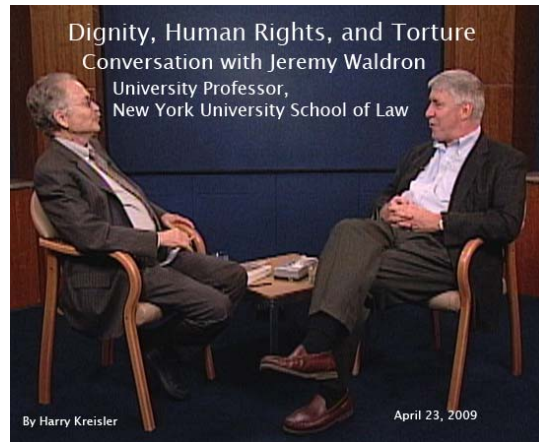


Conversation with Jeremy Waldron – April 23, 2009



**Harry Kreisler:** Welcome to a “Conversation With History.” I’m Harry Kreisler of the Institute of International Studies. Our guest today is Jeremy Waldron who is university professor at New York University School of Law. He is the 2009 Tanner Lecturer at the University of California at Berkeley. Jeremy, welcome to Berkeley. Welcome back to Berkeley.

**Jeremy Waldron:** Thank you very much, Harry. It’s very good to be here.

HK: Where were you born and raised?

JW: I was born and raised in New Zealand in a little city called Invercargill, which is at the very south of New Zealand, South Island.

HK: And looking back, how do you think your parents shaped your thinking about the world?

JW: My father was a clergyman, he was an Anglican minister, and I’m sure that made an obvious difference to my religion, but he was also philosophical in his thinking and he had qualifications in philosophy. I used to follow him around when I was a little kid and it made a huge impact on me. And my mother – the debt is even greater but it’s harder to put into words. It’s an understanding of vulnerability and the importance of passion in everything I do.

HK: And around the dinner table did these philosophical discussions with your father continue?

JW: Well, they did. There were five of us children as a family of seven, so philosophical might be a generous term to describe the bickering that would go on around the dinner table.

HK: [laughs]

JW: But I had an older brother and an older sister, and two younger sisters, and the conversations there were anarchic and wild, and philosophical and non-philosophical, rock and roll music, fashion, gossip.

HK: And current events.

JW: And current events.

HK: How were you affected by teachers as a young person, before college, then after college?

JW: I had a number of very, very strong male teachers, both at elementary school and at high school, I mean very, very strong father figures, I guess. I went to an all boys high school and loved it there. I was on the debate team and surrounded with a cohort of equally nerdy but equally high spirited boys. And then at college I had the benefit of one of the loveliest philosophy departments that you could possibly imagine, small, intimate, with some very, very good people. There was one woman in particular, Gwen Taylor. Gwen is still alive and lives in New Zealand, she's in her nineties now, and I go and see her, but she it was who introduced me to political philosophy.

HK: And this was where now?

JW: This was the University of Otago, which is in Dunedin, which is a city maybe a hundred miles north of where I grew up.

HK: Then you went on to study the law?

JW: Yes, that's right. I studied philosophy first and then I took a law degree. There was a kind of overlap and you could do a little bit of cross-crediting between the two of them, and so I did a law degree in New Zealand and then I went on to do a doctorate in legal philosophy at Oxford.

HK: Was it hard to make the choice between being a practitioner, being a legal philosopher, or being a political philosopher, or the latter two sort of overlap?

JW: The latter two overlap. There're sort of areas that overlap at their centers. They don't just overlap like a Venn diagram at their margins. They're like a couple of saucers pressed up against one another. So, that choice wasn't hard, and actually the choice to do legal theory rather than legal practice wasn't hard. It should've been harder than it was. I should've thought more about it. I regret, in many ways, I never practiced law. I would've like to have been a judge, as many people do, but it seemed natural to go on into the area where my talents were useful, and that really was in legal and political philosophy.

HK: What were the first problems you grappled with? Was there a particular set of issues that drew you from the beginning?

JW: Yes, there were two sets of problems. One was issues about private property and the justification of private property. I began thinking about that quite early on in my college days, and

then I did a little bit of teaching as a graduate student, and my doctoral work was on thinking about John Locke, and Hegel, and other people, about private property. And then the other set of problems that really invigorated me, Harry, in my early days in college, were a set of problems about the enforcement of morality, a set of philosophical problems about the enforcement of morality by the criminal law, problems that had arisen primarily in Britain and in New Zealand at the time when people were decriminalizing homosexuality, decriminalizing prostitution. In a variety of ways people were asking, should the law be in the business of trying to make us better people, or should the law be in the business of simply protecting us from harm. So, it was a whole set of issues, I guess, raised by John Stuart Mill, a hundred and fifty years ago, but they were very live in the late sixties and early seventies. And that was, again, an issue on which I cut my teeth for political philosophy.

HK: Which leads to a question that I wanted to address for our audience here, namely what does a philosopher do. What is different that a legal philosopher does from what a political philosopher does? You've already talked a little about that but let's go on with that.

JW: Yes. Both legal philosophers and political philosophers are interested in the structures of the state and they're interested in the way that state and law operate, the way in which they constrain people, the opportunities they offer, the dangers that they offer. Legal philosophers tend to focus quite tightly on how to read constitutions, how to read statutes, what the responsibilities of judges are, how to think about the nature of law and its relationship to other normative systems. Political philosophers tend to grapple more with particular problems, whether it's problems of social justice, or private property, of the enforcement of morality, or the prohibition on torture. But also, political philosophers do think about political institutions like democracy and issues about political institutions that aren't strictly legal. So, as I say, there is a very, very big overlap between the two, but there are a great many legal philosophers who really have no training in political philosophy, and I think that's a pity.

HK: It would seem to be a loss because to the outside observer there's a natural synergy there.

JW: There's a natural synergy, it's exactly right, and it ought to be more common than it is. But an awful lot of people who do legal philosophy – they see their main philosophical home as being moral philosophy rather than political philosophy. And that means that they take institutions, political institutions, a little less seriously than they should.

HK: Now what about the skill set that is involved in this kind of work, if students were watching this? What might you tell them about how they would prepare for a career in this?

JW: Yes. I mean, we do philosophy by – we do it on the shoulders of our predecessors, so reading into the history of the subject is hugely important. It's not just antiquarian interest; we do this in the company of people like John Locke and Thomas Hobbes, John Stuart Mill, Aristotle, Immanuel Kant, this whole cannon, this whole pantheon of great philosophers. So, reading your way into their

concerns, their texts, their letters – that’s the first skill set. And the other skill set is a degree of patience, and that involves having enough patience to be able to consider an argument that you don’t agree with but to persevere with the argument long enough to get inside it and find out what it involves. That’s one of the hardest things to do but it’s absolutely important in political philosophy.

HK: First, in terms of the academic preparation it seems to be that one has to have a sense of history and of the evolution of society. This came out very clearly in your lectures yesterday on dignity, which we’ll talk about in a minute. It’s a broad-based set of knowledge, so it’s not just that you know and can think about Locke and Mill but also what they were coming out of and how that has changed.

JW: I believe that’s right. Not everybody would say that that was important for political philosophy. Again, I think you and I would agree that this is tremendously important, as you say, not just to read the texts as though they were written yesterday but to understand the differences and the movements of history that frame the problems that we deal with.

HK: Now earlier, when you were talking about how you got interested in morality and the law, you seemed to be suggesting that in a way, the problems that you focus on you come to because of the times you’re living in and what’s going on. Talk about that because that’s very important. In essence, it’s thinking about big problems with reference to the past but also very strongly reference to the present, and clarifying what the thinking should be, or might be, or alternatives.

JW: That’s right. You certainly come to these issues through the problems that you read in the newspapers, the legislation that’s being proposed, the cases that are going through the courts, the controversies that are flaring up in politics. But you also – because you come to it with your knowledge of John Stuart Mill, or John Locke, you will identify problems in a particular way, you will see issues that maybe the ordinary newspaper reader won’t see. You’ll say, “Aha, this is part of the problem of political obligation,” or you’ll say, “Oh, this is a problem of the Hahn [??] Principle,” or “This is an issue of dignity,” and you’re reading into the history of the subject enables you to identify, label and relate issues to one another in a distinctive way.

HK: And it seems that we have a greater vacuum in this regard. I don’t mean in the academic departments of philosophy, but we seem to have lost the public intellectuals in the way we had them before. Is that fair? What I’m getting at is not a critique of philosophy but a critique of public discourse as we respond to events.

JW: Yes. I wouldn’t have said that myself. I think we’ve always had some people who work purely within the academy, even in political philosophy, some people who work more flamboyantly outside the academy. So, for example, a man to whom I owe a great intellectual debt, Ronald Dworkin – he was my doctoral supervisor at Oxford and is now my colleague at NYU – he’s sort of the essence of a public intellectual. He writes books and articles and law reviews for university presses, but he also engages with great issues, particularly about the Supreme Court and great issues of rights, in the

New York Review of Books and in the newspapers. There are a number of people like that who have a major presence, so I don't think that we are bereft of public intellectuals in this way. It is certainly true that there are a number of people who are in political philosophy and don't speak out on public issues. There's a division of labor; everybody finds their comfort level and their talents take them to a particular post in this division of labor.

HK: Well, I guess what I was implying was the – I'm thinking about the cultural debasement which seems to lead to a situation where there isn't sufficient recognition of people who are out there.

JW: That's probably right, and what we call public intellectuals are probably writing for a very small audience, and in that sense there is some cultural debasement.

HK: What about creativity? You're dealing with a problem, you're looking back, you're influenced by the present, you're trying to clarify – when does the light bulb go off? Is there a general statement or does the light bulb go off in different ways with different problems?

JW: The light bulb goes off in different ways with different problems, and you wait for it to go off and on, and you hope it will continue to come on in various ways. But again, it's a matter of patience. You work your way into a problem, you begin to make a little bit of progress on various fronts and then gradually you can see the big picture, and you can begin to see a distinctive, a new way, of stating the importance of an issue, or articulating a principle that hadn't been clearly articulated before, or I'm giving an account of the trajectory of some change that may not have been there just before.

HK: Now your Tanner Lectures on the Berkeley campus have focused on the problem of dignity and I thought it might be useful to talk about what you said, walk you through that issue and then maybe refer back to some of the things that we've just talked about. So, dignity – how do you come to that topic? Why is it important?

JW: Right. There're two questions. One is why is it important and why did I get interested in it. It's important in the way that it figures in the great human rights charters, in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, in the Geneva Conventions – dignity is all over the place. It's cited as a ground of rights and it's cited as something that we have a right to. And so, it certainly is presenting itself as though it were maybe not the be-all or an end-all but certainly a very, very important principle or value. I came at it, Harry, through some work I had done on torture and on inhuman and degrading treatment of detainees, which is an issue that many of us found to our shame that we had to be working on over the last five or six years. And although some of that work was public intellectual work on things that mattered greatly in this country, there was a need for a great deal of background work, as well, to try and get some background intellectual understanding of the values that might have to be invoked, if we were to talk intelligently and properly about abuses of this sort.

HK: And it's interesting because we're talking at a time when the torture memos have come out, made public, that were written during the administration of President Bush. So, in focusing on this topic you're helping us clear the brush, in a way, to give us a grounding in addressing this problem.

JW: I think that's right. What I haven't done in the Tanner Lectures is say very much about the torture issue. I tried to speak in more general terms and often in more upbeat, optimistic terms about what dignity is, rather than dignity being taken away. But the concerns about the torture memos are, of course, vividly in my mind and I imagine in the minds of many people in the audience. The important thing is exactly what you say; it's important to grapple with the deep values that are in the background here. We do think that one of the things about torture is that it is a staggering denial of human dignity, and we need to understand that that's not rhetoric, that's not just rhetoric, it's attempting to communicate a substantial idea. So, what I'm trying to do is to say in a reasonably upbeat way what that idea may be and how it's related to other things we care about.

HK: And I'm going to ask you about that in one second, but I think it's worth making the point that as the American public has been reading the memos this week – this interview's taking place in late April – in reading them you're repulsed. I mean, you don't have to have read any philosophical treatises, just as a human being you intuitively have a sense of dignity and what it is, and what has happened here. But it's quite interesting, as I listen to your lectures – and we're going to talk about this now – where does that sense of dignity come from? So, what is dignity, as you begin this inquiry? Give us an understanding of what it is, just in a few words.

JW: Yes. I think dignity – human dignity is a status that we now accord to every man, woman and child. Dignity used to be a status reserved for high nobles, high functionaries of the state, bishops, professors, statesmen, and so on, but it's now a – it's still a high ranking status but it's a high ranking status that we accord to everybody. It indicates that the person has certain rights, that they can stand up for themselves, that they are to be treated as worthy of respect, and that they are to be given deference and precedence, they are to be given some degree of authority in their life decisions and in the account that they give of what they're doing. So, it's a way of insisting – talk of human dignity is a way of insisting that each person is to be taken seriously, each person is to be taken seriously, as though they were a very important person, not just a commoner who can be brushed aside or somebody of no consequence. So, dignity is a way of insisting that we all hold a quite high rank in society and we're entitled to respect on that basis. And it has to do with how we're treated, it also has to do with how we bear ourselves, how we stand up for ourselves, and it ultimately has to do with how we enjoy our rights and exercise them responsibly.

HK: Now what you call a transvaluation, I think, namely when we move from seeing the king in this way to seeing every man that way, these ideas, in a way, bubble out over time through changes in society. Right?

JW: That's true.

HK: So, what we're witnessing is the emergence of a concept that reflects the changing power structure and the changing nature of western society over time.

JW: Yes, that's very true. I mean, societies have obviously become less aristocratic, less hierarchical, more democratic in their organization, certainly true of the United States. I don't mean more equal economically but more equal in terms of status. And so, there are changes of that sort, which are very important, but there're also changes, Harry, in the moral imagination and in how people think of themselves and how they think of others, and as my commentators – I've had the good fortune to have three very good commentators for these Tanner Lectures – as they have reminded me, the moral imagination does wonderfully complicated, ambiguous things with the idea of dignity. Sometimes it makes fun of the dignity of princes. Sometimes it makes fun of the pretensions of the common man to have the dignity of a prince or a duke. Sometimes it uses notes of pathos and irony to suggest that the dignity of the common man is actually higher than the dignity of the noble lord. And so, it's not just changes in power and changes in hierarchy, it's also changes in imagination, in literature, in all the various ways in which we think aloud to each other about our relations with one another.

HK: And so, you can then look to things like the Judeo-Christian culture as introducing the idea – the romantic poets, I think you mentioned in your...?

JW: That's right. Yes. There always was a tension between an idea of human dignity that was associated with simply our being created in the image of God, in the Judeo-Christian tradition, and the idea of dignitas, attaching to particular offices and ranks, for example, in the Roman Republic. And those two streams were in rather uneasy relationship with one another. What I see happening by the middle of the twentieth century is not that one of those prevailed and the other withered away, but rather the strand that emphasized everybody being created in the image of God also took on some of the sense of rank and hierarchy, but only now generalized rank and hierarchy.

HK: As you do this exploration and tease out this story, it's very clear – or let me assert and you question what I'm saying – that there is an element of idealism in what you're doing. So, one has to step back and say, well, he's not saying it's always that way. You are merely saying that it's an idea that is emerging over time, and that actually may be a touchstone to see where we could even get better in the future.

JW: That is certainly true. It's exploring an ideal, it's exploring the shape of an ideal. The only quibble I would have, Harry, with this term "ideal" is that that can sometimes simply connote a vague aspiration. But many of the most important dignitarian requirements are presented as moral absolutes. Now that also doesn't mean to say that they're necessarily reflected perfectly in what we do, but they're not just aspirations. They are strong, normative requirements. And so, the principle, for example, that even the lowest or the worst detainee is to be treated in a way that is commensurate with human dignity – that's an ideal but it's not just an aspiration,. It's supposed to be a requirement that people should be punished if they don't live up to.

HK: Now when you look for the foundations of this concept, you pose two choices: one, to look for it in morality and the evolution of morality, as if it were given down from on high, as one of the Commandments, or something. And you really reject that and see the law as being more important in creating the foundation for this. Talk a little about that, because it's surprising but after one hears the argument makes a lot of sense.

JW: Yes. I mean, I don't want to disparage the sense of morality associated with dignity, but I do think people really underestimate the resources and the nature of argumentation that goes on within the law. Law isn't just about rules, or constitutions, or statutes, or cases. Law has deep principles, and policies, and values of its own, and a lot of what we see with dignity is an evolution within the legal framework of important legal values, not values that the lawyers had to abandon their own craft and go over and talk to the theologians and the moralists about, but idea that were endogenous to law and whose development and dynamic of change was endogenous to law.

HK: So, it's an inter-logic partly coming out of assumptions, partly coming out of procedures, that in other words, it's suddenly – no, I don't want to say suddenly but over time, dignity is emerging. It's – I think you used the word “imminent” – in legal processes and assumptions.

JW: I think that's exactly right. Law changes, and the very idea of a legal system changes over time, but I think we are evolving – we have evolved now, perhaps over the last three or four hundred years, to a situation where distinctively legal processes, distinctively legal institutions, imminently convey a multitude of ideas about human dignity, not just by laying down certain rules about dignity but by insisting that people must be heard, by allowing people to give an account of themselves, by allowing people to make arguments on their own behalf, by, again, treating them seriously and insisting that they must not be dismissed with contempt.

HK: So, through all of this it's almost as if a recognition is there, even if you have to pull it out in the sense of putting these things together.

JW: This is true. And I think this happens in law all the time. We don't just argue about the interpretation of rules and constitutions and statutes, we also try to recognize deeper principles, see important normative patterns in the law that may not be visible to the first glance but require you to dive deep into the resources of the legal system and make connections that wouldn't be superficially evident.

HK: Now in making your argument you put on the table what morality and moral philosophy had to offer and you show a movement there from focusing on the noble to the common man, making it universal, and then you focus on the law, and we've just talked about this. Where is power in this? And the reason I raise this is because when we get to torture it seems to be that power enters the equation and can move us forward and set us back.

JW: Yes. We live in a world where power is organized and exercised in certain ways and not in other ways. Power is organized and exercised through political systems and through the frameworks of law. So, we very rarely see naked power being exercised. And even, Harry, in the distressing business of the torture memos what was striking was that an attempt, a perverted attempt but an attempt nonetheless, was made to try to show how torture could take its place in a legally justified set of responses. I think it was a disastrously inept argument, and it was a grave problem that law was being tainted with this business of torture, but what was remarkable was that those who were engaged in abusive interrogation didn't just say, let's do this and worry about the law later. They dragged the law into the torture chamber with them. They sought not just legal cover but they sought a legal framework for what they were doing, and that was both distressing but in a backhanded way quite inspiring. It shows that even at its most abusive, and at its most extreme – you never see naked power, what you see in political life is politicized, legalized and institutionalized power.

HK: And in fact, you've made the argument that it's in argumentation, one of the processes in the law, that allows for this sense of dignity emerge, but of course, the whole process of creating these memos was to make them secret, where they couldn't be argued about. So, in a way, this is another proof of your point, that they felt the need to do it but maybe they sensed that these arguments would be dismissed, so they kept it secret.

JW: Yes, I suppose that's true. As far as we know, the memos were produced at a time when a number of people, particularly in the Central Intelligence Agency, had become very nervous about their possible criminal and legal liability. Some people, some quite high ranking people, had been tortured to death, and there were a number of operatives who were very nervous about their position and wanted to know what their legal position was, so it was important to the agencies to get some clarification. I thought they were entitled to better, and rather stricter, advice than they received, but the advice was circulated to the agencies that needed it. It's just that the public was intended to be cut out of the process.

HK: Right. But in different parts of the government, when it was circulated and criticized, they were removed from circulation.

JW: This is true. But you have to remember we had torture memos circulating in public, in **semmersdat** [30:21.6??] form, no doubt, but on the web, really from 2003, 2004 onward. The memos that have been produced and released in the last three or four weeks are, as it were, a second wave of memos but some of the most egregious work, the Bibey memo drafted by John Yoo of this university, some of the other torture memos, were reasonably common knowledge to those who were prepared to look for them, certainly by late 2004.

HK: Now this raises an interesting question. You've worked a lot, you have a book on liberal rights, you've thought a great deal about the rights that have emerged from our tradition, you're obviously working now on dignity, and it's this problem that terrorism poses – in looking at the torture

memos, we're looking at the mistaken response to terrorism – but terrorism itself is a problem because it seems to want to fight in a way that undermines many of the central features of what has become this tradition that we believe in. Talk a little about that, because it's a new kind of adversary that challenges us in our commitment to the values that we have adopted.

JW: Right. So, let's put it this way. In armed conflict, in warfare, there is often some falling short of international law standards by armies and armed forces of all sorts, but terrorism is a military doctrine that holds a whole panoply of the laws and customs of armed conflict in contempt. It's an explicit turning of one's back on the norms that we have introduced, the fragile norms that we have introduced, to try and mitigate the barbarity of conflict. Terrorism claims to succeed, or hopes to succeed, by deliberately violating, denigrating and smashing the very rules that we have introduced to try and allow some sort of modicum of compassion, mitigation in armed conflict. And I mean, terrorism is wrong primarily because it is murderous and it does hold people's rights in contempt, but it's wrong also because it holds this fragile, necessary enterprise of regulating armed conflict in contempt. As I say, armies, whether it's the British army, of the American armed forces, is the Israeli defense forces, or the security forces of the Palestinian Authority, these organizations sometimes break the laws of armed conflict but they haven't turned their back on the whole enterprise in the way the terrorist organizations have. And I think that needs to be said very clearly. The other thing is that terrorism involves the same instrumentalization of terror that torture involves. I'm not saying that this means that torture is an appropriate response to terrorism, it's not, it's not an appropriate response to anything, but nevertheless part of the – by understanding what's wrong with torture we can also understand what's wrong with terrorism.

HK: What then would be the way we should look at an appropriate response to terrorism? I mean, clearly we're learning the many mistakes that were made, how, in a way, the Bush memos suggest a course that takes a liberal society and makes it like the other, who you've just described quite adequately. How should we think about that? Because I think one agenda that President Obama's trying to set is to say, well, we don't do this. So, help us understand what is an appropriate response.

JW: Right. I think the first thing to do is to distinguish the particular evil of terrorism from some things that are often confused with it, namely for example, insurgent movements, irregular forces. The Taliban, for example, is a strong, dangerous insurgent movement, it often engages in terrorism and certainly gives shelter to terrorist organizations, but its position in Afghanistan, and to a certain extent its position in Pakistan, is that of a particular fanatical insurgent movement. So, it's very important, I think, to distinguish between how we wage war against irregular forces and that sort of struggle, and how we deal with the suicide bombers, the al-Qaeda, the 9/11 terrorists, who are engaged directly in terrorism properly so called. I don't doubt that it is necessary to fight both battles, but dealing with the people who are going to plant bombs in public places is somewhat different from just engaging in the regular – irregular warfare in Afghanistan and Pakistan.

HK: And what emerges, as we think back about the last eight years, is really a lack of clarity on the part of the Bush administration as to who the adversary was, confusing national liberation movements with global terrorists who are of the al-Qaeda brand.

JW: Yes. I think that's right, and I think it comes back to this ambiguity between irregular warfare and terrorism. When I say that terrorism turns its back on the laws and customs of armed conflict, I have in mind primarily the norm that says you are not to attack civilians. So, when resistance forces, insurgent forces, in Iraq or Afghanistan attack a platoon of American soldiers, it's very bad, and is shameful, and is something that shouldn't be done, but that's not turning one's back on the laws of armed conflict. That's attacking soldiers in a neo-military situation. That's not terrorism. Terrorism is this other thing of deliberately attacking civilians in order to sow a certain amount of panic. So, these distinctions are important. It still doesn't tell you how to answer the question that you posed, which is how do you deal with terrorism, and I think you try to do the law enforcement part as far as you can, you try to avoid making things worse – sometimes people think something must be done, even if it makes things worse, we must respond, and it's the beginning of wisdom to realize that sometimes all you can do is avoid making things worse.

HK: I think it might be useful to talk a little, again, about power because the norms we're talking about, especially dignity, emerge both out of international covenants and out of national laws, basically. And one of the interesting things about the Bush administration was it's starting with the assumption that all international law could be put aside – almost all international – much of what had become part of the international law of covenants, treatment of prisoners of war, and so on. What I want to ask about is the fragility of the basis of the concepts that should guide us as we approach this new problem.

JW: Yes. I think that a fragility in international law has been exposed in this period. One of the interesting things is the way in which international law operates. It very seldom tries to do all the work by itself. What it usually does is it works hand in hand with national law. So, for example, we have the Convention on Torture to which this country, along with lots of other countries, is a signatory. That's a treaty, multilateral treaty, and has a status of international law, but that treaty requires the signatories to pass anti-torture legislation, so we have an anti-torture statute, and that's American law. So, we work with two layers all the time, and international law does that all the time, not just on human rights treaties, but it does it on civil aviation treaties, and postal conventions, and so on. You have one layer where you have the international law provisions and then you have a layer below that where the various national legal systems try to echo each other, and echo the international law provision. And at its best, that's how international law works, rather than – I mean, it's rather like we have the Human Rights Conventions but we also have our own Constitution, and our own Constitution does, in its way, much of what the international human rights conventions try to do in their way. We have a phrase for that. It's one of the ugliest phrases in political philosophy but it's called dual positivism, two levels of positivism. We positivism the law at the international level and we try to positivism the same law at the national level.

HK: And it's very clear that there's a synergy between the two, as we see threats of invoking universal jurisdiction to some of the former Bush administration officials, as a way to push the national system to undertake some sort of inquiry.

JW: I think that's right. I mean, I think it's very unfortunate if that becomes the primary way in which these abuses are dealt with. The United States generally in its history has had a creditable ability to be able to remedy its own shortcomings, and we should expect that of every national system and every well disciplined set of military and security forces, that they can use their own military law and their own criminal law, if need be, to deal with abuses. We shouldn't have to rely on some Spanish judge, or the international criminal court, to do these things. And I think it's wrong for scholars, however concerned they are about torture and other things, to become too intoxicated with universal jurisdiction. It's very exciting when it happens, as it was in the Pinochet case, for example, but it can't possibly be the frontline mode of enforcement.

HK: What do you think should be a path of inquiry with regard to this matter? I say "path of inquiry" – something seems to be done, in other words, to close the case on this issue, to have a sense that this was done and it was wrong to do it for these reasons. There has to be an inquiry, a tribunal, a truth commission, whatever. Do you have any thoughts about that? Because obviously politics interfaces with this, and if you go for criminal prosecution within the country, it may undermine other items on the agenda that have nothing to do with this.

JW: That's perfectly possible. And if you go for criminal prosecution – I'm not saying you should or you shouldn't – but if you do go for criminal prosecution, then the political reasons for opposing that may translate too quickly into political reasons for opposing the whole torture regime. In 1973, Great Britain was accused of using torture in Northern Ireland, certain methods of interrogation remarkably similar to some of the ones that we used in Guantanamo Bay, and they were introduced as a matter of policy. And the government of the United Kingdom, shortly after exception was taken to these, made a public announcement, saying, we have carefully considered what we did and we will never do it again, and we give an undertaking to the international community that we will never do it again. I don't know that they held any particular people criminally responsible, and it may or may not be a good idea in certain circumstances to do that. It's probably a good idea just to proceed in the way we are proceeding at the moment, which is that the Office of Professional Responsibility within the Government is investigating the low level of legal work done by people in the Office of Legal Counsel and elsewhere. And that's a matter of making sure that the professional standards remain high. This was a great lapse in professional standards. I don't know whether we particularly need a truth and reconciliation commission, or anything like that. We need to know what happened but we actually do have a reasonably clear understanding of what happened. What we need primarily is to concentrate on this announcement to the world and that in no circumstances will we go down this path again.

HK: What would you like to see the philosophical discourse on issues like dignity contribute to this process of coming to terms with what we've done, and how does that happen?

JW: Yes. The one thing that I found very, very hard in the philosophical discourse was to get a clear sense of a moral absolute, that there are certain things that were simply not to be done in any circumstances, no matter what the advantages may accrue, no matter what the temptations, and the anger, and the panic that was background to them. And it proved much, much harder than I thought to convey the point within modern philosophical vocabulary, and modern philosophical ideas, that there were certain absolute prohibitions on certain conduct. The law can make sense of these, partly because can simply announce an absolute prohibition, and torture is absolutely prohibited as a matter of national and international law. There's no emergency exception, nothing. But philosophically it revealed that we are a little bit bankrupt so far as the ideas that are necessary to make sense of an absolute prohibition, even in the face of overwhelming temptation. I believe, personally, this is partly because we've turned our back on certain religious ideas associated with morality, but that's a separate point.

HK: Now the answer on the other side is always the use, misuse of the ticking bomb scenario, and the extent to which that has been embedded in the popular culture is quite extraordinary. How do we get beyond that? I mean, at one level it's very easy to dismiss but on another level it really holds the imagination, even though what has gone on here has moved very much beyond the ticking bomb. The ticking bomb situation one might not want to have rules for and it's all just done very quickly and then over, but here, the process was bureaucratized.

JW: Yes, it was. I don't want to subscribe to the thesis that we should just let it happen but not bureaucratize it, although that's attractive to a number of people. The ticking bomb scenario is generally just present arithmetic, present a large number of lives at stake on the one hand and a considerable amount of pain for one person on the other hand, and if the argument is not accepted, then they double the number of lives on the one hand and to justify the pain on the other hand. The ticking bomb story is just arithmetic with illustrations. The real point is to be able to understand what might be at stake in torture in a way that's not revealed by consequential calculations of this sort, and that's where I think dignity is very important. Dignity is not just a certain aesthetic or a posture that somebody might value, but that dignity has to do with a fundamental, sacred status of each human being. And so, we need to understand, begin to understand, even in the ticking bomb scenario, that the proposal is to do something sacrilegious, effectively, to a human being. Sometimes I find it useful to say, in the debates I've had on this, that we all have some blocking point or some stopping point which we would use to resist even the ticking bomb hypothetical. There are many people who claim that they would be prepared to support torture to stop a ticking bomb from going off. Would they be prepared to support rape to stop a ticking bomb going off, or the raping of a terrorist's children? Usually some people will, as it were, draw the line somewhere. They will say, no, this is too abhorrent, this is too much of an abomination. My view is that we should draw that line roughly where the law has always insisted that it be drawn, at torture. But if people – it's almost as though now I'm playing the game from the other side. Just as the ticking bomb people multiply the number of possible victims to try and make their rhetorical point, I'm making my rhetorical point by saying that even the most hard-nosed

consequentialist is going to find some practice that he will regard as too abominable to be supported, even with a million people strapped to a bomb.

HK: I hear you suggesting that we're missing what religion might have wrought on some of these moral issues, that somehow a vacuum has been created. Am I correct in hearing that, and then what do we do about that? How does a secular world where law is so important make note of what is lost there and be informed by it?

JW: It has to acknowledge the loss, I think, is the first thing. You can't artificially recreate it. If people don't have religious faith, then there's no way in which you can force them back to it, but you try to give some secular surrogates – I mean, I believe, myself, that torture is sort of a way in which the demonic enters human affairs. But you can give a sort of secular account of that. I believe that the security that might be sustained by torture is a security not worth having and we should be disgraced rather than enjoy it, and I think we can state that idea in secular terms. I believe that there are some things worse than death or the threat of death and that sometimes the response to a ticking bomb scenario is, then we should be prepared to die rather than to do this. It's easier to say that from a religious point of view but it's not wholly unimaginable from a secular point of view. So, the hardest thing to convey is the sense that there is something ontologically sacred about the human individual, and that no matter what the temptation, or no matter how bad the human individual, there is some respect still owing. And this is not an argument against punishing terrorists, it's not even an argument against executing terrorists, it's insisting nevertheless that you must be prepared to proceed with the recognition that the person that you are proposing to try and punish, to apprehend and to stop, to interdict and perhaps to kill, is nevertheless a child of God like everybody else.

HK: One final question. As somebody who's worked on thinking through the rights and liberties that are part of our tradition, do you feel that we're going to have to do careful thinking in the future, as we respond to this security threat that we've been talking about, that we're going to have to make adjustments? And will we have to bring the same kind of thought process that we brought to this torture issue to other issues, such as freedom of the press, free speech, and so on?

JW: It's conceivable, Harry. I don't think we can rule it out. We shouldn't assume that any given set of rights, or any given set of the way in which rights have been calibrated in the past, is guaranteed to be suitable for the future, or even that we have gotten it right. There're a number of issues where we still argue; should hate speech be prohibited or does free speech protection preclude that, for example. And those are cases where we are not yet sure that we've got it right about rights. Some of those issues are background and enduring, some of them are circumstantial. So, I don't want to rule anything out, but it matters enormously that when we think about adjusting rights, or adjusting our understanding of rights, in the light of new threats to security, that we must understand that it is rights that we're adjusting. And that's not a small thing. These are very, very serious constraints designed to do a very serious job, and they're not supposed to be simply responsive to issues of social convenience. And they are supposed to be informed by a logic of

Conversation with Jeremy Waldron – April 23, 2009

equality and by these ideas of dignity and respect, and we must take care, even when we're juggling them, and recalibrating them for a more dangerous world, that we bear in mind that these are the primary ways in which we protect human dignity.

HK: Well, on that note, Jeremy, I want to thank you very much for coming on our program, coming back to the campus and delivering the Tanner Lectures. Thank you.

JW: It's a delight to be here, Harry. Thank you very much.

HK: And thank you very much for joining us for this "Conversation With History."

[End of Interview]