

2004

The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib

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Recommended Citation

Charles H. Brower, II, The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib, 37 *Vanderbilt Law Review* 1353 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol37/iss5/3>

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The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib

Charles H. Brower II*

ABSTRACT

In this Article, Professor Brower suggests that the images depicting inhuman treatment of detainees at the Abu Ghraib prison contain timely lessons about the function and the importance of legal personality. To illustrate this thesis, the Author first identifies animals as a population condemned to an existence bereft of the protections that accompany legal personality. Next, the Author describes the chilling similarities between the treatment of animals and the treatment of prisoners in Iraq and in the so-called "Global War on Terror." Finally, the Author discusses three potential lessons for a nation widely perceived to have retreated from its commitment to the rule of law.

TABLE OF CONTENTS

I.	INTRODUCTION	1354
II.	THE LIVES OF ANIMALS	1356
III.	THE LIVES OF PRISONERS.....	1360
IV.	THE REVELATIONS OF ABU GHRAIB	1364
	A. <i>The System Works</i>	1365
	B. <i>Have We Descended to the Level of Saddam Hussein?</i>	1380
	C. <i>Enlightened Self-Restraint</i>	1385
V.	CONCLUSION.....	1387

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The prisoner of war does not belong to our tribe. We can do what we want with him. We can sacrifice him to our gods. We can cut his throat, tear out his heart, throw him on the fire. There are no laws when it comes to prisoners of war.¹

I. INTRODUCTION

The sickening images appeared in April² and became notorious in May 2004.³ Photographs documenting inhuman treatment of Iraqi prisoners by U.S. military personnel unleashed a torrent of questions: How did the mistreatment start?⁴ Was it isolated or widespread?⁵

1. J.M. COETZEE, ELIZABETH COSTELLO 104 (2003). For avoidance of ambiguity, the title character utters these words in disgust.

2. See *The Present Situation of Human Rights in Iraq, Report of the High Commissioner for Human Rights*, U.N. Commission on Human Rights, 61st Sess., Agenda Item 4, ¶ 43, U.N. Doc. E/CN.4/2005/4 (2004), available at <http://www.unhchr.ch/html/hchr/docs/iraq.doc> [hereinafter *Report of the High Commissioner for Human Rights*] (“On 28 April 2004, the American news channel CBS aired photos showing male Iraqi detainees being humiliated by US soldiers.”); see also Reed Brody, *The Road to Abu Ghraib*, HUM. RTS. WATCH, June 2004, at 1, at <http://www.hrw.org/reports/2004/usa0604/> (observing that the “first photographs appeared” in “late April 2004”).

3. See Mike Allen & Josh White, *Rumsfeld Is Too Valuable to Lose, Say Cheney, Rice*, WASH. POST, May 9, 2004, at A22 (remarking that the story “has produced such massive news coverage that it has made it difficult for Bush or his reelection campaign to break through with any other message”); see also Manuel Riog-Franzia, *Perspectives on Abuse Separated by Miles in Florida*, WASH. POST, May 9, 2004, at A22 (recognizing that “the prison abuse case” has been “dominating the news cycle”).

4. See Steven Lee Myers & Eric Schmitt, *Abuse Inquiries Seen as Leaving Significant Gaps*, N.Y. TIMES, June 6, 2004, at <http://www.nytimes.com> (“We really don’t have a picture of whether the abuse was the brainchild of a small number of prison guards or whether it was something created or condoned by military intelligence officials.” (quoting Sen. Susan M. Collins)); see also Sewell Chan & Michael Amon, *Prisoner Abuse Probe Widened*, WASH. POST, May 2, 2004, at A1 (“An issue emerging in the defense of military police allegedly involved in abuse is whether the treatment was condoned or encouraged by military intelligence units interrogating Iraqi prisoners.”); *A Partial Disclosure*, WASH. POST, June 24, 2004, at A24 (“Questions . . . remain about how the abuse of detainees at Abu Ghraib prison . . . came about.”).

5. See David Stout, *Sharp Criticism Is Voiced in Congress on Abuse of Iraqis*, N.Y. TIMES, May 4, 2004, at <http://www.nytimes.com> (“It’s a few individuals that have apparently conducted these despicable actions. We hope it’s a few. We don’t know how systematic it is.” (quoting Sen. Carl Levin)); see also *Report of the High Commissioner for Human Rights*, *supra* note 2, ¶ 61 (“Were acts of depravity against prisoners committed by guards acting on their own or were they part of a systematic process of information gathering?”); Mike Allen & Dan Balz, *On Arab TV, President Says U.S. Is Appalled*, WASH. POST, May 6, 2004, at A1 (“The Pentagon is investigating whether the problems are widespread in prisons in Iraq.”).

Does it rise to the level of torture?⁶ Who bears responsibility?⁷ Why do women appear so prominently as tormentors?⁸ How will the pictures affect our nation's strategic interests?⁹ Have we blown the

6. Compare Adam Hochschild, *What's in a Word? Torture*, N.Y. TIMES, May 23, 2004, § 4, at 11 ("What has been charged so far is abuse, which I believe technically is different from torture," said Secretary of Defense Donald Rumsfeld.), and Richard Morin & Claudia Deane, *Americans Split on How to Interrogate*, WASH. POST, May 28, 2004, at A20 ("[O]nly a third of Americans would define what happened at Abu Ghraib as torture."), and *Rule of Lawlessness*, WASH. POST, May 2, 2004, at B6 ("Taken together, the photographs demonstrate some of the most demeaning, humiliating and shameful treatment of prisoners imaginable, *short of actual physical torture.*") (emphasis added), with Hochschild, *supra* ("[O]ur government, from the highest officials in Washington to Army prison guards in Baghdad, have used every euphemism they can think of to avoid the word that clearly characterizes what some of our soldiers and civilian contractors have been doing: torture."), and Peter Slevin & Joe Stephens, *Detainees' Medical Files Shared*, WASH. POST, June 10, 2004, at A1 ("The harassment and sexual humiliation of prisoners inside Iraq's Abu Ghraib prison was described last fall in a Red Cross report as 'tantamount to torture.'"), and Susan Sontag, *What Have We Done?*, GUARDIAN, May 24, 2004, available at <http://www.guardian.co.uk> ("To refuse to call torture what took place in Abu Ghraib—and in other prisons in Iraq and in Afghanistan, and in 'Camp X-ray' in Guantanamo Bay—is as outrageous as the refusal to call what happened in Rwanda a genocide."), and Ruth Wedgwood, *The Steps We Can Take to Prevent Another Abu Ghraib*, WASH. POST, May 23, 2004, at B5 ("Some incidents may constitute offenses under the treaties and statutes on torture.").

7. See Brody, *supra* note 2, at 2 ("It is not yet clear which techniques of ill-treatment or torture were formally approved at which levels of the U.S. government and the degree of severity in their application, or whether they were informally encouraged.").

8. See M.S. Embser-Herbert, *When Women Abuse Power, Too*, WASH. POST, May 16, 2004, at B1 ("I was shocked. I somehow thought that women couldn't, or at least wouldn't, act with such disregard for humanity."); see also *A View from Within*, ECONOMIST, May 13, 2004, available at <http://www.economist.com> ("For Iraqis, torture and jail go together. . . . Iraqis were less shocked . . . by the abuse than by the fact that some abusers were women.").

9. See *Finding a Way in Iraq*, WASH. POST, May 9, 2004, at B6 ("It is impossible yet to calculate the damage to U.S. prospects in Iraq and the Middle East caused by the mistreatment of Iraqi detainees."); *Rule of Lawlessness*, *supra* note 6 ("It's impossible even to guess how much damage they have done to America's image in the world, to the cause of stability in Iraq and even to the cause of democracy in the greater Middle East."); *A System of Abuse*, WASH. POST, May 5, 2004, at A28 ("[The scandal] has done incalculable damage to the U.S. position in Iraq and around the world."). Some have concluded that the inhuman treatment of prisoners in Iraq has inflicted long-term damage on the U.S.'s strategic interests. See Sewell Chan, *Rage Is on Display During Prison Tour*, WASH. POST, May 6, 2004, at A16 ("The public relations damage is profound and permanent," said Juan Cole, a professor of modern Middle Eastern history at the University of Michigan.); Dana Milbank, *U.S. Tries to Calm Furor Caused by Photos*, WASH. POST, May 1, 2004, at A1 ("Foreign policy experts said the photos could cause lasting damage to U.S. efforts."); Robin Wright, *Top U.S. Officials Apologize to Arabs for Prisoner Abuse*, WASH. POST, May 5, 2004, at A19 [hereinafter Wright, *Top U.S. Officials Apologize*] ("[Senator Joseph R. Biden, ranking Democrat on the Foreign Relations Committee,] called the abuse 'the single most damaging act' to U.S. interests in the Middle East in a decade and warned that it would have a broad and negative impact on U.S. national security."); Robin Wright,

scandal out of proportion?¹⁰ Whatever their merit, these questions fail to recognize the pictures as a well-timed revelation about the function and the importance of law.

Properly viewed, the images of captivity at Abu Ghraib do not merely depict brutality. The images provide a terrifying glimpse of life outside the protection of legal rights. Drawing on the work of a Nobel laureate, Part II of this Article explores this theme by describing animals as a population condemned to live without legal rights. Part III identifies the striking similarities between the lives of animals and the lives of prisoners captured on film at Abu Ghraib. By revealing a human population doomed to live, for however long, like beasts, the snapshots offer fresh insight into the function and importance of legal rights. Part IV discusses the significance of this revelation for a nation widely perceived to have retreated from its commitment to the rule of law.

II. THE LIVES OF ANIMALS

When studying public international law, students often struggle to understand the concept of “international legal personality,” the capacity to hold and assert rights at the international level.¹¹

U.S. Faces Lasting Damage Abroad, WASH. POST, May 7, 2004, at A26 [hereinafter Wright, *Lasting Damage*] (“The White House is so gloomy about the repercussions that senior adviser Karl Rove suggested this week that the consequences of the photographs documenting U.S. abuse of Iraqi detainees are so enormous that it will take decades for the United States to recover.”). Others, most notably the general formerly in charge of interrogating detainees at Guantanamo Bay, Cuba, and currently in charge of interrogating detainees in Iraq, portray the damage as a short-term, reversible setback. See Chan, *supra*.

10. Fred Hiatt, *Why Hawks Should Be Angry*, WASH. POST, May 31, 2004, at A23 (“Why is it that there’s more indignation over a photo of a prisoner with underwear on his head than over a video of a young American with no head at all? Why is it that some in this country still don’t get that we are at war?” (quoting Sen. Zell Miller)); Mark Leibovich, *The Scandal Scandal?*, WASH. POST, May 13, 2004, at C1 (“I’m probably not the only one up at this table that is more outraged by the outrage than we are by the treatment.” (quoting Sen. James M. Inhofe)); David Remnick, *Hearts and Minds*, NEW YORKER, May 17, 2004, available at <http://www.newyorker.com> (“This is no different than what happens at the Skull and Bones initiation . . .” (quoting Rush Limbaugh)).

11. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57 (6th ed. 2003).

A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims. . . . All that can be said is that an entity of a type recognized by customary international law as *capable* of possessing rights and duties and of bringing international claims . . . is a legal person.

Because abstract definitions rarely provide enlightenment, the Author frequently draws on a concrete example from domestic law: animals have no rights.¹² You can buy them and sell them. You can slaughter them, devour them, and parade around in their skins. Because they have no legal personality, animals lack the right and the capacity to object to such outrages.¹³ They must depend on our goodwill. Students generally meet this discourse with ripples of nervous laughter, signaling their appreciation for the grave situation of any living being forced to exist without the protection of legal rights.

In any legal system, certain entities . . . will be regarded as possessing rights and duties enforceable at law. . . . They are able to do this because the law recognizes them as 'legal persons'. . . . Legal personality is crucial. Without it institutions and groups cannot operate, for they need to be able to maintain and enforce claims.

12. See *Mass. Soc'y for Prevention of Cruelty to Animals v. Comm'r of Pub. Health*, 158 N.E.2d 487, 495 (Mass. 1959) (observing that "the rights of animals are not protected by the Constitution"); see also *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 n.5 (Haw. 1981) ("The law clearly views dogs as personal property."); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (acknowledging that "despite the long relationship between dogs and humans," the law "categorizes the dog as personal property").

13. See *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45, 49-50 (D. Mass. 1993) (concluding that a dolphin lacked standing to bring a claim under the Marine Mammal Protection Act); *Hawaiian Crow v. Lujan*, 906 F. Supp. 549, 551-52 (D. Haw. 1991) (deciding that a bird lacked standing to bring a citizen suit under the Endangered Species Act). Inevitably, someone raises the issue of "animal rights," better understood as legal restrictions on the cruel treatment of animals. When applied to the animals of other people, such prohibitions simply reflect the state's traditional power to defend property interests from outside interference. See *Rabideau*, 627 N.W.2d at 803-04 (involving the shooting of a pet dog by a police officer and sustaining the plaintiff's "claim for damages for property loss"). When applied to one's own animals, the prohibitions represent the state's traditional power to impose, for the public good, limitations on the enjoyment of property. See *Clark v. City of Draper*, 168 F.3d 1185, 1189 (10th Cir. 1999) (recognizing that "in . . . emergency situation[s], the property rights of the animal's owner are entirely subject to the state's police powers"); *Ramm v. City of Seattle*, 830 P.2d 395, 398 (Wash. Ct. App. 1992) (explaining that the "ownership of dogs and cats is generally subject to regulation under a municipality's police power"). Thus, descriptively, animals per se have no rights. See *Citizens to End Animal Suffering*, 836 F. Supp. at 49-50; *Hawaiian Crow*, 906 F. Supp. at 551-52; *supra* note 12 and accompanying text; cf. SHAW, *supra* note 11, at 175 ("In municipal law individuals, limited companies and public corporations are recognized as each possessing a distinct legal personality, the terms of which are circumscribed by the relevant legislation."). Normatively, however, observers have advanced cogent arguments in favor of animal rights. See generally STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000); see also Cass R. Sunstein, *Standing for Animals (With Notes for Animal Rights)*, 47 UCLA L. REV. 1333, 1367 (2000) (suggesting that "Congress should grant a private cause of action both to injured persons and to animals themselves, to prevent practices that are already unlawful") (emphasis added).

One could, however, describe the lives of animals even more forcefully. For example, when invited to give a lecture on the topic of her choice, the title character in *Elizabeth Costello* addresses her audience on “the subject of animals.”¹⁴ At the outset, she reminds her listeners that “Germans of a particular generation” still stand “a little outside humanity” not because “they waged an expansionist war,” but because they crossed the line between “the ordinary . . . cruelty of warfare” and “a state that we can only call sin.”¹⁵

“They went like sheep to the slaughter.” “They died like animals.” “The Nazi butchers killed them.” Denunciation of the camps reverberates so fully with the language of the stockyard and slaughterhouse that it is barely necessary for me to prepare the ground for the comparison I am about to make. *The crime of the Third Reich was . . . to treat people like animals. . . .* By treating fellow human beings . . . like beasts, they had themselves become beasts.¹⁶

Even those Germans who did not actively participate in such crimes found no shelter behind the mantle of innocence.¹⁷ To the contrary, their “willed” and incredible ignorance of the camps became the badge of guilt for an entire generation.¹⁸ Costello unveils the modern relevance of her observations:

Let me say it openly: we are surrounded by an enterprise of degradation, cruelty and killing which rivals anything that the Third Reich was capable of, indeed dwarfs it, in that ours is an enterprise without end, self-regenerating, bringing rabbits, rats, poultry, livestock ceaselessly into the world for the purpose of killing them.¹⁹

Costello anticipates the justification for condemning genocide while tolerating the slaughter of animals: people have the capacity to reason, whereas animals do not.²⁰ In her view, however, reason constitutes a “tendency in human thought” designed, *inter alia*, to justify the performance of cruel experiments on animals.²¹ To drive this point home, Costello recounts the work of a German psychologist involving a chimpanzee named Sultan.²²

Sultan is alone in his pen. He is hungry: the food that used to arrive regularly has unaccountably ceased coming. The man who used to feed him . . . stretches a wire over the pen three metres above ground level, and hangs a bunch of bananas from it. Into the pen he drags three wooden crates. . . . Sultan knows: Now one is supposed to think. . . . But what must one think? One thinks: Why is he starving me? One

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14. COETZEE, *supra* note 1, at 63.
 15. *Id.* at 64.
 16. *Id.* at 64-65 (emphasis added).
 17. *See id.* at 63-65.
 18. *Id.* at 64.
 19. *Id.* at 65.
 20. *See id.* at 67-68.
 21. *Id.* at 67-75.
 22. *See id.* at 71-75.

thinks: What have I done? Why has he stopped liking me? One thinks: Why does he not want these crates any more? But none of these is the right thought. . . . The right thought . . . is: How does one use the crates to reach the bananas? Sultan drags the crates under the bananas, piles them one on top of the other, climbs the tower he has built, and pulls down the bananas. He thinks: Now will they stop punishing me? The answer is: No. . . . As long as Sultan continues to think the wrong thoughts, he is starved.²³

Costello finishes her lecture: "I return . . . to the places of death all around us, the places of slaughter to which . . . we close our hearts. Each day a fresh holocaust, yet . . . [w]e do not feel tainted. We can do anything, it seems, and come away clean."²⁴ Later, she tells her son that humans treat animals "like prisoners of war."²⁵ Costello observes that people had a war with animals that was won only after the invention of guns.²⁶ Although victory has allowed humans to cultivate a thin layer of compassion toward their prisoners, "a more primitive attitude" flows below the surface.²⁷

Narrowly, Costello's thesis lends itself to criticism: few would view animals as prisoners of war and still fewer could accept their slaughter as the moral equivalent of a perpetual holocaust.²⁸ More broadly, however, Costello hits the mark at least four times. First, because animals live without the protection of legal personality, humans can mistreat them, more or less, with impunity. Second, the worst human rights atrocities involve the treatment of people like animals; in other words, they involve the obliteration, temporary or permanent, of legal personality. Third, the perpetrators of inhuman treatment simultaneously reduce themselves to the level of beasts, tainting themselves with a moral stain that persists for generations. Fourth, enemy prisoners cannot rely on our compassion; only the law can provide credible guarantees of humane treatment.

23. *Id.* at 72-73.

24. *Id.* at 80.

25. *Id.* at 104.

26. *Id.*

27. *Id.*

28. In fact, one of the book's characters, a respected poet, accuses Costello of "insult[ing] the memory of the dead" and "trad[ing] on the horrors of the camps in a cheap way." *Id.* at 93-94; see also Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1511 (2001) ("On the other hand, it seems . . . that we should not equate the suffering of animals with the suffering of human beings, lest we lose our moral footing utterly."). But see Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003) ("I believe that in the long run, our willingness to subject animals to unjustified suffering will be seen as a form of unconscionable barbarity—not the same as, but in some ways morally akin to, slavery and the mass extermination of human beings.").

III. THE LIVES OF PRISONERS

Most discussions of Abu Ghraib focus, in one way or another, on the images and vocabulary of sex:²⁹ “sexual humiliation,”³⁰ “pornography,”³¹ “perversion,”³² and the special offensiveness of these concepts to Arabs raised in the Islamic faith.³³ Virtually no one has recognized that the images and descriptions of Abu Ghraib equally recall the treatment of animals in stockyards, in kennels, and on safaris.

Consider the accounts of prisoners brought, hooded, into the cellblock where the abuses occurred.³⁴ Guards used open blades to cut away prisoners’ jumpsuits, from their necks to their thighs. This action represents a symbolic slaughter that created a sense of mortal terror among detainees.³⁵ Having obscured their faces and removed their clothing—eliminating two highly distinctive human

29. See Sontag, *supra* note 6 (observing that “most of the torture photographs have a sexual theme . . . a young woman leading a naked man on a leash is classic dominatrix imagery”).

30. Seymour M. Hersh, *Chain of Command*, NEW YORKER, May 17, 2004, available at <http://www.newyorker.com>; Jim Hoagland, *End of Empire*, WASH. POST, May 9, 2004, at B7; Milbank, *supra* note 9; David Stout, *Bush Expresses “Deep Disgust” over Abuse of Iraqi Prisoners*, N.Y. TIMES, Apr. 30, 2004, available at <http://www.nytimes.com>; 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.

31. See Scott Higham et al., *A Prison on the Brink*, WASH. POST, May 9, 2004, at A1 (recognizing that “[t]he photographs featuring piles of naked Iraqis seem as though they were taken from a pornographic magazine”); Hoagland, *supra* note 30 (explaining that “the pornography of war’s images shocks and horrifies—and titillates—mass audiences”); David Ignatius, *The Other Americans*, WASH. POST, May 7, 2004, at A33 (stating that the images have “a smuttiness to them; a[n] . . . amateur porn-movie, show-offy quality”).

32. See Charles Krauthammer, *Abu Ghraib as Symbol*, WASH. POST, May 7, 2004, at A33 (“What happened at Abu Ghraib was . . . gratuitous sexual abuse, perversion for its own sake.”).

33. See *Crime and Punishment*, ECONOMIST, May 6, 2004, available at <http://www.economist.com>; Christian Davenport, *New Prison Images Emerge*, WASH. POST, May 6, 2004, at A1; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, available at <http://www.newyorker.com>; Howard Schneider, *In Breaking Taboos, Photos Add Insult to Injury*, WASH. POST, May 7, 2004, at A24; Zernike & Rohde, *supra* note 30.

34. See Sewell Chan, *U.S. to Cut Iraq Prison Population*, WASH. POST, May 5, 2004, at A20 (“Several of the photographs depicting abuse of Abu Ghraib detainees . . . showed some prisoners wearing dark-colored cloth hoods.”).

35. See Scott Wilson, *Ex-Detainee Tells of Anguishing Treatment at Iraq Prison*, WASH. POST, May 6, 2004, at A18; see also Ian Fisher, *Iraqi Recounts Hours of Abuse by U.S. Troops*, N.Y. TIMES, May 5, 2004, at A1 (“When we refused to take off our clothes, they beat us and tore our clothes off with a blade.”); *Iraqi Inmate: “Treated Like Dogs,”* BBC NEWS ONLINE, May 6, 2004, at <http://news.bbc.co.uk> (“They cut our clothes off with blades.”).

characteristics³⁶—guards “branded” the prisoners like cattle, drawing words and symbols on their legs or buttocks.³⁷ According to several accounts, guards forced prisoners to crawl like dogs on their hands and knees,³⁸ to bark on command,³⁹ and to follow their captors on

36. The suppression of human characteristics plays an important role in enabling the commission of inhuman treatment. As the resemblance between us and other beings increases, so does our ability to imagine ourselves in their place and, thus, our capacity for sympathy. See COETZEE, *supra* note 1, at 76 (observing that, as one moves along the spectrum from Martians, to bats, to dogs, to apes, to humans, it becomes easier to answer the question, “What is it like for X to be X?”). As the resemblance fades, so does the strength of our compassion.

37. See Sworn Statement of Nori Samir Gunbar Al-Yasseri, File No. 0003-04-CID149-83130 (Jan. 17, 2004), at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/7787.pdf> [hereinafter Al-Yasseri Statement]; see also Wilson, *supra* note 35 (“He . . . felt the tip of a felt marker running over his body. There were writing on him, words and doodles.”); Sworn Statement of Haidar Sabar Abed Miktub Al-Aboodi, File No. 0003-04-CID149-83130 (Jan. 20, 2004), at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/13077.pdf> [hereinafter Al-Aboodi Statement] (recounting that “they wrote on our bodies in English”).

38. See Al-Aboodi Statement, *supra* note 37 (“Then . . . they forced us to walk like dogs on our hands and knees.”); Sworn Statement of Kasim Mehaddi Hilas, File No. 0003-04-CID149-83130 (Jan. 18, 2004), at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151108.pdf> (“And they were ordering them to crawl while they were cuffed together naked.”); Sworn Statement of Unidentified Detainee, File No. 0003-04-CID149-83130 (Jan. 21, 2004), at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/10.pdf> [hereinafter Unidentified Detainee Statement] (“Some of the things they did was make me sit down like a dog, and . . . one of the police was telling me to crawl in Arabic, so I crawled on my stomach”); see also Jackie Spinner, *MP Captain Tells of Efforts to Hide Details of Detainee’s Death*, WASH. POST, June 25, 2004, at A18 (describing the testimony of a soldier who witnessed guards “order three naked detainees to crawl low enough so that their genitals would scrape the floor”); Statement of Hussein Mohssein Mata Al-Zayadi, File No. 0003-04-CID149-83130 (Jan. 18, 2004), at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/19446.pdf> [hereinafter Al-Zayadi Statement] (“Q: Did the guards force you to crawl on your hands and knees on the ground? A: Yes. They forced us to do this thing.”); Verbal Statement of Asad Hamza Hanfosh, File No. 0003-04-CID149-83130 (Jan. 17, 2004), at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/152529.pdf> (“[H]e made me crawl the hallway until I was bleeding from my chest to my knees and my hands. . . . He made me crawl on the ground.”).

39. See Fisher, *supra* note 35 (“He said, ‘When I whistle, you bark like dog.’”); Al-Aboodi Statement, *supra* note 37 (“And we had to bark like a dog. . . .”); Unidentified Detainee Statement, *supra* note 38 (“Some of the things they did was make me sit down like a dog, and they would hold the string from the bag and they make me bark like a dog.”); see also Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A1; Steven Lee Myers, *Testimony from Abu Ghraib Prisoners Describes a Center of Violence and Fear*, N.Y. TIMES, May 22, 2004, at A9.

leashes⁴⁰ or strings.⁴¹ At other times, crawling prisoners served as “donkeys”⁴² or “riding animals,”⁴³ forced to bear fellow prisoners⁴⁴ or guards⁴⁵ on their backs. To complete the picture, Staff Sergeant Ivan Frederick reportedly forced one male detainee to masturbate near the open mouth of another male detainee, then remarked: “Look at what these *animals* do if you leave them alone for two seconds.”⁴⁶

To maintain discipline, guards reportedly placed “unruly prisoners” in “shipping containers used to house prison dogs.”⁴⁷ In other cases, guards left prisoners in their cells for days without clothes or bedding, “as if [they] were dogs.”⁴⁸ Mimicking the techniques often used for training pets, interrogators “drip-fed” small rewards to encourage “cooperation” and good behavior.⁴⁹ Again, to complete the picture, for readers of *Elizabeth Costello* the iconic photo of a hooded and wired prisoner standing on a box⁵⁰ calls forth the

40. Martin Asser, *Abu Ghraib: Dark Stain on Iraq's Past*, BBC NEWS ONLINE, MAY 25, 2004, at <http://news.bbc.co.uk> (“They made us act like dogs, putting leashes around our necks.” (quoting Haydar Sabbar Abed, identified as a victim of abuse)); Fisher, *supra* note 35 (stating that a male guard “grabbed the prisoners’ hoods as if they were on leashes”); Douglas Jehl, *U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.’s*, N.Y. TIMES, June 22, 2004, at A7 (indicating that some guards interpreted the instructions of military intelligence officers “to mean forcing [prisoners] to crawl naked on leashes for hours”).

41. See Unidentified Detainee Statement, *supra* note 38.

42. Wilson, *supra* note 35.

43. Al-Zayyadi Statement, *supra* note 38.

44. See Wilson, *supra* note 35.

45. See Higham & Stephens, *supra* note 39; Douglas Jehl & Eric Schmitt, *Afghan Policies on Questioning Prisoners Taken to Iraq*, N.Y. TIMES, May 21, 2004, available at <http://www.nytimes.com>; Myers, *supra* note 39; Al-Zayyadi Statement, *supra* note 38.

46. Hersh, *supra* note 33 (emphasis added); James Risen, *Command Errors Aided Iraq Abuse, Army Has Found*, N.Y. TIMES, May 3, 2004, at A1.

47. Scott Wilson, *Angry Ex-Detainees Tell of Abuse*, WASH. POST, May 3, 2004, at A1.

48. Al-Yasseri Statement, *supra* note 37; see also *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, ¶ 27 (Feb. 2004), at <http://www.stopwar.org.uk/Resources/icrc.pdf> [hereinafter *ICRC Report*] (documenting the practice of keeping prisoners “completely naked in totally empty concrete cells and in total darkness, allegedly for several days at a time”); Zernike & Rohde, *supra* note 30 (quoting the tier warden at Abu Ghraib, who recognized that the “detainees did not have appropriate clothing and bedding”).

49. *ICRC Report*, *supra* note 48, ¶ 27; Peter Slevin, *Red Cross Describes Systemic Abuse in Iraq*, WASH. POST, May 10, 2004, available at <http://www.washingtonpost.com>; see also R. Jeffrey Smith, *Memo Gave Intelligence Bigger Role*, WASH. POST, May 21, 2004, at A17 (describing a “classified memorandum explicitly calling for interrogators to assume control over the ‘lighting, heating . . . food, clothing, and shelter’ of those whom they questioned”).

50. The photograph of a “hooded prisoner, arms outstretched, standing on a box with wires attached to his genitals and other parts of his body” appeared recently on the cover of *The Economist*. See *Crime and Punishment*, *supra* note 33; see also Sewell

image of Sultan, the chimpanzee forced to strike a similar pose and to endure punishment until the engine of discomfort drives him to think “the right thought.”⁵¹

Even when placed in a broader context, the collection of photographs suggests that the guards viewed their prisoners like animals. Along with the snapshot of the naked prisoner on a leash⁵² and the photo of a soldier posing with the corpse of a prisoner recently beaten to death,⁵³ one finds pictures of a soldier riding a camel in the desert, the gutting and skinning of a cow, soldiers posing with the cow’s severed head, and “dozens of pictures of a cat’s severed head.”⁵⁴ In all cases, the photographs seem not to record criminal violence committed against the possessors of legal rights.⁵⁵ To the contrary, they appear to represent trophies, however eccentric, taken on the equivalent of a modern-day safari.⁵⁶

To put it bluntly, the images and descriptions of Abu Ghraib establish that, on some scale, we too have committed the crime of treating people like animals.⁵⁷ Although the evidence of that crime

Chan & Jackie Spinner, *Allegations of Abuse Lead to Shakeup at Iraqi Prison*, WASH. POST, Apr. 30, 2004, at A24; Milbank, *supra* note 9.

51. See COETZEE, *supra* note 1, at 71-75.

52. See Davenport, *supra* note 33 (referring to the photograph of “a soldier holding a leash tied around a man’s neck in an Iraqi prison[.] [h]e is naked, grimacing and lying on the floor”); Higham et al., *supra* note 31 (describing a “photograph of Pfc. Lynndie England holding a chain or strap around the neck of a naked man”).

53. See Dexter Filkins, *Testimony Ties Key Officer to Cover-Up of Iraqi Death*, N.Y. TIMES, June 25, 2004, available at <http://www.nytimes.com> (identifying Specialist Sabrina Harman as the soldier posing “with the dead detainee . . . , his body packed in ice”); Spinner, *supra* note 38 (identifying Harman as the person who appears in a photograph, “in which she is smiling and giving the thumbs-up with the corpse in the shower room”); see also *infra* note 187.

54. Davenport, *supra* note 33; see also Josh White, *Ex-Guard to Face More Charges*, WASH. POST, July 9, 2004, at A16 (mentioning that “there are scores of photographs that show military police soldiers throughout Iraq participating in a variety of acts, such as slaughtering a cow and setting up prankish scenes with the skull of a dead cat as the centerpiece”).

55. See Brody, *supra* note 2, at 3 (“The brazenness with which some soldiers conducted themselves at Abu Ghraib, snapping photographs and flashing the ‘thumbs-up’ sign as they abused prisoners, confirms that they felt they had nothing to hide from their superiors.”); Sontag, *supra* note 6 (concluding that “the meaning of these pictures is not just that the acts were performed, but that their perpetrators had no sense that there was anything wrong in what the pictures show”).

56. See Carl Hulse & Sheryl Gay Stolberg, *Lawmakers View Images from Iraq*, N.Y. TIMES, May 13, 2004, at A1 (“I got the idea they were sort of taken in the nature of souvenirs.” (quoting Sen. John Cornyn)).

57. See Al-Yasseri Statement, *supra* note 37 (complaining that “they treated us like animals not humans”). Apparently incapable of stating the proposition so directly, government officials and observers have used oblique language to articulate the same basic conclusion. See Wright, *Top U.S. Officials Apologize*, *supra* note 9 (quoting Dr. Condoleezza Rice and referring to “dehumanizations . . . of the Iraqi people”); see also Anne Applebaum, *Willing Torturers*, WASH. POST, May 5, 2004, at A29 (recognizing that the United States has

may be “red meat” to critics of the United States around the world,⁵⁸ the pictures and stories provide a chilling—yet edifying—glimpse of life without legal personality. Recoiling in horror, one comes to understand more fully the function and the importance of legal rights. For reasons stated below, this revelation comes at an opportune moment.

IV. THE REVELATIONS OF ABU GHRAIB

At some level of abstraction, most people can accept the snapshots from Abu Ghraib as a well-timed revelation about the function and importance of the law. Drawing more concrete lessons from that revelation may prove controversial. At least three possibilities exist. First, to quote the Secretary of Defense, “The system works.”⁵⁹ A few “bad apples” violated the law,⁶⁰ they were caught,⁶¹ and they will suffer the consequences:⁶² “It’s been taken care of.”⁶³ Second, articulating the message of a “Danziger” political cartoon, “We have descended to the level of Saddam Hussein.”⁶⁴ Third, even the United States needs the law’s enlightened self-restraint to maintain the thin veneer of civilization during times of public emergency and armed conflict. Assessments of each possibility follow below.

proven itself capable of “treating its enemies as subhuman”); Hersh, *supra* note 30 (discussing the “dehumanizing interrogation process”); Hersh, *supra* note 33 (observing that such “dehumanization is unacceptable in any culture”); Anne-Marie Slaughter, *Hubris and Hypocrisy: America Is Falling Below Its Own Codes*, INT’L HERALD TRIB., May 22, 2004, available at <http://www.ihf.com> (“[W]e preach human dignity and yet deny even the most basic rights to those we deem our enemies.”); C. Fraser Smith, *Echoes of Past at Abu Ghraib*, BALT. SUN, May 17, 2004, at 15A (“These pictures . . . suggest a willingness to dehumanize. . .”).

58. Milbank, *supra* note 9 (quoting Andrew Kohut, director of the Pew Research Center).

59. Stout, *supra* note 5.

60. See Asser, *supra* note 40; John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, available at <http://msnbc.msn.com/id/4989422/site/newsweek>; Brody, *supra* note 2, at 1; David Ignatius, *Small Comfort*, WASH. POST, June 15, 2004, at A23; *Lexington: Poor George*, ECONOMIST, June 26, 2004, at 38; *What Did He Know?*, ECONOMIST, May 20, 2004, available at <http://www.economist.com>.

61. See *infra* notes 67-69 and accompanying text.

62. See *infra* notes 70-74 and accompanying text.

63. Leibovich, *supra* note 10 (quoting Sen. James Inhofe); see also Hersh, *supra* note 30 (“There were errors made. We have corrected this. We will make sure that they do not happen again.”) (quoting Maj. Gen. Geoffrey Miller)).

64. The cartoon appeared in newspapers on May 6, 2004. It shows Uncle Sam peering into a mirror with an expression of shame and sadness; the visage of Saddam Hussein gazes back at him. See *Mirror, Mirror . . .* (May 4, 2004), at www.danzigercartoons.com/cmp/2004/danziger2004.html.

A. *The System Works*

According to Secretary of Defense Rumsfeld and others, the Abu Ghraib prison scandal establishes that “the system works,” in the sense that it swiftly identifies and responds to inhuman treatment.⁶⁵ Although a few prison guards horribly mistreated their wards,⁶⁶ a decent soldier reported the misconduct to superior officers on January 13, 2004.⁶⁷ Three days later, the Army disclosed the allegations to the press and launched an investigation.⁶⁸ As a result, Maj. Gen. Antonio Taguba prepared a candid report that identified several perpetrators.⁶⁹ Consistent with the promises of President Bush,⁷⁰ Secretary of State Powell,⁷¹ Secretary of Defense Rumsfeld,⁷² and the Pentagon’s top brass,⁷³ the Army has charged a number of soldiers with criminal misconduct.⁷⁴ Finally, under the leadership of its

65. Stout, *supra* note 5; see also Leibovich, *supra* note 10 (“We have seven bad guards. . . . They are being punished.” (quoting Sen. James Inhofe)).

66. See *supra* note 60; see also *infra* notes 96-102 and accompanying text.

67. Seymour M. Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004, available at <http://www.newyorker.com>.

68. News Release 04-01-43, U.S. Central Command, Detainee Treatment Investigation (Jan. 16, 2004), at http://www.centcom.mil/CENTCOMNews/release_list.asp.

69. Maj. Gen. Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (n.d.) [hereinafter Taguba Report].

70. See Allen & Balz, *supra* note 5 (recording President Bush’s assertion that “justice will be delivered” to those responsible); Milbank, *supra* note 9 (reporting President Bush’s promise that the perpetrators “will be taken care of”); Stout, *supra* note 30 (reporting similar statements by President Bush).

71. Stout, *supra* note 5 (reporting Powell’s assertions “that the United States would punish the perpetrators of these abuses ‘in a way that the world can observe and watch’ and that “[t]he one thing you can be sure of is that justice will be done”).

72. See Bradley Graham & Charles Babington, *Probes of Detainee Deaths Reported*, WASH. POST, May 5, 2004, at A1 (recording Secretary Rumsfeld’s “public assurances that those responsible for the misconduct would be held accountable”).

73. See Thom Shanker, *Rumsfeld Makes a Surprise Visit to Baghdad*, N.Y. TIMES, May 13, 2004, available at <http://www.nytimes.com> (reporting the statement of Gen. Richard Myers, chairman of the Joint Chiefs of Staff, to the effect that “opinion around the world . . . can best be satisfied by allowing the military justice system to run its course and by punishing those found guilty of violence and abuse of detainees”); Stout, *supra* note 5 (reporting the statement of “Gen. George Casey, the Army’s vice chief of staff, who promised that the people responsible would be punished”).

74. See *Report of the High Commissioner for Human Rights*, *supra* note 2, ¶ 65 (reporting President Bush’s observation that “some military personnel had been charged already”); Scott Higham et al., *Dates on Prison Photos Show Two Phases of Abuse*, WASH. POST, June 1, 2004, at A1 (observing that seven military police soldiers have been charged); Dana Priest & Josh White, *Detainee Reportedly Was Lost in System*, WASH. POST, June 17, 2004, at A19 (reporting that “[s]even MPs have been charged with the abuses”); Jackie Spinner, *More GIs at Prison May Face Charges*, WASH. POST, June 26, 2004, at A14 (mentioning that the Army has charged seven soldiers to date, but reporting the likelihood that it will soon charge more soldiers).

chairman, the Senate Armed Services Committee has undertaken to provide the supervision needed to ensure that such breaches of civilized behavior “never, never [happen] again.”⁷⁵

Taken in isolation, Rumsfeld’s view seems unassailable because it accurately records a chronology of events. Upon closer examination, however, one finds that it rests on two premises. First, when presented with credible evidence of abuse, authorities took swift and appropriate corrective action. Second, the inhuman treatment of prisoners reflects the isolated misconduct of a few soldiers. When judged against a broader range of reported facts, however, the credibility of both premises seems open to serious doubt.

With respect to the first premise, the evidence suggests that U.S. military authorities did not react swiftly to credible allegations regarding the physical abuse of prisoners. Reviewing events chronologically, the United States commenced an air and ground offensive against Iraq on March 20, 2003.⁷⁶ Approximately three weeks later, on April 9, U.S. forces took control of Baghdad.⁷⁷ After another four weeks, on May 6, President Bush appointed Ambassador L. Paul Bremer III to take control of the Coalition Provisional Authority.⁷⁸ In both May⁷⁹ and July 2003,⁸⁰ the Special Representative of the United Nations Secretary-General disclosed concerns about the treatment of Iraqi detainees to Ambassador

75. Helen Dewar & Spencer S. Hsu, *Warner Bucks GOP Right on Probe of Prison Abuse*, WASH. POST, May 28, 2004, at A1 (quoting Sen. John W. Warner for the proposition that the Senate Armed Services Committee “has a ‘solemn obligation’ to discover what went wrong and to ‘make sure that it never, never happens again’”); see also Timothy Naftali, *Berlin to Baghdad: The Pitfalls of Hiring Enemy Intelligence*, FOREIGN AFF., July/Aug. 2004, at 126, 132 (concluding that the “Abu Ghraib prison-abuse tragedy has awakened congressional interest in providing effective oversight in Iraq”). *But see Abu Ghraib, Stonewalled*, N.Y. TIMES, June 30, 2004, available at <http://www.nytimes.com> (recognizing that while Sen. Warner shows “one of the few signs of life on Capitol Hill on this issue,” the “Bush administration has spent nearly two months obstructing investigations” by his committee and, to that end, has “withheld crucial government documents”); Eric Schmitt, *Congress’s Inquiry into Abuse of Iraqi Prisoners Bogs Down*, N.Y. TIMES, July 16, 2004, at A8 (stating that the “Congressional investigation into the abuse of Iraqi detainees at Abu Ghraib prison has virtually ground to a halt” and that “[i]nterest in the issue among senators may be waning”).

76. See HUMAN RIGHTS WATCH, *OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 17-18*, 64-66 (2003) (providing a synopsis of the air and land offensives).

77. *Id.* at 66.

78. See Kathleen T. Rhem, *Bush Appoints State Department Official to Administer Iraq*, AM. FORCES PRESS SERV., May 6, 2003, at <http://www.dod.mil/news/May2003>.

79. Brody, *supra* note 2, at 30; see also Schmitt, *supra* note 75 (indicating that the Red Cross also complained to military officials regarding the abuse of Iraqi detainees “as far back as May 2003”).

80. *Report of the High Commissioner for Human Rights, supra* note 2, ¶ 42.

Bremer. Furthermore, the Secretary-General reported these concerns to the United Nations Security Council on July 17, 2003.⁸¹

In July 2003, non-governmental organizations such as Amnesty International publicly accused Coalition Forces of subjecting detainees to hooding, prolonged periods of standing and kneeling, sleep deprivation, beatings, and electric shocks.⁸² Likewise, in July 2003, the International Committee of the Red Cross (Red Cross or ICRC) submitted a "working paper" to Coalition Forces, which documented roughly fifty allegations of abuse at a single detention center.⁸³ In one "illustrative case," guards kicked a hooded and handcuffed detainee in the head, back, and groin; urinated on him; forced a baseball into his mouth; threatened to torture and kill him; and deprived him of sleep for four consecutive days.⁸⁴ A medical examination by the ICRC revealed, *inter alia*, "a haematoma in the lower back, blood in urine, . . . and a broken rib."⁸⁵

Turning to the Abu Ghraib facility in particular, when conducting an inspection in late October 2003, Red Cross monitors became "so alarmed by the number of nude detainees that they halted their visit and demanded an immediate explanation."⁸⁶ Furthermore, in November 2003, U.S. military interrogators at the facility began to report incidents of abuse, "including the beatings of five blindfolded Iraqi generals," one of whom apparently suffered a broken nose and required stitches on his chin.⁸⁷ Interrogators also reported allegations regarding the application of electric shocks to two detainees before their transfer to Abu Ghraib.⁸⁸

Thus, when viewed in a broader factual context, it becomes clear that, since the first days of Ambassador Bremer's tenure in Baghdad, the United States received a steady flow of credible information regarding the inhuman treatment of Iraqi prisoners.⁸⁹ To their credit, Bremer and Secretary of State Powell⁹⁰ discussed such

81. *Id.* ¶ 13.

82. *Id.* ¶ 42; *see also* Amnesty International, Iraq: Memorandum on Concerns Relating to Law and Order 11, 24-25 (July 2003), at <http://www.amnesty.org>.

83. *ICRC Report*, *supra* note 48, ¶ 34.

84. *Id.*

85. *Id.*

86. Zernike & Rohde, *supra* note 30.

87. *See* Andrea Elliott, *Unit Says It Gave Earlier Warning of Abuse in Iraq*, N.Y. TIMES, June 14, 2004, at A1 (noting incidents of abuse and injuries).

88. *Id.*

89. *See generally* Brody, *supra* note 2, at 3 (contending that "the U.S. government has been aware of allegations of abuse" ever since "the earliest days of . . . the occupation of Iraq").

90. *See* Mike Allen, *Management Style Shows Weaknesses*, WASH. POST, June 2, 2004, at A6.

allegations in meetings with Secretary Rumsfeld,⁹¹ President Bush,⁹² and the White House staff.⁹³ After receiving the Pentagon's assurances that it was "on the case," however, the White House "did nothing" to follow up.⁹⁴ Thus, while parts of the "system" swiftly identified and responded to allegations of inhuman treatment, other parts of the system plainly—perhaps even criminally—failed.⁹⁵

With respect to the second premise, U.S. officials including President Bush,⁹⁶ Secretary of State Powell,⁹⁷ Secretary of Defense Rumsfeld,⁹⁸ the chairman of the Joint Chiefs of Staff,⁹⁹ the spokesmen for the Coalition Provisional Authority and Coalition Forces,¹⁰⁰ and the former commander of the Abu Ghraib prison¹⁰¹ have uniformly described the inhuman treatment of prisoners as the

91. Bradley Graham & David Von Drehle, *Bush Apologizes for Abuse of Prisoners*, WASH. POST, May 7, 2004, at A22. Some officials "described Bremer as 'kicking and screaming' about the need to release thousands of uncharged prisoners and improve conditions for those who remained." *Id.*

92. Allen, *supra* note 90.

93. *Id.*; Graham & Von Drehle, *supra* note 91.

94. Allen, *supra* note 90. Reports suggest that, contrary to its assurances, the Pentagon actively resisted repeated warnings from Ambassador Bremer and State Department personnel. See Graham & Von Drehle, *supra* note 91; Robin Wright & Bradley Graham, *Bush Privately Chides Rumsfeld*, WASH. POST, May 6, 2004, at A1.

95. See Myers & Schmitt, *supra* note 4 (quoting Senator Lindsay O. Graham, Republican of South Carolina, for the proposition that there was "command failure at many levels that could be criminally culpable"); see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004) (discussing command responsibility for war crimes and explaining that civilian political leaders who participate actively "in the direction of military affairs" bear criminal responsibility for the acts of subordinates, provided that (1) those leaders either know of or consciously disregard information regarding the commission of war crimes by subordinates, and (2) fail to take all necessary and reasonable steps to prevent their commission, or to require their investigation and prosecution).

96. See Allen & Balz, *supra* note 5; Brody, *supra* note 2, at 1; Bradley Graham, *Army Investigates Wider Iraq Offenses*, WASH. POST, June 1, 2004, at A1 [hereinafter Graham, *Army Investigates*]; Bradley Graham, *Some Seek Broad, External Inquiry on Prisoner Abuse*, WASH. POST, May 27, 2004, at A14; Hersh, *supra* note 33; Hiatt, *supra* note 10; Jehl, *supra* note 40; Douglas Jehl et al., *G.I.'s Prison Abuse More Widespread, Says Army*, N.Y. TIMES, May 26, 2004, available at <http://www.nytimes.com>; Remedies for Prisoner Abuse, WASH. POST, June 7, 2004, at A22; Josh White & Scott Higham, *Use of Dogs to Scare Prisoners Was Authorized*, WASH. POST, June 11, 2004, at A1.

97. Wright, *Top U.S. Officials Apologize*, *supra* note 9.

98. Brody, *supra* note 2, at 1; *Crime and Punishment*, *supra* note 33; *A System of Abuse*, *supra* note 9; *What Did He Know?*, *supra* note 60.

99. See Chan, *supra* note 9. But see Risen, *supra* note 46 (noting the chairman expressed conflicting views with regard to this proposition).

100. See Wilson, *supra* note 47 ("[L]et's not express frustration with the entire military in the process." (quoting Coalition spokesman Daniel Senor)); see also Milbank, *supra* note 9, at A16 ("I can tell you that I've got 150,000 other American soldiers who feel as appalled and disappointed as I do at the actions of those few." (quoting General Mark Kimmitt, spokesman for Coalition Forces)).

101. Higham et al., *supra* note 31.

isolated work of a few rogue soldiers.¹⁰² Certain facts lend credence to this official version of events. For example, one of the perpetrators told investigators that guards would not have mistreated prisoners if senior officers had been present.¹⁰³ Likewise, one of the victims told a reporter that the abuse occurred over a period of ten days and that, during six months of detention, most U.S. soldiers “treated him well and with respect.”¹⁰⁴ Furthermore, the Red Cross has acknowledged that it received “no complaints of ‘physical ill treatment’ at Camp Bucca,” another major detention facility.¹⁰⁵

Although a clear majority of the U.S. public has accepted the official version at face value,¹⁰⁶ certain facts might justify a higher level of suspicion.¹⁰⁷ For example, it seems unlikely that the perpetrators of rogue acts would systematically record their misconduct on film.¹⁰⁸ It seems even more improbable that President Bush would respond to isolated misconduct by pledging, as he did on May 24, to “demolish the Abu Ghraib prison.”¹⁰⁹ Political leaders usually reserve the destruction of symbols for situations involving the broadest and most serious transgressions of civilized norms.¹¹⁰ Furthermore, the official version seems impossible to square with reports that Maj. Gen. Geoffrey Miller (formerly in charge of detainees at Guantanamo Bay, Cuba, and currently deputy

102. See Zernike & Rohde, *supra* note 30 (observing that “military officials have portrayed the sexual humiliation captured in the images as the isolated acts of a rogue night shift”); see also *Crime and Punishment*, *supra* note 33 (“American officials insist that only an isolated handful of soldiers were responsible.”); *Torture Policy*, WASH. POST, June 16, 2004, at A26 (“President Bush and his spokesmen shamefully cling to the myth that the guards were rogues acting on their own.”).

103. *What Did He Know?*, *supra* note 60. *But see infra* note 187.

104. Fisher, *supra* note 35.

105. Zernike & Rohde, *supra* note 30.

106. See Riog-Franzia, *supra* note 3 (“According to a Washington Post-ABC News poll . . . , 62 percent of Americans believe the prison abuse case dominating the news cycle is an isolated incident, rather than evidence of a widespread pattern of abuse.”).

107. See Hiatt, *supra* note 10 (opining that “by now you’d have to have your own head in a bag to believe that a few badly trained reservists are at the core of this scandal”); Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, available at <http://www.nybooks.com> (concluding, in light of the “known facts,” that “the notion that the photographed outrages at Abu Ghraib were just the actions of a few sick men and women . . . is beyond belief”).

108. See Riog-Franzia, *supra* note 3 (“If it was a rogue [act of abuse], they would not have memorialized it’ in photos.” (quoting Prof. Janan Anwar Smither)).

109. Ruth J. Abram, *Save Abu Ghraib*, WASH. POST, May 30, 2004, at B2; see also *Judge Declares Abu Ghraib Prison a Crime Scene*, N.Y. TIMES, June 21, 2004, available at <http://www.nytimes.com>; *Mr. Bush’s Challenge*, WASH. POST, May 25, 2004, at A16; Jonathan Weisman, *Congress Disputes Bush Pledge*, WASH. POST, May 26, 2004, at A17.

110. Cf. Abram, *supra* note 109 (recognizing the temptation “to get rid of symbols of a time when our world went awry”).

commander for detainee operations in Iraq) instructed Brig. Gen. Janis Karpinski (formerly in charge of Abu Ghraib and other detention facilities in Iraq) to treat Iraqi prisoners "like dogs."¹¹¹

Thus, even a casual review of disconnected facts casts substantial doubt on official descriptions regarding the scope of abuse at Abu Ghraib. By the same token, a broader and more systematic examination strongly suggests that the mistreatment constitutes an inevitable result of policy decisions to place an ever-growing number of detainees ever farther beyond the protection of the law.

Since its first days in office, the Bush administration displayed a conceptual aversion to the restrictions and outside supervision inherent in multilateral legal regimes.¹¹² Following the terrorist attacks of September 11, 2001, that distaste began to take more concrete forms. Substantively, in January 2002, the administration declared al-Qaeda and Taliban prisoners "unlawful combatants" who "do not have any rights" under the Geneva Conventions of 1949.¹¹³ To eliminate their procedural capacity to challenge that decision, the administration transported suspected al-Qaeda and Taliban prisoners to the U.S. military base at Guantanamo Bay, Cuba, carefully selected as the "legal equivalent of outer-space."¹¹⁴ At Guantanamo

111. Annabel Crabb, *Jail Chief Told: Treat Prisoners Like Dogs*, SYDNEY MORNING HERALD, June 16, 2004, available at <http://www.smh.com.au>. According to the account, Maj. Gen. Miller said, "They are like dogs, and if you allow them to believe at any point that they are more than a dog, then you've lost control of them." *Id.*

112. See Hendrik Hertzberg, *Unconventional War*, NEW YORKER, May 24, 2004, available at <http://www.newyorker.com> ("George W. Bush's Administration has never had much use for international agreements. As soon as it took office, it set about unencumbering itself from those it considered irksome, such as the Kyoto environmental protocol, the Anti-Ballistic Missile treaty, and the statute of the International Criminal Court."); see also *Supreme Rebuke*, WASH. POST, June 29, 2004, at A22 ("Since the outset of the war on terrorism, the Bush administration, across a wide range of issues, has had a simple message for the federal judiciary: Trust us and don't interfere."); *The White House Papers*, N.Y. TIMES, June 24, 2004, at A22 ("From the start of his presidency, Mr. Bush has resisted scrutiny and regulation, taking the position that the public should recognize that his people are good people with good intentions, and trust them to do the right thing."). See generally Slaughter, *supra* note 57 (describing Europeans' questions regarding the United States' decisions not to "join the International Criminal Court or the Land Mines Treaty").

113. Brody, *supra* note 2, at 5 (quoting Secretary Rumsfeld); *Mr. Rumsfeld's Responsibility*, WASH. POST, May 6, 2004, at A34 (quoting Secretary Rumsfeld); Sontag, *supra* note 6 (quoting Secretary Rumsfeld); see also Hersh, *supra* note 30 ("Soon after 9/11, as the war on terror got under way, Donald Rumsfeld repeatedly made public his disdain for the Geneva conventions."); Hertzberg, *supra* note 112 ("After the attacks of September 11, 2001, the Geneva Conventions, among other niceties, were added to the list of obstacles to be got around.").

114. Barry et al., *supra* note 60 (quoting a former administration lawyer); see also *Gherebi v. Bush*, 352 F.3d 1278, 1299 n.27 (9th Cir. 2003) (quoting American College of Trial Lawyers, Report on Military Commissions for the Trial of Terrorists 8 (Mar. 2003), for the proposition that the "placement of the detainees at Guantanamo, w[as] carefully designed to evade judicial scrutiny"); Brody, *supra* note 2, at 5

Bay, detainees have endured a regime of harsh treatment, including “the reversal of detainees’ normal sleep patterns, as well as expos[ure] . . . to heat, cold and loud music.”¹¹⁵ Although such practices may fall short of the abuses committed at Abu Ghraib,¹¹⁶ the U.S. government has submitted that prisoners would have no legal right to complain even if subjected to torture or summary execution.¹¹⁷ Thus, the U.S. government virtually suspended the legal personality of some 600¹¹⁸ detainees for well over two years before the Supreme Court finally intervened to restore their procedural capacity.¹¹⁹

(concluding that “Guantanamo was deliberately chosen in an attempt to put the detainees beyond the jurisdiction of the U.S. courts”); Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 8 (2004) (maintaining that the “purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of their victors”).

115. John Mintz, *Interrogations Are Criticized*, WASH. POST, June 9, 2004, at A2. Reports suggest that interrogation techniques include restrictions on the amount or quality of food, isolation from peers, and body-cavity searches. Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., June 7, 2004, at A1; Dana Priest & Bradley Graham, *Guantanamo List Details Approved Interrogation Methods*, WASH. POST, June 10, 2004, at A13.

116. See Brody, *supra* note 2, at 13 (acknowledging that “Human Rights Watch has no information of Abu-Ghraib-level abuses at Guantanamo”); see also Tim Golden & Eric Schmitt, *General Took Guantanamo Rules to Iraq for Handling of Prisoners*, N.Y. TIMES, May 13, 2004, at A1 (reporting that, according to military officers who served in Cuba, “the controls on coercive interrogation methods appeared to be stronger at Guantanamo than they were in Iraq”); Priest & Graham, *supra* note 115 (observing that the list of procedures for Guantanamo “does not include some of the more severe methods available to interrogators in Iraq”).

117. *Gherebi*, 352 F.3d at 1299-1300.

118. See Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1 (referring to approximately 625 detainees); Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, available at <http://www.nytimes.com> (referring to approximately 650 detainees). See generally *Gherebi*, 352 F.3d at 1299-1300 (describing the detention of captives at Guantanamo Bay).

119. See *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003) (holding that “the privilege of litigation’ does not extend to aliens in military custody” outside the United States), *rev’d sub nom. Rasul v. Bush*, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) (holding that the habeas corpus jurisdiction of district courts extends to detainees held at Guantanamo Bay, but expressly declining to address the nature of “what further proceedings might become necessary” following the United States’ response to the petitioners’ allegations). In the wake of the Supreme Court’s decision, the Defense Department announced its intention “quickly” to provide all Guantanamo detainees with the opportunity to challenge their identification as “enemy combatants” in “hearings” before military officers, who must apply a presumption in favor of the government’s evidence and who will not provide detainees with access to lawyers. John Mintz, *Pentagon Sets Hearings for 595 Detainees*, WASH. POST, July 8, 2004, at A1. According to news reports, the government hopes that the perception of a fair and deliberative process could help to minimize the level of judicial review by federal courts in habeas corpus proceedings. *Id.*

In 2002, the United States extended a similar regime to limited numbers of detainees held in the United States, in Afghanistan, and at undisclosed locations abroad. For example, after declaring them to be “enemy combatants,” the U.S. government has attempted, with mixed results, to commit two citizens to open-ended detention on the territory of the United States, without access to lawyers, without criminal charges, and without extensive judicial review.¹²⁰ The Deputy Attorney General publicly justified such incommunicado detentions as a convenient way to prevent citizens from exercising their constitutional rights.¹²¹ One observer describes such tactics as the modern equivalent of casting people into a “dungeon.”¹²²

Perhaps concerned about ICRC inspections¹²³ and the eventual assertion of judicial jurisdiction over Guantanamo Bay,¹²⁴ the

120. Compare *Hamdi v. Rumsfeld*, 316 F.3d 450, 473, 475 (4th Cir. 2003) (holding that when captured abroad in a “zone of active combat operations” and declared to be an “enemy combatant,” a U.S. citizen has no right to an “evidentiary hearing” or other “searching review of the factual determinations underlying his seizure” even if subsequently transferred to the territory of the United States), with *Padilla v. Rumsfeld*, 352 F.3d 695, 698, 711, 724 (2d Cir. 2003) (holding that the President lacks constitutional or statutory authority to detain U.S. citizens as enemy combatants, at least when “seized on American soil outside a zone of combat”), *rev'd sub nom. Rumsfeld v. Padilla*, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (dismissing the petition, which improperly sought relief in the wrong judicial district). Continuing the pattern of mixed results, a plurality of the Supreme Court recently announced that it would uphold the President’s authority to order open-ended detention without criminal charge of U.S. citizens captured in Afghanistan and declared to be enemy combatants, would allow the President to substantiate his determination on the basis of hearsay and other inadmissible evidence, and would even recognize the suitability of a presumption in favor of evidence submitted by the President, but would also require the government to provide such detainees with access to counsel, as well as a meaningful opportunity to rebut the President’s evidence before a neutral decision maker. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (O’Connor, J., plurality opinion). Although a fifth justice would have upheld open-ended, incommunicado detention of U.S. citizens without extensive judicial review, *see id.* at 2674-85 (Thomas, J. dissenting), four justices apparently would have required the government to file criminal charges against U.S. citizens or to release them, *see id.* at 2652-60 (Souter, J., concurring and dissenting), *id.* at 2660-74 (Scalia, J., dissenting).

121. Richard Cohen, *It’s Not the American Way*, WASH. POST, June 3, 2004, at A19 (“He would very likely have followed his lawyer’s advice and said nothing, which would have been his constitutional right.” (quoting James B. Comey, Jr.)) (emphasis added).

122. *Id.*; *see also* Scott Turow, *Trial by News Conference? No Justice in That*, WASH. POST, June 13, 2004, at B1 (“Because the government cannot convict him after affording him the due process of a trial, it will skip all of it—due process, trial, the Bill of Rights—and imprison him indefinitely anyway.”).

123. *See* Brody, *supra* note 2, at 13 n.28 (stating that “Guantanamo detainees are visited by the ICRC”); Priest & Gellman, *supra* note 118 (observing that while “military lawyers, news reporters and the Red Cross receive occasional access to monitor prisoner conditions and treatment” at Guantanamo Bay, “the CIA’s overseas interrogation facilities [remain] off-limits”); Slevin & Stephens, *supra* note 6 (noting that detainees at Guantanamo Bay are permitted to see Red Cross monitors).

124. *See* Brody, *supra* note 2, at 12 (“Perhaps out of concern that Guantanamo will eventually be monitored by U.S. courts, certainly to ensure even greater secrecy,

Defense Department and the Central Intelligence Agency (CIA) developed clandestine programs to hunt and capture high-value targets in the war on terror¹²⁵ and to interrogate them at locations even farther removed from the frontiers of effective legal protection.¹²⁶ These programs led to the detention of some one to two dozen prisoners,¹²⁷ who were interrogated by highly trained intelligence officers¹²⁸ in Afghanistan, at Diego Garcia, and at undisclosed locations outside the United States.¹²⁹ According to press reports that appeared in late 2002 and early 2003, interrogators subjected these prisoners to hooding, bombardment with lights, sleep deprivation, painful and awkward “stress” positions, as well as transfer to foreign intelligence services schooled in the art of torture.¹³⁰

the Bush administration does not appear to hold its most sensitive and high-profile detainees there.”); *see also supra* note 119 and accompanying text.

125. *See* Hersh, *supra* note 67 (asserting that “Rumsfeld . . . authorized the establishment of a highly secret program that was given blanket advance approval to kill or capture and, if possible, interrogate ‘high value’ targets in the Bush Administration’s war on terror”); James Risen et al., *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1 (explaining that “[a]fter the attacks of Sept. 11, President Bush signed a series of directives authorizing the C.I.A. to conduct a covert war against Osama bin Laden’s Qaeda network” and that the “directives empowered the C.I.A. to kill or capture Qaeda leaders”).

126. *See* Risen et al., *supra* note 125 (explaining that the “Bush administration began the program when intelligence agencies realized that a few detainees captured in Afghanistan had such a high intelligence value that they should be separated from the lower-level figures who had been sent to a military installation at Guantanamo Bay, which officials felt was not suitable”); *see also* David Johnston, *Uncertainty About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists*, N.Y. TIMES, June 28, 2004, at A8 (asserting that “the C.I.A. decided early in the war on terrorism to isolate top-level Qaeda detainees in remote and undisclosed locations outside the United States, keeping them far removed from the rules governing the American judicial system”); Priest & Gellman, *supra* note 118 (emphasizing that the CIA conducts interrogations at “secret detention centers overseas where U.S. due process does not apply”); Van Natta, *supra* note 118 (reporting that “[i]nterrogations of important Qaeda operatives . . . occur at isolated locations outside the jurisdiction of American law”).

127. David Johnston & James Risen, *Aides Say Memo Backed Coercion for Qaeda Cases*, N.Y. TIMES, June 27, 2004, available at <http://www.nytimes.com>; Risen et al., *supra* note 125.

128. *See* Priest & Gellman, *supra* note 118 (explaining that “highly trained CIA officers question captives through interpreters”); Van Natta, *supra* note 118 (reporting that “[s]enior Qaeda members . . . are interrogated by specially trained officers”).

129. Priest & Gellman, *supra* note 118, at A1; Van Natta, *supra* note 118.

130. *See* Priest & Gellman, *supra* note 118; Van Natta, *supra* note 118; *see also* Brody, *supra* note 2, at 20 (claiming that “U.S. officials have told journalists and Human Rights Watch that U.S. military and intelligence personnel in Afghanistan employ an interrogation system that includes the use of sleep deprivation, sensory deprivation, and forcing detainees to sit or stand in painful positions for extended periods of time”).

Over the past eighteen months, however, U.S. interrogators themselves appear to have approached, and then crossed, the threshold of torture. For example, after shooting him several times during his apprehension in Pakistan, interrogators withheld painkillers from Abu Zubaydah, a senior member of al-Qaeda.¹³¹ Furthermore, for three months after capturing Omar al-Faruq, al-Qaeda's senior operative in Southeast Asia, interrogators fed him "very little," subjected him to sleep and light deprivation, and exposed him to temperature extremes that varied between ten and 100 degrees Fahrenheit.¹³² While insisting that Faruq's treatment did "not quite" qualify as torture, a Western intelligence official acknowledged that it was "about as close as you can get."¹³³ Finally, just after the capture of al-Qaeda's operations chief, Khalid Sheikh Mohammad, officials stated that his interrogation would include "acceptable techniques" such as "sleep and light deprivation and the temporary withholding of food, water, access to sunlight and medical attention."¹³⁴ Just over a year later, however, reports emerged that CIA interrogators had subjected Mohammad to "water boarding," a technique that involves simulated drowning.¹³⁵ Even more ominously, in 2002 and 2003, the Departments of Justice and Defense produced high-level legal memoranda, opining that national and international laws prohibiting torture do not apply to interrogations ordered by the President in his capacity as commander-in-chief of the armed forces.¹³⁶

131. *The CIA's Prisoners*, WASH. POST, July 15, 2004, at A20; Mark Danner, *Torture and Truth*, N.Y. REV. BOOKS, June 10, 2004, available at <http://www.nybooks.com>; Dana Priest, *CIA Puts Harsh Tactics on Hold*, WASH. POST, June 27, 2004, at A1; Priest & Gellman, *supra* note 118; Van Natta, *supra* note 118.

132. Van Natta, *supra* note 118.

133. *Id.*

134. *Id.*

135. *The CIA's Prisoners*, *supra* note 131; Johnston & Risen, *supra* note 127; Risen et al., *supra* note 125.

136. Department of Defense, Draft Working Group Report on Interrogations on the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 20-24 (Mar. 6, 2003), at <http://www.npr.org/documents/2004/dodmemo030306.pdf>; Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President 31, 33-39 (Aug. 1, 2002), at <http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf>; see also Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3; Anne Applebaum, *So Torture Is Legal?*, WASH. POST, June 16, 2004, at A27; Bravin, *supra* note 115; Brody, *supra* note 2, at 1-2, 8-9; Kathleen Clark & Julie Mertus, *Torturing the Law*, WASH. POST, June 20, 2004, at B3; Ignatius, *supra* note 60; *Legalizing Torture*, WASH. POST, June 9, 2004, at A20; Lewis, *supra* note 107; Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1; Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for the Use of Torture*, WASH. POST, June 8, 2004, at A1; *The Roots of Abu Ghraib*, N.Y. TIMES, June 9, 2004, at A22. After they became public, senior officials at the Department of Justice and the White House disavowed the so-called "torture memoranda" as "irrelevant" and "unnecessary." Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed*, WASH. POST, June 23, 2004, at A1; Adam

Thus, although one might draw attention to the relatively small populations¹³⁷ and to the supervision by highly qualified “professionals,”¹³⁸ the facts suggest a trend of placing increasing numbers of detainees ever farther beyond the protection of legal rights to obtain intelligence relevant to the so-called “war on terror.”¹³⁹ Although the United States promised to limit this disturbing trend by applying the Geneva Conventions to its invasion and occupation of Iraq,¹⁴⁰ it reverted to form when confronted by an unexpectedly intense and popular insurgency.¹⁴¹

Following a string of high-profile bombings and daily attacks on Coalition Forces during the last quarter of 2003,¹⁴² U.S. political and

Liptak, *Author of '02 Memo on Torture: 'Gentle' Soul for a Harsh Topic*, N.Y. TIMES, June 24, 2004, at A1; Priest, *supra* note 131; R. Jeffrey Smith, *Lawyer for State Dept. Disputed Detainee Memo*, WASH. POST, June 24, 2004, at A7; Richard W. Stevenson, *White House Says Prisoner Policy Set Humane Tone*, N.Y. TIMES, June 23, 2004, at A1. The administration has not expressly disavowed the memoranda as wrong.

137. See *supra* notes 118, 120, 127 and accompanying text.

138. See *supra* note 128 and accompanying text.

139. See *The Homicide Cases*, WASH. POST, May 28, 2004, at A22 (citing “evidence that detention policies the President approved set the stage for torture and homicide”); *Mr. Rumsfeld's Responsibility*, *supra* note 113 (arguing that “Mr. Rumsfeld's decisions helped create a lawless regime in which prisoners in both Iraq and Afghanistan have been humiliated, beaten, tortured and murdered—and in which, until recently, no one has been held accountable”); *A System of Abuse*, *supra* note 9 (claiming that a “pattern of arrogant disregard for the protections of the Geneva Conventions or any other legal procedure has been set from the top, by Mr. Rumsfeld and senior military commanders”); *The White House Papers*, *supra* note 112 (opining that “the Bush administration fostered a culture of permissiveness regarding the treatment of prisoners that ultimately led to the Abu Ghraib disaster”).

140. See Douglas Jehl & Andrea Elliott, *Cuba Base Sent Its Interrogators to Iraqi Prison*, N.Y. TIMES, May 29, 2004, at A1 (“Prisoners captured in Iraq, unlike those sent from Afghanistan to Guantanamo, were to be protected by the Geneva Conventions.”); Priest & White, *supra* note 74 (“President Bush has said the Geneva Conventions apply to all combatants in Iraq.”); Stevenson, *supra* note 136 (reporting the statement of a senior Justice Department official to the effect that “prisoners in Iraq were clearly covered by the Geneva Conventions”).

141. See Thom Shanker, *Wolfowitz Testifies Pentagon Misjudged the Strength of Iraqi Insurgency*, N.Y. TIMES, June 23, 2004, at A11 (recording Deputy Defense Secretary Wolfowitz's acknowledgement that “the Pentagon had underestimated the violent tenacity of an insurgency that formed after Baghdad fell”). See generally Josh White, *Iraqi Insurgents Are Surprisingly Cohesive, Armitage Says*, WASH. POST, June 26, 2004, at A15 (recording Deputy Secretary of State Armitage's admission that “U.S. officials have underestimated the insurgency”).

142. See R. Jeffrey Smith, *Bush Adviser Toured Abu Ghraib*, WASH. POST, June 19, 2004, at A11 (discussing official concern about “high-profile bombings at the Jordanian Embassy, the U.N. mission and a police barracks run by Italian soldiers,” as well as the fear that “not enough was being done” to identify the source of the violence); see also Douglas Jehl & Eric Schmitt, *Prison Interrogations in Iraq Seen as Yielding Little Data on Rebels*, N.Y. TIMES, May 27, 2004, at A1 (explaining that the “interrogation center [at Abu Ghraib] was set up in September to obtain better information about an insurgency in Iraq that was killing American soldiers almost every day last fall”).

military leaders developed an intense interest “in determining who was behind the rising insurgency in Iraq and using that information to squelch it.”¹⁴³ To that end, Secretary Rumsfeld endorsed a plan to “get tough” with suspected insurgents,¹⁴⁴ first by detaining them in large numbers¹⁴⁵ and, second, by establishing an effective interrogation process based on techniques and personnel imported from Guantanamo Bay and Afghanistan.¹⁴⁶ As a result, Maj. Gen. Geoffrey Miller, “the commander of the detention . . . center at Guantanamo [Bay],” traveled to Baghdad in late August and early September 2003 to review interrogation procedures in Iraq.¹⁴⁷ In his wake, the Defense Department assigned three to five of Miller’s interrogation teams to ninety-day tours in Iraq.¹⁴⁸ Furthermore, the Department transferred Capt. Carolyn Wood from Afghanistan, where she served as operations officer in charge of the Bagram Collection Point, to Iraq, where she became the officer in charge of interrogation at Abu Ghraib.¹⁴⁹ According to many reports, these people brought with them the harsh—but allegedly successful—interrogation techniques developed at Guantanamo Bay¹⁵⁰ and in Afghanistan.¹⁵¹

143. R. Jeffrey Smith, *Soldier Described White House Interest*, WASH. POST, June 9, 2004, at A3; see also Blake Morrison & John Diamond, *Pressure at Iraqi Prison Detailed*, USA TODAY, June 18, 2004, at 1A (citing official “concern about that increasingly violent Iraqi insurgency that was claiming American lives daily” and the desperation of commanders to “get a clearer intelligence picture of the burgeoning insurgency”).

144. Hersh, *supra* note 67.

145. See Brody, *supra* note 2, at 24 (opining that “U.S. forces” have taken “more than 12,000 Iraqis” into custody since “President Bush declared the end of major combat in Iraq in May 2003”); see also *Report of the High Commissioner for Human Rights*, *supra* note 2, ¶ 63 (stating that Coalition Forces have detained “some ten thousand or more prisoners” in Iraq).

146. See Golden & Schmitt, *supra* note 116, at A1 (reporting the views of some officials that “with the insurgency raging in Iraq, there was no effective system at the prisons for wringing intelligence from the prisoners”); see also *infra* notes 150-51 and accompanying text.

147. Hersh, *supra* note 67; see also Brody, *supra* note 2, at 32; Chan, *supra* note 34; Jehl, *supra* note 40; Jehl & Elliott, *supra* note 140; Lewis, *supra* note 107; Morrison & Diamond, *supra* note 143; Slevin & Stephens, *supra* note 6; Smith, *supra* note 49; *What Did He Know?*, *supra* note 60.

The United States later reassigned Miller to Iraq as deputy commander for detainee operations. Chan & Spinner, *supra* note 50; see also Hersh, *supra* note 30; Hersh, *supra* note 33. The Army portrayed Miller “as the general who would clean up the Iraqi prison system and instill respect for the Geneva Conventions.” Hersh, *supra* note 67.

148. Brody, *supra* note 2, at 33; Jehl & Elliott, *supra* note 140.

149. Jehl & Elliott, *supra* note 140; Douglas Jehl & David Rohde, *Afghan Deaths Linked to Unit at Iraq Prison*, N.Y. TIMES, May 24, 2004, at A1; Jehl & Schmitt, *supra* note 45; Lewis, *supra* note 107; Smith, *supra* note 49, at A17.

150. Brody, *supra* note 2, at 25; Tim Golden & Don Van Natta, *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, June 21, 2004, at A1; Jehl, *supra* note 40; Jehl & Elliott, *supra* note 140; Morrison & Diamond, *supra* note 143;

As a result of the conscious policy choices outlined above, the United States placed a much larger and different group of detainees beyond the reach of the law. For example, the number of people detained in Iraq *after* President Bush declared an end to active hostilities reportedly exceeds by a factor of ten to twelve the number of people detained by U.S. forces in Afghanistan.¹⁵² In addition, the profiles of detainees radically changed in Iraq: instead of supposedly hardcore al-Qaeda operatives and Taliban soldiers, the United States imprisoned “cabdrivers, brothers-in-law, and people pulled off the streets.”¹⁵³ Although military intelligence officials concluded that seventy to ninety percent of those prisoners had been incarcerated “by mistake,”¹⁵⁴ their commander in Iraq, Maj. Gen. Barbara Fast,

The Policy of Abuse, WASH. POST, May 16, 2004, at B6; R. Jeffrey Smith & Josh White, *General Granted Latitude at Prison*, WASH. POST, June 12, 2004, at A1; *Torture Policy*, *supra* note 102, at A26.

151. Brody, *supra* note 2, at 25; Jehl, *supra* note 40; Jehl & Elliott, *supra* note 140; Jehl & Rohde, *supra* note 149; Jehl & Schmitt, *supra* note 45; Lewis, *supra* note 107; Smith, *supra* note 49; *see also* *What Did He Know?*, *supra* note 60 (“The harsher interrogation techniques were aimed at terrorists taken in Afghanistan; but when the methods proved successful, they were apparently transferred to Iraq.”).

152. Compare Brody, *supra* note 2, at 19 (opining that “[s]ince the fall of the Taliban government in Afghanistan, U.S.-led forces have arrested and detained at least one thousand Afghans and other nationals”); “*Enduring Freedom*”: *Abuses by U.S. Forces in Afghanistan*, HUM. RTS. WATCH, Mar. 2004, at 2, at <http://www.hrw.org> [hereinafter Human Rights Watch, *Enduring Freedom*] (estimating that “at least one thousand Afghans and other nationals have been arrested and detained by U.S.-led forces in Afghanistan” during the period from 2002 to the present), *with* Brody, *supra* note 2, at 24 (asserting that “[s]ince President Bush declared the end of major combat in Iraq in May 2003, more than 12,000 Iraqis have been taken into custody by U.S. forces”), and *Report of the High Commissioner for Human Rights*, *supra* note 2, ¶ 63 (reporting that Coalition Forces in Iraq have taken “ten thousand persons or more prisoners” into custody).

It is appropriate to recognize, however, that in addition to the prisoners held by U.S. forces in Afghanistan, much larger numbers are held by local forces allied with, or under control of, the Afghan government. *See Enduring Freedom*, *supra*, at 3 (stating that in “the northern city of Shiberghan, approximately one thousand detainees—alleged Taliban combatants and foreign fighters allied and captured with them—are being held at a facility under the control of Afghan General Abdul Rashid Dostum, a member of the Karzai government and the commander of a predominately Uzbek militia”).

153. Hersh, *supra* note 67 (quoting a former official). Furthermore, unlike their counterparts at Guantanamo Bay and in Afghanistan, the United States recognized that Iraqi detainees qualified for protection under the Geneva Conventions. *See supra* note 140 and accompanying text.

154. *See ICRC Report*, *supra* note 48, ¶ 7; Lewis, *supra* note 107; R. Jeffrey Smith, *Army Report Warned in November About Prison Abuses*, WASH. POST, May 30, 2004, at A31; Sontag, *supra* note 6; *see also* Douglas Jehl & Kate Zernike, *Scant Evidence Cited in Long Detention of Iraqis*, N.Y. TIMES, May 30, 2004, at 1 (reporting the conclusion of the Army’s provost marshal that “some Iraqis had been held for several months for nothing more than expressing ‘displeasure or ill will’ toward American occupying forces”); Peter Slevin, *Red Cross Report Describes Systemic Abuse of Iraqis*, WASH. POST, May 10, 2004, available at <http://www.washingtonpost.com>

“routinely denied the recommendations of review boards that certain detainees no longer posed a threat and should be released.”¹⁵⁵ In so doing, she or another general at headquarters in Baghdad reportedly stated, “I don’t care if they are innocent.”¹⁵⁶

Thus “overwhelmed by a flood of detainees,”¹⁵⁷ the intelligence unit at Abu Ghraib increasingly required the assistance of officers and soldiers who lacked relevant experience¹⁵⁸ and who should, instead, have been “driving trucks.”¹⁵⁹ To make matters worse, superior officers pressed them for better intelligence,¹⁶⁰ authorized

(reporting that “U.S. forces in Iraq often arrested Iraqis without good reason”). *But see* Jehl & Zernike, *supra* (“If they were innocent, they wouldn’t be at Abu Ghraib.” (quoting Brig. Gen. Mark A. Kimmitt)).

155. Smith, *supra* note 154; *see also* Jehl & Schmitt, *supra* note 142 (quoting an American general, who stated that “when someone was sent down there, they went into a black hole and never came out”); Jehl & Zernike, *supra* note 154 (quoting an officer for the proposition that “once they were tagged as security detainees, it was very hard to get them released”).

156. Jehl & Zernike, *supra* note 154.

157. Smith, *supra* note 49; *see also* Morrison & Diamond, *supra* note 143 (discussing the “pressures . . . surrounding the handling of Iraqi prisoners at an understaffed, overcrowded prison”); Eric Schmitt, *Army Report Criticizes Training and Practices at Detention Centers*, N.Y. TIMES, July 2, 2004, at A9 (describing the contents of a report by the Army inspector general, which paints “a sobering picture of conditions, policies and practices that left the Army ill prepared to hold and question thousands of Iraqi detainees at Abu Ghraib”).

158. Before he took the job, the “former head of the interrogation center at Abu Ghraib” had “no experience in interrogating prisoners.” Eric Schmitt, *Officer in Charge of Questioning Iraqi Inmates Had No Interrogation Training*, N.Y. TIMES, June 9, 2004, at A9; *see also* Morrison & Diamond, *supra* note 143 (stating that the officer’s “résumé lacked . . . anything beyond a ‘passing familiarity’ with the rules and laws governing prisoner treatment”). The military police officers who guarded the prisoners “were poorly trained for their mission and were overwhelmed by the prison population, which outnumbered them 100 to 1.” Spinner, *supra* note 74; *see also* Schmitt, *supra* note 157 (referring to the “inadequate training for military jailers and interrogators,” which “contributed to the abuses at Abu Ghraib prison”).

159. *See* Mark Danner, *The Logic of Torture*, 51 N.Y. REV. BOOKS, June 24, 2004, available at <http://www.nybooks.com> (“I think what happened is that you took a sophisticated concept at Gitmo, where the Geneva Convention did not apply . . . and you put it in the hands of people [in Iraq] who should have been driving trucks, or doing something else instead of guarding prisoners.” (quoting Sen. Lindsay Graham)). As an example, one of the seven soldiers charged as of this writing, “sells, makes and delivers pizza for a living” when not in uniform. Spinner, *supra* note 74. Thus, according to one observer, “[w]hat separates Abu Ghraib . . . is not the ‘methods of physical and psychological coercion used’ but the fact that, under the increasing stress of war, the pressing need for intelligence, and the shortage of available troops and other resources in Iraq, military policemen like Pfc. England, who had little or no training, were pressed into service to ‘soften up’ the prisoners and, as the Taguba report puts it, set ‘the conditions for successful exploitation of the internees.’” Danner, *supra* note 131.

160. *See* Morrison & Diamond, *supra* note 143 (reporting that the officer then in charge of interrogations at Abu Ghraib “testified that he was under intense ‘pressure’ from the White House, Pentagon and CIA last fall to get better information from detainees,” that “he was reminded of the need to improve the intelligence output of the prison ‘many, many, many times,’” and that “Lt. Gen. Ricardo Sanchez, the commander

treatment harsher than practiced at Guantanamo Bay,¹⁶¹ imposed fewer controls on its application,¹⁶² posted no copies of the Geneva Conventions,¹⁶³ and encouraged soldiers to avoid identification by using aliases and covering their insignia.¹⁶⁴

In short, the facts reveal an ever-expanding population of detainees intentionally placed ever farther beyond the protection of

of U.S. forces in Iraq, was pressing for intelligence that would help combat the rash of attacks on U.S. forces that summer and fall"); Smith, *supra* note 142 (mentioning that the same officer was "told many times that the intelligence must be improved because of the widening attacks"); *see also* Brody, *supra* note 2, at 3 (observing that the "severest abuses at Abu Ghraib occurred in the immediate aftermath of a decision by Secretary Rumsfeld to step up the hunt for 'actionable intelligence' among Iraqi prisoners"); Douglas Jehl & Kate Zernike, *Greater Urgency on Prison Interrogation Led to Use of Untrained Workers*, N.Y. TIMES, May 28, 2004, at A11 (indicating that "some soldiers who served in military intelligence units at the prison said the sense of urgency contributed to the loosened standards and the abuses that followed"); Smith, *supra* note 143 (recalling that in "the last quarter of 2003, virtually every senior military officer in Iraq, as well as at the Pentagon, was intensely interested in determining who was behind the rising insurgency in Iraq").

161. *See* Jehl, *supra* note 40 (reporting that "[s]ome of the procedures authorized in Iraq had been banned as too harsh months earlier at Guantanamo"); Tom Malinowski, *The Logic of Torture*, WASH. POST, June 27, 2004, at B7 (noting that although "Rumsfeld eventually rescinded his approval of . . . cruel methods for Guantanamo," they "still ended up being authorized by commanders and used on prisoners throughout Afghanistan and Iraq"); Priest & Graham, *supra* note 115 (observing that the list of procedures for Guantanamo "does not include some of the more severe methods available to interrogators in Iraq"); *Torture Policy*, *supra* note 102 (suggesting that interrogators used tougher techniques in Iraq than at Guantanamo Bay).

162. *See* Golden & Schmitt, *supra* note 116 (reporting that, according to military officers who served in Cuba, "the controls on coercive interrogation methods appeared to have been stronger at Guantanamo than they were in Iraq"); *see also* Smith & White, *supra* note 150 (discussing the interrogation policy in effect at Abu Ghraib, which permitted "the use of yelling, loud music, a reduction of heat in winter and air conditioning in summer, and 'stress positions' for as long as 45 minutes every four hours—all without first gaining the permission of anyone more senior than the 'interrogation officer in charge' at Abu Ghraib").

163. *See* Higham et al., *supra* note 31 (reporting that "[s]tandard operating procedures and copies of the Geneva Conventions were not distributed to the guards handling the prisoners"); *Mr. Rumsfeld's Responsibility*, *supra* note 113 (observing that guards at Abu Ghraib received no instruction regarding the Geneva Conventions and the "no copies were posted at the facility"); *see also* Taguba Report, *supra* note 69, at 19-20 (finding that military police personnel received "very little instruction or training" on "the applicable rules of the Geneva Convention Relative to the Treatment of Prisoners of War" and that "few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees"), 26 (finding that "[n]either the camp rules nor the provisions of the Geneva Conventions are posted in English or in the language of the detainees at any of the detention facilities" run by the 800th Military Police Brigade); Morrison & Diamond, *supra* note 143 (comparing the "intensity of the demands on commanders at Abu Ghraib to deliver useful intelligence" with the "relative lack of emphasis on treating prisoners in accord with international standards").

164. Jehl & Schmitt, *supra* note 142; Smith & White, *supra* note 150 .

the law. The consequences are self-evident:¹⁶⁵ “systematic” abuse of security detainees,¹⁶⁶ many of them innocent,¹⁶⁷ by unaccountable neophytes, which has triggered nearly 100 investigations involving, *inter alia*, the deaths in custody of more than thirty Iraqi prisoners.¹⁶⁸ Under these circumstances, one cannot readily accept the premise that the inhuman treatment of prisoners constitutes the “isolated” work of a few “rogue” soldiers, much less the conclusion that “the system works” in any responsible way.¹⁶⁹

B. *Have We Descended to the Level of Saddam Hussein?*

Perceiving a broad pattern of inhuman treatment, prominent observers have, in good faith, compared the U.S. military detention system to the atrocious ones maintained by Saddam Hussein,¹⁷⁰ Nazi Germany,¹⁷¹ and the Soviet Union.¹⁷² While others categorically

165. See Jehl & Zernike, *supra* note 160 (“When you let people take power into their own hands, it’s going to happen,” said a soldier who served as a military intelligence analyst at the prison. “There was no higher authority really.”).

166. ICRC Report, *supra* note 48, Executive Summary.

167. See *supra* note 154 and accompanying text.

168. See Graham, *Army Investigates*, *supra* note 96 (reporting that over the past 18 months, “the Army has opened investigations into at least 91 cases of possible misconduct by U.S. soldiers against detainees and civilians in Iraq and Afghanistan,” noting that a majority of the cases occurred in Iraq, and mentioning that 30 investigations relate to the deaths of 34 detainees); Douglas Jehl & Eric Schmitt, *Dogs and Other Harsh Tactics Linked to Military Intelligence*, N.Y. TIMES, May 22, 2004, at A1 (referring to the statement of “a senior military official . . . at a Pentagon briefing” that “37 prisoners have died in American custody in Iraq and Afghanistan since August 2002, all but five in Iraq”); see also Sewell Chan, *Pentagon Reinforces Policy for Reporting Deaths of Detainees*, WASH. POST, June 11, 2004, at A18 (discussing the investigations); Eric Schmitt, *U.S. Army Charges 4 Soldiers in the Drowning Death of an Iraqi Man*, N.Y. TIMES, July 3, 2004, at A7 (“The Army has now opened investigations into the deaths of 40 Iraqi detainees, and the new charges announced reflect a widening pattern of prisoner abuse, including deaths and assault, that took place beyond the confines of the Abu Ghraib prison.”).

169. See *supra* notes 59, 65, 96-102 and accompanying text.

170. See Slaughter, *supra* note 57 (“And so much of it seemed outlandish, such as the claims that the United States posed a greater threat to international security than Saddam Hussein. No longer.”); Josh White & R. Jeffrey Smith, *House Panel Reviews Iraq Prison Reports*, WASH. POST, July 15, 2004, at A14 (“Rep. Gene Taylor . . . said he believes it is possible that U.S. troops lapsed into ‘Hussein-type behavior’ under pressure from Bush administration officials to produce results.”); David Winston, . . . *Or Proving his Resilience?*, WASH. POST, May 30, 2004, at B1 (“Sen. Edward Kennedy, reacting to the Abu Ghraib prison scandal, has equated the U.S. military with Saddam Hussein.”); see also Stout, *supra* note 30 (“The abuse of prisoners by American military people may strike some people as reminiscent of the very abuses Mr. Hussein and his cronies inflicted.”).

171. See Zernike & Rohde, *supra* note 30 (recalling that “[s]oldiers in Nazi Germany [also] paraded naked prisoners in daylight”); see also *New York Judge Apologises for Comparing Bush to Hitler*, EXPRESS INDIA, June 25, 2004, at <http://www.expressindia.com> (reporting that Judge Guido Calabresi expressed

reject such comparisons,¹⁷³ they overlook two fundamental points. First, the United States finds itself in the “extraordinary position” of having to draw distinctions of scale and degree between itself and history’s most repressive regimes.¹⁷⁴ Second, even if valid, distinctions of scale and degree provide no excuse for “aping,” if not fully replicating, the tactics of brutal dictators.¹⁷⁵ These facts justify deeper self-examination,¹⁷⁶ which reveals an unsettling congruence between interrogation methods used by cruel dictators and by the United States.

Descriptions of U.S. interrogation tactics in Iraq constitute a veritable rogues’ gallery of methods used by brutal regimes.¹⁷⁷ Interrogators have subjected naked prisoners to dog attacks,¹⁷⁸ as

“profound regret” for comparing President George W. Bush’s “rise to power” to “that of Mussolini and Hitler”).

172. See Maureen Dowd, *Marquis de Bush?*, N.Y. TIMES, May 27, 2004, at A29 (reporting that former Vice President Albert Gore “accused the commander in chief of being responsible for ‘an American gulag’ in Abu Ghraib, as depraved as anything devised by the Marquis de Sade”); Sontag, *supra* note 6 (contending that “[w]hat has happened in the new, international carceral empire run by the United States military goes beyond even the notorious procedures in . . . Soviet Russia’s Gulag system”).

173. See *Anger and Shame, America and Iraq*, ECONOMIST, May 15, 2004, available at <http://www.economist.com> (“America’s defenders complain that its soldiers’ crimes are nothing compared with those of Saddam Hussein. . . .”); Applebaum, *supra* note 57 (“The American soldiers and civilians responsible for humiliating, torturing and possibly murdering Iraqi prisoners in the Abu Ghraib prison near Baghdad . . . do not belong in the same category as Nazi or Soviet camp guards.”); Barry et al., *supra* note 60 (“That’s unfair: what Saddam did at Abu Ghraib during his regime was more horrible, and on a much vaster scale, than anything seen in those images on Capitol Hill.”); Hochschild, *supra* note 6 (“Granted, the torture of prisoners under Saddam Hussein was incomparably more widespread and often ended in death.”); Charles Krauthammer, *Abu Ghraib as Symbol*, WASH. POST, May 7, 2004, at A33 (“Let’s be clear. [They] . . . are not . . . the worst atrocities committed in war. Indeed, they pale in comparison with . . . what Saddam Hussein did to his own people.”); Remnick, *supra* note 10 (“Major General Antonio M. Taguba’s confidential report on the brutality, humiliation, and sadism at Abu Ghraib can hardly compare to the descriptions of the horrors there under Saddam.”).

174. See Allen & Balz, *supra* note 5 (“Speaking to the Arab channels in the Map Room . . . the president found himself in the extraordinary position of making the case for why what had occurred under the Pentagon’s watch was morally different from Hussein’s practices.”); see also Hiatt, *supra* note 10 (lamenting that “the United States is reduced to pleading that it’s not as bad as al Qaeda”).

175. See David S. Broder, *McNamara Moment*, WASH. POST, May 9, 2004, at B7 (writing that “we find ourselves . . . aping Hussein’s brutal tactics to soften up prisoners for interrogation”).

176. See Elliot A. Cohen, *Our Soldiers and Us*, WASH. POST, May 25, 2004, at A17 (arguing that the “hardest lesson is that the torture and abuse at Abu Ghraib should cause us to look harder at ourselves”).

177. See Brody, *supra* note 2, at 2 (describing the United States’ use of techniques “familiar to victims of torture in many of the world’s most repressive dictatorships”).

178. Publicly released photographs depict one dog attack. Hersh, *supra* note 30; see also Sworn Statement of Mohanded Juma Juma, File No. 0003-04-CID149-83130

well as the imminent threat of dog attacks.¹⁷⁹ They have used a 110-volt power supply to shock detainees.¹⁸⁰ They have performed “numerous” simulated asphyxiations to obtain information.¹⁸¹ In at least one case, interrogators exceeded the bounds of simulation by stuffing an Iraqi general into a sleeping bag head-first, rolling him over repeatedly, sitting on his chest, and covering his mouth until he died.¹⁸² Sometimes by neglect,¹⁸³ sometimes by design,¹⁸⁴ and sometimes on cabinet-level instructions,¹⁸⁵ U.S. personnel have “disappeared” prisoners.¹⁸⁶ To some degree, they may have engaged

(Jan. 18, 2004); Higham et al., *supra* note 31; Myers, *supra* note 39; R. Jeffrey Smith, *General Is Said to Have Urged Use of Dogs*, WASH. POST, May 26, 2004, at A16; White & Higham, *supra* note 96. A guard at Abu Ghraib reported that she saw dog bites on at least two other prisoners. White & Higham, *supra* note 96.

179. Two dog handlers reportedly engaged in a contest to see which one could frighten more prisoners to the point of involuntary urination. Lewis, *supra* note 107; White & Higham, *supra* note 96; *see also* Chan & Amon, *supra* note 4 (reporting that “dogs were used as tools of intimidation”); Graham & Babington, *supra* note 72 (disclosing that “guard dogs with their muzzles removed were used to threaten detainees”).

180. *See* Sewell Chan, *2 Marines Guilty of Abusing Prisoner*, WASH. POST, June 4, 2004, at A18 (reporting that “[t]wo 19-year-old Marines pleaded guilty [in May 2004] to abusing an Iraqi prisoner under their watch by giving him electric shocks” with a 110-volt power converter); Sewell Chan, *Marine Sergeant to Face Court-Martial in Abuse*, WASH. POST, June 12, 2004, at A18 (reporting, in addition, that a third 19-year-old Marine private and a 27-year-old Marine sergeant face charges for disciplining an Iraqi prisoner by “shocking him with a live power wire attached to a converter that delivered 110 volts of electricity”); *see also supra* notes 82, 88 and accompanying text.

181. Douglas Jehl et al., *Abuse of Captives More Widespread, Says Army Survey*, N.Y. TIMES, May 26, 2004, at A1 (reporting that Army interrogators “forced into asphyxiation numerous detainees in an attempt to obtain information’ during a 10-week period last spring”).

182. Brody, *supra* note 2, at 28-29; Jehl et al., *supra* note 181; Jehl & Schmitt, *supra* note 168.

183. *ICRC Report*, *supra* note 48, ¶ 9; *Report of the High Commissioner for Human Rights*, *supra* note 2, ¶ 41; Ian Fisher, *Searing Uncertainty for Iraqis Missing Loved Ones*, N.Y. TIMES, June 1, 2004, at A1; Slevin, *supra* note 154.

184. Graham & Babington, *supra* note 72; Higham et al., *supra* note 31; Douglas Jehl & Eric Schmitt, *C.I.A. Bid to Keep Some Detainees Off Abu Ghraib Roll Worries Officials*, N.Y. TIMES, May 22, 2004, at A15; *Mr. Rumsfeld’s Responsibility*, *supra* note 113; *see also* Taguba Report, *supra* note 69, at 26-27 (describing this as a routine practice in facilities operated by the 800th Military Police Brigade).

185. Jehl, *supra* note 40; Morrison & Diamond, *supra* note 143; Dana Priest & Bradley Graham, *U.S. Struggled over How Far to Push Tactics*, WASH. POST, June 24, 2004, at A1; Priest & White, *supra* note 74; Eric Schmitt & Thom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq*, N.Y. TIMES, June 17, 2004, at A1; Thom Shanker & Andrea Elliott, *Rumsfeld Admits He Told Jailers to Keep Detainee in Iraq Out of Red Cross View*, N.Y. TIMES, June 18, 2004, at A13; *Torture Policy (cont’d)*, WASH. POST, June 21, 2004, at A18.

186. *See* Brody, *supra* note 2, at 12 (“Among the most disturbing cases, perhaps unprecedented in U.S. history, are the detainees who have simply been ‘disappeared.’”); *see also* Risen et al., *supra* note 125 (quoting a former intelligence official for the proposition that “[t]here was a debate after 9/11 about how to make people disappear”).

in extra-judicial killings.¹⁸⁷ Although Secretary Rumsfeld asserts that much of the abuse “technically” falls outside the definition of torture,¹⁸⁸ this represents a tacit acknowledgement that it comes close to the edge. In fact, the Red Cross has described some of the abuse as “tantamount to torture.”¹⁸⁹ In any event, Secretary Rumsfeld and other senior officials have publicly described the documented abuse of prisoners as “atrocities”¹⁹⁰ involving “cruel” and “inhuman” treatment,¹⁹¹ which the International Covenant on Civil

187. See Chan, *supra* note 168, at A18 (discussing an Iraqi prisoner who died in detention from “closed head injury with a cortical brain contusion and subdural hematoma” on June 13, 2003, and an Iraqi prisoner who died in detention from “blunt force injuries complicated by compromised respiration,” on November 4, 2003, and mentioning that U.S. authorities did not certify either death until May 2004); Graham, *Army Investigates*, *supra* note 96 (reporting on the investigation of 10 unjustified homicides committed by U.S. personnel in Iraq and Afghanistan); *The Homicide Cases*, *supra* note 139 (reporting the statement of a senior official that “nine of the 10 homicides” committed in Afghanistan or Iraq and “acknowledged by the Pentagon” occurred “either before or during interrogation sessions that may have led to the detainee’s death”); *Remedies for Prisoner Abuse*, *supra* note 96 (reporting the existence of “disturbing evidence that senior U.S. military commanders ignored or covered up serious crimes against prisoners, including homicides, until the disclosure of shocking photographs from the Abu Ghraib prison forced them to act”).

In one case documented by photographs, Navy Seals delivered a prisoner to Abu Ghraib for interrogation. Following an hour of interrogation, he died, “bleeding from the head, nose, [and] mouth.” An Army colonel and CIA officers participated in the decision to pack the body in ice and, later, to spirit the corpse out of the prison connected to an intravenous drip. Filkins, *supra* note 53; see also Spinner, *supra* note 38 (detailing an MP Captain’s testimony about the incident). No one recorded the detainee’s identification or how they ultimately disposed of the body. *Id.*

188. According to news reports, Secretary Rumsfeld stated at a press conference, “[W]hat has been charged so far is abuse, which I believe technically is different from torture.” Hochschild, *supra* note 6; Remnick, *supra* note 10; Sontag, *supra* note 6. Apparently, the vast majority of the American public agrees with Secretary Rumsfeld on this point. See Morin & Deane, *supra* note 6 (reporting that “only a third of Americans would define what happened at Abu Ghraib as torture”).

189. *ICRC Report*, *supra* note 48, Executive Summary & ¶ 59; Slevin, *supra* note 154; Slevin & Stephens, *supra* note 6; see also Hochschild, *supra* note 6 (“[O]ur government, from the highest officials in Washington to Army prison guards in Baghdad, have used every euphemism they can think of to avoid the word that clearly characterizes what some of our soldiers and civilian contractors have been doing: torture.”); Ignatius, *supra* note 31 (“All week long, I’ve had in the back of my mind the images from Abu Ghraib prison of the young American torturers—sadly, that is the only word that fits.”); Wedgwood, *supra* note 6 (“Some incidents may constitute offenses under the treaties and statutes on torture.”).

190. See Neil A. Lewis, *Ashcroft Says the White House Never Authorized Tactics Breaking Laws on Torture*, N.Y. TIMES, June 9, 2004, at A8 (quoting Attorney General John Ashcroft for the proposition that the “kind of atrocities displayed in the photographs are being prosecuted by this administration”) (emphasis added).

191. See Hersh, *supra* note 30 (“There are other photos that depict . . . acts that can only be described as *blatantly* sadistic, *cruel*, and *inhuman*.” (quoting Secretary Rumsfeld)) (emphasis added); *Torture Policy*, *supra* note 102 (“Mr. Rumsfeld described [the treatment depicted in photographs] as ‘grievous and brutal abuse and *cruelty*.’”) (emphasis added); see also *Report of the High Commissioner for Human Rights*, *supra*

and Political Rights prohibits even in times of public emergency threatening the life of the nation and which the Third and Fourth Geneva Conventions of 1949 define as “grave breaches” of the protections extended, respectively, to prisoners of war and civilians.¹⁹²

Furthermore, domestic and international reactions to the revelations of abuse resemble—in kind, if not in scale—historical responses to widespread, state-sponsored violations of human rights. For example, following the publication of photographs recording the inhuman treatment of prisoners at Abu Ghraib, U.S. officials including President Bush,¹⁹³ members of Congress,¹⁹⁴ Secretary Rumsfeld,¹⁹⁵ the commander of U.S. forces in Iraq,¹⁹⁶ and the general in charge of the prison¹⁹⁷ at Abu Ghraib all claimed to be stunned by the images and the information that they disclosed.¹⁹⁸ Their collective state of ignorance might strike some observers as no less willful, incredible, or damning¹⁹⁹ than the one expressed by “Germans of a particular generation.”²⁰⁰ By contrast, more insightful observers have recognized the appearance of a moral stain that touches Americans regardless of their participation in, or knowledge

note 2, ¶ 65 (reporting that, on May 10, 2004, President Bush promised “a full accounting for the *cruel* and disgraceful abuse of Iraqi detainees”) (emphasis added).

192. International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 4, 7, 999 U.N.T.S. 171; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

193. Allen, *supra* note 90; Allen & Balz, *supra* note 5; Wright & Graham, *supra* note 94.

194. Graham & Babington, *supra* note 72; Graham & Von Drehle, *supra* note 91; *A System of Abuse*, *supra* note 9; Wright & Graham, *supra* note 94.

195. *Crime and Punishment*, *supra* note 33; Graham & Babington, *supra* note 72; Graham & Von Drehle, *supra* note 91.

196. Chan & Spinner, *supra* note 50; Bradley Graham, *Top Officer Seeks New Head of Iraq Inquiry*, WASH. POST, June 10, 2004, at A13; Priest & White, *supra* note 74.

197. Chan, *supra* note 9; Chan & Amon, *supra* note 4; Crabb, *supra* note 111; Josh White, *Army Suspends General in Charge of Abu Ghraib*, WASH. POST, May 25, 2004, at A11.

198. See Danner, *supra* note 159 (“We’ve now had fifteen of the highest-level officials involved in this entire operation, from the secretary of defense to the generals in command, and nobody knew anything was amiss. . . .” (quoting Sen. Mark Dayton)); Hersh, *supra* note 30 (“Everybody I’ve talked to said, ‘We just didn’t know’—not even the J.C.S., one well-informed former intelligence official told me. . . .”); *The Roots of Abu Ghraib*, *supra* note 136 (reporting that “the White House has denied that any senior official was aware of the situation”).

199. See *A System of Abuse*, *supra* note 9 (“That several of its senior Republican members were proclaiming themselves shocked yesterday to learn of the abuses—as if none had been previously reported—was itself shameful.”).

200. See *supra* note 15 and accompanying text.

of, the abuse.²⁰¹ Internationally, victims and observers have suggested that by “treating fellow human beings . . . like beasts,” Americans have, like the Nazis,²⁰² stepped outside of humanity²⁰³ and presented themselves to the world as beasts.²⁰⁴

In short, although we have not fully descended to the level of Saddam Hussein, the United States finds itself engaged in the disquieting task of measuring the difference in terms of scale but not of kind.

C. Enlightened Self-Restraint

Trying, perhaps, to reassure the nation and the world, President Bush²⁰⁵ and Secretary Rumsfeld²⁰⁶ have described the inhuman treatment of prisoners as “Un-American,” as if the United States and

201. See Slaughter, *supra* note 57 (stating that the author “felt tainted and ashamed,” even reluctant to show her passport, following publication of the photographs); see also Richard Cohen, *A Plunge from the Moral Heights*, WASH. POST, June 10, 2004, at A19 (“The Bush administration has shamed us all, reducing us to the level of those governments that also have wonderful laws forbidding torture, but condone it anyway.”); Hochschild, *supra* note 6 (“But torture is torture. It permanently scars the victim even when there are no visible marks on the body, and it leaves other scars on the lives of those who perform it and on the life of the nation that allowed and encouraged it. Those scars will be with us for a long time.”); Lewis, *supra* note 107 (“The torture and death of prisoners . . . have a powerful claim on our national conscience.”).

202. See *supra* note 15 and accompanying text.

203. See Chan, *supra* note 9 (“These are inhuman actions . . .” (quoting Salim Mandelawi, a lawyer who directs the Human Rights Organization in Iraq)); Wilson, *supra* note 47 (“The savagery the Americans have practiced against the Iraqis, well, now we have seen it, touched it and felt it. . . .”) (“How can we not hate the Americans after the treatment we have received? . . . It is not human.” (quoting former detainees)).

204. See Milbank, *supra* note 9 (“Arab countries were more strident, with the Arab League calling the mistreatment ‘savage acts’”); Jackie Spinner, *Abu Ghraib Prisoners Freed During Sit-In*, WASH. POST, May 25, 2004, at A14 (“No religion approves what they did. . . . They do only what brutal animals do.” (quoting an Iraqi man)).

205. See Allen & Balz, *supra* note 5 (“What took place in that prison does not represent the America that I know.” (quoting President Bush)); Brody, *supra* note 2, at 1 (“In a nationally televised address on May 24, President George W. Bush spoke of ‘disgraceful conduct by a few American troops who dishonored our country and disregarded our values.’”); Danner, *supra* note 131 (“Such scenes, President Bush tells us, ‘do not represent America.’”); Jehl at al., *supra* note 96 (“President Bush . . . described incidents at Abu Ghraib . . . as involving actions ‘by a few American troops who dishonored our country and disregarded our values’”); Milbank, *supra* note 9 (“Their treatment does not reflect the nature of the American people.” (quoting President Bush)); Stout, *supra* note 30 (“Their treatment does not reflect the nature of the American people. That’s not the way we do things in America.”).

206. See *Crime and Punishment*, *supra* note 33 (“Donald Rumsfeld . . . said . . . [t]he soldiers’ actions in the photographs were ‘totally unacceptable and unAmerican.’”); Stout, *supra* note 5 (observing that Secretary Rumsfeld called the abuse of prisoners “totally unacceptable and Un-American”).

its people enjoyed a special resistance to the primitive impulses that afflict other members of the human race. With all due respect, those statements seem to ignore the four central lessons to be drawn from the revelations of Abu Ghraib. First, the stress of public emergency and armed conflict can push institutions²⁰⁷ and human beings²⁰⁸—no matter how clever, decent, and patriotic—to lose their moral bearings.²⁰⁹ Second, when it comes to this human frailty, the United States and its people possess no claim to exceptional status.²¹⁰ To the contrary, one finds startlingly high levels of support for the use of torture and other forms of physical violence among the U.S. public,²¹¹ politicians,²¹² and civil servants.²¹³ Third, precisely for that reason, the founders of this nation understood that the responsible exercise of power demands a commitment to individual rights, legal restraint,

207. See Steyn, *supra* note 114, at 1 (“Executive branches of government, faced with a perceived emergency, often resort to excessive measures.”); Applebaum, *supra* note 57 (“But even in democracies, the rule of law is often suspended during wartime.”); *Crime and Punishment*, *supra* note 33 (“Everyone knows that even the most civilized countries sometimes break the rules in the stress of battle.”).

208. See Applebaum, *supra* note 57 (“In fact, it is not difficult to create a situation in which ordinary soldiers of any nationality feel entitled to mistreat prisoners of war.”); Wedgwood, *supra* note 6 (“The law of armed conflict is built on the presumption that the emotions of war are powerful and, at least for a time, could be disfiguring and distorting.”).

209. See Cohen, *supra* note 176 (“[T]o control the use of violence amid the terrors and hardships of war, armed forces must create unusual institutions, mores and habits.”). See also *The Policy of Abuse*, *supra* note 150 (“Once a government opens the door to abusive treatment of prisoners, it creates a climate in which those abuses are likely to be practiced far more widely and with less exactitude than it intends.”).

210. See Applebaum, *supra* note 57 (“But their actions prove . . . that no culture is incapable of treating its enemies as subhuman.”); Smith, *supra* note 57 (“All of this should remind us that humankind, including Americans bent on the spread of democracy, is capable of base behavior.”); *The White House Papers*, *supra* note 112 (concluding that the “debacle at Abu Ghraib shows how badly things can go when average Americans are let loose from those restraints, or allowed to believe that such restraints do not apply to them”); see also Fred Hiatt, *Shadow on the U.S. Beacon*, WASH. POST, May 16, 2004, at B7 (“We believed in American exceptionalism, and American exceptionalism has proven to be fraudulent.” (quoting Tommy Koh, formerly Singapore’s ambassador to the United States)).

211. See Morin & Deane, *supra* note 6 (reporting that more than one-third of the American public supports the use of torture in certain circumstances, that half of the public believes that the United States practices torture as “a matter of policy,” and that two-thirds of the public believes that “military policy allows for physical abuse of prisoners”).

212. See Susan Schmidt, *Ashcroft Refuses to Release '02 Memo*, WASH. POST, June 9, 2004, at A1 (“I think there are very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake.” (quoting Sen. Charles E. Schumer)).

213. See Priest & Gellman, *supra* note 118 (“While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view.”); see also *supra* note 136 and accompanying text.

and judicial supervision.²¹⁴ And, fourth, to the extent that they depict anything inherently “Un-American,” the images from Abu Ghraib provide a glimpse and a warning of the road ahead for a nation being led, unintentionally but no less dangerously,²¹⁵ from its original devotion to the rule of law.²¹⁶

V. CONCLUSION

In 2001, the United States maintained the image of a progressive, law-based society that became the victim of a treacherous terrorist attack. In 2003, the United States expected to project the image of a liberator, toppling the statues of Saddam Hussein.²¹⁷ Today, the world associates the United States with the image of a hooded prisoner, standing on a box, attached to wires, waiting to die.²¹⁸ To move beyond that image, we must reflect more

214. See Lewis, *supra* note 107 (“The basic premise of the American constitutional system is that those who hold power are subject to the law.”); Smith, *supra* note 57 (“Our defense against ourselves, our claim to virtue, includes the rule of law.”); *The White House Papers*, *supra* note 112 (“The nation . . . has always held to a . . . tradition that relies on the restraint of the rule of law rather than individual goodness.”).

215. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647, 159 L. Ed. 2d 578, 600 (2004) (O’Connor, J., plurality opinion) (submitting that “history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse”); *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2735, 159 L. Ed. 2d 513, 547 (2004) (Stevens, J., dissenting) (implying that the government has already deployed “the tools of tyrants . . . to resist an assault by the forces of tyranny”); Steyn, *supra* note 114, at 2 (cautioning that “unchecked abuse of power begets ever-greater abuse of power”); Danner, *supra* note 159 (warning that “torture, once sanctioned, is inevitably used much more broadly”); Priest & Smith, *supra* note 136 (quoting a senior military attorney for the proposition that “[o]nce you start telling people it’s okay to break the law, there’s no telling where they might stop”); *Rule of Lawlessness*, *supra* note 6, at B6 (concluding that “these photographs demonstrate the potentially corrupting effect of the atmosphere of lawlessness in these prisons”).

216. See *Slaughter*, *supra* note 57 (“If America won’t listen, won’t consult, won’t play by the rules, won’t try to see the world through any lenses but its own, can we still be sure that American power is a force for good?”); see also Lewis, *supra* note 190 (“I hope that in the end . . . Saddam Hussein will not have taken away from us something that our Constitution . . . granted us, and that we have taken . . . away in the name of safety and security.” (quoting Sen. Larry Craig)).

217. See *From Abu Ghraib, A Story Beyond Words*, WASH. POST, May 10, 2004, available at <http://washingtonpost.com> (“Early on, the photos of soldiers toppling a statue of Saddam Hussein illustrated the heady sensation of what many of us hoped would be a quick conquest.”).

218. See *Resign, Rumsfeld*, ECONOMIST, May 8, 2004, available at <http://economist.com> (warning that the “pictures of abuse, especially the one . . . of the hooded man wired as if for electrocution, stand an awful chance of becoming iconic images that could haunt America for years to come”); see also Scott Cooper, *The Prism of Abu Ghraib*, WASH. POST, June 4, 2004, at A23 (observing that “Abu Ghraib threatens to serve as a . . . metaphor for [the] war in Iraq”); Shanker, *supra* note 73

deeply and sincerely on the lives of animals, the lives of prisoners, and the revelations of Abu Ghraib.

(recording the Bush administration's fear "that the signature image of the war is no longer cheering Iraqis toppling Mr. Hussein's statue in Baghdad, but may instead become American soldiers laughing and giving 'thumbs up' signs as Iraqi detainees are abused and humiliated"); Sontag, *supra* note 6 (predicting that the "photographs of the torture of Iraqi prisoners in . . . Abu Ghraib" will be "the defining association of people everywhere with the . . . war that the United States launched preemptively in Iraq").