he photographs are

see the indelible reality of the photographs of Abu Ghraib, for America and for the rest of the world.³³

Those photographs fuel the hate of those who hate us.³⁴ They confirm the fear of those who fear us.³⁵ They undermine the support of those who support us.³⁶ Like the word “disappearance” in the report of the Red Cross, the images in the photographs from Abu Ghraib will not go away. They, too, will stay. Long after many Americans may have forgotten them, they, too, will linger. They will linger in the eyes of the world.

So we Americans cannot turn silently away. We must continue to make our way through the garden. And we must see the path before us clearly, for there are thorns in our path. They are the thorns of torture. They are the thorns of Abu Ghraib. We must remove those thorns because, if we do not, if the thorns remain, we will take the wrong path as a Nation, and we will lose our way through the garden.

Many of those who would profess to lead us along the winding paths of the garden do not seem to see the damage done to America by Abu Ghraib.³⁷ They do not seem to see the italics of

us. That is, they are representative of the fundamental corruptions of any foreign occupation together with the Bush administration’s distinctive policies.”); *see also* Myriam Marquez, *Not Who Americans Are As a People*, ORLANDO SENTINEL, May 2, 2004, at G3 (“This is not who we are as a people. Because if it is, we are doomed to lose the war on terror, no matter how much anyone tries to excuse what happened at Abu Ghraib as necessary to break down Iraqi detainees for interrogation.”).

33. *See Donald Rumsfeld Should Go*, N.Y. TIMES, May 7, 2004, at A30 (“The United States has been humiliated to a point where government officials could not release this year’s international human rights report this week for fear of being scoffed at by the rest of the world. The reputation of its brave soldiers has been tarred, and the job of its diplomats made immeasurably harder . . .”).

34. *See* Reuel Marc Gerecht, *Who’s Afraid of Abu Ghraib?*, WEEKLY STANDARD, May 24, 2004, available at <http://www.weeklystandard.com/content/public/articles/000/000/004/096uutti.asp> (“[T]he humiliating scenes of abused Iraqi prisoners’ and the war in general ‘have turned that country [Iraq] into a model to be feared and avoided in the eyes of many in the Middle East, and a tool in the hands of governments reluctant to change.’”).

35. *See id.*

36. *See* Roger Cohen et al., *Challenging the Rest of the World with a New Order*, N.Y. TIMES, Oct. 12, 2004, at A1 (“[N]ations like Pakistan, Jordan, Egypt and Saudi Arabia, [are] important allies whose leaders are sometimes supportive, but . . . many people [there] believe Mr. Bush has ignited a war against Islam. Their reliability is uncertain.”).

37. *See id.* (“It is a characterization of Mr. Bush’s foreign policy style often heard around the world: bullying, unreceptive, brazen. The result, critics of this administration contend, has been a disastrous loss of international support, damage to American credibility, the sully of America’s image and a devastating war that has already taken

the word “disappearance.” They do not seem to see how the images of torture linger. They do not see the thorns.

The Chairman of the Joint Chiefs of Staff, General Richard B. Myers, sits in his spacious office in the Pentagon. News of the photographs from Abu Ghraib reaches his desk. The Chairman does not choose to have the photographs sent to other top decision-makers in the government of the United States because “the impact of the photos [is] not appreciated.”³⁸ He does not see the thorns.

The Secretary of Defense offers his view of the events at Abu Ghraib when he is asked about the atrocities there in an interview with a radio station in Phoenix, Arizona. “I have not seen anything thus far,” he insists, “that says that the people abused were abused in the process of interrogating them or for interrogation purposes.”³⁹ The Secretary chooses not to seize the chance to denounce torture.⁴⁰ He does not see the thorns.

Soon after the media revelations about Abu Ghraib, soon after the photographs from Abu Ghraib are shown to all the world, the President of the United States holds a rare press conference in Washington, D.C.⁴¹ “Three times, journalists gave the President chances to condemn the use of torture, distancing himself and the [N]ation unequivocally from such practices. He

more than 1,000 American lives.”); *see also Abu Ghraib, Unresolved*, N.Y. TIMES, Oct. 28, 2004, at A28 (“When the Abu Ghraib prison scandal first broke, the Bush administration struck a pose of righteous indignation. It assured the world that . . . the United States would never condone the atrocities . . . that it would punish those responsible for any abuse . . . and that it was committed to the Geneva Convention and the rights of prisoners. None of this appears to be true.”); Roger Cohen et al., *supra* note 36 (“The result . . . has been a disastrous loss of international support, damage to American credibility, the sullyng of America’s image and a devastating war that has already taken more than 1,000 American lives.”).

38. Eric Schmitt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1. *See Rumsfeld Testifies Before House Armed Services Committee*, WASH. POST, May 7, 2004, available at www.washingtonpost.com/ac2/wp-dyn/A9251-2004May7? [hereinafter *Rumsfeld Testifies*]. General Myers testified that he knew for months that the photos existed, but had not seen them. *See Rumsfeld Testifies, supra*.

39. Eric Schmitt, *Rumsfeld Mischaracterizes Findings of 2 Studies on U.S. Abuse at Iraqi Interrogations*, N.Y. TIMES, Aug. 28, 2004, at A6 [hereinafter Schmitt, *Rumsfeld Mischaracterizes Findings*].

40. *See id.*

41. *See* Press Release, Int’l Media Center, President Bush Holds Conference Following G8 Summit (June 10, 2004), at www.whitehouse.gov/news/releases/2004/06/ [hereinafter *President Bush Holds Conference*].

didn't."⁴² The President does not choose to foreswear forever the use of torture.⁴³ He does not see the thorns.

In the familiar way of Washington, following criticism, all three of these would-be leaders later "clarify their remarks." Later, the Chairman of the Joint Chiefs of Staff sees the significance of the photographs of Abu Ghraib.⁴⁴ Later, the principal spokesman for the Secretary of Defense admits, "He misspoke, pure and simple. But he corrected himself."⁴⁵ Later, the President states, "I will never order torture."⁴⁶ He adds, "The values of this country are such that torture is not a part of our soul, and our being."⁴⁷

With the last remark, I would certainly agree. But how sincere are we to suppose all of this belated backing and filling by our current leaders to be? In my experience, what people mean *most*, is evidenced best by what they say and do *first*. As someone who has been, at various times, both a politician and a press aide to a politician, I know that political truth is often truer to the genuine views of politicians *before* it is politically corrected.

The scrubbed and sobered second thoughts of those who profess to lead America in our "war on terror" are less revealing of their real views than are their initial answers and actions in their occasional unscripted moments. What the President said belatedly in condemnation of torture is surely true of our values, but recent events lead to the conclusion that it is considerably less true of our recent actions, which do not reflect our values, and which certainly are not true to the Jeffersonian ideal of human rights that inspires those values.

Ample supporting evidence for this conclusion is found in almost everything that those in the current administration in the United States have said and done while they have sought to lead America. They have not only placed the thorns of torture along the paths of the American garden. Through their actions, and

42. John Harwood, *New Values Debate Over Prisoner Abuse Could Hurt Bush*, WALL ST. J., June 23, 2004, at A4.

43. See *id.*; see also President Bush Holds Conference, *supra* note 41.

44. See *Rumsfeld Testifies*, *supra* note 38 ("This situation . . . is nothing less than tragic. The Iraqi people try to build a free and open society. And I regret that they saw such a flagrant violation of the very principles that are the cornerstone of such a society.").

45. Schmitt, *Rumsfeld Mischaracterizes Findings*, *supra* note 39, at 6.

46. Harwood, *supra* note 42, at 4.

47. *Id.*

through their inactions, they have refused at every turn in the path to see them.

For example, only a few weeks after the world first saw the photographs from Abu Ghraib, the U.S. State Department released its annual report on human rights.⁴⁸ Dating back to the idealistic days of President Carter, this report details every year of the ongoing efforts of the United States to promote human rights and democracy in more than one hundred countries.⁴⁹ The latest annual report criticizes a number of countries — including allies of the United States in the “war on terror” — for engaging in torture and other human rights violations.⁵⁰ The United States of America is not among them.⁵¹ The report does not so much as mention Abu Ghraib.⁵² If this report is to be believed, the U.S. State Department, too, does not see the thorns.

Given such seeming blindness among those who would lead us, it is not surprising to learn that many other Americans appear to agree with them. A national poll of American attitudes on the appropriateness of various techniques of interrogating captive terrorists shows, reassuringly, that sixty-three percent of those polled think torture is never acceptable, but, disturbingly, slightly more than one-third of those polled say torture is legitimate in some cases.⁵³ Moreover, and most disturbingly, despite widespread objection among those polled to electric shocks, exposure, forced immersion, sexual humiliation, starvation, and other so-called interrogation “techniques” used against the inmates at Abu Ghraib, according to the poll, “only a third of Americans would define what happened at Abu Ghraib as torture.”⁵⁴ Perhaps in part because of the blindness of our leaders, these Americans also do not see the thorns.

What would Jefferson say? Would he say, like so many Americans, that torture is not torture if we choose not to call it

48. See U.S. ST. DEP'T, SUPPORTING HUMAN RIGHTS AND DEMOCRACY: THE U.S. RECORD 2003-2004 (2004), available at www.state.gov/g/drl/rls/shrd/2003/ (last visited Nov. 20, 2004).

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. See Richard Morin & Claudia Deane, *Americans Split on How to Interrogate*, WASH. POST, May 28, 2004, at A20.

54. *Id.*

torture? Would he say that anything goes in the “war on terror”? Would he also not see the thorns? Or would he say that we Americans have strayed from the right path because we have not tended our garden?

Anyone who has ever visited his home at Monticello knows that Jefferson valued gardens. There are long and winding paths through the garden he made of his grounds there. Today, he would enjoy walking along the winding path of the garden in Washington that leads to his statue in the Jefferson Memorial. More than anyone, he would understand why the garden there is much more than merely another garden for America.

Jefferson was fond of saying, “There is not a sprig of grass that grows uninteresting to me.”⁵⁵ He once told a friend, “No occupation is so delightful to me as the culture of the earth, and no culture comparable to that of the garden.”⁵⁶ For nearly fifty years, he kept a journal that he called his “Garden Book,” in which he kept a lifelong record and loving description of “my native woods and feilds [sic].”⁵⁷ In it he also recorded how, over the course of his long life, he gradually transformed his rustic mountaintop at Monticello into one of America’s premier gardens.

He did so with a plan in mind. Like other eighteenth-century exponents of the philosophical view called Enlightenment, Jefferson believed that “the economy of nature” established a rational order in the world.⁵⁸ Thus, he sought a “universal intelligibility” in his view of his surroundings.⁵⁹ From his studies of aesthetics, from his readings in the theories of the landscaping of English gardens, and from his tours (with John Adams) of some of the most famous English gardens of his time, he concluded that a garden could be a reflection of intelligibility. It could be a manifestation of the mind of those who made it.⁶⁰

But the right kind of garden was needed. A natural garden

55. DAVID McCULLOUGH, *JOHN ADAMS* 357 (2001).

56. Letter from Thomas Jefferson to Charles Willson Peale (Aug. 20, 1811), in THOMAS JEFFERSON, *THOMAS JEFFERSON: WRITINGS* 1249 (Merrill D. Peterson ed., 1984).

57. ANDREW BURSTEIN, *THE INNER JEFFERSON: PORTRAIT OF A GRIEVING OPTIMIST* 21 (1995). See *THE GARDEN AND FARM BOOKS OF THOMAS JEFFERSON* 191 (Robert C. Baron, ed., 1987).

58. See DANIEL J. BOORSTIN, *THE LOST WORLD OF THOMAS JEFFERSON* 41-53 (1948).

59. See KARL LEHMANN, *THOMAS JEFFERSON: AMERICAN HUMANIST* 156-76 (1947).

60. See generally McCULLOUGH, *supra* note 55, at 356-62; WILLARD STERNE RANDALL, *THOMAS JEFFERSON: A LIFE* 418-25 (1993).

was needed in a natural arrangement with sheltering trees, blowing waters — and winding paths. And the paths needed to wind in the right way. The right paths through the garden were needed. It was important to choose the right paths through the garden, because the course the paths followed through the garden revealed the deepest beliefs of those who chose them.

It was equally important to tend the garden. A garden requires cultivation. To make the right kind of garden requires the right kind of gardener. To keep the right kind of garden requires the right kind of gardening. The fate of a garden depends on the care and the nourishment we give it. With the right kind of cultivation, a garden will last, it will flourish, it will flower into all that its makers hoped it would some day be. But without the right kind of cultivation, a garden will fill with thorns.

Jefferson tried to choose the right paths for his garden at Monticello. He tried to cultivate a garden that would flourish, and would be filled with flowers. He would advise us to do the same for our garden of national memory along the Mall and around the Tidal Basin in Washington, D.C. He would have us choose paths for our national garden that would be true to our deepest beliefs, and he would have us tend our garden in ways that would make it flourish, would help fill it with flowers, and would keep it from filling with thorns.

We need not wonder what Jefferson would say about the thorns our current leaders refuse to see in the American garden. On that bright January morning years ago when I made my way through the garden to the Jefferson Memorial, I stopped afterwards in the gift shop kindly provided by the National Park Service in the basement below the Memorial. I bought a book there entitled *Thomas Jefferson: His Life and Words*.⁶¹ I kept it as a souvenir of my pilgrimage to the Jefferson Memorial. I kept it on my desk all the while I was in the Congress. I keep it on my desk to this day. It is a slim volume containing some of Jefferson's most stirring statements.

On page fifteen of this book, filled with felicitous quotations are these words of Jefferson: "The god who gave us life, gave us liberty at the same time; the hand of force may destroy, but can-

61. THOMAS JEFFERSON, THOMAS JEFFERSON: HIS LIFE AND WORDS (Nick Beilenson ed., 1986) [hereinafter JEFFERSON: HIS LIFE AND WORDS].

not disjoin them.”⁶² These noble words of Jefferson are from his rhetorical dress rehearsal of sorts for the *Declaration of Independence*, a manifesto he wrote in 1774 entitled *A Summary View of the Rights of British America*.⁶³ These bold words, written in protest to the King of England in 1774, helped inspire Jefferson’s selection two years later as the principal draftsman of the *Declaration*.⁶⁴ They express his view at that time of the basic human rights of “British America.” What is more, they express his view also of the basic human rights at all times of *everyone everywhere*.

I am no pacifist. Not long after my visit to the Jefferson Memorial in 1991, I cast my first substantive vote as a Member of Congress. It was a vote in favor of the Congressional resolution that authorized the President of the United States to take military action in what became the Persian Gulf War.⁶⁵ It was a vote to engage as part of a coalition of Nations in an act of collective security in response to a clear act of aggression in violation of international law by the murderous regime of Saddam Hussein of Iraq.⁶⁶ It was a vote to go to war.

In those same circumstances, I would cast that vote again today. I would vote for any military action necessary to defend America, and I would certainly not require us first to get the permission of others before defending ourselves. One of our human rights is our right to defend ourselves. Sometimes we must go to war to do that. Yet, that said, we Americans must look beyond our understandable outrage at the unspeakable evils of terrorism. We must see beyond the superficial political rhetoric that is used by those who seek to cloud our sight. We must pause and peruse the photographs from Abu Ghraib, and we must ask ourselves: what are we defending when we go to war to defend America?

What was it that I swore to uphold when I first took the oath as a Member of Congress on the day after my visit to the Jeffer-

62. *Id.* at 15.

63. Thomas Jefferson, *A Summary View of the Rights of British America* (1774), available at <http://libertyonline.hypermall.com/Jefferson/Summary-Body.html> (last visited Nov. 7, 2004).

64. See MSN ENCARTA ENCYCLOPEDIA, DECLARATION OF INDEPENDENCE, available at http://encarta.msn.com/encyclopedia_761559234/Declaration_of_Independence.html (last visited Nov. 7, 2004).

65. See Persian Gulf Resolution, H.R.J. Res. 658, 101st Cong. (1991), S.Con.Res. 147, 101st Cong. (1991).

66. See *id.*

son Memorial? In our “war on terror,” we Americans are defending our homes, our families, our borders. But are we not also supposed to be defending something more? Are we not also supposed to be defending the American heritage that we celebrate in all of those shining marble memorials in our national garden? Are we not also supposed to be defending the validity of Mr. Jefferson’s noble words about human rights that are carved into the Jefferson Memorial?

Whatever else we may do as Americans, we must tend our garden. Whatever else we may be defending as Americans, we must defend the truth of Jefferson’s words. Just as those words are carved into the Jefferson Memorial, so too must they be carved into all we say and all we do as Americans. For his words about human rights give expression to what has always been the best part of America. They give voice to the revolutionary idea that we all have human rights. They give voice to the breathtaking, world-shaking, freedom-making idea that human rights are universal.⁶⁷

The Jeffersonian belief in the universality of human rights is the seed of the American garden. It is the audacious assumption on which America was founded. It has been, from the beginning, the most basic American belief. It has been the essential, the quintessential belief that we Americans have always professed, and that has always beckoned from America to the rest of the world. It is the reason why so many visitors from other countries have long made the pilgrimage from afar to the Jefferson Memorial. They come to share in the “radical thought” of his “magic words.”⁶⁸

Jefferson certainly believed that we must defend ourselves.⁶⁹ He would be among the first to acknowledge that the “hand of force” must be used from time to time.⁷⁰ He not only wrote the *Declaration of Independence*, he also signed it.⁷¹ Later, he favored

67. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

68. See ELLIS, *supra* note 1, at 10-11.

69. See Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 911 (Merrill D. Peterson ed., 1984) (“The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants.”).

70. See Jefferson, *A Summary View of the Rights of British America*, *supra* note 63.

71. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

aggressive action against the pirates of Tripoli who were the “seafaring terrorists” of his time.⁷² He would surely support our efforts in our time to maintain our independence in the aftermath of terrorist attacks through our “war on terror.” Jefferson would, however, caution us now, as he did then, to remember always that although the “hand of force” may destroy both life and liberty, the “hand of force” can never “disjoin them.”⁷³

Perhaps the most radical aspect of the Jeffersonian vision of human rights is its universal application.⁷⁴ In this vision that has long been the bedrock American belief, the use of force can never erase the God-given right of every human being to be treated with humanity. The least of us is entitled to the same humane treatment as the rest of us. This is also true of the worst of us. There are no exceptions to the universality of human rights. If there were exceptions, then human rights would not truly be universal.

As Jefferson wrote so memorably in the *Declaration of Independence*, the rights of life, liberty, and the pursuit of happiness are “among” the rights with which we have each been “endowed” by our Creator, and these “certain” among our rights are rights that are “unalienable.”⁷⁵ They are God-given rights that belong to each and every one of us. They are rights that can never be taken away. They are natural rights that are founded on the ultimate sovereignty of every individual. Jefferson lived his long life believing this. He went to his grave believing this. Two years before his death, he wrote, “Nothing then is unchangeable but the inherent and unalienable rights of man.”⁷⁶

This is the American idea. This is the American birthright. This is the indispensable American belief. This is what truly makes us “Americans.” Not our proud flag. Not our patriotic anthems. Not our red-white-and-blue rhetoric. Not our economic power. And certainly not our martial might. But this, and this alone: this fundamental belief in the dignity and the

72. See ELLIS, *supra* note 1, at 75-76.

73. JEFFERSON, *A Summary View of the Rights of British America*, *supra* note 63.

74. See THE DECLARATION OF INDEPENDENCE (U.S. 1776); see also MSN ENCARTA ENCYCLOPEDIA, *supra* note 64.

75. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

76. Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 1490, 1494 (Merrill D. Peterson ed., 1984).

worth of every single individual human being; this basic belief in human rights; this enduring belief that human rights are universal; this abiding belief that human rights are immutable and unalienable; this unwavering belief that the rights we each have as human beings do not change, and they cannot be taken away.

Without this belief, America is no longer America. Without this belief, we are no longer Americans. Without this belief, we will surely lose our way along the meandering paths of the garden, and we will decline and fall as a Nation among the thorns we will fail to see.

There are many good reasons to oppose torture, any one of which is reason enough to condemn what was done by Americans at Abu Ghraib in betrayal of the basic American belief in the universality of human rights.

There is, first of all, a purely practical reason. Torture does not work. As a means of interrogation, torture does not produce reliable information.⁷⁷ There are literally centuries of accumulated evidence of the unreliability of torture as a means of eliciting the truth.⁷⁸ Prisoners will say absolutely anything while under torture in the desperate hope of making the torture stop.⁷⁹ Even in the medieval days of the Spanish Inquisition, this was widely known. At least formally, a confession to an inquisitor had to be voluntary.⁸⁰ The rules governing the Inquisition required that a confession made under torture “must be repeated the next day without torture, ‘voluntarily.’”⁸¹

Another reason to oppose torture is because torture is counter-productive. We might be tempted to ask: Why not engage in torture? Have our opponents not “tortured” us with their reign of terror? But simple logic suggests that, if we torture others, they will, when they get the chance, also torture us. Even Hitler and his Nazis generally understood this. It was not a respect for human rights that caused them largely to refrain from

77. See AMNESTY INTERNATIONAL USA, STOP TORTURE: TALKING POINTS: HOW TO RESPOND TO THOSE ADVOCATING THE USE OF TORTURE, available at http://www.amnesty-usa.org/stoptorture/talking_points.html (last visited Nov. 7, 2004).

78. See PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 154-55 (2000) (discussing the use of torture during the Spanish Inquisition including the Inquisitors’ procedures for overcoming the unreliability of confessions made under pain of torture).

79. See AMNESTY INTERNATIONAL USA, *supra* note 77.

80. See BROOKS, *supra* note 78.

81. *Id.*

torturing prisoners of war. It was logic. As Democratic Senator Joe Biden of Delaware — a supporter of the American military action in Iraq — explained to the Attorney General of the United States in a recent Congressional hearing, “There’s a reason why we sign these treaties . . . so when Americans are captured they are not tortured. That’s the reason, in case anybody forgets it.”⁸²

Another reason to oppose torture is because torture is against the law.⁸³ It is against American law, and it is against international law.⁸⁴ In addition to prohibitions against the use of torture in U.S. statutes, there are also prohibitions against torture in “these treaties” to which U.S. Senator Biden rightly referred.⁸⁵ The law prohibits torture, and thus the rule of law requires us to oppose torture. And is not ours a Nation that respects and upholds the rule of law? Is not ours a Nation that knows that the rights of individual human beings can rightly be restricted only through the due process of the rule of law? Is not ours a Nation that understands that, without the rule of law, there can be no freedom to enjoy any of our human rights?

Is not ours a government of laws, and not of men?

Jefferson believed it ought to be. Indeed, he believed it had to be. Jefferson told us that ours must be a Nation that upholds the rule of law if we hope to hold on to our basic belief in human rights. He saw the rule of law as our sole salvation from “tyranny over the mind of man.”⁸⁶ On pages twenty-one and twenty-two of the book I bought as a souvenir in the gift shop at the Jefferson Memorial are words that tell us in no uncertain terms what Jefferson thought about the difference between a government of laws and a government of men.⁸⁷

“It would be a dangerous delusion,” Jefferson said,

were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is every-

82. *A Memo Too Far: Torture*, ECONOMIST, June 12, 2004, at 29.

83. See U.S. CONST. amend. VIII (prohibiting “cruel and unusual punishment”); see also *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 3rd Sess., art. 5, U.N. Doc. A/RES/3/217 (1948) (stating that “No one shall be subject to torture.”).

84. See U.S. CONST. amend. VIII; see also *Universal Declaration of Human Rights*, *supra* note 83.

85. *A Memo Too Far: Torture*, *supra* note 82.

86. Letter from Thomas Jefferson to Benjamin Rush (Sept. 23, 1800), in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 1082 (Merrill D. Peterson ed., 1984).

87. See JEFFERSON: HIS LIFE AND WORDS, *supra* note 61, at 21-22.

where the parent of despotism — free government is founded on jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.⁸⁸

Amid the mischief of the misadventures of our current leaders, these words — from Jefferson's draft of the Kentucky Resolutions of 1798 — deserve our continued resolution as Americans today.

Our current leaders would doubtless insist to us in soothing "sound bites" that they support the rule of law. But there is little in what they have said and done in the aftermath of Abu Ghraib to indicate that they truly agree with Jefferson about the indispensability of the rule of law. Their first inclination is to say that there is no law.⁸⁹ Their next recourse is to say that, even if there is law, the law does not apply.⁹⁰ Their last resort is to say that, even if there is law, and even if the law applies, it does not apply to us.⁹¹ Why not? Because we are Americans, of course, and because the true belief of our current leaders seems to be that, in our dealings with the rest of the world, we Americans are above the law.⁹²

There is no lack of American laws that condemn torture. In 1991, Congress enacted the Torture Victim Protection Act, which allows victims of torture, or the families of those who are killed by extrajudicial means, to sue their torturers in American courts, regardless of their citizenship, and regardless of where the crime occurred.⁹³ In 1994, Congress enacted a federal anti-torture statute, which defines "torture" and establishes severe

88. *Id.* See *Draft of Kentucky Resolutions*, reprinted in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 449, 454-55 (Merrill D. Peterson ed., 1984).

89. See, e.g., Bruce Zagaris, *Human Rights, Counter-Terrorism, War and Detention Policy: U.S. and British Detention Policies Continue to Unravel and Draw Litigation and Criticism*, 20(8) INT'L ENFORCEMENT L. REP. 338, § 5 (discussing White House memoranda that attempted to find loopholes in international law prohibiting torture).

90. See *id.* (discussing the initiation of a "Common Plan" to violate the Geneva Conventions).

91. See *id.* (discussing how international laws and U.S. laws against torture were to be narrowly interpreted by the U.S. government).

92. See *id.*

93. See Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992) (giving the district courts original jurisdiction of any civil action by a non-U.S. citizen for a tort in violation of either an international law or a treaty of the United States).

penalties for anyone who commits an act of torture outside the United States.⁹⁴ As a Member of Congress at the time, I voted for both of these laws. (The Library of Congress provides a convenient list of all Congressional votes on a website it calls "Thomas," in honor of the founder of the library, Thomas Jefferson.)⁹⁵

In addition, American law has long acknowledged that our leaders can be held accountable under the law for acts of torture committed by those under their command. The Supreme Court of the United States has stated that those with "command responsibility" can be held "individually responsible" for war crimes committed by their subordinates, not only when they directly ordered those crimes, but also when they knew or they should have known that their subordinates were committing those crimes, and failed to take necessary and reasonable steps to prevent or punish them.⁹⁶ That ruling, in 1946, was in a case relating to the military tribunal convened to consider atrocities committed by Japanese troops under the command of General Tomoyuki Yamashita in the Philippines during World War II.⁹⁷ But why would not the same reasoning apply to troops under American command?

Clearly the war crimes for which there should be such "command responsibility" would include torture. Torture is clearly a crime against humanity under various international laws requiring humanitarian treatment and the protection of human rights. And, for the most part, these various international laws that outlaw torture as a crime against humanity have long been embraced and endorsed by the United States.

Like every other member of the United Nations, the United States of America has signed the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948.⁹⁸ In echo of Jefferson's ringing phrase in the American Declaration of Independence, Article 3

94. See 18 U.S.C. §§ 2340, 2340A, 2340B (1994).

95. See LIBRARY OF CONGRESS, THOMAS: LEGISLATIVE INFORMATION ON THE INTERNET, at <http://thomas.loc.gov> (last visited Oct. 24, 2004).

96. See *Yamashita v. Styer*, 327 U.S. 1, 15-16 (1946); see also Allison Marston Danner & Jenny S. Martinez, *Commanders Can Be Held Liable for Actions of Their Subordinates*, MIAMI HERALD, Aug. 31, 2004.

97. See *Yamashita*, 327 U.S. at 15-16.

98. See generally *Universal Declaration of Human Rights*, *supra* note 83.

of this Universal Declaration proclaims: "Everyone has the right to life, liberty and security of person."⁹⁹ Further, Article 5 of this Universal Declaration provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁰⁰

In addition to the Universal Declaration of Human Rights, the member States of the United Nations have also adopted the International Covenant on Civil and Political Rights.¹⁰¹ This global Covenant was concluded in 1966 and entered into force in 1976.¹⁰² It was ratified by the United States in 1992.¹⁰³ Echoing the Universal Declaration, and also expanding on it, Article 7 of the Covenant provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."¹⁰⁴

The International Criminal Tribunal for the Former Yugoslavia — which has been supported in its work by the United States — has said in no uncertain terms that "the prohibition of torture is an absolute value from which nobody must deviate."¹⁰⁵ Closer to home, the United States Court of Appeals for the Second Circuit has said that

deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties Among the rights universally proclaimed by all [N]ations is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and the slave trader before him *hostis humanis generis*, an enemy of all mankind.¹⁰⁶

99. *See id.* art. 3.

100. *See id.* art. 5.

101. *See International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

102. *See id.*

103. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, at <http://www.unhchr.ch/pdf/report.pdf> (last visited Nov. 8, 2004).

104. *See International Covenant on Civil and Political Rights*, *supra* note 101, art. 7.

105. *Prosecutor v. Anton Furundzija*, Case IT-95-17/1-T, [1988] Int'l Crim. Trib. for Fmr. Yugoslavia (Trial Chamber II), ¶ 154, *reprinted in* [1999] 38 I.L.M. 317, 349, ¶ 154.

106. *Filartiga v. Peña-Irala*, 630 F.2d 876, 878, 890 (2d Cir. 1980).

In addition to the international law that is found in treaties and other international conventions, there is also “customary international law,” which draws on treaty law as one source but exists independently of treaty law as a matter of generally established and generally accepted international custom.¹⁰⁷ Determining whether a particular practice among States has acquired the legal status of international custom, can be difficult, but every State — including the United States — has long agreed that there is such a thing as “customary international law.” The Statute of the International Court of Justice — approved by the United States and other members of the United Nations — reflects this shared international understanding in identifying custom as one of the sources of international law.¹⁰⁸

Under customary international law, there are certain rules that are so “accepted and recognized by the international community of States as a whole” that they are considered to be rules “from which no derogation is permitted.”¹⁰⁹ These rules of customary international law are, in the Latin phrasing of international lawyers, *jus cogens*.¹¹⁰ They are universal and peremptory norms from which there can be no legal departure. Such rules give rise, in yet another lawyers’ Latin phrasing, to duties that are *erga omnes*.¹¹¹ They give rise to universal duties that are owed to everyone everywhere. Under international law, these universal duties are binding on all States — whether or not those States

107. See BARRY E. CARTER ET AL., INTERNATIONAL LAW 120-24 (4th ed. 2003); see also THEFREEDICTIONARY.COM (2004) at [http://encyclopedia.thefreedictionary.com/custom+\(law\)](http://encyclopedia.thefreedictionary.com/custom+(law)) (last visited Nov. 8, 2004) (defining *customary international law* as “the Law of Nations or the legal norms that have developed through the customary exchanges between [S]tates over time, whether based on diplomacy or aggression”).

108. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(b), available at <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (last visited Oct. 25, 2004).

109. See Vienna Convention on the Law of Treaties, May 22, 1969, art. 53, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

110. See BARRY E. CARTER ET AL., INTERNATIONAL LAW 107-9 (4th ed.); see also THEFREEDICTIONARY.COM (2004), at <http://encyclopedia.thefreedictionary.com/jus%20cogens> (last visited Nov. 8, 2004) (defining *jus cogens* as “a peremptory norm . . . , a fundamental principle of international law considered to have acceptance among the international community of [S]tates as a whole. Unlike customary law that has traditionally required consent and allows the alteration of its obligations between [S]tates through treaties, peremptory norms cannot be violated by any [S]tate.”).

111. See generally Olivia Lopes Pegna, *Counter-claims and Obligations Erga Omnes Before the International Court of Justice*, 9 EUR. J. INT’L L. 724 (1998), available at <http://www.ejil.org/journal/Vol9/No4/090724.pdf> (last visited Nov. 8, 2004).

have ratified the treaties that impose them.¹¹² Traditionally, the United States, like other countries, has supported these customary legal concepts.¹¹³

The rule against torture is *jus cogens*. In the words of at least one human rights advocate, and in an expression of the view of many more around the world, “[t]here can be no doubt that the rule against torture has evolved into a *jus cogens* prohibition which every [S]tate has a duty owed to the international community to outlaw and to punish.”¹¹⁴ I share this view. So, too, I think, would Thomas Jefferson.

This view is justified by a variety of international agreements. Most notably, the notion that the right not to be tortured is a basic human right is supported by the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which was adopted by the General Assembly of the United Nations in 1984 and entered into force in 1987.¹¹⁵ At last count, 137 of the States that are members of the United Nations are parties to this Convention.¹¹⁶ One of them is the United States of America.¹¹⁷

The 1984 Convention Against Torture clarifies that under international law, every country has an obligation to prevent torture, and torture is never justified. Article 2(1) of the torture convention provides: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”¹¹⁸ Article 2(2) of the torture convention provides: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may

112. See, e.g., FREDERIC L. KIRGIS, *AM. SOC'Y INT'L L., TREATIES AS BINDING INTERNATIONAL OBLIGATION* (May 1997), at <http://www.asil.org/insights/insight9.htm> (last visited Nov. 8, 2004).

113. See *id.*

114. ROBERTSON, *supra* note 11, at 98.

115. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

116. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, *STATUS OF RATIFICATION OF THE CONVENTION AGAINST TORTURE*, at <http://www.ohchr.org/english/law/cat-ratify.htm> (last visited Nov. 8, 2004) [hereinafter *STATUS OF RATIFICATION OF THE CONVENTION AGAINST TORTURE*].

117. See *id.*

118. Convention Against Torture, *supra* note 115, art. 2(1).

be invoked as a justification of torture."¹¹⁹ The United States ratified the Convention Against Torture in 1994.¹²⁰ As permitted under international law, the American ratification was subject to a number of express reservations, but none of those reservations relate to these absolute obligations of Article 2 of the torture convention.¹²¹

In addition to this international convention against torture, there are the four Geneva Conventions.¹²² The Geneva Conventions have their antecedents in the nineteenth century, were negotiated in their current form following World War II, and were concluded in 1949.¹²³ The four conventions cover, respectively, the treatment of the wounded and sick on land, the treatment of the wounded and sick at sea, the treatment of prisoners of war, and the treatment of civilians in time of war.¹²⁴ The Geneva Conventions have been ratified by nearly two hundred States.¹²⁵ All of the member States of the United Nations have ratified them — including the United States of America.¹²⁶ Indeed, the United States has been a party to the Geneva Conventions since 1955 — for nearly half a century.¹²⁷

Moreover, U.S. domestic law requires compliance with the

119. *Id.* art. 2(2).

120. See STATUS OF RATIFICATION OF THE CONVENTION AGAINST TORTURE, *supra* note 116.

121. See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, DECLARATIONS AND RESERVATIONS OF THE CONVENTION AGAINST TORTURE, at <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm> (last visited Nov. 21, 2004) [hereinafter DECLARATIONS AND RESERVATIONS OF THE CONVENTION AGAINST TORTURE].

122. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

123. See Francois Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT'L L. 191, 193-94 (2004).

124. See Geneva Conventions, *supra* note 122.

125. See INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS, at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/\\$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20GenSve%20et%20Protocoles%20additionnels%20ENG-logo.pdf) (last visited Nov. 15, 2004) (noting that 192 States are parties to the Geneva Conventions).

126. See *id.* (noting that all 191 members of the United Nations are parties to the Geneva Conventions).

127. See *id.* (noting that the United States ratified the Geneva Conventions on Aug. 2, 1955).

important provisions of the four Geneva Conventions. The War Crimes Act of 1996, as amended, grants jurisdiction to federal district courts in the United States over certain violations of the Geneva Conventions by or against a member of the armed forces of the United States or a citizen of the United States either “inside or outside of the United States.”¹²⁸ It makes grave breaches of the Geneva Conventions — including torture — war crimes that are punishable by penalties up to and including life imprisonment or the death penalty.¹²⁹ The war crimes covered by the statute include those falling under “common Article 3” of the Geneva Conventions.¹³⁰

Common Article 3 — so-called because it is identical in all four Geneva Conventions — specifically prohibits a number of different kinds of inhumane treatment.¹³¹ Article 3 includes prohibitions of hostage-taking, extra-judicial executions, murder, mutilation, “cruel treatment,” and “outrages upon personal dignity.”¹³² It also includes a ban on torture.¹³³

The most recent international agreement that addresses the issue of torture is the Rome Statute of the International Criminal Court (“ICC”), which was adopted in 1998 at the United Nations Conference in Rome, Italy.¹³⁴ The Rome Statute created a permanent ICC.¹³⁵ This new international court has jurisdiction over genocide, the crime of aggression, war crimes, and crimes against humanity.¹³⁶ Under the Rome Statute, “crimes against humanity” specifically include “torture.”¹³⁷ Our previous leaders in the United States signed the Rome Statute.¹³⁸ In an act that is

128. War Crimes Act of 1996, 18 U.S.C. § 2441 (2004) (entered into force Nov. 26, 1997).

129. See 18 U.S.C. § 2441(a).

130. See Geneva Conventions, *supra* note 122, art. 3; see also 18 U.S.C. § 2441(c)(3) (2004).

131. See Geneva Conventions, *supra* note 122, art. 3.

132. See *id.* art. 3(1).

133. See *id.* art. 3(1)(a).

134. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

135. See *id.* art. 1.

136. See *id.* art. 5.

137. See *id.* art. 7.

138. See Jess Bravin, *U.S. to Pull Out of World Court on War Crimes*, WALL ST. J., May 6, 2002, at A4 (noting that the Clinton Administration signed the Rome Statute on Dec. 31, 2000).

decidedly dubious under international law, our current leaders have purported to “un-sign” it.¹³⁹ They have professed to erase America’s signature from this international treaty.¹⁴⁰

This is typical of the attitude of our current leaders to all of the national and international laws that condemn the use of torture. Time and again, they have acted in ways that suggest that they would prefer to erase the letter of the law. Time and again, they have interpreted the law in ways that suggest that law must yield to necessity in the face of the threat of unprecedented terror. Time and again, they have implied that the rule of law must submit to the rule of expediency in the aftermath of the tragic events of September 11, 2001.

Because of “leaks” to the press, we have been able to read confidential memos prepared by lawyers in the current administration that attempt to provide legal justification for the use of torture in interrogating suspected terrorists.¹⁴¹ As Professor Allison Marston Danner of Vanderbilt University Law School has pointed out, “[w]hat is most disturbing” about what we have been able to read because of these leaks “is . . . the fact that lawyers from the Department of Justice, as well as the Department of Defense, have signed off on memos that represent ‘how to’ guides to circumventing U.S. laws and the Constitution.”¹⁴² In these memos, lawyers for our current leaders focus not on ways to follow the law, but on ways to evade the law. They suggest that the President’s “inherent constitutional authority to manage a military campaign” overrides all of the domestic laws and the international conventions that prohibit the use of torture.¹⁴³ They go so far as to suggest that, in the “war on terror-

139. *See id.* (noting that “international law generally requires that a country not undercut a treaty it has signed, even if it hasn’t been ratified”); *see also* Ratification Status of the Rome Statute, at <http://www.isc-icc.org/signedlist.html> (last visited Nov. 8, 2004) (noting that on May 6, 2002, the U.S. government informed the U.N. Secretary-General that the United States “does not intend to be bound by its signature to the Rome Statute and that it has no intention to ratify.”).

140. *See* Rome Statute, *supra* note 134, art. 7.

141. *See Legalizing Torture*, WASH. POST, June 9, 2004, at A20.

142. Allison Marston Danner, *Administration’s Position “Appalling”*, MIAMI HERALD, June 11, 2004.

143. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1 (quoting a report by lawyers of the Department of Defense in March 2003).

ism," torture "may be justified."¹⁴⁴

In early August 2002, Jay S. Bybee, head of the Office of Legal Counsel in the Department of Justice, advised Alberto R. Gonzales, Counsel to the President in the White House:

Certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within [a legal] proscription against torture We conclude that for an act to constitute torture . . . it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.¹⁴⁵

President Bush later appointed Bybee to the United States Court of Appeals for the Ninth Circuit.¹⁴⁶

Gonzales, the President's counsel, advises him that the "nature of the new war" on terror "renders obsolete Geneva's strict limitations on questioning of enemy wounded" and renders some of the other provisions of the Geneva Conventions "quaint."¹⁴⁷ The Secretary of Defense argues that the Geneva Conventions do not "precisely apply" to today's "set of facts."¹⁴⁸ We do not know if the President of the United States agrees with this conclusion. We do know that he has not said otherwise.

As our current leaders search for rationalizations to conclude that existing international law is "quaint" and "obsolete" for dealing with prisoners in the "war on terror," much of the rest of the world continues to work to strengthen the international law against torture. In December 2002, after a decade of negotiation, the General Assembly of the United Nations adopted an "Optional Protocol" to the U.N. Convention Against Torture.¹⁴⁹ This "Optional Protocol" will allow independent na-

144. *Id.* (quoting a memorandum to the President by the Department of Justice in Aug. 2002).

145. SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 4-5* (2004). This memorandum was "leaked" to *Newsweek* in May 2004. *See id.*

146. *See* Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3.

147. Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, at 4 (quoting a memorandum to the President by White House Counsel Alberto R. Gonzales on January 25, 2002).

148. *See* Fareed Zakaria, *The Price of Arrogance*, NEWSWEEK, May 17, 2004, at 39 (quoting Secretary of Defense Donald Rumsfeld).

149. *See* Optional Protocol to the Convention Against Torture and Other Cruel,

tional and international experts to make regular visits to places of detention within the States that are parties to the Convention in order to assess the treatment of the wounded, and to make recommendations for improving their treatment.¹⁵⁰ There were only four votes against the "Optional Protocol" in the General Assembly. Those votes were cast by the Marshall Islands, Nigeria, Palau — and the United States of America.¹⁵¹

This is not surprising. At almost every turn, those who lead America today have cast the vote of America, in the United Nations and in numerous other international endeavors, against international law, and especially against global efforts to extend the current reach of international law.¹⁵² They have rescinded America's previous signature of the Kyoto Accords on global climate change.¹⁵³ They have renounced the treaty on anti-ballistic missiles.¹⁵⁴ They have refused to seek ratification of a treaty banning land mines.¹⁵⁵ They have opposed a proposed treaty regulating international trade in small arms.¹⁵⁶ They have hindered

Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, G.A. Res. 57/199, U.N. GAOR, 57th Sess., 42 I.L.M. 26 (2003) (entered into force Feb. 4, 2003) [hereinafter *Optional Protocol to the Convention Against Torture*].

150. See *id.* arts. 1, 11.

151. The Optional Protocol to the Convention Against Torture was adopted by 127 votes to 4 with 42 abstentions. See *Optional Protocol to the Convention Against Torture*, *supra* note 149.

152. See Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Towards the International Criminal Court*, 36 CORNELL INT'L L. J. 415, 415-16 (2004) (discussing not only the U.S. refusal to support the International Criminal Court ("ICC"), but also the current administration's focus on unilateralism as opposed to an international law); see also Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. FOR SOC. JUST. 345 (2004) (highlighting the Bush Administration's efforts to prevent the ICC's effective operation).

153. See Richard W. Thackeray, *Struggling for Air: The Kyoto Protocol, Citizens' Suits Under the Clean Air Act, and the United States' Options for Addressing Global Climate Change*, 14 INDIANA INT'L & COMP. L. R. 855, 856-57 (2004) (noting the Bush Administration's reversal of the Clinton Administration's support of the Kyoto Protocol).

154. See Nina Tannenwald, *Law Versus Power on the High Frontier: The Case for a Rule Based Regime for Outer Space*, 29 YALE J. INT'L L. 363, 366-67 (2004) (stating that the Bush Administration pulled out of the Anti-Ballistic Missile Treaty as a move to remove constraints on its power).

155. See Randall H. Cook, *Dynamic Content: The Strategic Contingency of International Law*, 14 DUKE J. COMP. & INT'L L. 89, 118-21 (2004) (commenting on the Bush Administration's lack of support for land mine initiatives in the context of rejecting international law that presents constraints on the United States).

156. See Jeremy Ostrander, *Changing Direction on Non-Nuclear Arms Control? American Exceptionalism, Power, and Constancy*, 21 BERKELEY J. INT'L L. 495, 508 (2003) (stating that the Bush Administration refused to sign the treaty based on its support of legitimate small arms trading).

enforcement of a treaty banning biological weapons.¹⁵⁷ And they have tried repeatedly to exempt American troops from prosecution by the new ICC.¹⁵⁸ The laws against torture are only some among the many current and proposed international laws that our current leaders would rather not apply to America and to Americans. At almost every turn, they have shown contempt for international law, contempt for the international rule of law, and contempt for the very concept of international cooperation that is essential to making international law and to upholding the international rule of law.

Their contempt has consequences.

There are many sources in many of the cultural and philosophical traditions throughout the world for the belief that there are human rights, and for the belief also that human rights are universal. But few in the world would deny that all of the many international laws that require humane treatment and respect for human rights can be seen at least in part as having been sown by the seeds of Thomas Jefferson's noble words.¹⁵⁹ All of those laws are efforts to heed Jefferson's admonition to rely in the unrelenting fight against tyranny on the government of laws and not of men. They are the flourishing of his revolutionary belief in basic human rights.

The international laws that affirm human rights and that require humane treatment are flowers that have long flourished in the American garden. If we choose to undermine international law, and if we choose to undermine the international rule of law, then we trample on those flowers. If we trample on the flowers, they will die, the thorns will grow, and we will lose our way along the winding paths of the garden.

We can pretend that torture is not torture if we refuse to call it "torture." The report of the Red Cross said specifically that some of the incidents that occurred at Abu Ghraib "were tantamount to torture."¹⁶⁰ The current leaders of the United

157. See *id.* at 512-16 (discussing the Bush Administration's continual actions against the efforts of the international community to ban biological weapons using the argument that the drafted proposals were not realistic).

158. See Orentlicher, *supra* note 152; see also Heindel, *supra* note 152.

159. See THE DECLARATION OF INDEPENDENCE (U.S. 1776); see also *supra* note 75 and accompanying text.

160. See REPORT OF THE INT'L COMM. OF THE RED CROSS, *supra* note 30.

States of America stubbornly insist otherwise.¹⁶¹ The legal memos that have been “leaked” to the world give the narrowest possible definitions of torture and other prohibited acts of inhumane treatment.¹⁶² The international investigation ordered by the Department of the Army speaks of the commitment of “egregious acts and grave breaches of international law” at Abu Ghraib, but stops short of using the word “torture.”¹⁶³ The Secretary of Defense explains at a press conference, “[m]y impression is that what has been charged thus far is abuse, which I believe technically is different from torture, and therefore I’m not going to address the ‘torture’ word.”¹⁶⁴ And, of course, at every turn, every effort is made to portray whatever it was that happened at Abu Ghraib — whether “torture” or not — as the aberrational acts of an errant few, and not as the predictable outcome in the field of a pronounced policy of contempt at the highest levels of the current administration for the laws that are supposed to safeguard human rights against such “abuse.”¹⁶⁵

We lawyers can — as lawyers often do — quibble about definitions. We can debate about the fine distinctions in the definitions in the national and international laws on humane treatment and human rights. We can quarrel about where to draw the fine lines in the law between humane and inhumane treatment. We can argue about the fine lines that can be drawn be-

161. See Sontag, *supra* note 32 (citing Secretary of Defense Donald Rumsfeld’s response to Abu Ghraib and claims of torture).

162. See Mike Allen & Dana Priest, *Memo on Torture Brings Focus to Bush*, WASH. POST, June 9, 2004, at A3 (citing a memorandum from the Justice Department Office of Legal Counsel to White House Counsel Alberto R. Gonzales, which stated that torturing suspected al Qaeda members abroad “may be justified”).

163. Art. 15-6 Investigation of the 800th Military Police Brigade, Conclusion (Feb. 26, 2004), available at <http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm> (last visited Oct. 28, 2004) [hereinafter The Taguba Report]. The Taguba Report was issued on February 26, 2004, but was not made publicly available until after the photographs from Abu Ghraib were aired by CBS on *60 Minutes II* on April 28, 2004. See *id.* *Compare 60 Minutes* (CBS television broadcast, Apr. 28, 2004), with *Testimony on Mistreatment of Iraqi Prisoners: Hearing Before the Senate Committee on Armed Services*, 108th Cong. (2nd Sess. May 11, 2004) (Major General Taguba’s testimony before the Senate Committee on Armed Services came only after the media made public his report).

164. Sontag, *supra* note 32.

165. See, e.g., Press Release, St. Dep’t, U.S. Human Rights Advocacy Not Stalled by Abu Ghraib, Powell Says (July 2, 2004) (deflecting the question of whether the occurrences at Abu Ghraib were torture, U.S. Secretary of State Colin Powell suggests that it was rather the misconduct of a few).

tween inhumane treatment and abuse, and between abuse and torture. We can if we choose — and as the lawyers who serve our current leaders largely choose to do — look for ways to evade the law instead of looking for ways to obey it. We can refuse to address the “torture” word.

But the thorns remain, and the thorns are all the more visible when we trample on the flowers. Our refusal to see the thorns does not remove them.

The various definitions of “torture” in American law and in the international laws that ban torture are very much the same.¹⁶⁶ In lawyerly fashion, we can read those definitions. If we are American lawyers, we can choose to rely on how our elected representatives in the Congress of the United States have defined “torture” in American law.¹⁶⁷ Here then is how one U.S. statute defines “torture.” It says: “‘torture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”¹⁶⁸

The same U.S. statute goes on to define “severe mental pain or suffering” as

the prolonged mental harm caused by or resulting from — (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.¹⁶⁹

Tell me. Do any or all of the “enhanced interrogation techniques” that have been approved by our current leaders fall

166. Compare 18 U.S.C. § 2340(1) (1994) (defining torture as an “act . . . specifically intended to inflict severe physical or mental pain or suffering”) with Convention against Torture, *supra* note 115 (defining torture as “any act by which severe pain or suffering, whether physical or mental, is inflicted”).

167. See 18 U.S.C. § 2340(1) (1994).

168. *Id.*

169. 18 U.S.C. § 2340(2) (1994).

within this definition? What about so-called “water-boarding” — when an inmate is strapped down, forcibly immersed under water, made to struggle for breath, and made to believe he will be drowned? What about prolonged placement in painful “stress positions?” What about extended “sleep deprivation?” What about the “physical coercion” of old-fashioned beatings? Are these what we define as “torture”? Or is the Honorable Judge Bybee of the Ninth Circuit correct in his conclusion that, to amount to “torture,” the pain must be “equivalent in intensity” to that of “organ failure, impairment of bodily function, or even death?”¹⁷⁰

We lawyers can quarrel all we like over whether the hoods and the other humiliations at Abu Ghraib fall within this U.S. statutory definition or any of the other similar definitions of “torture” in American and international law. But recall the photographs from Abu Ghraib, and recall especially the photograph I saw from Abu Ghraib in that magazine on my flight home from Argentina, and judge for yourself. Is the image in that photograph an image of human humiliation sufficient to meet the definition of “torture” I have recited from duly enacted American law? Moreover, is there not something more that ought to concern us over and above our quibbles about legal definitions? However we may define “torture” according to law, must we not also define our actions according to some moral standard of right and wrong?

The internal report of U.S. Army Major Gen. Antonio M. Taguba on the abuses in the prison at Abu Ghraib was made public after the media released the photographs of that abuse.¹⁷¹ The Taguba Report describes incidents of “sadistic, blatant, and wanton criminal abuses . . . inflicted on several detainees . . . [that were] systemic and illegal.”¹⁷² These incidents included, among other atrocities, physical abuse, videotaping and photographing both male and female prisoners in the nude, posing and photographing prisoners in various sexually explicit positions, forcing a female prisoner to have sex with a male prison guard, using nuzzled military dogs to frighten and intimi-

170. Allen & Priest, *supra* note 162, at A3 (citing the memo from the Justice Department Office of Legal Counsel composed by then Assistant Attorney General now 9th Circuit judge, Jay S. Bybee, to White House Counsel Alberto R. Gonzales).

171. *See supra* note 163.

172. The Taguba Report, *supra* note 163, at Pt. I, ¶ 5 (2004).

date prisoners, and much more.¹⁷³ Separate and apart from the question of whether all of this is legal, is the question of whether it is right or wrong.

Still another reason to oppose torture is because torture, whether it is legal or not, is simply immoral.¹⁷⁴ Beyond law is morality. Beyond the quibbling questions of lawyers is the simple question of right and wrong. Others may contend otherwise in our all too relativistic, “postmodern” world.¹⁷⁵ Others may quarrel with the contention of Jefferson and other Enlightenment thinkers that there can be such a thing as a “universal intelligibility” in the world.¹⁷⁶ Others may contend that a “new paradigm” in our post-“9/11” world has somehow altered the previous dictates of both law and morality in ways that must alter also our traditional notions of right and wrong.¹⁷⁷ But I remain with Jefferson. I continue to cling to the belief that there are such absolutes as right and wrong — whatever the circumstances. And the torture of another human being is just plain wrong.

Missing from the memos of the lawyers in the current administration was a simple admonition: “But this would be wrong.” Whatever distinctions we may try to make legally, it is simply wrong morally to submit another human being to the atrocities that were committed by Americans, and in the name of Americans, in the prison at Abu Ghraib. The lines that matter are not drawn only by law and by lawyers. No legal memorandum, no matter how persuasive the distinctions it makes, can change the dictates of morality. Over and above what the law may require of us looms our knowledge of what is required of us by the simple fact of our humanity.¹⁷⁸ Over and above the bounds of the law is the moral imperative imposed by our mu-

173. *See id.*

174. *See* Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 253 (2004) (presenting the arguments for the immorality of torture).

175. *See generally* ZYGMUNT BAUMAN, *POSTMODERN ETHICS* (1993) (discussing postmodern ethics and morality).

176. *See generally* Rex R. Perschbacher & Debra Lyn Basset, *The End of Law*, 84 B.U. L. REV. 1, 10-13 (2004) (analyzing the detachment of morality from law).

177. *See* William C. Bradford, “*The Duty to Defend Them*”: *A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1435-37 (2004) (examining how September 11th has allowed for a stronger preference of the sovereign to treat law in a manner consistent with asserting its will).

178. *See* Letter from Thomas Jefferson to Thomas Law (June 13, 1814), in JEFFERSON: WRITINGS, *supra* note 4, at 1335-36.

tual humanity with others.¹⁷⁹

Does this moral imperative have exceptions? Should it matter who the “others” are? Should it matter if they are “prisoners of war” or not? Should it matter if they are “terrorists” or not? Should it matter if they are torturers or not? The “war on terror” raises these questions in challenge to this moral imperative. Regardless of what the law may say in answer to these questions, what does morality say? Is there one morality where some of us are concerned, and another morality for some “others?”

Jefferson did not think so. “I know but one code of morality for man,” he said, “whether acting singly or collectively.”¹⁸⁰ We Americans have always agreed with him. For all our confessed shortcomings, for all our admitted failings, for all our poor choices from time to time along the paths of our garden, we Americans have always professed an allegiance to one code of morality for all.¹⁸¹ Furthermore, we have always aspired to treat all “others” according to one code of morality, whoever they were, wherever they were from, and whatever they may have done in violation of law or morality.¹⁸² Do we still pledge our allegiance to these noble words about morality by Mr. Jefferson?

During the darkest days of the “disappearances” in Argentina, the writer V.S. Naipaul, who would later be awarded the Nobel Prize, traveled to Argentina to see for himself why so many uncivilized things were happening in such a civilized country.¹⁸³ He interviewed Argentines on both sides of the “Dirty War.”¹⁸⁴ He interviewed those who supported the military *junta*,

179. See THOMAS JEFFERSON, *Opinion on the French Treaties* (Apr. 28, 1793), in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 423 (Merrill D. Peterson ed., 1984); see also Duncan Kelly, *Revisiting the Rights of Man: Georg Jellinek on Rights and the State*, 22 LAW & HISTORY REV. 493, 513-16 (2004) (discussing the origin and formation of law in the context of our common human bonds).

180. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), at <http://www.founding.com/library/lbody.cfm?id=160&parent=57>.

181. See George Washington, Farewell Address (1796), available at www.yale.edu/lawweb/avalon.washing.htm (last visited Nov. 6, 2004).

182. See Letter from Thomas Jefferson to Thomas Law (June 13, 1814), in THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 1335-36 (Merrill D. Peterson ed., 1984).

183. See V.S. Naipaul, Two Worlds, Nobel Lecture (Dec. 7, 2001), available at http://www.literature-awards.com/nobelprize_winners/naipaul_nobel_lecture.htm.

184. See V.S. Naipaul, *Argentine Terror: A Memoir*, N.Y. REV. OF BOOKS, Oct. 11, 1979, available at <http://www.nybooks.com/articles/7671>.

and he interviewed those who opposed it.¹⁸⁵ He soon discovered that many of those he interviewed on both sides of the “Dirty War” made the same distinction.¹⁸⁶

Whatever their political sentiments, many of those he interviewed in Argentina made a distinction between what Naipaul described as “good torture” and “bad torture.”¹⁸⁷ As he explained their shared view, “Torture was going to continue; but there was good torture and bad torture. Bad torture was what was done by the enemies of the people; good torture was what, when their turn came, the enemies of the people got from the protectors of the people.”¹⁸⁸ In other words, “It was ‘all right’ to torture an ‘evildoer’; it was another thing to torture ‘a man who’s trying to serve the country.’”¹⁸⁹

The moral courage of the mothers of the “disappeared” has long since defeated such sentiments in Argentina. But what about America? Do we Americans no longer agree with Jefferson that there is only one morality for everyone? Do we believe today in “good torture” and “bad torture?”¹⁹⁰ Have we concluded since September 11, 2001, that there is more than one code of morality, and that it is permissible to apply a different standard of right and wrong to our actions against “evildoers” because of the extent of the evil of their deeds?

It seems so. In the action of our current leaders in America, it certainly seems so.

A senior general in the United States Army who investigated the abusive treatment of prisoners at Abu Ghraib tells a hearing of the U.S. Senate that the Central Intelligence Agency — in violation of the Geneva Conventions — may not have registered perhaps as many as 100 detainees in U.S. military facilities.¹⁹¹ He acknowledges that he has failed in his efforts to obtain docu-

185. See V.S. Naipaul, *Argentina: Living With Cruelty*, N.Y. REV. OF BOOKS, Jan. 30, 1992, available at <http://www.nybooks.com/articles/3024>.

186. See Naipaul, *Argentine Terror: A Memoir*, *supra* note 184 (noting that Peronist trade union men and high ranking military officials acknowledged a dichotomy between “good” and “bad” torture).

187. See *id.*

188. V.S. NAIPAUL, *Argentina and the Ghost of Eva Perón, 1972-1991*, in *THE WRITER AND THE WORLD: ESSAYS* 405 (Pankaj Mishra ed., 2002).

189. *Id.* at 395.

190. See Naipaul, *Argentine Terror: A Memoir*, *supra* note 184.

191. See Bradley Graham & Josh White, *General Cites Hidden Detainees: Senators Told CIA May Have Avoided Registering Up to 100*, WASH. POST, Sept. 10, 2004, at A24.

ments from the CIA about these unregistered detainees.¹⁹² They are known as “ghost detainees.”¹⁹³ They are prisoners without names in cells without numbers. They have “disappeared.”¹⁹⁴

In his annual State of the Union Address to the Congress of the United States and to the people of the United States, the President of the United States seems to boast of extra-judicial killings.¹⁹⁵ In a stilling, chilling moment in his speech, he reports that “more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate.”¹⁹⁶ Within his familiar smirk, the President adds, “Let’s put it this way — they are no longer a problem for the United States and our friends and allies.”¹⁹⁷

They have *disappeared*.

Yes, there *is* evil in the world. Evil must be acknowledged. Evildoers must be opposed. Evildoers must often be opposed with force. The evildoers who have declared war on America by inflicting terror on Americans and on many others around the world must be opposed with all the will we can muster, with all the strength we can summon, and with all the force we can apply to secure a victory in our “war on terror.”

But there is not one code of morality that is owed to evildoers and another that is owed to the rest of us.¹⁹⁸ There is, as Jefferson said, only one code of morality, and, because there is only one code of morality, there is no such thing as “good torture” and “bad torture.”¹⁹⁹ There is only torture. And torture is always “bad.” It is always wrong. If we choose to believe otherwise, then what has long been special about America, about Americans, and about the American garden, will disappear.

The final reason to oppose torture is because torture is “un-American.”²⁰⁰ A garden where the thorns of torture grow is not

192. *See id.*

193. *Id.*

194. *Id.*

195. *See* George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* <http://whitehouse.gov/news/releases/2003/01/print/20030128-19.html> (last visited Oct. 25, 2004).

196. *Id.*

197. *Id.*

198. *See* Letter from Thomas Jefferson to James Madison, *supra* note 180.

199. *See* Naipaul, *Argentine Terror: A Memoir*, *supra* note 184.

200. Christopher E. Smith, *The Bill of Rights After September 11th: Principles or Pragmatism?*, 42 DUQ. L. REV. 259, 282-83 (2004).

truly an “American” garden.

We Americans may choose to engage in a collective act of national self-denial.²⁰¹ We may say, like our President, that the atrocities that were photographed at Abu Ghraib were “disgraceful conduct by a few American troops, who dishonored our country and disregarded our values.”²⁰² We may say, like him, that the photographs “do not represent America.”²⁰³ We may say, like him, that this is not “the America I know.”²⁰⁴ But the images in the photographs from Abu Ghraib say otherwise. The torturers in those photographs are *Americans*.

We Americans may choose to say, with Thucydides, that “war is a stern teacher.”²⁰⁵ We may choose to say with that ancient chronicler of the Peloponnesian War among the Greeks that war is a violent and a terrible teacher. The Sicilian expedition began with the sails of a vast armada of Athenian ships filled with a hopeful wind. It ended with thousands of defeated Athenians dying one by one of unquenchable thirst, parched by an unforgiving sun in the stone quarries of Syracuse.²⁰⁶ But we are not ancient Athenians. The torturers in those photographs are *Americans*.

We Americans may also choose to invoke the ancient Biblical adage of an eye for an eye.²⁰⁷ We may ask about the abuse at Abu Ghraib, like our Secretary of Defense: “Does it rank up there with chopping someone’s head off on television? It doesn’t. It doesn’t.”²⁰⁸ No, it doesn’t. Of course it doesn’t. But is this really the measure of America? Is this really the standard for Americans? Does every beheading deserve, if not another, then at least some other, perhaps less hideous, form of inhumane abuse? Does the fact that Saddam Hussein’s torture cham-

201. See Timothy Noah, *The Right’s Abu Ghraib Denial: Is the Liberal Outrage Really Worse Than the Torture?* (May 11, 2004), at <http://slate.msn.com/id/2100373>.

202. Dana Milbank, *Bush Seeks to Reassure Nation on Iraq*:

President Talks of Razing Abu Ghraib Prison to Mark “New Beginning”, WASH. POST, May 25, 2004, at A1.

203. Mark Danner, *Torture and Truth*, N.Y. REV. OF BOOKS, June 10, 2004, at 47.

204. Frank Rich, *It Was the Porn That Made Them Do It*, N.Y. TIMES, May 30, 2004.

205. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 242 (Rex Warner trans., 1972) (431-404 B.C.).

206. See *id.* at 536-37.

207. See *Exodus* 21:24 (King James).

208. John J. Lumpkin, *Rumsfeld Says Abu Ghraib Abuses Do Not Compare with Terrorist Atrocities*, N.Y. TIMES, Sept. 10, 2004, available at http://www.nctimes.com/articles/2004/09/11/military/18_33_339_10_04.

bers were far worse than ours make ours any less appalling? Again, the torturers in those photographs are *Americans*.

We Americans may choose as well to observe that we live in a world where there is a difference between “ought” and “is.” We may choose to point out that ours is a less than perfect world, and that, in our less than perfect world, it is only to be expected that we might occasionally fall short of our highest ideals. We might even note the undeniable historical fact that Jefferson himself, the most eloquent exponent of our ideals, the author of all those noble words, fell short of living up to them. Not far from the winding paths of his garden at Monticello were the cabins of his slaves on Mulberry Row.²⁰⁹ But again, the torturers in those photographs are *Americans*.

This is supposed to make a difference. This is supposed to make all the difference. As one commentator has put it, “These were, after all, Americans.”²¹⁰ Americans are not supposed to be torturers. Americans are not supposed to cause “disappearances.” The fact that those in charge of the prison at Abu Ghraib are Americans is supposed to make all the difference, because we Americans have always believed that we are different, and, for all the shades of gray of our current day, for all the ways that the America of today differs from the America of Jefferson’s day, we still do.

But the truth is we Americans are *not* different. We are just like everyone else in the world. We share the same DNA. We share the same frail and fallible human nature. We share the same fond hope of immortality, and the same fatal fear of an ever-approaching mortality. We share the same mortal fate as all the others of our striving, struggling species. The only thing that makes us different as Americans — the only thing that has ever made us different — is the American ideal of universal human rights that is given its most eloquent expression in the noble words of Thomas Jefferson.

Those of us who are so fortunate as to be able to call ourselves “Americans” have come, we and our forebears, from all over the world. We have come together to live together today,

209. See MONTICELLO: THE HOME OF THOMAS JEFFERSON, TO LABOUR FOR ANOTHER, at <http://www.monticello.org/jefferson/dayinlife/plantation/home.html> (last visited Nov. 23, 2004).

210. See *Danner*, *supra* note 203, at 46.

and we have also come together to try to achieve something together tomorrow. We are trying to achieve something together tomorrow, not only for America, but for all the world. What is it we hope to achieve? What is the historic contribution we Americans hope to make to humanity? What is the contribution we hope to make to the future of the world? The answer, now as always, is found in the words of Jefferson.

“The disease of liberty is catching,” he said, and we Americans have long hoped to contribute to the future of the world by helping infect all the world with the emancipating disease of liberty.²¹¹ In yet another of Jefferson’s metaphors about freedom, he said, during the early days of the American experiment with freedom, “This ball of liberty . . . is now so well in motion that it will roll round the globe.”²¹² Perhaps foremost among America’s “Founding Fathers,” he foresaw that a worldwide spread of liberty through the American example of liberty, and through the continuing American commitment to liberty, would become America’s foremost contribution to the future of the world.

Jefferson still lives for Americans — Jefferson is more to us than merely a marble statue in a memorial on the Mall — because Jefferson still speaks for what Americans still see as this historic global mission of our country. The American idea is nothing more nor less than the contagious idea of the human opportunities and the human possibilities that are created through the free and liberating exercise of human rights. The American idea is the idea of a liberty that emancipates as it rolls ever onward around the globe. This is an idea that belongs by birth to Americans, but it is also an idea that belongs by equal right to everyone else. It is the idea of a universal liberty for all the world that is forever opposed to “every form of tyranny over the mind of man.”²¹³

Is not torture the worst form of such tyranny? And is not torture therefore the worst form of “anti-Americanism?” What does it say to us about “Americanism” — what does it say to us

211. Letter from Thomas Jefferson to Marquis de Lafayette (Dec. 26, 1820), *available at* <http://www.constitution.org/tj/jeff15.txt> (last visited Oct. 24, 2004).

212. Letter from Thomas Jefferson to Tench Coxe (June 1, 1795), *available at* <http://www.loc.gov/exhibits/jefferson/181.html> (last visited Oct. 24, 2004).

213. Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), *in* THOMAS JEFFERSON, THOMAS JEFFERSON: WRITINGS 1082 (Merrill D. Peterson ed., 1984).

about all our patriotic pretensions as a Nation — when we read that, in between other forms of “abuse,” the inmates at Abu Ghraib were made to stand and sing “The Star-Spangled Banner” in the nude?²¹⁴ And, above all, what does it say about America, and about “Americanism,” to all the rest of the world?

There can be no compromising with terrorism. There can be no compromising with terrorists. There can be no relenting in our “war on terror.” But if we embrace a policy that justifies the use of torture, if we defend a policy that rationalizes the use of torture, if we reduce ourselves to engaging in torture, then the “war on terror” will be lost, because the terrorists will have won. They will have won, because they will have caused us to abandon the defining American idea of universal human rights that is the only thing about America that makes Americans different. They will have won the ultimate victory. For it is this very idea that they are most determined to defeat and to destroy with all their terror.

One of his earliest biographers wrote, “If Jefferson was wrong, America is wrong. If America is right, Jefferson was right.”²¹⁵ Jefferson was right. America has been right when America has followed Jefferson. America will be right again only when America returns to the Jeffersonian ideal of universal human rights. Jefferson’s noble words about human rights must continue to guide us through the American garden. His words are the only reliable map along the garden’s winding paths. They are the only way we can see clearly enough to remove the thorns that impede us.

In our “war on terror,” we must be true to the true idea of America that Jefferson’s words represent. In all our dealings with the terrorists, we must remember his words, and we must hold ourselves to the higher standard of those words. We must hold ourselves always to the higher standard that service to the emancipating idea of America always demands of all Americans. In service to this higher standard, we must act always as Jefferson would urge us to act.

We must defeat our enemies. We must deny their cause. We must never deny their humanity.

214. See Kate Zernike & David Rohde, *Forced Nudity of Iraqi Prisoners Is Seen as a Pervasive Pattern, Not Isolated Incidents*, N.Y. TIMES, June 8, 2004, at A14.

215. ELLIS, *supra* note 1, at 3 (quoting James Parton (1874)).

As it is, the thorns are multiplying as we wander onto the wrong path of the garden. As embattled countries often do, we can seek the “last refuge” of a rhetorical patriotism.²¹⁶ But this will not lead us back to the right path, and this will not help us see or remove the thorns. We are not exonerated by all the euphemisms of our current leaders about the torture at Abu Ghraib. We are not excused by all their attempts at excuses. Nor are we spared by the ever-shorter attention span of the American people. The photographs from Abu Ghraib may have disappeared from the front pages of the American press, but the images from those photographs have not disappeared from the minds of the rest of the world. What *is* disappearing from the minds of the rest of the world is the Jeffersonian idea of America as an exemplar and an exponent of universal human rights.

Jefferson’s passion for gardens was shared by the greatest of Argentine writers (and one of the greatest of all writers), Jorge Luis Borges. In his early poems, Borges celebrated the beauties of the gardens of Buenos Aires in the peaceful decades long before the “Dirty War.”²¹⁷ In the celebrated short stories he wrote later in life, Borges, like Jefferson, often relied on metaphors.²¹⁸ In his own way, in his short stories and in his other fables, he, like Jefferson, tried to create new worlds with his words.²¹⁹ One of his most famous metaphorical fables is entitled *The Garden of Forking Paths*.²²⁰

The Garden of Forking Paths is a tale within a tale of a scholarly and learned politician who abandons politics and public life “in order to compose a book and a maze.”²²¹ It turns out that “the

216. Samuel Johnson warned us, “Patriotism is the last refuge of a scoundrel.” JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 543 (Alfred A. Knopf 1992) (1791).

217. See EDWIN WILLIAMSON, *BORGES: A LIFE* (2004). Publisher’s comment states that the book charts the evolution of Borges’ political ideas: from his early days as a cultural nationalist through to his support for Argentine military *juntas* during the Dirty War of the 1970s. See *id.*

218. See *Borges, Jorge Luis 1899-1986*, available at <http://www.biography.com/search/printable.jsp?aid=9220057> (last visited Nov. 3, 2004) (stating that metaphors dominate Borges’ poetry and short stories).

219. See *Jorge Luis Borges*, available at http://www.penguin.co.uk/nf/Author/AuthorPage/0,,0_1000004468,00.html (last visited Nov. 3, 2004) (quoting Mario Vargas Llosa’s tribute to Borges, “His is a world of clear, pure, and at the same time unusual ideas . . . expressed in words of great directness and restraint . . .”).

220. See JORGE LUIS BORGES, *The Garden of Forking Paths*, in *LABYRINTHS: SELECTED STORIES AND OTHER WRITINGS* 19 (Donald A. Yates & James E. Irby eds., 1964).

221. *Id.* at 24.

book and the maze were one and the same thing.”²²² The book and the maze he builds in what remains of his life take the form of a labyrinth that is a “garden of forking paths.”²²³ The forking paths of the garden in Borges’ tale contain “all possible outcomes” in all the “various futures” that human choices might make.²²⁴ The garden is forever “incomplete.”²²⁵ It is forever in the making. It is forever unfolding in new forks on new paths that result from new human choices. It is a garden that reveals the consequence of human choices.

The American garden is such a garden. It is likewise a garden of forking paths. It offers all possible outcomes. It offers all possible choices. It unfolds along paths that are created by our choices. It reveals the consequences of our choices.

Late in life, in his retirement at Monticello, the aged Jefferson spent part of most mornings working in his garden. He aligned the rows of flowers with a measuring line, and he clipped away excess buds and leaves with his pruning knife.²²⁶ Jefferson tended his garden. He chose his own paths through his garden. So must we all. We must choose our own paths through the garden, and we must understand that we become the choices we make. Like Borges’ story of *The Garden of Forking Paths*, our story of our American garden is a story of our success as gardeners. It is a story of the paths we choose, and thus it is a story that has alternative endings.

Freedom is about making choices. Freedom is about choosing our own paths. Freedom is truly freedom only if there are alternative endings. The ending we make to the American story will depend on the choices we make from now on as Americans among the forking paths of our garden.

Why are we Americans not choosing the path of public outrage in response to the photographs from Abu Ghraib? Why are we not marching in protest, like the mothers of the “disappeared” in Argentina, in the garden of our national memory? Why are we not choosing to use our freedom as Americans to make an ending to our story that will be true to the basic idea of what America is supposed to be?

222. *Id.* at 25.

223. *Id.* at 23.

224. *Id.* at 26.

225. *Id.* at 28.

226. See ELLIS, *supra* note 1, at 231.

Every choice we make becomes a new path in the garden. That new path can lead us to flowers, or it can lead us to thorns. The essential American idea of universal human rights is “disappearing” now amid the thorns in the garden. But it need not be that way. If we choose the right path, if we tend the garden, if we are true to Thomas Jefferson’s words, we can yet see a new flowering of the hopes that were first sown there by Jefferson and by the other freedom-loving Americans who first planted the seed and first cultivated our garden.

On my next visit to Washington, I will walk again in the garden of our national memory. I will make another pilgrimage to the Jefferson Memorial. I will read once again the carved inscriptions of Jefferson’s noble words.

My hope is that, on that next visit, I will also hear once again the voices of other pilgrims from many other places, come from afar to pay their respects to Jefferson, and to read his words in their own languages. My hope is that, on that next visit, the Jefferson Memorial in the American garden will remain what it has always been — a symbol of the hope held by all the world for a future when everyone throughout the world will have a full flourishing of human rights.

Jefferson would urge us to remember always that the fate of a garden depends on the diligence of the gardeners. Some say that we Americans only pretend to be gardeners for human rights.²²⁷ They say that we do not support human rights at all.²²⁸ They point to the photographs from Abu Ghraib, and they say that all our noble words are only words.²²⁹

But what do we say? What will we choose to cultivate? What path will we choose to take from here through the garden?

227. See *Tending the Garden of Liberty*, HARTFORD COURANT, July 4, 2004, at C2.

228. See Gary Younge, *Annan Rebukes Law-Breaking Nations*, GUARDIAN (LONDON), Sept. 22, 2004, at 4.

229. See *U.S. Election: In The In-Tray: Challenges for Next Four Years*, INDEPENDENT (LONDON), Nov. 3, 2004, at 10.