Thinking About Torture

Peter Berkowitz on Because it is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror by Charles Fried and Gregory Fried.

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Charles Fried and Gregory Fried. Because it is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror. W. W. Norton & Company. 222 Pages. $24.95.

This in many ways admirable book was "born of conversations" between father and son. The father, Charles Fried, a professor at Harvard Law School, is the author of many works on legal and political philosophy, and served as solicitor general of the United States under President Ronald Reagan. The son, Gregory Fried, is chair of the Philosophy Department at Suffolk University and author of Heidegger's Polemos: From Being to Politics. The father voted for George W. Bush in 2000 and supported the war in Iraq; the son opposed Bush and "only reluctantly" backed the Iraq war. The conversations in question arose out of shared concerns about the dangers posed to the United States by those who attacked the country on 9/11 and about the legality and morality of measures adopted by the Bush administration to defend the nation.

Father and son found that their conversations increasingly focused on two controversial tactics in the war against the terrorists — brutal interrogations of suspected terrorists abroad and pervasive electronic surveillance at home — tactics used to get desperately needed intelligence about a hidden and unfamiliar enemy. What we realized they shared was the question of whether an executive has the right to break the law in a time of crisis, for both were indeed illegal.

To assess whether Bush administration interrogation and surveillance policy were nevertheless proper, the Frieds examine the meaning of torture and the significance of suffering and inflicting it; the sphere of privacy and the cost to liberty when government invades it; and the conditions under which executives may honorably and justly break the law.

Despite their political differences, father and son succeed in producing a single voice and, up until their final pages, a single line of argument. They diverge on what to do about the Bush administration officials implicated in the use of harsh interrogation techniques that, they assert unequivocally, broke domestic and international law prohibiting torture. The younger Fried believes that Bush administration officials should be prosecuted to the full extent of the law, while the older Fried believes the extraordinary circumstances under which they acted and the need in a democracy for winners in elections to refrain from using their power to

pursue their defeated rivals counsel forbearance. They articulate their difference of opinion in the same lucid tones and restrained terms that characterize even their most uncompromising claims.

At the same time, their argument is marked by evasions, equivocations, and rash conclusions. The evasions and equivocations begin with their failure to state clearly that the genuinely hard questions they laudably confront arose not in the struggle against terrorists of all kinds but in a battle against Islamic extremists who have chosen terror as their tactic and are determinedly seeking weapons of mass destruction to kill vast numbers of American civilians and strike crippling blows against the United States. Prominent among their rash conclusions are the two most dramatic in their book: the philosophical opinion that torture is "absolutely wrong," and the legal and political claim that in ordering the use of harsh interrogation and warrantless electronic surveillance the Bush administration brazenly, if on behalf of the national interest as the president and his team understood it, defied the law.

Although scholars of law and politics will profit from their book, which draws on art, philosophy, moral and political theory, history, and legal analysis, it was not in the first place written for specialists. It is intended, rather, for "fellow citizens, and particularly for those engaged in public service, be it in the military or the government, who find themselves running up against those limits in the crisis we now face and may continue to face in new and unexpected forms." Indeed, among the impressive features of the book is the way in which the force of the Frieds' analysis, in its graceful movement between a more philosophic perspective and a more political perspective, compels them to run up against limits to their own view and at the end to call into question the cogency and morality of their central contention that torture is absolutely wrong.

The Frieds recognize, as so many critics do not, that Bush administration authorization of harsh interrogation of enemy combatants and use of super computers to scan electronic communications for hints of terrorist activities sprang from legitimate concerns. Intelligence, they emphasize, while critical in all military operations, is even more so in the struggle against terrorists, because "governments know so little about where the enemy is or even who he is." In this context they might have added the still greater demand for intelligence against jihadists whose language, history, culture, religion, grievances, and goals were virtually unknown in the United States in 2001 and remain today poorly understood in and out of government.

While examining the implications of what they regard as the Bush administration's trampling on the law is an important objective of their book, the Frieds also seek to expand the debate about post-9/11 terror and surveillance policy beyond what they regard as the "weirdly legal terms" in which it has largely been conducted. To deepen and refine the issues, they pose, and pursue answers to, "basic human questions" implicated in our judgments about torture and surveillance. These questions concern our rights and responsibilities as citizens and human beings, and in the Frieds' book they culminate with an exploration of whether "our

leaders [are] bound by the same rules as the rest of us? Or because they are responsible for all of us, may they do things (and order things to be done) that the rest of us must not?" Even where their answers fall short, their book demonstrates that answers to the hard legal questions raised by 9/11 depend on an inquiry that is at once moral, political, strategic, and philosophical.

Take torture. The Frieds argue that it is not merely "intrinsically bad" but absolutely wrong — everywhere, always, and no matter what the circumstances. The use of violence to obtain information cannot be justified, they argue, when the police have good reason to believe a criminal suspect under their control has information that could lead to saving the life of a kidnapped child. The use of violence in interrogations cannot be justified even in ticking-time-bomb scenarios, in which a terrorist may possess information that might save tens or hundreds of thousands of lives or more. The Frieds respect but reject Alan Dershowitz's sober view that in extreme circumstances, when officials conclude that the balance of considerations favors using torture, they should be able to go to a court for permission. And while they share Richard Posner's opinion that since the use of courts would routinize torture and implicate the whole system in an immoral act, torture should remain illegal, they respect but reject his unblinking proposal that since torture may nevertheless be necessary in extreme circumstances, officials who order it should be prepared to face the legal consequences in court and, if extreme circumstances did warrant its use, judges should be prepared to show leniency.

The Frieds certainly understand that law is coercive. And they know that war, which can be necessary and lawful, is brutal. But torture — an act which, as a first approximation, is designed to elicit information or punish and which inflicts acute physical or mental pain in order to destroy the prisoner's will — in their view is different. The difference is grounded, they contend, in the sacred character of every individual human life.

According to the Frieds, torture is absolutely wrong because human beings are created in the image of God and torture desecrates the divine image in man. It is a bold step for these two philosophically minded professors to invoke the beautiful and tremendously significant teaching in the Bible's first chapter that God created man, male and female (as the Bible emphasizes, Genesis 1:27) in His image. Deriving an absolute prohibition from it, however, is beset with problems.

That human beings are created in God's image signifies, the Frieds contend, that in all human beings there is something "of a value and significance than which nothing is greater." Set aside the philosophical and theological problem that the image would seem to be of less value than the original. Strangely, given that they wish to rest an absolute prohibition on it, they deny that the notion that man is created in God's image rests on belief in God, since secularists "have similarly celebrated the sacredness of the human person." That's true but begs the question. At issue is whether secularists can coherently and convincingly affirm the sacredness, or transcendent value, of the human person while denying God's existence. The

words of Hamlet (Hamlet Act 2, Scene 2, lines 319–323) comparing man's actions to those of angels and man's understanding to that of God that they cite to support the idea that secularists can believe in the sacredness of individual human life may suggest the inescapability of religious belief for finding absolute value in humanity. But Hamlet's speech does nothing to show that it is coherent or convincing for nonbelievers to affirm the absolute significance of human life.

More to the point — if it was philosophical clarity rather than affirmation of a secular faith that they were after — would have been addressing Nietzsche's powerful argument that our modern morality of freedom and equality is a descendant of biblical faith, and collapses with the collapse of the belief in God. Instead, the Frieds weakly assert that "nothing is lost in the logic of our argument (though perhaps something of its force) if we substitute the humanist for the religious conception of this sacredness." But if the logic of the argument for an absolute prohibition on torture depends on the premise that human beings are composed of a divine element, then allowing that the premise is true only in a metaphorical sense substantially diminishes the force of the argument's logic.

Moreover, even if, as the Bible teaches, human beings are created in God's image, what justifies an absolute prohibition of torture? The Frieds accept that it is just to kill in self-defense, both for individuals threatened by criminals and for nations facing enemies. And they know that under the laws of war doctrine of proportionality, while innocent civilians must not be targeted, in the pursuit of legitimate military objectives soldiers may, if their actions are not excessive, incidentally injure or kill civilians without committing a crime. Why then, if the information gained might save hundreds of thousands, or hundreds, or tens of innocent lives, shouldn't an enemy combatant, in extreme and extraordinary circumstances, be harshly interrogated? Isn't placing an absolute prohibition on the use of violence in interrogations — declaring it not just morally and legally wrong but absolutely forbidden under all conceivable circumstances — tantamount to playing God?

In part, the Frieds' reply is that torture generally is absolutely wrong not merely because of the pain and humiliation inflicted on the victim, but because of the degradation to his humanity suffered by the torturer. To commit torture "is to become the agent of ultimate evil no matter how great the evil we hope to avert by what we do." The Frieds' powerful examination of the experience of torture will leave few doubting that it is vicious and cruel to the victim and corrupting to the torturer. And yet their argument arouses rather than stills concern that it would be an act of selfishness, in some cases monstrous selfishness, to permit a hundred thousand innocents to die terrible deaths — or perhaps one innocent to perish — in order to keep one's own hands clean and conscience clear.

In moving from the morality of torture to the conduct of the Bush administration, the Frieds show a good deal more appreciation of the moral and political complexity of the context in which administration officials acted than most of their academic colleagues, but on the question which requires the greatest care they cannot contain a propensity to rush to

judgment. They treat as uncontroversial, indeed they assert without the slightest legal argument, the conventional progressive wisdom that in authorizing enhanced or harsh interrogation the Bush administration committed torture and knowingly and clearly broke the law. Astonishingly, however, the lawyer and law professor father and the philosophy professor son never perform the elementary work of analyzing the deliberately ambiguous legal definition of torture.

In fact, one of the striking features of the Bush administration war effort rendered invisible by the Frieds' account was that even in adopting extreme measures it sought and obtained legal authorization. To be sure, the legal reasoning employed by Deputy Assistant Attorney General John Yoo and his boss in the Office of Legal Counsel, Assistant Attorney General Jay Bybee, in their 2002 memo which provided the initial legal basis for the use of enhanced interrogation techniques, including waterboarding, was overbroad and sloppy. But that is hardly the end of the story, or even the crux of the matter. Despite pressing for interpretations of the Constitution that gave the executive wide and arguably unprecedented latitude, by constantly seeking and receiving legal opinions and ultimately complying when its lawyers said no and when courts said no, the Bush administration demonstrated its determination to adhere to the law.

Accordingly, it is a grave mistake to present the Yoo and Bybee memo, which went so far as to suggest that under the Constitution the commander in chief could not be bound by torture law, as somehow emblematic of the Bush administration view. The Frieds bury in a footnote that Bush administration Assistant Attorney General Jack Goldsmith, who replaced Bybee as the head of the Office of Legal Counsel in 2003, withdrew the controversial Bybee and Yoo memo. Nor, in leveling the charge of lawlessness against the Bush administration, do the Frieds give sufficient consideration to the unprecedented involvement in military matters in the midst of war that the Supreme Court undertook after 9/11 through a series of cases concerning the rights of enemy combatants. And when, with the military campaign against al Qaeda and affiliates far from over, the Supreme Court ruled against it — in 2004 in Hamdi v. Rumsfeld and Rasul v. Bush, and in 2006 in Hamdan v. Rumsfeld — the Bush administration did not hesitate to comply with the Court's rulings, and thereby powerfully demonstrated a core respect for the rule of law.

As with harsh interrogation, the Frieds probe beneath the legal controversy over the government's massive efforts to glean information about terrorists' activities from the constant flow through cyberspace of immense amounts of electronic communications to bring into focus the human questions. We value privacy, they observe, because we fear that information about the personal details of our lives will be used, particularly by the government, to harm us, and because part of our notion of personal autonomy is that we and not others should decide what is publicly known about our lives. Laws aimed at securing individual freedom necessarily put a premium on safeguarding privacy, contend the Frieds, but unlike the prohibition on torture, the prohibition on invading privacy, they argue, is not absolute.

Invasions of privacy are a lesser evil in part because the boundaries of privacy are conventional. It is also partly because the Constitution's central promise of privacy (a term actually not found in the document) in the Fourth Amendment is limited: "the right of the people to be secure in their persons, houses, papers, and effects" is not protected absolutely but against "unreasonable searches and seizures" (emphasis added) and "probable cause" is sufficient to justify the issuance of a warrant that allows the police to examine intimate details of one's life. Although they are certain that the Bush administration's expansive interpretations of its authority to conduct warrantless electronic wiretapping violated the 1978 Foreign Intelligence Surveillance Act (fisa) — the Frieds again do not pause to examine the Bush administration argument that it operated within the law — the Frieds insist that drawing the boundaries depends on "precedent and practical wisdom" and "convention and historical practice."

Despite their condemnation of his decision to authorize harsh interrogations and their criticism of his electronic surveillance programs, the Frieds find no reason to doubt that in responding to 9/11 President Bush was moved by a "a sense of honor, the sense of an unexpected, awesome responsibility, and the imperative to do his duty." And like wartime Presidents Jefferson and Lincoln, Bush, the Frieds maintain, "thought that the crisis he faced required him to break the law." In 1807, Jefferson on his own authority spent money to fortify U.S naval vessels against British attacks, even though Article I, section 9, clause 7 of the Constitution makes clear that funds from the Treasury must be appropriated by Congress. And in 1861, at the outbreak of the Civil War, Lincoln unlawfully suspended the writ of habeas corpus, ultimately imprisoning between 10,000 and 15,000 Maryland citizens without due process of law. To make sense of executive power in emergency circumstances, and to vindicate Jefferson's and Lincoln's exercise of it, the Frieds provide a thoughtful discussion of seminal explanations that Aristotle, under the name of equity, and Locke, under the name of prerogative, give for the need when the law fails in its purpose to correct it by completing or even acting against it.

But according to the Frieds, Bush's conduct in the wake of 9/11 was "a radical departure from the behavior of Jefferson and Lincoln in a time of crisis." In contrast to Bush, Jefferson and Lincoln

both openly recognized the danger in their own actions, and acknowledged that they had violated the Constitution, seeking ratification by Congress after the fact. Bush and his administration insisted that the power of the president to violate the law was an entailment of presidential authority to act in his capacity as commander in chief in a time of war and emergency, allowing Congress only so much oversight as he could not avoid or evade.

Their own formulation, however, suggests that while there was an important difference between Bush and his great predecessors, the Frieds misunderstand it.

Unlike Jefferson and Lincoln, Bush insisted that he did not break the law. Indeed, in contrast to Jefferson and Lincoln, his administration went to considerable lengths to show that all of its actions were authorized by the Constitution, properly understood. To the detriment of the judicious analysis to which they laudably aspire and for the most part achieve, the Frieds throughout their book blur the difference between proceeding in defiance of the law and proceeding on the basis of controversial, dubious, or even weak but nevertheless recognizably legal rationales.

In their final chapter, perhaps as a result of their intervening reflections on the need for practical wisdom to correct the inherent limitations of law, the Frieds exhibit a certain anxiety about the moral and political implications of an absolute prohibition on torture. While they disapprove of the distinctive combination of good humor and cold-bloodedness with which Machiavelli in The Prince advises rulers "to learn how not to be good" and to use goodness or conventional morality according to the dictates of necessity, they recognize that the great Florentine had a point. Political responsibility brings dirty hands, tragic choices, and "a sadder but wiser prudence." The Frieds even permit themselves the daunting thought, at odds with their conclusion that torture is absolutely wrong and an ultimate evil, that "the most costly kind of moral heroism" may be a political leader's "ultimate responsibility to be prepared to lose even his soul in a cause that all can understand."

Contrary to their signature contention that torture is absolutely wrong, father and son seem to be acknowledging that even the firmest and finest principles must yield to the judgments of practical wisdom.

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