

Because It Is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror

Charles Fried and Gregory Fried

Introduction by Michael Boudin

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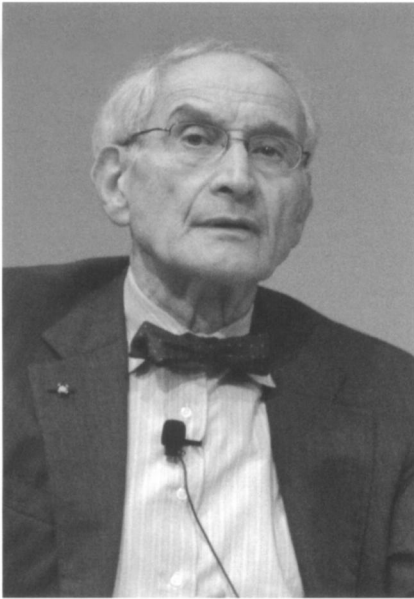
Judge for the United States Court of Appeals for the First Circuit and Fellow of the American Academy since 1999

It is a particular pleasure to introduce two very good friends, Charles Fried and Gregory Fried. Father and son have coauthored the book *Because It Is Wrong: Torture, Privacy, and Presidential Power in the Age of Terror*. Charles is a graduate of Princeton University, Oxford University, and Columbia Law School. His career is centered around Harvard Law School, where he has held two named chairs in succession, taught a range of subjects, including constitutional law, and written a succession of books and articles, some of which have a decidedly philosophical slant. From 1985 to 1989, he served as Solicitor General of the United States. From 1995 to 1999, he was a Justice of the Supreme Judicial Court of Massachusetts. He is also a distinguished appellate lawyer and was elected a Fellow of the American Academy in 1997.

Gregory graduated from Harvard College, obtained his M.A. and Ph.D. from the University of Chicago, and is currently Chair of the Department of Philosophy at Suffolk University. He has acquired a number of distinguished fellowships and has published many scholarly writings, including a book on the philosopher Martin Heidegger. He has not yet held a high government office, but at his age, neither had Charles.

The events of 9/11 and the ensuing war on terror have focused attention on how far governments and individuals can go to protect domestic and national security. These questions recur in every age, but the perspective from which they are answered is often different. The fashionable modern view is a utilitarian perspective, which asks whether the benefits outweigh the costs in any decision. With respect to torture, Charles and Gregory reject that perspective. They have mostly joint views, although there is a discrepancy or two. To begin our discussion, I have a question for the authors.

Because It Is Wrong examines immoral behavior by high government officials, focusing on the use of torture, the invasion of privacy, and instances in which presidents act illegally. All three issues are connected to the Bush administration, though it is not alone. Some might think that the gravest devastation of the last eight years was wrought not by illegal or unethical behavior, but by the Iraq War. The planning and execution of the invasion of Iraq are viewed as serious mistakes in judgment. Is bad statesmanship in security matters arguably much worse than illegality and immorality?



Charles Fried

Charles Fried is the Beneficial Professor of Law at Harvard Law School. He has been a Fellow of the American Academy since 1997.

The two problems are very different. Bad statesmanship is hard to avoid and frequently encountered. Grossly immoral behavior is something we can avoid. We know what should be avoided on moral grounds. We can be told what to avoid. On the other hand, to wag a finger at a president and say, “Be prudent, be wise,” is an injunction without a lot of content, however much we would wish that injunction be followed.



Gregory Fried

Gregory Fried is Professor and Chair of the Department of Philosophy at Suffolk University.

Bad statesmanship can do enormous damage to a nation, but we focus in our book on matters of principle, not specific imprudent acts. Undermining matters of principle, in my view, has a longer-lasting deleterious effect on the character of a nation than a single miscalculation in diplomatic or military affairs.

Michael Boudin

Could you summarize for the audience the main point of the book?

Charles Fried

We start by looking at the difference between behaviors that are illegal because they are wrong and those that are wrong because they are illegal. Torture, on one hand, is illegal because it is wrong. Unwarranted wiretaps and the surveillance of cyberspace, among other violations of laws such as the Foreign Intelligence Surveillance Act (FISA) that the Bush administration engaged in after 9/11, were wrong because they were illegal.

Many people are reluctant to admit that torture is an absolute prohibition. Absolute prohibitions make people nervous, even if the choices they make in their own lives adhere to such prohibitions. This tendency is shown by the fact that people who have this decent and correct instinct cast about for empirical arguments for why torture never works: it provides wrong answers more often than it provides right answers; the results are unreliable; or the same information can be obtained in other ways. Those arguments make me nervous because as empirical facts, they may be correct much of the time, but they are not correct all the time. When this is the case, the temptation to allow torture creeps in.

We look at the difference between behaviors that are illegal because they are wrong and those that are wrong because they are illegal.

Torture is a very old prohibition. In the Lieber Code of 1863 – the first code of conduct for war developed by any nation – President Lincoln affirmed that it is proper to kill combatants and admissible, if regrettable, that noncombatants be killed as a result of so-called collateral damage. What he stated with great clarity, however, is that torture and cruelty are absolutely forbidden. In recent years, the Catholic Church – that great torturer – has admitted a similar absolute pronouncement: in the encyclical *Veritatis Splendor* of 1993 from Pope John Paul II.

How do we make a case that something is absolutely wrong? In our book, we first make the argument graphically. We show a painting by Leon Golub, a stark, striking painting of someone being tortured. Then we discuss what happens in torture. But in the end, we understand that this is not an unanswerable argument. As my dear friend, the late political philosopher Bob Nozick said, “A good argument is not like a machine

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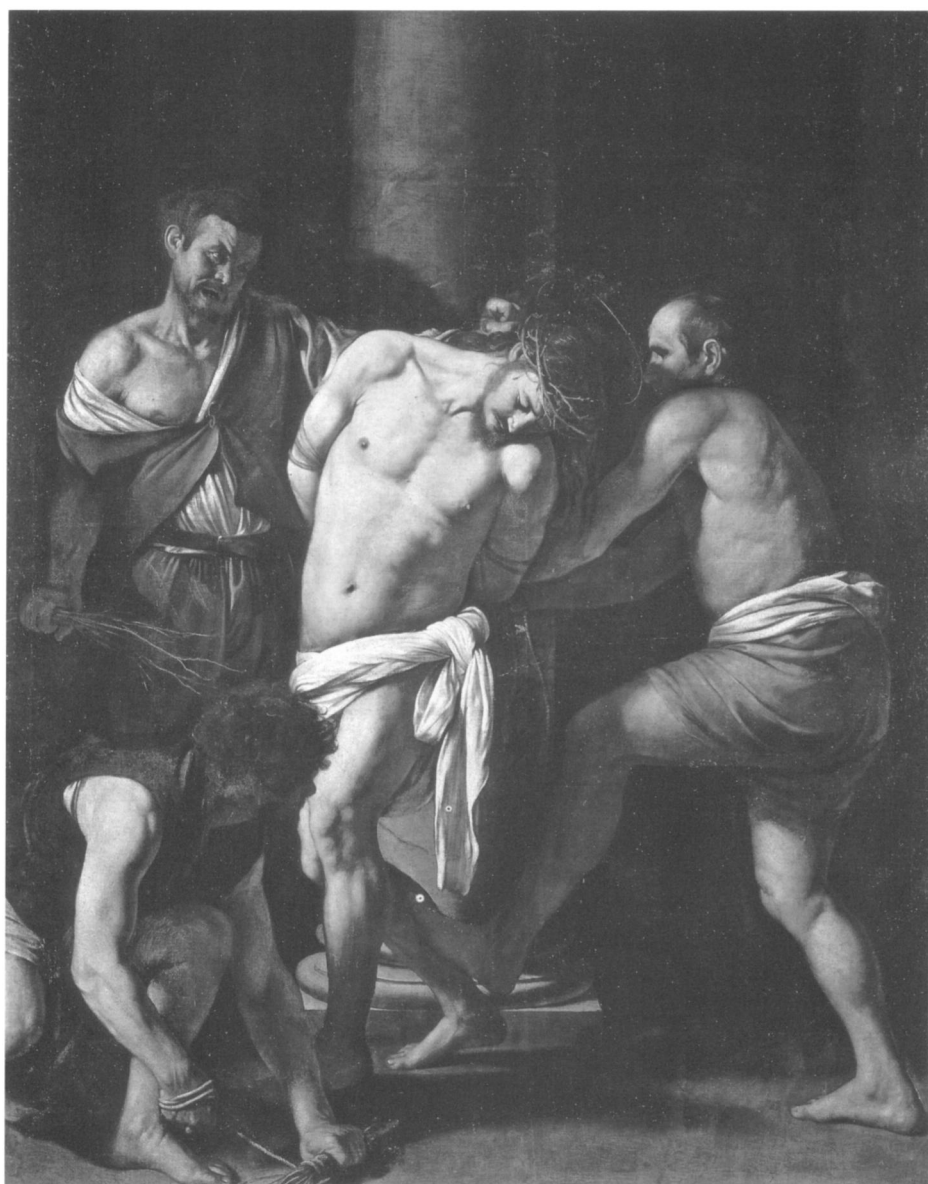
Torture is illegal because it is wrong. Unwarranted wire-taps and the surveillance of cyberspace that the Bush administration engaged in after 9/11 were wrong because they were illegal.

gun. It does not physically disable you from objecting." We do not try to machine-gun our audience into agreement.

What we do show is that the absolute prohibition is reasonable. It is in line with many of the beliefs that guide us; we do not think that everything has a price. Prohibition on torture is not a goal. In other words, we do not try to have as little torture as possible. Such a scenario is the premise of Lenin's argument: "Let's have a little torture today, so that we have much less torture in the future." Rather, the prohibition is a constraint. In the pursuit of goals, there are trade-offs, as the utilitarians like to say. The constraints are the borders – the limits – within which those goals are pursued. To quote my hero once again, Lincoln said, "As I would not be a slave, so I would not be a master." As I would not be tortured, so I would not be a torturer. Survival is not simply a matter of physical survival; what we survive *to be* matters. Respecting the absolute prohibition against torture describes the kind of human being that it is worth trying to be.

Gregory Fried

Although we state that, unlike torture, violations of privacy such as surveillance and eavesdropping are wrong because they are illegal, we are not making a purely relativistic argument about the latter. We believe there is a core value of privacy. Any decent society that respects fundamental principles will give its people some refuge of privacy to which they may retreat; that is a necessity of the human condition. However, the contours of that region of privacy must depend



Caravaggio (Michelangelo Merisi da), *Flagellation of Christ*. S. Domenico Maggiore, Naples, Italy. Photo credit: Scala/Art Resource.

somewhat on the traditions of the society in question as well as the level of technological progress in that society. A society without telephones, recording machines, or the Internet is very different than one that uses such technology. For a state to employ its investigative and prosecutorial powers, its duly appointed officers must have some capacity to invade the established zone of privacy. We believe, therefore, that while privacy is an important value, it is not an absolute one. In that sense, it differs from the prohibition on torture.

The third main subject of our book is executive authority. Our work on the first two topics led us to the realization that the world after 9/11, which has pushed us into these divisive questions on surveillance and torture, has also ushered in a crisis in how the American people relate to the concept of executive power. That crisis is embodied by some of the arguments the Bush administration made, particularly in its defense of torture. To what extent is any duly appointed officer of the law responsible for upholding the rule of law? In other words, is the rule of

law absolute in the same way that the prohibition on torture is absolute? Surprisingly, we argue in our book that the answer is no: officers of the law are sometimes required to break certain laws – not all laws, but some laws.

One example we use in the book is a story reported in *The Boston Globe* in early Winter 2008. A pregnant woman named Jennifer Davis had the misfortune of going into labor during rush hour, and there was a traffic jam along the route to the hospital. Her husband drove in the breakdown lane, which is against the law in the state of Massachusetts. They ran into one state trooper, who saw that Davis was in labor and waved them through. They ran into another state trooper, paused, and he waved them through. They ran into a third state trooper, who stopped them, saw that Davis was in labor, and then wrote them a ticket. The State Police of Massachusetts said the officer had made a principled decision based on his understanding of the rule of law. They were breaking the law; he had to write them a ticket.

Many people are reluctant to admit that torture is an absolute prohibition.

Aristotle said there is a principle of equity or reasonableness in the law, and that is because there is no such thing as a law that can anticipate all the possible conditions in which it could be applied. In the context of Jennifer Davis getting to the hospital, any reasonable agent of the law would have said that Jennifer should be waved through, and the law on driving in the breakdown lane ignored. Because it is impossible to write all conceivable exceptions into the law, people who have a responsibility to the law need to be able to judge when it should be ignored. But this principle can be dangerous, too, in a liberal democracy dedicated to the rule of law.

How do we get out of this bind? Presidents Jefferson and Lincoln provide good examples. In 1807, after the Chesapeake Affair in which a British warship fired on an American warship, Jefferson faced the real possibility that the United States would go to war with Great Britain in a very unprepared state. Therefore, he took it upon himself to requisition the funds to reequip our fortresses and navies. In doing so, he violated the Constitution, which states that only Congress has the authority to requisition such funds. He went to Congress, acknowledged his clear violation of the law, and asked Congress to ratify what he had done.

Abraham Lincoln acted similarly when he suspended habeas corpus, which only Congress can do, at the outset of the Civil War. He recognized this violation, and Congress ratified the suspension. In the same way, a police officer who not only waves a pregnant woman through but escorts her to the hospital, should tell his or her boss, “Chief, here are my badge and gun. If you think what I have done is wrong, accept my resignation.” Presumably, the chief would say, “Forget about it. Take your badge, take your gun, and get back to work.”

To repair the breach in the rule of law, those responsible must recognize their violations and seek reconciliation through the avenues available to them.

Charles Fried

We are left with a couple of dilemmas. What of the situation in which the president asks Congress to ratify his violations and heal the rule of law *nunc pro tunc*, as we lawyers say, and Congress does nothing? Congress ratified Bush’s violation of FISA, but it certainly did not approve torture. Indeed, at the insistence of Senator McCain, Congress reconfirmed its prohibition. What happens in this case?

Greg had a wonderful idea for handling this situation that I think is genuinely patentable. The president should say, “Look, we’ve got

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to fix this somehow, and you won’t do anything. I have drawn up my own articles of impeachment to present to the House Judiciary Committee.” If Congress then fails to act, he ought to relax. Bush presented the FISA case before Congress, albeit kicking and screaming. With respect to approving the use of torture, however, Bush sought no congressional authorization. How is this breach to be healed? Gregory has one view.

Gregory Fried

It is important to underline that these are extremely difficult questions. Not only is the act of torture a serious crime, but also, the theory of presidential power employed by the Bush administration is utterly contrary to fundamental American principles. Namely, the administration advanced the doctrine that in his role as commander in chief, the president is unable to break a law because no law can stand before a president seeking to secure national security.

The engagement in torture and the serious refutation of this country’s balance of powers deserve repudiation. In our system, crimes and faulty legal philosophies are repudiated through prosecution.

Charles Fried

I am convinced that there will be no prosecutions; indeed, there should not be. I have lived through Watergate, Billygate, Iran-Contra, the farce of Whitewater, and the Monica Lewinsky scandal, and history makes quite clear that in a functioning democracy, there is a very good reason why those who have ousted the persons before them should not try to put their predecessors in jail. If we started down that path,

then those in power might be tempted never to give it up because of the risks that would befall them. Or, they would await their chance to prosecute the next group. The process would create a terrible Orestian cycle.

We must remember that Vice President Cheney, Attorney General Gonzalez, and Secretary of Defense Rumsfeld, though they authorized terrible practices on an inadmissible theory, were not Hitler; they were not Pol Pot. They were trying to protect us against enemies who did not hesitate to torture and kill as many innocent people as possible. They made bad judgments, which must be repudiated. But if we pursued criminal prosecutions, they would not even begin until well into the second Palin administration! Furthermore, prosecutions might result in acquittals. Then where would we be? We have to find some other way. I think President Obama, who seems to share my distaste for criminal

To what extent is any duly appointed officer of the law responsible for upholding the rule of law?

prosecutions in this case, ought to issue a pardon to Rumsfeld, Cheney, and Gonzalez, stating that they have committed crimes but are being pardoned. There is a precedent for this idea; it is what Gerald Ford did for Richard Nixon, and it was an act of great wisdom and great courage. Ford's proclamation was the best case that could have been made against prosecution.

Michael Boudin

The central message of your book is that torture is absolutely wrong. Making the absolutist argument, you begin with the dramatic reproduction of a painting that shows fascist officers torturing a victim who is hung upside down, naked, in a cell; then you say the basis for your contention is not

aesthetic or emotional. You invoke the image of God and quote from the Scriptures; then you say the argument is not premised on a religious foundation. You reject, rather flatly, the suggestion that it is necessary to establish pragmatically that torture is always wrong. You believe it is wrong even if it is useful. What do you say to someone who maintains that your view is a personal intuition that he or she does not happen to share? How do you persuade that person?

Charles Fried

The chapter that discusses torture is directed at changing the reader's intuition, and it does that, first, evocatively, as in the examples you mentioned, but then rationally. The rational argument is that accepting moral constraints on one's choices in behavior is not unreasonable or unusual. Torture can easily be put on the list of things that most people would not do.

Gregory Fried

To return to my father's citing of Bob Nozick's wonderful line that an argument is not a machine gun, there is a point at which one cannot force people to share one's intuition. That said, the United States has had a long tradition of eschewing torture, from the Bill of Rights and its prohibition on cruel and unusual punishment to George Washington's proclamation after the Battle of Princeton that the Hessians, who had treated American soldiers with great cruelty, should not be treated with similar cruelty.

Of course, there have been departures from that tradition in American history. To the skeptic, I would pose the questions: What are the habits of thought and conduct that are necessary to a democratic republic? What instincts and intuitions are necessary to the people of a democratic republic? Repugnance against torture, I would argue, must be one of those instincts.

This is a quasi-Burkean argument in favor of the prohibition against torture. Torture is the practice of tyrannies. If we engage in

one of the most singular habits of tyranny, we should not imagine that the utilitarian calculus of rationalists will preserve us from it infecting all other branches of our civic life. Torture is a powerful venom; once it enters the system, it eats away at the fundamental habits and traits of a democratic people.

Is the rule of law absolute in the same way that the prohibition on torture is absolute?

Michael Boudin

Imagine a scenario in which a president is faced with a ticking nuclear bomb and a villain who says, "I've planted the bomb. It's going to go off in some large city. I know where it is, and you can't make me tell you." Couldn't a president who failed to water-board the villain, or let loose the people with pliers to tear out his thumbnails, watch the city explode and think that he or she had acted immorally?

Gregory Fried

The problem with ethics is that sometimes it puts us in a position where we do not want to be; it forces us to ask ourselves, what would I do in a situation like that? This scenario reminds me of some of the cast-away lifeboat cases of the nineteenth century, in which people ate one or more of the other people there. No one would say the castaways had done the right thing, but they might be excused. When people who are under enormous pressure and strain act wrongfully, they might still be pardoned on account of the circumstances. But this answer presents a problem for our argument because it seems to offer a get-out-of-jail-free card.

In this world, things pass away; but that does not mean we should not stand fast by our core principles. There are some fundamentals that define us as a nation, and I believe

that the prohibition on torture is one of them. We can give ourselves up in more ways than physical destruction. That's a hard thing to hold to in the moment of disaster, but I believe that's where we need to take our stance.

Question

We think of torture in terms of examples we can articulate and get our arms around, but there are circumstances in which our finite thinking needs to be replaced with infinite thinking – a magnitude of scale vastly beyond what we normally deal with. Suppose someone has invented an Earth-ending weapon. There is a prisoner in our midst, and we do not know for certain whether we will get the answer required to stop the bomb if we torture him. Under those circumstances, should the president insist on torturing the prisoner for the purpose of saving civilization? My answer is that he should.

Accepting moral constraints on one's choices in behavior is not unreasonable or unusual. Torture can easily be put on the list of things that most people would not do.

Charles Fried

The hypothetical is that there would simply be no world left afterwards? I want to say I am unmoved. I don't want to give the reasons that come crowding to my mind: What if just one continent was at risk? What if there were four hundred people who might have information? There are infinite possible circumstances. I'm inclined simply not to go there at all, and live with my answer. After all, the world will end, though almost certainly not in your scenario. Maybe it is best that the world not end with torture.

Question

Do you understand torture to mean deliberately inflicting tremendous pain on someone for a purpose, to get them to do something or expose information over a prolonged period of time?

Charles Fried

The chapter called "Bordering on Torture" confronts the difficult question of defining what constitutes torture. I will offer two answers. First, there are bound to be borderline questions. Take, for example, the question, "Are you bald?" Some people are clearly bald; some people are clearly not at all bald; and then there are the difficult in-between cases. Your question demands that we try to move beyond the ostensive definition. Second, I see a difference between torture and saying to a person who has been captured, "Look, if you don't help us, you will never see your wife and children and home again; you will be in prison for the rest of your life." I see a difference between addressing the will of the person and seeking simply to destroy it, so that he is no longer a person capable of thought or choice.

Question

Your argument seems to focus on torture that takes place once someone is captured. Now suppose you had to kill a person to stop him from shooting and killing another person. Then imagine that instead of killing the would-be shooter, you could incapacitate him by imposing physical pain for a certain period of time, perhaps for many hours. If you have the choice between killing the person to stop him from shooting someone or torturing him in that way, do you think it would be correct to kill him rather than torture him?

Charles Fried

Yes.

What are the habits of thought and conduct that are necessary to a democratic republic? Repugnance against torture, we would argue, must be one of those instincts.

Comment

I think it is torture to stop a person from killing someone else by inflicting terrible pain on him. Charles Fried says that this behavior also would be impermissible, but it doesn't strike me as impermissible.

Charles Fried

I think we do, in fact, acknowledge that distinction. In war, we have outlawed certain kinds of bullets because they cause terrible wounds that cannot be healed. We have forbidden poison gas on the same principle. In the early 1960s, philosopher Jack Rawls said his most awful experience in World War II was using flamethrowers to flush Japanese soldiers out of their cave. He said, "I'd rather encounter them in battle than do that."

Comment

The two paintings that you use as central illustrations in your book depict the kinds of torture that are not among the techniques we are worried about today, the ones that generated your book and this conversation. The United States did not use the rack and the screw. They used waterboarding, sleep deprivation, sensory deprivation, and solitary confinement for extended periods of time. The Bush administration never publicly took the classic position of "yes, it's torture, but it's permissible because we're trying to save the world." Rather, the consistent argument was that it wasn't torture. Waterboarding is very bad, but the UN Convention itself offers wiggle room, suggesting there is a category of cruel and inhumane methods of interrogation that are not torture.

Pictures of a doctor watching somebody being waterboarded would ask people to think about what actually occurred and who was responsible, particularly in terms of professional responsibility. Ultimately, we are talking about the CIA's use of so-called professional interrogators and whether that constitutes torture. If it does, then the fact that nobody has been prosecuted is horrific. But I also think it's horrific to say that torture is depicted by the images in your book, and so long as we are not doing that, it's merely cruel and inhumane and therefore subject to different modes of legal analysis.

Gregory Fried

Some of the chapters in Jane Mayer's book *The Dark Side* help explain the genesis of the actual procedures that the United States used. Methodologies like sensory deprivation, sleep deprivation, and forcing prisoners to stand for long periods of time were used by the Nazis, Stalin, and North Korea to induce insanity in their prisoners – to leave them gibbering mounds of flesh. These

Torture is a powerful venom; once it enters the system, it eats away at the fundamental habits and traits of a democratic people.

practices were all adopted by the people in the Bush administration as ways of softening up people to get them ready for interrogation. They have long been recognized as torture. After World War II we executed Nazis for using these “no blood, no foul” techniques.

The Jay Bybee memos of August 1, 2002, authorized not only waterboarding, which receives the most attention, but also stress positions and sleep deprivation, which were used by the Inquisition, the Gestapo, and Franco; exposure to extreme cold and heat; sensory deprivation, which was used on American citizen Jose Padilla, who went insane as a result; putting insects into cells

with prisoners; isolation in windowless cells for up to months at a time; forced nakedness, diapering, and slapping; the use of dogs to terrorize prisoners; and chaining prisoners to the floor and forcing them to defecate on themselves. According to a Senate Armed Services Committee report, those practices were all directly approved at the highest level. All that we see in the photos from Abu Ghraib are extensions of the techniques that those soldiers saw being used by duly appointed torturers. The techniques are incredibly insidious, and they constitute torture by the tradition of American law. Indeed, waterboarding was considered torture until the United States began to use it.

Charles Fried

The supposed benign quality of waterboarding is much belied by the fact that at least one person was waterboarded 187 times. The powers that were involved decided that they should use saline because the use of water risked causing the subject's death. The notion that waterboarding is not torture is unacceptable.

Gregory Fried

It has been documented that these other techniques, including exposure to extreme heat and cold and stress positions, have resulted in the deaths of people in our capture. Those are serious war crimes.

Charles Fried

I would like to come back to our rough definition of torture. Torture is that which does not seek to persuade the will, even in terms of what the mafia would refer to as “an offer you can't refuse.” It is the employment of techniques meant to destroy the will, to drive the person mad.

Question

I have criticized the premature use of technologies for brain reading. But is the mind a privileged island of privacy, or is it permissible to develop these technologies for obtaining knowledge from guilty parties as an alternative to torture?

Torture is that which does not seek to persuade the will. It is the employment of techniques meant to destroy the will, to drive the person mad.

Charles Fried

The Fourth Amendment, which embodies our commitment to privacy, prohibits only unreasonable searches and seizures and search or seizure without a warrant. This stricture assumes that even your private diaries can be searched and seized with judicial authorization. To me, that is different from the torture that destroys you.

Gregory Fried

I think there may be a point at which we will need a warrant to do brain scans. The caveat is that these methods are potentially so invasive, and so unaccountable – both in the sense of who has them and also in the sense of where they are being used and how we know they are being used – that the public could reasonably sense that our island of privacy is being shrunk to zero, even if it isn't really. The development of those techniques is extremely dangerous and would need careful monitoring.

If it could save us from the situation in which either the world disappears into a black hole or we get world-saving information from a prisoner, I think I would prefer to have the prisoner's brain scanned. Those yet undeveloped techniques, wedded to other techniques that have been proven by many sources, may be our best bet for avoiding such nightmare scenarios. ■

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