2012

# Right About Wrongs? A Review of Fried & Fried's Because It Is Wrong and the Implications of Their Arguments on the Use of Capital Punishment Book Review

William W. Berry, III

CONNECTICUT
LAW REVIEW

VOLUME 44 JULY 2012 NUMBER 5

## Book Review

# Right About Wrongs? A Review of Fried & Fried's *Because It Is Wrong* and the Implications of Their Arguments on the Use of Capital Punishment

WILLIAM W. BERRY III

*In their recent book,* Because It Is Wrong, *former solicitor general and Harvard Law professor Charles Fried and his son, Suffolk University philosophy professor Gregory Fried, begin with the principle that morality is essential to the proper understanding of how to assess the exercise of power by the President of the United States. In particular, the Frieds are interested in the use of presidential power in an extralegal manner. Considering the actions of the administration of George W. Bush, they focus on two specific areas: the use of torture and the use of surveillance during the War on Terror.*

*This Book Review asserts that, for the most part, Fried and Fried are "right" about "wrongs"—that is, their arguments concerning torture and surveillance generally are persuasive. Further, this Review explores the consequences of the Frieds' conceptualization of torture on the use of capital punishment in the United States. Specifically, it argues that the moral underpinnings of torture as "wrong" in all circumstances, to the degree that one adopts their normative framework, offer a compelling basis for the abolition of the death penalty.*

*In Part II, the Review evaluates Fried and Fried's claim that torture is "wrong" under all circumstances. Part III considers the Frieds' claim that surveillance is not always "wrong"—even when its practice is against the law. Finally, Part IV argues that if the Frieds are "right" about these "wrongs," then their reasoning leads to the fundamental conclusion that the death penalty is its own "wrong."*

## BOOK REVIEW CONTENTS



# Right About Wrongs? A Review of Fried & Fried's *Because It Is Wrong* and the Implications of Their Arguments on the Use of Capital Punishment

WILLIAM W. BERRY III*

## I. INTRODUCTION

*There is no right way to do wrong.*

—Unknown

It is often difficult to separate morality from law.[1] This is particularly true when attempting to define the outer boundaries of the law as applied to sovereigns and elected officials.[2] Even ancient monarchs, Machiavellians notwithstanding,[3] have traditionally relied on a presumed moral authority—perhaps divinely bestowed—to legitimize the governance of their kingdoms.[4] The importance of moral authority then, even for those

---

* Assistant Professor of Law, University of Mississippi; D.Phil., University of Oxford; J.D., Vanderbilt University; B.A., University of Virginia. The author would like to thank Ben Cooper and Ron Rychlak for their helpful comments and Kathleen Ingram for her excellent research assistance.

[1] *See* Shirley Robin Letwin, *Morality and Law*, 2 RATIO JURIS 55 (1989) (arguing that Plato, Aristotle, Aquinas, and Hobbes held a common notion of legal authority that was distinctively moral). Positivists, of course, would suggest that such separation is necessary when possible. *Id.*

[2] Indeed, the expansion of the executive branch of the United States federal government, particularly during times of crisis, has increasingly invited questions as to whether the invocation of some boundary, moral or otherwise, is necessary. *See, e.g.*, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998) (describing the authority of the President in times of war); Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 352 (2005) (discussing how power can easily become "susceptible to abuse"); Oren Gross, *Chaos and Rules: Should Responses to Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1024 (2003) (providing a description of what the author calls the "Extra-Legal Measures model" that "promotes, and is promoted by, ethical concepts of political and popular responsibility, political morality, and candor"); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 767–68 (2002) (providing examples of how the Constitution is silent during times of war or perceived national emergency); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 281 (1994) (describing the "interbranch coordinacy and independence").

[3] A Machiavellian ruler had little concern for pursuing morality unless it was to his political advantage. *See* NICCOLÒ MACHIAVELLI, THE PRINCE 58–60 (Harvey C. Mansfield trans., 2d ed. 1998) (providing a description of how a prince should lead his military that does not discuss morality at all).

[4] *See, e.g.*, Rodney Bruce Hall, *Moral Authority as a Power Resource*, 51 INT'L ORG. 591, 619 (1997) (discussing how the "moral authority of the monarch . . . has been transferred to the 'people'").

who "are the law,"[5] suggests that morality, on some core level, ought to shape the development of the law.[6]

In their recent book, *Because It Is Wrong*,[7] former solicitor general and Harvard Law professor Charles Fried[8] and his son, Suffolk University philosophy professor Gregory Fried,[9] begin with the principle that morality is essential to the proper understanding of how to assess the exercise of power by the President of the United States.[10] In particular, the Frieds are interested in the use of presidential power in an extralegal manner. Considering the actions of the administration of George W. Bush, they focus on two specific areas: the use of torture and the use of surveillance during the War on Terror.[11]

---

[5] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (Arthur Goldhammer trans., 2004) ("The French, under the old monarchy, held [it for a maxim] . . . that the king could never fail. When he did do wrong, they blamed his advisors.").

[6] *See* P. S. ATIYAH, PROMISES, MORALS, AND LAW 4–5 (1981) (discussing the role morality has played in contract law); LON L. FULLER, THE MORALITY OF LAW 42 (1964) (using the term "inner morality of law" to describe the relationship between morality and social life); Tony Honoré, *The Dependence of Morality On Law*, 13 OXFORD J. LEGAL STUD. 1, 2–3 (1993) (discussing the interconnectedness of morality and the law). The precise nature of the complex relationship between morality and law, a much argued and discussed topic, is clearly beyond the scope of this short Review. It is enough to establish, regardless of the wisdom of doing so, that the Frieds are traveling a well-worn path by using morality as a tool to determine the proper application of the law in the context of torture and surveillance.

[7] CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR (2010).

[8] Charles Fried is the Beneficial Professor of Law at Harvard Law School.

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

[10] FRIED & FRIED, *supra* note 7, at 23–25 (providing a brief overview of the debates on the war on terror and presenting the questions "how should we treat each other, what should we do to those who threaten us, and are our leaders bound by the same rules as the rest of us?").

[11] As in the Frieds' book, the term "War on Terror" here refers to the responses of the U.S. government to the 9/11 attacks, including the use of interrogation techniques and surveillance, in an attempt to protect the United States from another such attack. *Id.* at 22–25. Some have argued that this is a misnomer as it is not a true war. *See, e.g.*, RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW 247 (2004) (stating that, although it may not properly be labeled a "war," the conflicts between the United States and transnational terrorist organizations can indeed be categorized under the term "[e]mergency circumstances"); PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 21 (2003) ("Although . . . traditional characteristics of the term 'war' do not fit comfortably with its use to describe the aftermath of the attacks of September 11, that does not preclude stretching the concept if that has desirable consequences [particularly in the conflict between the United States and international terrorist organizations]."); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340–43 (2004) (arguing that, contrary to the Bush Administration's contention that the 9/11 attacks created a state of "war" between the United States and al Qaeda, no conflict between the United States and al Qaeda actually amounted to war); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOB. STUD. L. REV. 135, 140 (2004) (arguing that, based on the principles of international law, "a transnational group of terrorists is not engaged in 'armed conflict,' in the legal sense of the word, but is [instead] engaging in organized crime"). Others disagree. *See, e.g.*, RICHARD A. POSNER, PREVENTING

Employing a philosophical approach, the Frieds make a compelling case that torture is "wrong" under all circumstances,[12] but conclude that surveillance may be acceptable in certain exigent circumstances, even when the law prohibits such action.[13] The Frieds draw this distinction, in part, on the concept that torture *always* infringes upon core conceptions of human dignity, while surveillance does not.[14] As a result, for the Frieds, one cannot weigh possible extrinsic benefits against the "wrong" of torture,[15] while exigent circumstances may sometimes outweigh the "wrong" of privacy invasion.[16]

This Book Review asserts that, for the most part, Fried and Fried are "right" about "wrongs"—that is, their arguments concerning torture and surveillance generally are persuasive. Further, this Review explores the consequences of the Frieds' conceptualization of torture on the use of capital punishment in the United States.[17] Specifically, it argues that the moral underpinnings of torture as "wrong" in all circumstances, to the degree that one adopts their normative framework, offer a compelling basis for the abolition of the death penalty.[18]

In Part II, the Review evaluates Fried and Fried's claim that torture is "wrong" under all circumstances. Part III considers the Frieds' claim that surveillance is not always "wrong"—even when its practice is against the

---

SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 186 (2005) (noting that the struggle between the United States and international terrorism may, "like the Cold War, [be] plausibly described as war"); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2070 (2005) (arguing that the post-9/11 armed conflict is in fact a war on the basis that (1) an armed conflict exists whenever there is armed violence between governmental authorities and organized armed groups and (2) both Congress and President Bush treated the individuals identified in the AUMF as enemy combatants); Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT'L L. 423, 424 (2005) (adopting the position that the laws of war may apply to conflicts between states and international terrorist organizations, but only in modified form—and that the war between the United States and al Qaeda may, in time, fit into such a definition); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 213 (2003) ("[W]hatever the 'level of intensity' required to create an armed conflict, the gravity and scale of the violence inflicted on the United States on September 11 crossed that threshold.").

[12] *See* FRIED & FRIED, *supra* note 7, at 35–37 (arguing that torture is "absolutely wrong"—as opposed to "*intrinsically* bad"—in that it can never be right, regardless of circumstances or consequences, and regardless of whether the prisoner is innocent or guilty).

[13] *See id.* at 109 ("[T]o claim that [privacy] is absolute makes no sense: its boundaries are set by custom and law, and every intrusion on privacy might in exigent circumstances be justified if only certain limits—themselves circumstantial—are observed.").

[14] *See id.* at 25 (differentiating between torture and surveillance by arguing that the image of God makes torture "wrong," while surveillance may be "wrong" merely because it is "illegal").

[15] *See id.* at 36–37 (arguing that, because torture violates the "image of God," it is "*absolutely* wrong").

[16] *Id.* at 109.

[17] As discussed below, see *infra* Part IV, the Frieds briefly allude to this "undesired consequence" of their argument. FRIED & FRIED, *supra* note 7, at 76–80 but this review explores this conclusion in a deeper way.

[18] FRIED & FRIED, *supra* note 7, at 76–80.

law. Finally, Part IV argues that if the Frieds are "right" about these "wrongs," then their reasoning leads to the fundamental conclusion that the death penalty is its own "wrong."

## II. WHY TORTURE IS WRONG

The first half of the Frieds' book develops the argument that torture is morally wrong in all circumstances. They begin by highlighting Leon Golub's painting, *Interrogation I*, a visual depiction of torture, using it as a metaphor to illustrate the human reality of government interrogation.[19] They then explain that the debates concerning the use of torture and surveillance in the War on Terror "have gone on in weirdly legalistic terms . . . ."[20] As a different approach, they suggest that "a deeper set of questions" applies to the government's actions, including how Americans ought to treat one another, whether our leaders must abide by the same rules as the general public, and whether certain actions are permissible (and perhaps necessary) for the government to protect us.[21]

The Frieds begin by positing that the real issue is not whether torture is "wrong," but whether, as they claim, it is "absolutely wrong" in all circumstances.[22] Rather than focus on the issue as a weighing of competing interests—the dignity of the captured versus the safety of the country—the Frieds isolate the treatment of the prisoner as its own moral question. Putting aside any possible benefits of torture, the Frieds emphasize the deep level of human degradation involved in the torture of a prisoner.[23]

In doing so, they answer the "ticking time bomb" hypothetical,[24] as well as the narrow conceptions of permissible torture advocated by Alan Dershowitz[25] and Richard Posner,[26] by focusing on the intrinsic value of

---

[19] Indeed, the Frieds liken the painting's depiction of the interrogated man, hanging upside down and naked between two soldiers, to the "image of God . . . ." *Id.* at 22–25.

[20] *Id.* at 24.

[21] *Id.* at 25.

[22] *Id.* at 28–29 (emphasis omitted).

[23] *See id.* at 67–70 (citing examples of the physical, emotional, and psychological degradation involved in the torture of a prisoner).

[24] The "ticking time bomb" hypothetical posits the situation where an unknown bomb is set to explode in a short amount of time with catastrophic consequences. It asks whether torture is appropriate in such a circumstance given both the exigency of the situation and the magnitude of the impending harm. *E.g.*, Thomas P. Crocker, *Torture, with Apologies*, 86 TEXAS L. REV. 569, 570 (2008) (book review).

[25] *See* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGES 124–25 (2002) (discussing the limits of torture "approved" by the eleventh circuit).

[26] *See generally* Richard Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

human life.[27] Using religion as a tool to demonstrate their point, they acknowledge that the prisoner, as a human being made in God's image, constitutes "what is most sacred, most ultimate in value and goodness."[28] As a result, the Frieds make the ultimate moral judgment that there is no justification for torturing any person, as all persons are a reflection of "the image of God."[29] They explain: "Therefore, to make him writhe in pain, to injure, smear, mutilate, render loathsome and disgusting the envelope of what is most precious to each of us is to be the agent of ultimate evil—no matter how great the evil we hope to avert by what we do."[30] Thus, for the Frieds, nothing justifies the evil of torture.[31]

The important analytical connection the Frieds make is to develop the humanity of the prisoner, linking it to the humanity of the captors as well as the readers of their book. The prisoner is more than a terrorist—a criminal "other" that deserves (or at least has invited) harsh treatment based on his criminal actions. They thus demonstrate the humanity of the prisoner, portraying him as a person worthy of a minimum level of respect and dignity like anyone else, irrespective of his associations or past actions.

Finally, the Frieds bolster their claim that torture is always morally wrong by distinguishing it (as a philosophical matter) from other actions that "border" on torture, including killing,[32] war,[33] and the death penalty.[34] In doing this, the Frieds develop the underlying principle that makes torture wrong. The principle at stake is the fair treatment of a person's "soul"—the core of the human being with "plans, emotions, rational and aesthetic or spiritual capacities, and the capacity to form relations to other persons."[35] Torture, then, is wrong because it "distorts, destroys, or impairs the physical envelope that contains, enables, and expresses the person's soul."[36]

But killing is different from torture, according to the Frieds, because it contains an element of self-help, or possibly self-defense.[37] Taking a life to defend one's own life carries a different moral consequence than

---

[27] FRIED & FRIED, *supra* note 7, at 36–39.

[28] *Id.* at 48.

[29] *Id.* They explain that, to the extent that their claim depends on a religious view that God made man in His image, it is a narrow one, and that their claim could apply in a more secular context that highly values human life. *Id.* at 38.

[30] *Id.* at 48.

[31] *Id.* at 48–49.

[32] *Id.* at 55–58.

[33] *Id.* at 71–76.

[34] *Id.* at 76–80.

[35] *Id.* at 55.

[36] *Id.*

[37] *See id.* at 55–56 ("[W]e ask how . . . torture . . . can be absolutely wrong, but killing . . . might not be. The clue to an answer lies in the notion of self-defense . . . .").

torture.[38] While torture seeks to dehumanize, killing one's enemy, particularly in the hand-to-hand combat metaphor the Frieds employ, fits within broader conceptions of chivalry and honor.[39] The idea is that there exist certain rules of conduct that one may abide by that justify—perhaps even require—killing in certain situations.[40] In other words, where killing occurs, the victim often has some ability to fight back; the use of torture, on the other hand, depends on the helplessness (or perceived weakness) of the prisoner, who has no ability to halt the interrogation and fight back except by complying with the interrogator's demands.

The Frieds then expand this concept to modern warfare, again suggesting that killing others in war encompasses a morally acceptable component that torture does not.[41] Importantly, the concept that the Frieds embrace ascribes to a level of human decency in warfare, even if the enemy seeks to win at all costs—certainly the modus operandi of modern terrorists.[42] They explain:

> It is an argument that insists on the limits we must observe if we are to pursue our goals, protect our community and families, [and] seek to assure our own . . . survival *as* decent human beings. There is a kind of millenarian thinking that true believers *must* do anything to achieve their goal because after that goal is achieved, *then* is the time to speak of kindness, love, mutual respect: now they must fight in any way they can. And that is what we deny.[43]

The real question concerning the plausibility and persuasiveness of the Frieds' absolutist position against torture—and similar insistence of decency in the context of modern warfare—is whether their position is merely the product of ivory tower naiveté or is a realistic option in a post-9/11 world. Initially, their approach possesses the sentiment of waiting for the "Hollywood movie ending," where one knows that the good or moral

---

[38] *See id.* at 56 (in "situations in which the only reasonably available way to repel a potential lethal assault is to respond in kind[,] [m]ost people approve a deadly response . . . .").

[39] *See id.* at 56–57 ("The central image here . . . is that of hand-to-hand combat . . . . In a chivalric contest there is equality, respect, an observance of limits, even though the stakes are life itself.").

[40] *Id.* at 57 ("A person attacked defends himself even with deadly force because valuing his own life, and ensuring his own survival, accord with respect for humanity . . . .").

[41] *See id.* at 71 ("War is often justified by thinking of it as self-defense on a large scale . . . ."). C.S. Lewis has discussed the moral acceptability of killing in the context of war. C.S. Lewis, *Why I Am Not a Pacifist*, *in* THE WEIGHT OF GLORY (Walter Hooper ed., 1980).

[42] *See* FRIED & FRIED, *supra* note 7, at 62 ("[T]he fight is so desperate that one side is willing to sacrifice the lives and dignity of its own soldiers taken prisoner, or one side is eager to see its whole population—the young, the old, the sick and disabled—as enlisted in its cause . . . .").

[43] *Id.* at 62–63.

will ultimately prevail. Many, including the Bush administration, seemed to think that without torture, employing such a "Pollyannaish" perspective would result in disaster, or at the very least, compromise the security of American citizens (and perhaps the country as a whole).

Upon deeper examination, such a critique misses the greater moral claim that the Frieds have advanced. For them, the price of abandoning our moral compass to protect against potential future harms is too high, regardless of the benefits it might achieve.

Their position is persuasive on two accounts. First, to adopt the moral compromise of win at all costs warfare—and its corresponding reliance on torture and similar dehumanizing techniques—would require America to embrace "the logic of the terrorists."[44] Abandoning the most basic of moral values—to treat other human beings with honor and decency—has the effect of dehumanizing the United States as a people. In other words, if America becomes the equivalent of terrorists, it may lose something more sacred than any harm it may have escaped.

Second, the use of torture requires the trade of an absolute—moral character and honor of the "soul" of other humans—for a hypothetical benefit that may or may not prove to impede additional harms. When torturing an enemy, there is no way to know whether there really is a "ticking time bomb" or some other impending disaster to avert. And even if the torture works, it is not always apparent that the information was *the* silver bullet that averted the awaiting harm. Thus, a decision to torture will always dehumanize both the victims and those administering the torture; it may or may not avoid future physical harms.

Despite the risks of not using torture—that potential intelligence about an impending attack on the United States may be lost—the Frieds seem right about torture being absolutely wrong. To compromise the moral principle of honoring the dignity and "soul" of *all* human beings may be simply unacceptable.[45]

## III. WHY SURVEILLANCE IS (NOT ALWAYS) WRONG

Surveillance, for the Frieds, is qualitatively different from torture.[46] They argue that privacy, by its very nature, is a less important value than

---

[44] *Id.* at 62.

[45] This concept is, of course, also at the heart of the Geneva Convention's prohibition on torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 24841; *see generally* THE PHENOMENON OF TORTURE: READINGS AND COMMENTARY (William F. Schultz ed., 2007); TORTURE: A COLLECTION, *supra* note 26.

[46] *See* FRIED & FRIED, *supra* note 7, at 83–86 (discussing government's use of surveillance and acknowledging the necessity to balance the need for such actions against the protection of privacy rights).

the human dignity upon which torture infringes.[47] They make this argument despite the obvious parallel between the overt impropriety of the two types of government infringement: torture and violation of privacy. At its core, privacy infringement, like torture, violates the right to be free from government.

To make their case, Fried and Fried probe the origins of the concept of privacy, both etymologically and philosophically. Interestingly, they find at the heart of the concept of privacy a desire to hide something—such that the "right" to privacy paradoxically "begin[s] with a wrong."[48] They explain:

> Now, while none of this directly suggests transgression, it does point to a suspicion, lurking in the trails of language itself, that what goes on in private may run counter to the public good and the common interest. Might privacy have its roots in our injustice, or in something like our sinfulness?[49]

The implications of this discovery are central to the connection between torture and surveillance that Fried and Fried draw. Violations of bodily sanctity through torture and of personal privacy through surveillance share the same purpose: "to break through the barrier that shields us from the gaze of others, to get at facts about us or knowledge we are not ready to display—or at least not to everyone, or maybe just not to the public authorities."[50]

Unlike torture, the Frieds explain, surveillance and privacy give rise to competing fears: the fear of persons and the fear of government.[51] The fear of bad actors cautions against according too much privacy, as safety depends in part on acquiring information needed to prevent crime. On the other hand, the fear of government demands protection of privacy to prevent arbitrary governmental prosecution of individuals. As Fried and Fried suggest,

> [w]e have all done things, said things, certainly thought things that taken out of context, or even in context, might

---

[47] *Id.* at 101 ("[P]rivacy is undoubtedly an important value . . . . But it is not like torture. Torture is intrinsically evil; privacy both shields against evil and shields evil, it is constructive and destructive. Torture is absolutely wrong. Nothing like that can be said about violations of privacy.").

[48] *Id.* at 90.

[49] *Id.* Indeed, the Frieds cite to the Genesis story of Noah's sons covering his naked body in his drunkenness as an example of the connection between privacy and the desire to hide one's sin. *Id.* at 91.

[50] *Id.* at 92.

[51] *Id.* at 96.

> be interpreted as signs of crime or of the intention to commit a crime. We all own things that might testify against us. A book, a letter, a souvenir, or some casual artifact might cast our associations, our thinking, our motives in a dark light. Pry deep enough, and there will be in all of our personal histories something that could tie us to a crime, whether rightly or wrongly.[52]

The idea that "[h]uman beings should never stand absolutely naked before human authority" provides what Fried and Fried identify as the first component of justification for protection of privacy.[53]

The second component is the value of privacy in "protecting our liberty to be whomever we wish to be."[54] In other words, privacy allows us to "maintain authority over who we *are* and *will be*," which the Frieds intimate is "perhaps the deepest liberty of all."[55] Thus, privacy protects the ability to choose one's persona and the ability to employ multiple personas in different contexts and with different people.

Unlike the concept of the human soul, which Fried and Fried want to protect irrespective of the costs in the torture context, they acknowledge limits on this "right to privacy."[56] While finding both the underlying values of freedom from government oppression and the freedom to develop persona as important values, the Frieds argue that, unlike in the torture context, it is acceptable to infringe upon such rights in exigent circumstances.[57]

To justify the Bush administration's use of surveillance, though, the Frieds must address a second hurdle—the illegality of the program itself.[58] Not only did the Bush administration invade the privacy of American citizens by using wiretapping and other monitoring techniques, but it also did so without the approval of Congress, a warrant from a federal judge, or

---

[52] *Id.* at 97.

[53] *Id.* at 98.

[54] *Id.* at 99.

[55] *Id.*

[56] *See id.* at 101–04 (discussing the right of privacy as delineated in the Fourth Amendment and how the right can be defined by a "reasonable expectation").

[57] *See id.* at 101 (explaining how the right to privacy is not absolute because "the boundaries and landmarks of privacy are largely conventional").

[58] In this context, the Bush administration's argument for its illegal use of surveillance programs is consistent with Cicero's maxim, "*Inter arma silent leges*," translating into "[i]n time of war, the law is silent," which has been widely cited in recent years. Cicero, *Pro Milone*, *quoted in* Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting); *see also* REHNQUIST, *supra* note 2, at 224; QUINCY WRIGHT, A STUDY OF WAR 863 (2d ed. 1965) (citation omitted); Aharon Barak, Foreword, *A Judge on Judging: the Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 150 (2002); Bay, *supra* note 2, at 336; Lobel, *supra* note 2, at 767.

disclosure to the subjects of their surveillance.[59] This raises two issues: the illegality of the government conduct and the invasion of privacy by the government where citizens had a different expectation.

In their analysis, the Frieds find that neither of these issues was problematic enough to condemn the government's actions under the circumstances.[60] To support their view, Fried and Fried cite the historical precedents of Abraham Lincoln and Thomas Jefferson.[61]

Abraham Lincoln suspended the writ of habeas corpus during the Civil War.[62] Lincoln's unilateral act was illegal, particularly as Congress did not have the opportunity to ratify it.[63] Fried and Fried explain that the exigent nature of the circumstances warranted Lincoln's actions, despite their illegality.[64]

Similarly, Thomas Jefferson used his own authority to spend money on warships and improve the Navy with the War of 1812 impending.[65] Jefferson did not get Congressional approval to support his expenditures.[66] Again, the Frieds claim that this was a situation where the emergency justified the illegal behavior of the President.[67]

Analogizing to these two incidents, the Frieds suggest that after 9/11, when the Bush administration faced similar exigent circumstances, its decision to act illegally was acceptable.[68] In other words, when emergencies arise, the President and his administration can legitimately behave in illegal ways, as Lincoln and Jefferson did during their presidencies.

Further, the Frieds argue that the benefit of the invasion of privacy (the wiretapping) outweighs the cost of the invasion of privacy.[69] For the

---

[59] *See* FRIED & FRIED, *supra* note 7, at 119–20 (discussing the illegality of Bush's post-9/11 surveillance program); *see also* Michael B. Farrell, *Bush Wiretap Program Gets Rebuke from Federal Judge*, CHRISTIAN SCI. MONITOR (Apr. 1, 2010), *available at* http://www.csmonitor.com/USA/2010/0401/Bush-wiretap-program-gets-rebuke-from-federal-judge ("In the wake of 9/11, President Bush authorized a controversial program that allowed US citizens with suspected terrorist links to be wiretapped without a warrant.").

[60] *See* FRIED & FRIED, *supra* note 7, at 112–14 (explaining the Framers believed that "honor . . . demanded that they act with seriousness of purpose for the sake of a common cause that is genuinely noble" and, as a result, President Bush acted with "a similar sense of honor" in his response to 9/11).

[61] *Id.* at 113 ("Like other presidents before him—Jefferson, Lincoln, Franklin Roosevelt, but especially Lincoln—[Bush] thought that the crisis he faced required him to break the law.").

[62] *Id.* at 114–16.

[63] *Id.* at 115–16.

[64] *Id.* at 114–15 (describing how the United States was in a "precarious position" and that Lincoln found it necessary "to raise an army and to intern rebel sympathizers" despite acting "against the letter of the Constitution and his oath as president to 'take care that the laws be faithfully executed'").

[65] *Id. at* 117.

[66] *Id.* at 117–18.

[67] *Id.* at 118, 148–49.

[68] *Id.* at 113–14, 148–49, 158–59.

[69] *Id.* at 86, 96, 119–20, 137 (arguing that the right to privacy is not absolute and that eavesdropping can be justified by the government's need for information to protect the people).

Frieds, listening to phone calls for a specified purpose does not unduly infringe on privacy where the benefits are amply significant.[70]

While the Frieds seem convinced that the use of illegal wiretapping by the Bush administration rose to the level of exigent circumstances, their narrative is not as convincing on this account. Unlike the level of detail included in their underlying philosophical positions, the Frieds fail to connect the dots between the examples of Lincoln and Jefferson and the Bush administration. Given the differences in technology between the eras of the earlier presidents and President Bush as well as the gap in available means of surveillance, it is difficult to make an apt comparison.

Also, despite having the examples of Lincoln and Jefferson, we should be hesitant to encourage our presidents, who manage an ever-expanding executive branch, to unabashedly behave illegally. Congress ought to play some role in providing legitimacy and legality to such executive endeavors.

The Frieds do seem "right" that the consequences of an invasion of privacy, particularly if it narrowly tailors the wiretapping grant, are far less than those of torture. In other words, the invasion of privacy did not threaten the two strands of privacy—personal autonomy and freedom from government—in such a way as to outweigh the potential benefits of using such information in the War on Terror.

## IV. "WRONGS" AND THE ABOLITION OF THE DEATH PENALTY

As indicated by Fried and Fried, their philosophical argument that torture is "absolutely wrong" in all circumstances has important implications for the use of the death penalty in the United States.[71] This section expands upon their brief ruminations on the subject, and ultimately argues that if torture is "absolutely wrong" in all circumstances, so, too, is the death penalty. In fact, the case the Frieds make with respect to the immorality of torture is even stronger when applied to the death penalty.

With torture, the Frieds focused on the act of interrogation and its dehumanizing effect on the prisoner.[72] As mentioned above, such action arguably exceeds the moral harm caused by killing, because in most situations killing involves the potential for self-defense on the part of the victim, or results from the self-defense of the killer.[73] The helplessness of the prisoner, then, is in many ways at the heart of the moral "wrongness" of torture.

As mentioned by the Frieds, the modern use of lethal injection

---

[70] *Id.*

[71] *Id.* at 76.

[72] *Id.* at 64–70.

[73] *See supra* notes 37–39 and accompanying text.

possesses eerie similarities to the use of torture in that it depends on a helpless prisoner.[74] It is the *process*—as much as the killing itself—that gives rise to the problematic moral nature of capital punishment.

First, the psychological damage, documented by several scientific studies, of being on death row for many years is certainly its own class of torture.[75] It is not only the cruelty of having to know the date of one's death; it is also the complete isolation from other human beings during that time.[76]

Second, the use of lethal injection is a direct attack on the body and person of a defenseless individual.[77] This method of using force seems similar in many ways to the use of force to elicit confessions in its exertion of raw physical power over the prisoner.[78]

The arguments in favor of the death penalty parallel those in favor of torture—that is, the benefits of execution outweigh whatever cost in human dignity that capital punishment may inflict. Given the widespread availability of life without parole, state-sanctioned killing does not achieve a result different from a life-without-parole sentence: the result is still death in the custody of the state.

To assess whether the death penalty, like torture, is absolutely wrong, one must also consider, then, the purposes for the death penalty. This is where the case for the "wrongness" of capital punishment becomes even more compelling than the case for the "wrongness" of torture.

There are three possible justifications for the use of capital punishment: (1) the offender "deserves" it (retribution); (2) use of the punishment will deter others from committing capital crimes (deterrence); and (3) the use of the punishment will incapacitate a dangerous individual and keep society safe (future dangerousness).[79] The future dangerousness rationale, though, is dubious given the availability of life without parole.[80] Further, no one has conclusively established that the death penalty actually

---

[74] FRIED & FRIED, *supra* note 7, at 77–78.

[75] *See, e.g.*, Amy Smith, *Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 242–45 (2008) (discussing death row syndrome and reviewing studies of the experiences of death row inmates).

[76] *See id.* at 244–45, 248–52 (discussing the psychological effects of death row confinement and the possible causes of these effects).

[77] *See* FRIED & FRIED, *supra* note 7, at 77–79.

[78] *Id.*

[79] *See* ARGUMENTS FOR AND AGAINST THE DEATH PENALTY, MICH. ST. UNIV. & DEATH PENALTY INFO. CTR. (2000), *available at* http://deathpenaltycurriculum.org/student/c/about/arguments/arguments.PDF.

[80] *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 903–07 (2010) (explaining why life without parole keeps society sufficiently safe from criminal offenders and therefore "eliminates dangerousness as a valid reason for execution").

deters crime,[81] particularly with the typical ten-year gap between sentencing and execution.[82]

Therefore, if one seeks to measure the efficacy of capital punishment by weighing its positive benefits against the clear moral degradation and dehumanization that it requires, the question then becomes what benefits the concept of retribution offers. The most logical response is that execution is the method by which the state achieves justice—avenging the death of one of its citizens.

While retribution can weigh punishments as a relative matter, it does not proscribe a particular punishment for a particular crime.[83] A life-without-parole sentence—a sentence to die in prison—may accord a prisoner his "just deserts" for a murder. Indeed, justice may never require the use of the death penalty to satisfy the goal of retribution. Depending on one's philosophical perspective, then, the death penalty, unlike torture, may never offer a tangible benefit.

A second important aspect of retribution is the communication function it serves. The state-sanctioned killing of an individual communicates, in theory, the censure of the society through the hard treatment (and death) imposed upon the offender.[84] But the

---

[81] *See* ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 214–18 (3d ed. 2002) (reviewing numerous studies of the death penalty's effectiveness in deterring violent crime); *compare* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705–07 (2005) (arguing that capital punishment has a deterrent effect and may be "morally required" to prevent a significant number of future murders), *with* Carol S. Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 754–56 (2005) (critiquing the argument that the death penalty is morally justified).

[82] *Time on Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/time-death-row (last visited Mar. 14, 2012).

[83] ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 13 (2005) (stating that the explanation for punishment is "largely metaphorical" and "[p]unishment 'requites' or 'pays back' the wrong, but it is not made clear how or why it does so; or punishment 'undoes' the unfair advantage obtained by the wrongdoer, but the modalities of this undoing remain unexplained").

[84] The U.S. Supreme Court has addressed the importance of this communication function. Panetti v. Quarterman, 551 U.S. 930, 958–59 (2007) ("Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole."); *see also* Dan Markel, *Executing Retributivism, Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1184–85 (2009) ("[T]he punishment—the censure that appears through the coercive setback—communicates to offenders that they are autonomous agents capable of responsibly choosing between lawful and unlawful actions, and the reason the defendant is being punished is because he can and must be held responsible for his freely chosen actions.").

communication itself, as Fried and Fried indicate, is troubling in the same way that torture is unsettling.[85] The prisoner, much like the one in the Golub's painting, is helpless, strapped to a cot with an IV attached to his arm. Like the tortured prisoner, the condemned prisoner is at the mercy of his captors, who inflict harm upon him.

If one views the condemned prisoner in the same way that the Frieds view the tortured prisoner, the prisoner is not an enemy of the state, but an individual with dignity and humanity.[86] In other words, the killing of a defenseless human being, at least through the Frieds' analytical lens, is also the murder of human dignity. Certainly this communication undercuts whatever public satisfaction the retributive censure might achieve. Indeed, the nature by which states conduct modern executions—through private, hidden rituals designed to mask the pain inflicted on the condemned—suggests that the death penalty fails to achieve the desired retributive communication.[87]

The Frieds' arguments for the narrow exceptions to the "wrong" of privacy likewise further the case for death penalty abolition. As mentioned above, privacy protects both against (1) the "wrong" of the arbitrary prosecution and (2) the "wrong" of interfering with one's personal development. Neither of these considerations lends support to the use of the death penalty. If anything, they counsel against its use.

There are no corresponding "wrongs" that occur when a capital offender receives a life-without-parole sentence rather than the death penalty. Unlike the violation of privacy, there are not extenuating circumstances that make the use of the death penalty more likely to be acceptable or appropriate.

If anything, there is the potential for additional wrongs *when states use the death penalty*. Both the concerns of privacy invasion are present, but on a much larger scale.

Arbitrary prosecution is not simply a worry; it is a reality. Studies demonstrate that such improper criteria as the location of the crime,[88] the

---

[85] *See* FRIED & FRIED, *supra* note 7, at 77–79 (comparing torture to capital punishment because the prisoner is unable to defend himself); *see also supra* notes 37–39 and accompanying text.

[86] *See* FRIED & FRIED, *supra* note 7, at 48 ("The human form has a worth and divinity we do not want our action, our intelligence to be directed at defacing."); *see also supra* note 29 and accompanying text.

[87] David Garland eloquently explores the paradoxical nature of the use of capital punishment in the United States at the beginning of the twenty-first century. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010).

[88] This reality is true both on an interstate and an intrastate level, as the state and county are both significant determinants of one's likelihood of receiving the death penalty. *See, e.g.*, Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 314, 316–18 (2010) (demonstrating the significant variation across various counties in several states (Pennsylvania, Maryland, New York, Ohio and Tennessee) in how prosecutors pursue the death penalty).

race of the victim,[89] and the race of the offender[90] are all predictive of whether an offender is likely to receive a capital sentence.

Finally, comparing the consequences of an invasion of privacy to receiving the death penalty demonstrates why the exceptions made for illegal government invasion of privacy should not apply even to the legal use of capital punishment.

Put simply, death is different.[91] While the costs of privacy invasion are not trivial, the finality of death warrants a higher level of justification. Indeed, the concept of privacy clearly does not undermine the idea that the death penalty is immoral *in all circumstances*.

## V. CONCLUSION

This Review has considered the Frieds' arguments concerning the "wrongs" of torture and surveillance in their recent book, *Because It Is Wrong*. In finding that they are, for the most part, right about their characterization of these wrongs—torture as an absolute wrong and surveillance as a wrong with exceptions in exigent circumstances—this Review then considered the broader implications of these views on the use of capital punishment in the United States.

This Review thus determines that the implication for the death penalty using the Frieds' approach to torture is the conclusion that capital punishment is "absolutely wrong" in all circumstances. Like torture, the degradation of a human being at the hands of the state, as the Frieds claim, simply causes the state to mirror the very behavior that resulted in the condemnation of the offender.

Finally, there remain other implications to explore through the lens that the Frieds offer in terms of the use of government power against criminal offenders. Indeed, as the Court continues to consider the scope of the Eighth Amendment with two cases in the current term,[92] it is worth exploring the degree to which the Frieds' argument against torture might also apply to life-without-parole sentences for juvenile offenders.

---

[89] *See, e.g.*, DAVID BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 141–88 (1990).

[90] *Id.*

[91] The Supreme Court's Eighth Amendment jurisprudence has long emphasized this concept. Justice Brennan's concurrence in *Furman v. Georgia* apparently is the origin of the Court's death-is-different capital jurisprudence. 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

[92] Two cases argued on March 20, 2012 will discuss the death penalty as applied to fourteen-year-olds. Miller v. Alabama, 63 So. 3d 676 (2010), *cert. granted* 132 S. Ct. 548 (2011); Jackson v. Hobbs, 2011 Ark. 49 (2011), *cert. granted* 132 S. Ct. 548 (2011).