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**Criminal Law and Philosophy**  
**Professor Waldron Goes to Washington**  
--Manuscript Draft--

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| <b>Abstract:</b>                                     |  |

*Professor Waldron goes to Washington*<sup>1</sup>

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6 The relationship between political philosophy and ‘real world’ politics has never been an easy one: it  
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8 all got off to a shaky start in around 399 BCE when Socrates was found guilty of corrupting the youth  
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10 and duly sentenced to death. He drank the hemlock – some say in obedience to the unjust law which  
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12 had condemned him – and the scene was set for a series of sulks and squabbles that has continued,  
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14 off and on, for over 2,000 years.  
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22 Of course, the precise character of the quarrel between political philosophy and politics has been  
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24 different at different times, but the bone of contention has remained roughly the same through the  
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26 ages, and it is that philosophers are too high-minded and unworldly to have much to contribute to  
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28 the realities of political life. Moreover, when, like Socrates, they do try to contribute to political life,  
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30 they almost invariably make things worse. So, while Karl Marx famously complained that  
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32 ‘philosophers have only interpreted the world in a variety of ways; the point, however, is to change  
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34 it’<sup>2</sup>, others have offered thanks that, on the whole, philosophers do confine themselves to  
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36 interpreting the world rather than changing it, and have noted that their (the philosophers)  
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38 interventions in politics have all too often been disastrous<sup>3</sup>.  
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48 Moreover, there has been widespread agreement that the reason philosophers are either ineffective  
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50 or damaging is because, in their interventions, they focus on high moral principle and are neglectful,  
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52 or ignorant, of political reality. Machiavelli is, of course, the most famous critic here. In *The Prince* he  
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56 <sup>1</sup> My title is borrowed from that of Frank Capra’s 1939 film, *Mr Smith Goes to Washington*. The film tells of the  
57 fate which befalls a young man of high ideals and firm moral principles when he enters the world of Washington  
58 politics. I hope my reasons for choosing this title will become clear as the essay progresses.

59 <sup>2</sup> *The German Ideology* Thesis 11.

60 <sup>3</sup> See, for example, Plato’s forays into practical politics at Syracuse.

1 is adamant that adherence to moral principle will spell political disaster and that if a man wishes to  
2 succeed in political life he must 'learn how not to be good'. Sticking by the principles of morality will,  
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4 Machiavelli insists, do nothing but harm and will serve only to bring the ruler to grief<sup>4</sup>.  
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10 Against this background of both scepticism and cynicism about the contribution political  
11 philosophers can make to politics, Jeremy Waldron shows considerable courage in offering a  
12 collection of articles entitled *Torture, Terror and Trade-Offs*, which deals with political responses to  
13 9/11, and which comes with the ambitious subtitle 'Philosophy for the White House'. Whatever the  
14 reservations of others, Waldron clearly believes that philosophy can illuminate the real world of  
15 politics post 9/11 and in justifying this claim he writes:  
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29 *We should not expect the threat of terrorist attack to evaporate, nor the need for*  
30 *precautions against attack, whether large or small. And if precautions continue to be*  
31 *necessary, then vigilance is also needed to ensure that the precautions we take are regulated*  
32 *by moral, legal, and constitutional constraints. It would be arrogant to regard the positions*  
33 *taken in these essays as the final word on these constraints. There are other opinions around*  
34 *and they are certain to make themselves heard. Still, it is important to bear witness to certain*  
35 *considerations that, as events have shown, are always in danger of getting lost in the rage*  
36 *that afflicts a country when its citizens come under attack: the inviolability of the individual,*  
37 *the complexity of security, the abomination of torture, the importance of humanity and*  
38 *dignity in our response to terrorism, and above all the integrity of law*<sup>5</sup>.  
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58 <sup>4</sup> Machiavelli, *The Prince*, Harmondsworth, Penguin, 1961.

59 <sup>5</sup> *Torture, Terror and Trade-Offs: Philosophy for the White House*, Oxford University Press, Oxford, 2010,  
60 p.19.  
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1 For Waldron, and as this quotation demonstrates, the role of the philosopher is to offer a calm  
2 reminder of the importance of moral principle to those who, in the heat of political battle, may be  
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4 tempted to act impetuously and to depart from important moral principles.  
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10 But if Waldron shows courage in supposing that philosophers can make a positive contribution to  
11 the politics of the real world, he shows a courage which borders on foolhardiness when he  
12 articulates the precise way in which he thinks philosophy can do this. Turning the normal order back  
13 on itself, he insists that, far from being too principled and high-minded, modern moral and political  
14 philosophers have been altogether too 'realistic', too willing to compromise, negotiate, and 'trim' in  
15 their responses to 9/11 in particular, and to the morality of torture, terror and trade-offs in general.  
16 Thus, commenting on the response of academics, including moral and political philosophers, to  
17 political events post 9/11, he writes:  
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34 *Once it became apparent that the government was using or contemplating the use of*  
35 *torture.... in order to extract information about terrorist organizations and possible future*  
36 *terrorist attacks, there should have been an outpouring of condemnation ... In fact there was*  
37 *a great deal of enthusiasm for torture, and such condemnation as there was seemed to be*  
38 *half-hearted and heavily qualified. Prominent legal scholars, even people usually committed*  
39 *to civil liberties, spoke openly of the possibility of issuing 'torture warrants' ... As for the*  
40 *philosophers, it seemed to them that our morality did not have the resources to rule out*  
41 *torture in every circumstance and it became routine in discussions of this matter to always*  
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*begin by emphasizing that of course in anything like a 'ticking bomb' situation, torture would be the appropriate, if not the morally requisite recourse<sup>6</sup>.*

Waldron is appalled by these responses, and throughout the articles in this collection he defends high principle, indeed absolutism, against its many detractors. Thus, although the articles deal with a number of distinct topics (the meaning of terrorism, the balance between security and liberty, the morality of torture), there is a single theme running through many, if not all, of them. This is that philosophy can indeed cast light on politics and that it will best do so by emphasising the importance of adhering to moral principle and the dangers of making exceptions, even in what appear to be extreme cases. Indeed, it is precisely because we are tempted to make exceptions in extreme cases that we should recognise the absolute and exceptionless character of rules such as the rule against torture. For Waldron, then, and *pace* Machiavelli and his supporters, it is the very high-mindedness and commitment to absolute moral principles which make philosophy especially valuable for politicians. Philosophy and philosophers should remind us that there are some things which are absolutely wrong whatever the circumstances, and some principles which should never be violated whatever the temptation.

So put, Waldron's position is a very unusual one and he acknowledges that it owes something (a great deal perhaps) to his own Christian convictions<sup>7</sup>. Indeed, he vents a considerable amount of spleen at Jean Bethke Elshtain who, despite her Christian credentials, has expressed a willingness to modify her principles since the attacks of 9/11 and to countenance - even condone - the use of torture and cruel treatment. But his wrath is not confined to Christian believers, and he also has

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<sup>6</sup> Op.cit., p.6. 'Ticking bomb' cases are cases in which it is supposed that a bomb will shortly kill a large number of people, that someone who knows the whereabouts of the bomb is in police custody, and that the only way to find out where the bomb is and thus avert many deaths is to torture the prisoner. The case will be described and discussed in further detail later in this essay.

<sup>7</sup> See especially the essay in this collection entitled 'What can Christian Teaching add to the Debate about Torture?'

1 much to say about those secular philosophers who adopt what he calls ‘the Dershowitz strategy’,  
2 which is the strategy of using extreme examples to deliver the conclusion that there are no moral  
3 absolutes. This strategy, Waldron says, is corrupt ‘because it attempts to use a far-fetched scenario,  
4 more at home in a television thriller than in the real world, deliberately to undermine the integrity of  
5 certain moral positions’<sup>8</sup>. And he concludes by offering a robust response to those who ask:  
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16 *Should we not be willing to allow the authorization of torture at least in a ‘ticking bomb’ case*  
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18 *... where we are sure that the detainee we are proposing to torture has the information that*  
19 *will save thousands of lives and that he will give it up only if subjected to excruciating pain?*  
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27 Waldron’s reply is ‘a simple “No”’ and, for the avoidance of doubt, he goes on to state that not only  
28 is the possibility of authorizing (legally authorising) the use of torture to be ruled out, it is also the  
29 case that he personally would not consider it under any circumstances. He writes: ‘My personal  
30 conviction is that torture is an abomination, to be excluded from consideration in all circumstances,  
31 even in the ticking bomb scenarios that commentators like Alan Dershowitz and Charles  
32 Krauthammer are fond of imagining<sup>9</sup>. So, when Professor Waldron goes to Washington, his advice  
33 to the occupants of the White House will be that they should not consider revising the laws which  
34 place an absolute prohibition on torture. And his further advice will be that, as individuals, they  
35 should not consider licensing or authorising the use of torture in any circumstances, however great  
36 the temptation and however dreadful the consequences of not doing so appear to be.  
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59 <sup>8</sup> ‘Torture and Positive Law’, op. cit., p. 219

60 <sup>9</sup> ‘What Can Christian Teaching Add to the Debate about Torture?’ op. cit., p.267.  
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In this paper I want to take issue with Waldron's endorsement of absolutism and, in particular, with his view that absolutism is to be commended in political contexts. The structure of my argument will be as follows: first, I will try to establish the precise form which Waldron's absolutism takes, and here I will identify some ambiguities in his position. In particular, I will note his tendency to equivocate between legal and moral absolutism, and between individual and institutional absolutism. I will suggest that, although these are distinct kinds of absolutism, and although one need not (and indeed should not) be committed to all of them, in fact Waldron is committed to all of them. Crucially he is committed to a form of moral absolutism which, he believes, should govern not only institutions and governments, but also individuals, including individuals who occupy positions of political power. I will then go on to ask what reasons Waldron has for embracing this moral absolutism, and I will suggest that there are very few reasons which can be offered other than those which depend upon Christian conviction. Finally, I will ask whether there is any good reason to commend Waldron's moral absolutism to the occupants of the White House. My conclusion will be that there is no good reason and that, in fact, such absolutism is not only politically naive, but also largely point-missing. We have good reason to keep Professor Waldron well away from the White House.

### *Waldron's Absolutism*

It is important to note at the outset that most of the essays which make up this collection are essays in legal philosophy, and that Waldron's focus is predominantly on matters of law. Indeed, his essay on 'Torture and Positive Law' originally appeared with the subtitle 'Jurisprudence for the White House'. However the subtitle of the volume as a whole is not 'Jurisprudence for the White House' but 'Philosophy for the White House', and this choice signals Waldron's intention to extend the



1 scope of his arguments beyond legal philosophy and into moral philosophy. In the Introduction to  
2 the volume he writes:  
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8 *Not only was there no change in the unlawfulness of torture after 9/11, even in the face of*  
9 *what seemed an enhanced prospect of more destructive terrorist attacks and a pressing need*  
10 *for information to pre-empt them, but I believe there was no change in its moral status*  
11 *either. Torture was and remains a moral as well as a legal abomination. I believe I did not say*  
12 *nearly enough about its moral wrongness in the article on torture that became Chapter 7 of*  
13 *this volume, so let me try to say something here<sup>10</sup>.*  
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27 However, his subsequent elucidation and defence of moral absolutism are not always as clear as  
28 they might be. For example, when expressing his outrage at attempts to condone or legitimize  
29 torture in the aftermath of 9/11, he moves seamlessly from criticism of those who were silent on  
30 that particular occasion to criticism of those who are unwilling to rule out torture on each and every  
31 occasion<sup>11</sup>. But it is perfectly possible to think that there should have been an outcry when  
32 governments considered the use of torture post 9/11, without thinking that torture ought never to  
33 be considered whatever the circumstances. For what it is worth, I agree with Waldron that the  
34 silence which greeted the attempts to legitimize torture post 9/11 was disgraceful, but it does not  
35 follow that all attempts to legitimize torture are to be ruled out absolutely. The move from  
36 abhorrence at a specific case to general abhorrence is too quick and stands in need of justification.  
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59 <sup>10</sup> *Torture, Terror and Trade-Offs*, p.4.

60 <sup>11</sup> See pp. 5-6  
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Additionally, it is not always clear who Waldron is addressing when he defends moral absolutism. He frequently speaks of what 'we' should allow and what 'we' might consider permissible (or not), but he does not always make it clear who 'we' are. Thus, sometimes he laments the fact that commentators like Elstain and Dershowitz are so ready to contemplate the legalisation of torture by governments, while at other times he seems to be objecting to philosophers' willingness to consider the moral permissibility of torture, and on yet other occasions he seems to be focusing on what he himself would or would not contemplate doing or condoning<sup>12</sup>. But these are different questions and they may have very different answers (or so it seems to me). If the question is 'should we contemplate the use of torture?' the answer may be 'No', if that means that we should consider changing the law so as to make torture permissible in some circumstances; but 'Yes', if it means that, as moral philosophers, we should turn our minds to the question of whether and why it might ever be morally permissible to torture; and 'Yes' again, if it means that I, Susan Mendus, should consider whether I would ever be willing to engage in it. And this last answer, in turn, may be interpreted either as a statement of my moral position (I think there may be circumstances in which it would be morally right for me to torture) or as a statement of my psychological propensities (I think there may be circumstances in which I would be psychologically disposed to consider it). So it seems to me that we need to be specific when we raise these questions, and we need to consider the possibility that the different questions will have different answers<sup>13</sup>. But my guess is that Waldron fails to distinguish between them because he thinks that there is a single answer to them all, and that that answer is 'No'.

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In short, then, Waldron's endorsement of absolutism seems to reflect his belief that certain actions (torture) are always wrong and that the question of their permissibility should never arise.

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<sup>12</sup> See for example p.6, p.7, p. 267 for instances of Waldron's vacillation between what governments should consider making legal, what philosophers should canvas as moral possibilities, and what individuals might think it appropriate to consider.

<sup>13</sup> Later in the paper I will say more about why it might be important to specify which audience one is addressing.

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Moreover, and crucially for my purposes, he believes that the question of permissibility should not arise in any context (legal, moral, political) or for any agent (lawyer, government agent, politician, moral philosopher, Christian, ordinary citizen). If that is a correct interpretation, then two further questions arise: first, why does Waldron hold these views; and second, what implications do his views have for practical politics – for the occupants of the White House?

### *Waldron's Defence of Moral Absolutism*

The burden of Waldron's defence of absolutism is offered in Part III of his essay 'Torture and Positive Law', and also in his Introduction to the collection as a whole. In setting the scene for his defence, Waldron follows a large number of other writers in focusing on the 'ticking bomb' example. This hypothetical case, which has been referred to already, asks us to suppose that there is a ticking bomb hidden in a public building (perhaps a school) and that the only way to avert a crisis in which many people (perhaps many small children) will be killed when the bomb explodes is to torture the person who knows where the bomb is. A fictional case of this kind is described in Brian Moore's novel, *Lies of Silence*, and Mark Bowden describes an actual case which is very similar to the ticking bomb case in his article 'The Dark Art of Interrogation'<sup>14</sup>. The question then is: 'Is it permissible to torture in a case like this?'

As has been noted already, Waldron's answer is 'No', and the reasons he offers for this answer are overwhelmingly - and surprisingly - pragmatic. He notes that the temptation to torture is most likely to arise in circumstances of 'fear, anger, stress, danger and panic', and he also notes (surely

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<sup>14</sup> Bowden 'The Dark Art of Interrogation', *Atlantic Monthly* October 2003, as referred to by David Luban, 'Liberalism, Torture and the Ticking Bomb', *Virginia Law Review*, Vol. 91, No. 6, October 2005, pp.1425-1461, footnote 46.

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correctly) that these circumstances are ones in which people’s judgement is impaired. In the heat of the moment they are likely to think that they can and should depart from their firmly held moral principle – but they are likely to be wrong about that. He concludes:

*The important point is that the use of torture is not an area in which human motivations are trustworthy. Sadism, sexual sadism, the pleasure of indulging brutality, the love of power, and the enjoyment of the humiliation of others – these all-too-human characteristics need to be kept very tightly under control, especially in the contexts of war and terror, where many of the usual restraints on human action are already loosened<sup>15</sup>*

In short, we know that we cannot trust ourselves when we are acting under pressure and we know that we should not trust others who habitually find that they have to act in such circumstances.

These reflections on the dangers of decision-making in conditions of crisis are, of course, very important, but they do not deliver absolutism. On the contrary, they are the stock-in-trade of rule utilitarians and as such they support a deontological attitude to moral rules, but not an absolutist understanding of their status. We can all agree that torture is abhorrent, that it is therefore of the utmost importance to have a rule forbidding it, and that it is precisely when we are tempted to torture that we most need to be reminded of the rule, since the circumstances in which torture is a temptation are also the circumstances in which our judgement will not be at its best. But none of this adds up to a defence of moral absolutes. So if Waldron is to make good on his argument for moral absolutes, he needs to go beyond these purely pragmatic considerations.

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<sup>15</sup> op. cit., p. 221

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However, he has worryingly little to say in this connection, and the case he mounts appears to depend in large part on Christian belief in general and on the concept of the sacred in particular. This is, of course, a concept that is much more accessible to religious believers (especially Christian believers) than it is to the secular, and Waldron acknowledges that fact when he writes:

*The idea of the sacred is not one that secular philosophers have wholly ignored. But it is not an easy notion for us to make sense of, as it defies the sort of counting and manipulation that we usually associate with 'our' values. I am told that secular moral thought can make sense of the objectivity of value – values that do not depend on what we think, are not relative to our desires or customs or cultures. That is reassuring. But the notion that the value accorded to a person (or a thing or a place) might come from somewhere altogether beyond human life and imagining is a form of radical objectivity that goes beyond common-or-garden moral realism. And this, I think, is something that has proved very hard for secular theory to capture<sup>16</sup>*

I agree with Waldron's conclusion that it is difficult (perhaps impossible) for secular theory to capture what he calls 'radical objectivity', and indeed a large number of modern moral philosophers have written eloquently and at length about the problems associated with making sense of morality in a disenchanted world<sup>17</sup>. But it is not clear that anything positive or encouraging follows from Waldron's bald recognition of the problem. On the contrary, if moral absolutism can be justified only by appealing to 'something higher' then its appeal will be severely limited. At best, it will have nothing to say to those of us who are not believers, and at worst it may offer us advice that is, to use

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<sup>16</sup> *Torture, Terror and Trade-Offs*, p.269.

<sup>17</sup> I think especially here of Bernard Williams, Charles Taylor and Alasdair MacIntyre, but there are a number of other writers who have discussed these issues.

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2 one of Waldron's favourite words, corrupt. Moral principles may not translate well, or at all, from a  
3 religious to a secular context.  
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9 To see how this might be so, consider an example which Waldron himself uses. In 'What Can  
10 Christian Teaching Add to the Debate?' he quotes from the gospel according to St Mark 'For what  
11 shall it profit a man, if he shall gain the whole world, and lose his own soul?', and he cautions 'We  
12 need to take care how we seek the goods and avoid the dangers of this world, because we face  
13 goods and dangers beyond this world that are a lot more important than those<sup>18</sup>. But we only need  
14 to take care on condition that there really are more important goods beyond this world; if there are  
15 not, then the argument falls, and attempts to translate it into secular terms tend to be ones which  
16 give individual conscience an implausible and unappetising degree of significance. In the context of  
17 the debate about torture, it is one thing for a Christian believer to defend his refusal to torture on  
18 the grounds that to torture would be to imperil his immortal soul; it is quite another for the non-  
19 believer to defend his refusal on the grounds that to torture would be to violate his conscience or his  
20 integrity.  
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41 This is not to say that appeals to conscience or integrity are never legitimate or morally weighty; but  
42 it is to say that they are of a very different order from appeals to God and the soul and that, if used  
43 too readily, they can degenerate into mere narcissism<sup>19</sup>. Waldron's bald reminder that things look  
44 different from a Christian perspective is, I think, entirely correct, but it is not clear that the  
45 appropriate response is to attempt to find a secular version of the moral principle that has been  
46 adopted on religious grounds. In other words, it is not clear that the appropriate response is to  
47 attempt to find a secular analogue of the religious justification of moral absolutism.  
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58 <sup>18</sup> *Torture, Terror and Trade-Offs*, op. cit., p.271.

59 <sup>19</sup> This point is discussed in detail in Brian Barry 'And Who is my Neighbour?', in Barry *Liberty and Justice: Essays in Political Theory*, 2, Oxford, Clarendon Press, 1991, pp. 40-77.  
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3 The aim of this section has been to identify the nature of Waldron's absolutism and to ask what  
4 justification he offers for it. My conclusion is that its scope is indeterminate and its justification  
5 uncertain: Waldron's appeal to the dangers of allowing exceptions is entirely consistent with a rule  
6 utilitarian approach. But rule utilitarians are not absolutists, since they (rule utilitarians) will concede  
7 that, in truly exceptional circumstances, it may be justifiable, indeed morally mandatory, to break  
8 the rule against torture. Waldron makes no such concession. On the contrary, and as we have seen,  
9 he insists that torture is an abomination 'to be excluded from consideration in all circumstances'. So  
10 the pragmatic considerations offered in support of Waldron's position are, in fact, considerations  
11 which support only rule utilitarianism, not absolutism. In the end, Waldron's absolutism rests  
12 entirely upon his Christian conviction, but the argument from Christianity should be approached  
13 with caution, not only because we now live in a disenchanted world, but also, and more importantly,  
14 because the attempt to translate religiously-grounded moral value into secular terms may prove to  
15 be impossible or corrupting.  
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38 In the final section of the paper, and drawing upon these interpretations, I will ask the direct  
39 question 'what would happen if Professor Waldron went to Washington?' and, to anticipate, my  
40 reply will be that the results would almost certainly be unhappy ones. We have reason to be glad  
41 that absolutists do not become politicians, and we have reason to resist their attempts to advise  
42 politicians.  
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*Waldron and the Problem of Dirty Hands*

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3 As has been noted already, in his defence of the absolute prohibition (both legal and moral) on  
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5 torture, Waldron cites and discusses the 'ticking bomb' case. However, he does not mention the fact  
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7 that the case was most famously used by Michael Walzer, and subsequently by Jean Elshtain, as part  
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9 of a discussion of the specific problem of political dirty hands. That is to say, the context in which  
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11 Walzer, Elshtain and others put forward their views is not that of a general discussion of moral  
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13 absolutism, but rather of a specific discussion of the desirability and propriety of absolutism in  
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15 politicians. It seems to me that Waldron's neglect of this fact is unfortunate in itself and damaging  
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17 for the plausibility of his argument. In what remains of my time I will try to explain and defend this  
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19 position.  
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28 To begin with, let us grant Waldron his claim that torture is never to be countenanced, and let us  
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30 grant him the further claim that this means that it would be wrong both for governments to consider  
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32 the possibility of changing the law governing torture and for individuals (for example, politicians in  
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34 ticking bomb cases) to consider ordering or engaging in torture on a specific occasion, however  
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36 exceptional. Having granted the latter, in particular, we are in a position to see why, far from having  
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38 a philosophy for the White House, Waldron in fact has virtually nothing to say to the occupants of  
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40 the White House, and the reason for this is that the question which is central to the 'dirty hands'  
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42 debate - Machiavelli's question - is a question about the kinds of people we want and need  
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44 politicians to be. By announcing in advance his commitment to absolutism, and his conviction that it  
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46 would always be wrong to consider torture, whatever the circumstances, Waldron also announces  
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48 his answer to the dirty hands question. But his answer is one which attempts to solve the problem  
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50 by denying that it should ever arise.  
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1 The problem of dirty hands begins with the thought, explicitly stated in Walzer's example, that we  
2 want politicians to be decent and honourable men and women. We want them to have strong moral  
3 principles, and we want them to stick by those principles when circumstances are difficult, or even  
4 desperate. In short, we want them to be pretty much like Waldron. However, the story continues,  
5 their being like Waldron is incompatible with their being successful politicians, where 'successful'  
6 does not simply mean that they will be able to gain and retain gain political power; it also means  
7 that they will be able successfully to pursue the morally valuable projects which were contributory  
8 factors in their being elected in the first place. So the problem of dirty hands is precisely the problem  
9 which arises when morally good people pursue political careers. In other words, when people like  
10 Waldron go to Washington. It is the problem which arises because, in politics, it may not always be  
11 possible to pursue morally good ends through good means and therefore, if the ends are to be  
12 attained at all, the politician may have to consider deploying means which are morally suspect or  
13 even (as in the Walzer example) means which he has explicitly ruled out in his initial election  
14 campaign. To see how this may come about, consider the precise way in which Walzer sets up the  
15 example. He writes:

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39 *He (the politician) and his friends win office pledged to de-colonization and peace; they are*  
40 *honestly committed to both, though not without some sense of the advantages of the*  
41 *commitment. In any case, they have no responsibility for the war; they have steadfastly*  
42 *opposed it. Immediately, the politician goes off to the colonial capital to open negotiations*  
43 *with the rebels. But the capital is in the grip of a terrorist campaign, and the first decision the*  
44 *new leader faces is this: he is asked to authorise the torture of a captured rebel leader who*  
45 *knows or probably knows the location of a number of bombs hidden in apartment buildings*  
46 *around the city, set to go off within the next twenty four hours. He orders the man tortured,*  
47 *convinced that he must do so for the sake of the people who might otherwise die in the*  
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1                   *explosions – even though he believes that torture is wrong, indeed abominable, not just*  
2                   *sometimes, but always. He had expressed this belief often and angrily during his own*  
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4                   *campaign; the rest of us took it as a sign of his goodness. How should we regard him now?*  
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6                   *(How should he regard himself?<sup>20</sup>)*  
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13                   In Walzer's example, the politician orders the torture, convinced that he must do so for the sake of  
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15                   those who may otherwise die in the explosions. But what of the politician who is persuaded by  
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17                   Waldron that torture is indeed an abomination and something which is not to be considered in any  
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19                   circumstances whatsoever? To repeat Walzer's questions: How should we regard him? (How should  
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21                   he regard himself?). Well, perhaps we should regard him favourably – as a man who was good to his  
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23                   word. He promised that he would never torture or authorize torture whatever the circumstances;  
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25                   we elected him knowing that that was his view, and he has lived up (or down) to his promise.  
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27                   Perhaps. However, there is a difficulty with this answer which, as Walzer points out, is that in  
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29                   circumstances of this kind the people (the electorate) may positively want the politician to authorize  
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31                   torture. We hope, says Walzer, that our man will 'overcome his scruples'. So a politician who simply  
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33                   refuses is likely to find himself out of office quite quickly and, when he is out of office, he will be  
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35                   unable to do any of the good things that a decent person like him could have been expected to do.  
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37                   The things we expected him to do when we elected him.  
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48                   In saying this, I am not merely drawing attention to the fact that the electorate may be fickle –  
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50                   though of course they may. I am also drawing attention to the fact that, in a democracy, politicians  
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52                   act for the people. They are our representatives and it is therefore not open to them to ignore  
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54                   entirely what we, the people, believe to be the right course of action. Of course, we should not  
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59                   <sup>20</sup> Walzer 'Political Action: the Problem of Dirty Hands' in Cohen. Nagel and Scanlon (eds) *War and Moral*  
60                   *Responsibility*, Princeton University Press, 1974, p. 69.  
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1 expect a blind and unquestioning adherence to the popular will. That would be both unrealistic and  
2 illegitimate, but equally it is morally inappropriate for politicians simply to ignore the views of those  
3 who elected them. So while it may be true that we should, in justice, think well of the politician who  
4 is good to his word and refuses to authorize torture, it is far from clear that this is in fact what will  
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9 happen.

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16 For myself, however, I am not at all clear that we should think well of the politician who sticks by his  
17 word in circumstances of this kind. It seems to me that whether we should think well of him  
18 depends, in part, on the reasons he has for persisting with his absolutist position. I have already  
19 acknowledged that there may be powerful pragmatic reasons for persisting - reasons connected  
20 with the fact that, in situations of crisis, one's judgement may not be reliable, and reasons  
21 associated with the very real possibility of error. So, in Walzer's example, it may well be that the  
22 politician cannot be sure that torture will elicit the information he wants and, if that is the case, then  
23 it is a very persuasive reason for adhering to the rule prohibiting torture. However, and has been  
24 noted already, these pragmatic reasons are ones which do not, in themselves, justify absolutism,  
25 since they can be fully accommodated by rule utilitarians, who are acutely aware of the difficulty of  
26 being sure about the consequences of one's actions and of the difficulty of knowing whether one's  
27 own situation is exceptional. In the heat of battle, it is important to adhere to the rules, and the  
28 rules are there precisely to assist us when we are under fire and therefore unlikely to be thinking as  
29 clearly as we should. All this is familiar and persuasive, but it is not an argument for absolutism, nor  
30 (most importantly) is it a reason for thinking that absolutism is to be admired in a politician.  
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55 So, to return to Walzer's question 'How should we think of the politician who refuses to authorize  
56 torture and who does so because he believes this to be absolutely excluded from consideration?' My  
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own view is that we should regard him with some suspicion, and in what remains of my time I will try to defend this view. As will become clear, I am critical of the position endorsed by Waldron, and especially critical of it insofar as it is commended to politicians. Whatever Waldron offers us, it cannot be (and must not be) philosophy for the White House. Or so I will claim. My reasons for making this claim fall into two parts<sup>21</sup>.

(i) the character of politics

The first point to make is that in these essays Waldron is offering, or purporting to offer, advice to the politician. It is not advice offered to a private individual or to a man of God (though, as we have seen, Waldron does have such advice in some of his essays). But politics is an area in which compromise is not only predictable but (often) desirable. In Walzer's example the electorate hope that the politician will authorise torture, and if he does not, they may elect someone different the next time round. Were that to happen then 'our man' would be out of office and unable to pursue any of the valuable projects he promised to pursue. Of course, it will only be the very unlucky politician who will be called upon to compromise his principle against torture, and of course all politicians must know the limits of their willingness to compromise. Nonetheless, the problem of dirty hands arises only because compromise is a predictable hazard of political life, and those (like Waldron) who announce in advance that they will never engage in it are displaying a certain amount of prospective naiveté about the character and requirements of political life. This first point leads to a second, which concerns the duties of office.

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<sup>21</sup> The argument of this final section draws upon the final chapter of my book *Politics and Morality*, Cambridge, Polity Press, 2009, pp. 96-123.

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3 (ii) political office and its duties  
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5 Almost every job or position brings duties with it, and those duties may serve to change the basis of  
6 moral decision-making. To give a familiar example: I have special duties to my own children and if  
7 their school is on fire, I am morally entitled (perhaps required) to save them first. However, if I am  
8 not only their parent but also the fire officer in charge on the day of the blaze, then I ought not to  
9 save my own children first. On the contrary, I should treat them like all the other children who are in  
10 danger.  
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21 However, Waldron makes no reference to the duties of office, and his absolutism ignores those  
22 duties by requiring that all cases are to be determined by private conscience. Again, it is far from  
23 clear that we should want to be governed by a politician who neglects (or denies) the duties of office  
24 in this way, and one reason for this is that, when the politician obeys the dictates of his conscience  
25 and ignores the duties of office, it is not he alone, but the people who are likely to pick up the bill.  
26 Thus, in the ticking bomb case, the conscience of the politician can be preserved only by allowing  
27 many people to die – and we may think that this price is too high. The point is eloquently made by  
28 Martin Hollis when he writes:  
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*There are several reasons for thinking that the statesman should not practise the moral consistency of a saint. The integrity of the martyr is saved at his own expense whereas the statesman's refusal to compromise is paid for by his people ... The martyr goes to the stake himself, and that we admire. But, let loose with political power, he sends others to the stake with an equal will and, in shutting his eyes to the nuances of political life without thereby*

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*abolishing them, he licenses very foul play, provided that it is conducted outside the limits of his simple moral lexicon<sup>22</sup>.*

Again, it does not follow that the duties of office should always triumph over private conscience but, in remaining silent about these duties, Waldron makes the dirty hands case dangerously easy.

The point can be generalised in the following way: early on in this essay I noted that Waldron makes no distinction between the different audiences there may be for his moral absolutism. It is, I pointed out, often unclear whether he is addressing individual citizens, or moral philosophers, or politicians. And I went on to suggest that this is problematic. We can now see why that is so: if there are indeed duties of office, then there may be no general answer to questions about the permissibility of torture. It may be that those who hold political office will be morally required to consider its permissibility in certain circumstances, whereas private citizens will not be. And my own view is that that is indeed the case. Whatever may be the responsibilities of those of us who are private citizens, political actors cannot afford the luxury of supposing, in advance, that they will never do, or authorise, certain dreadful acts.

### *Conclusion*

The essays gathered together in this volume are subtle, sophisticated, and thought-provoking in equal measure. Waldron challenges us to remember the realities of what we are proposing when we suggest that torture may sometimes be permissible, and he is rightly indignant at those who would

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<sup>22</sup> Martin Hollis 'Dirty Hands', in Hollis *Reason in Action*, Cambridge, University Press, 1996, p. 139.

1 reduce the debate about torture to a kind of parlour game or intellectual puzzle. It is impossible not  
2 to admire his integrity and honesty, but it is (for me, anyway) hard to concur with his conclusions. In  
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4 *The Prince* Machiavelli tells us that if all the world were good, the prince could also be good, but  
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6 since men are wicked, the prince must be prepared to compromise his principles. In other words, it  
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8 is the fact of evil that makes political goodness both impossible and undesirable. We can indeed be  
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10 glad that there are people of Waldron's integrity in the world, but we must also be glad that they do  
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12 not hold political office, and we should discourage them from venturing too close to the White  
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