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No Brainer: The Early Modern Tragedy of Torture[1]

James Simpson

No-one wants to talk about torture.

Listen, for example, to Vice-President Dick Cheney, speaking in October 2006. Scott Hennen, a radio show host from Fargo, N.D., posed this question to the Vice-President: "Would you agree a dunk in water is a no-brainer if it can save lives?" Note, before we listen to the Vice-President's reply, that Mr Hennen does not himself wish to talk about torture; instead he reverts to an extremely common feature of torture discourse, the use of euphemism. "A dunk in the water" could have referred to nothing but waterboarding in October 2006, but Mr Hennen clearly preferred to draw his phrase from the lexical realm of children's horse play, rather than from that of torture. Now let us observe the same consent to, and denial of, torture in the Vice-President: "Well," he replied, "it's a no-brainer for me, but for a while there, I was criticized as being the vice president for torture. We don't torture. That's not what we're involved in."[2]

Listen, too, to President Bush not wishing to talk about torture. In his autobiography, *Decision Points*, published in 2010, President Bush acknowledges that he chose waterboarding as a form of "enhanced interrogation," but goes on immediately to deny that this constitutes torture:

"The enhanced interrogation program complied with the Constitution and all applicable laws, including those that ban torture" (Bush 169).

Now of course the President and the Vice-President will not wish to acknowledge torture because it is illegal. To be sure, the Bush Administration had been careful to cover itself legally, by changing "all applicable laws."[3] Even as it changed the law, and even as it clearly wished to torture, the Administration tried, however, not to talk about torture. Thus the then White House Counsel Alberto Gonzales declared, in a memo of January 2002, that the "new paradigm" of the war on terrorism "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions" (Sands 32). This was a prelude to the President's formal abrogation of the Geneva Convention in February 2002, in the US treatment of Al-Qaeda and Taliban captives.[4] Later in 2002, in August, Gonzales received legal opinions from Jay Bybee and John Yoo in memos that judged that current definitions of torture were far too restrictive. Physical torture, they argued, "must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure" (Sands, 75). Anything less than this was, as they argued contrary to international law and contrary to the US military's own manual, not torture (75). Once again, even in memos that in retrospect produced torture, we are not talking about torture. We don't do that.

The reticence is, I readily concede, most obviously born of legal caution. But even where there is no legal restraint, historically torturers routinely avoid talk of torture with euphemism.[5] Or they deny the source of the so-called evidence they produce by torture. Thus Continental legal regimes, which required torture between the thirteenth and eighteenth centuries, also demanded that the confession produced under torture be repeated, voluntarily (Langbein 15). The system of torture needs to deny its own conditions, and to re-establish the conditions – above all that of voluntary talk – that characterizes civilized intercourse.

The reticence about torture, that is, goes deeper than legal caution alone, since torture offends our very deepest relational protocols. Often – many times every day, in fact - we wish to find out what others think. Depending on circumstance, we might occupy different strategies for discovering what our interlocutor thinks: a knowing, intimate glance might stand at one end of a spectrum, at the other end of which stands torture; conversation and formal interrogation would find a place between these extremes, along with very many graded variations. To choose torture against various other means on initiating talk is not unlike rape, since it rejects the realm of both rhetoric, and, thereby, of our humanity. This is especially true when the torture is legally-sanctioned, since the law, as we all like to believe, is designed to underwrite civil society. We all know that torture undoes our

humanity; even the torturers know it. And so no-one wants to talk about it. It demeans all of us, torturers, tortured, and the rest of us alike.

So we share our desire not to speak about torture with the torturer. At this point we could resist the torturer by resisting that shared desire. We could, that is, speak about torture. We could show the torturer images of Abu Graib. We could raise the obvious moral objections to torture. We could also raise the *practical* objections, such as the objection that torture produces bad intelligence. Or that torture permits criminals to evade conviction, because evidence produced under torture is inadmissible. (This predictable damage to the justice system has since, in fact, happened since the Bush-Administration application of torture).[6] Or, and above all, in my view, we could point out that our torture of prisoners increases the risk of torture for our own captured military. Even if our soldiers are indeed tortured, we need absolutely to be able to say to the world that *we do not do that*. Not only did the Bush Administration render the torture of our soldiers more likely; it also robbed the peoples of the United States, and its allies, of our principal ethical defense against the torture of our soldiers: the simple, absolute defense that we do not torture.[7] Later in this essay we will see some Early Moderns who were also robbed of that defense, even as they were tortured.

We could, as I say, talk about torture directly. We could also look at it directly, now that we have the images of Abu Graib since April 2004. That,

however, is not what I intend to do in this essay, since I agree that talk about torture takes us to places none of us wishes to go. To get anywhere near torture is to be degraded; the talk itself somehow demeans us. Instead, I shall change the subject.

I shall, so far as I can, instead take my cue from the playful strategy of Mr Hennen's question to Vice-President Cheney: we will retreat from the contemporary torture chamber, and instead occupy the adjacent space of play, the space of "a dunk in water" rather than "waterboarding." We shall also retreat to the period between the middle of the fifteenth century and late sixteenth-century in England.

The retreat to play and plays might seem like an irresponsible retreat, but, as we shall see, play frequently turns out to be adjacent to interrogation, and the adjacency is illuminating. And plays, as distinct from play, are especially interested in capturing that adjacency.

I make the strategic historical retreat, because legally-sanctioned torture for the purposes either of gathering evidence or intelligence is in fact extremely rare in the Anglo-American legal tradition. Aside from the Bush Administration, there is only one other period in which the state practiced legally-sanctioned torture. It possibly occurred from the middle of the fifteenth century, but it certainly occurred between 1540 and 1640 (and especially between 1588 and 1600), during which period 80 cases of torture

are recorded in the Privy Council registers. Most of these occurred in the reign of Queen Elizabeth, and, within that reign, most in the decades 1580-1600, after the Papal bull excommunicating the Queen in 1570.[8] The legal justification for torture seems to lie in the sovereign immunity from prosecution, and the sovereign's power to delegate that same immunity (Langbein 129-30). Some of the cases are unrelated to religion, but most involve torture of Catholics. Contrary to the standard view of the barbaric Middle Ages, judicially-sanctioned torture is, in England at any rate, a feature of our early modernity. These decades are also, not co-incidentally, part of the period in which, by Diarmid MacCulloch's account, "England judicially murdered more Roman Catholics than any other country in Europe."[9]

When we make our retreat to the period 1470-1600, and especially 1540-1600, we see a paradox: on the one hand, those agents of Queen Elizabeth who practiced torture denied, for the most part, that torture occurred; instead, they insisted that it was illegal. On the other hand, the Catholics who protested the use of torture did not protest its illegality; instead, they protested its monstrous inhumanity. In Section I of this essay, I offer evidence for both sides of this paradox: that the torturers deny torture, and that the tortured do not point to its illegality. In Section II I briefly open the paradox, by explaining why the torturers deny their torture and why the tortured do not protest the illegality. Section III looks to the ways in which

play, in the form of plays, tells a different, more refreshing story than the stories of either the inflictors, or the sufferers, of torture across this period. The "literary" documents are more expressive of a common humanity than are the official and/or the polemical documents.

I

I offer evidence, then, for one side of our paradox: that some of those who practice torture denied that it happened and declared it illegal.

We can start in 1470, with a denial. Sir John Fortescue, who had previously been Chief Justice of the King's Bench until his exile in 1461, denied that the English practice torture. Even as he writes about torture in his *De laudibus legum Anglie* (1468-71),[10] we see that same unwillingness to look in torture's direction. Fortescue compares the legal practice in France with that of England. In France, he says correctly, "the law prefers the accused to be racked with tortures until they themselves confess to their guilt." His "pen shrinks," he says, from describing these tortures; or again, "the pen is ashamed to narrate the enormities of the tortures elaborated for this purpose." Appalled at the prospect, he nevertheless does relate them, including the torture we know as waterboarding: for example, "the mouths of others are gagged open while a torrent of water is poured in that swells their bellies to great mounds." Who, he asks, would not "rather, though

innocent, confess to every kind of crime, than to submit to the agony of torture already suffered?"(Fortescue 31-2).

Fortescue's horror is evident, yet it may be the case that his denials of English torture are designed to protest English torture, since, as Edward Coke reports in his *Institutes of the Laws of England* (1628-1634),[11] the rack had possibly been introduced in 1448 by the Duke of Exeter, who (we are about to hear another euphemism) "brought into the Tower the rack or brake...and thereupon the rack is called the duke of Exeter's daughter"(Coke 34-5).

Whether or not Fortescue was in fact protesting torture in England is unclear. Coke's own position in the 1630s is, however, more puzzling. For Coke goes on in the same passage to commend Fortescue's repudiation of torture and denial that it happens in England. He says that Fortescue affirms that "all tortures and torments of parties accused were directly against the common lawes of England, and shewed the inconvenience thereof by fearfull example." And so, he goes on in his own voice, "there is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in" (Coke 35).

I describe his view as puzzling, since Coke had himself been named as a Commissioner to Torture in six separate instances between 1593 and 1603, using "manacles," "manacles and torture," or "manacles or the rack." His name appears along with, for example, that of Sir Francis Bacon, who

served five times as Commissioner to Torture.[12] Coke's position is almost parallel to that of Sir Thomas Smith, who, in his *De republica Anglorum* of 1565, affirms unequivocally that "torment or question which is used by the order of civill lawe and custome of other countries to put a malefactor to excessive pain, to make him confesse of him selfe," "is not used in England."[13] And yet Smith, too, is also named as a commissioner to torture, using the rack, though in his case he tortured in 1571; so he denied the existence of torture in England a few years *before* he tortured. Coke, by contrast, denied that torture existed in England *after* he served as a torturer.

Not everyone denied that torture occurred, but those who acknowledged it insisted that questions of conscience were not being asked; they also insisted on its legality, its necessity, and, above all, its clemency. Take, for example, Thomas Norton, co-author of the tragedy *Gorboduc* (1561), named as a commissioner of torture, and probably the author of *A Declaration of the fauourable dealing of her Maiesties Commissioners appointed for the Examination of certaine Traitours, and of tortures vniustly reported to be done vpon them for matters of religion*.[14] This text was published in 1583 in the wake of Edmund Campion's torture between August and September 1581. Campion had been first imprisoned in the Tower in "Little Ease" (note the playful pun), "where a prisoner could neither stand upright nor lie stretched out."[15] On 30 July 1581, the Privy Council ordered him to be further examined and, if he refused "to answer truly and directly to such things as

by them shall be demanded … then to deal with him by the Rack."[16] Thomas Norton was one of those responsible for administering the torture. In addition to his being listed as torturer to Campion, Norton's name appears four further times on the inglorious torture warrants between 1574 and 1581 (Langbein 103-7).

In *A Declaration of the fauourable dealing of her Maiesties Commissioners*, Norton defends the use of torture on a variety of grounds: the rack has not been used as it is said to have been; that those tortured were never asked questions of conscience, but only about plots; that no-one had been tortured who had not already been convicted; that only those who said they would not tell the truth were tortured; and, finally, that the steps towards torture were always taken slowly and unwillingly. In sum, he concludes, even if torture is permitted "by the general laws of nations," the recent cases were both "enforced by the offenders' notorious obstinacy," and in any case conducted so as to reveal "the sweet temperature of her Majesty's mild and gracious clemency." Nothing has been done to the tortured, but what is "gentle and merciful"(Norton image 5).[17]

In sum, we have a range of legal positions surrounding the actual use of torture: denial that it happens; or recognition that it happens, but only in very extraordinary circumstances, with exceptional care for process, and with exceptional mildness. Why, exclaims Norton, Campion was "charitably

used," and "was never so racked, but that he was presently able to walk, and to write, and did presently write and subscribe all his confessions, as by the originals thereof may appear"(Norton image 2).

Thus one side of our paradox: the torturers, for the most part, denied that it happened and underlined its illegality. Or they denied its severity. Now for the second, matching part of this paradox: those who protested at torture, and here I refer to people who described themselves as "Catholics," did not protest its illegality. Instead, they underlined its monstrous inhumanity.

Cardinal William Allen's *A True, Sincere, and Modest Defense of English Catholics that Suffer for their Faith* was published in 1584,[18] in response to William Cecil's *Execution of Justice in England*, published earlier in the same the year (Allen xvii). In the *Defense*, Allen certainly disputes the applicability of the treason laws to Catholics, and their extension,[19] but he is silent on the legal justification of torture or of burning for heretics. Instead, he disputes claims made by Norton about the *manner* of the torture: "As for the moderation, great pity, and courtesy, which by your libel you would have the world believe Her Majesty's ministers have ever used in giving the torment to the persons aforesaid, the poor innocents have felt it, and Our Lord God knoweth the contrary" (Allen 73).

Allen's text is part of a larger, Continental Catholic denunciation of Protestant cruelty in the 1580s. Richard Verstegan, for example, had fled

England in 1581 after publishing an account of Campion's execution, and produced his *Theatrum crudelitatum haereticorum* in 1587, a short but spectacular book of images of Protestant torture of Catholics in both England and France, including images of waterboarding [Figure 1].[20]

Figure 1: "Horrible crimes perpetrated by Hugenots in France" [A scene of what we would call waterboarding]. Richard Verstegan, *Theatrum*

crudelitatum haereticorum nostri temporis. Editio altera emendatior. 1587. Antwerp, 1604. (39).

More telling, for our purposes, is a set of texts under the title *An Epistle of the persecution of Catholickes in Englande*.[21] The bulk of the *Epistle* is by Robert Parsons, who first published it in Latin in 1581 as *De persecutione anglicana, epistola*.[22] The English translation and edition, to which is prefaced a letter to the Privy Council by the translator, was published in 1582, again in the wake of the Campion torture. The English work presents a sequence of separate texts: (i) a long preface by the translator, in which he makes a very broad defense of the Catholic Church as a letter to members of the Privy Council; (ii) the epistle proper, presented as sent to one "Gerard," which gives a detailed account of the persecution and torture of Catholics in England; (iii) a short response by Gerard; (iv) a short introduction to a letter by Alexander Briant to the Fathers of the Society of Jesus, detailing the tortures he underwent (Briant was tortured by Norton in May 1581); (v) Briant's letter; and (vi) a coda by the translator. All but items (i) and (vi) are found in the Latin. The shifting authorship and address of this composite text is expressive of the dangers from which it emerges. So too is the account of the midnight raids and ransackings(image 54, 64). The most striking accent of this work in all its parts is, however, its appeal to pity. Take for example this address to the Privy Council, from item (i):

> Good Lord, what comfort can it be to any of your honors, at the day when you must depart this world, to have used such rigor, to your own flesh and blood, for matter of conscience, which you have not done to any other most impious, heinous, or detestable malefactor. What good or comfort can the tormented members of your brethren, the stretched veins, the broken sinews, the dismembered joints, the rented bowels of your country men, of your own quiet subjects, of most peaceable, modest, and innocent priests yield unto your souls at that day? you must your selves cry for mercy in that dreadful hour, to him whom these men, ether in truth, or in opinion do serve, and why then may not we ask some mercy at your honors hands now, at the least, from these horrible and servile torments? (Parsons image 20)

The author does appeal to law, but to divine, not human law, after appealing to human feelings of enormity.

The text proper of the *Epistle* (item ii) does list the penal laws applying to Catholics (images 27-30), and protests each one of them; it also cites the treason law and its separate clauses (images 33-36), before turning to particular, heart-rending narratives of humiliation, cruel confinement, and tortures for Catholic priests. The author does not, however, protest the illegality of torture or the burning of heretics. Instead, he appeals to our common humanity. No "Christian can have so hard and ironed a heart (unless he have lost both feeling of humanity and faith) but might be moved

to compassion with these extremities, which our poor Catholics do suffer" (image 36). The torturers

> seem to degenerate clean from all sense and feeling of human nature, and to be quite transformed in to (I cannot tell what) unnatural wildness, utterly forgetful of that sentence: *Judgment without mercy to him which hath not showed mercy* (image 49).

The authors of this composite work rely on that deferred, final judgment, when, as we read in the closing moments of the text (item vi), the priest Briant and the torturer Norton will debate one day, "when the devils shall be at hand to bear witness," as to whether it is the property of the devil to suffer patiently," or to "torment other men mercilessly"(image 92).

II

In sum, our paradox, again: there is a hole at the center of the torture debate of the early 1580s. The perpetrators deny its existence and legality, or at least minimize its ferocity; and the sufferers do not object to torture on legal grounds, despite their attention to the injustice of the law in many other respects. They focus not on its illegality, but its barbarity.

How do we resolve this paradox? The answer is simple, if depressing. To arrive at the answer, we need to retreat even further back, to the twelfth century, for that is when the grievous history of European judicial torture

starts again. I am leaving the case of Roman judicial torture aside, although the twelfth century reintroduction of torture depends on introduction of Roman civil law.[23]

In this brief account I am indebted to the splendid books by John H. Langbein, *Torture and the Law of Proof*, first published in 1977 (but reissued in 2006, in the wake of Bush-Administration torture), and by Edward Peters, *Torture*, first published in 1985. The Continental legal revolution of the twelfth century involved many factors, but there are two that concern us here. Firstly, we observe the change from an accusatorial to an inquisitorial system. We witness a shift from a system where the accuser is the wronged *individual*, to one where the inquisitor is the wronged jurisdictional *institution*. This can also be described as a shift from private to public law. Secondly, we observe a shift in the procedure of judgment: whereas God was to be the judge in trials of ordeal or combat in the older system, the newer system required evidential proof. The only satisfactory forms of evidential proof were two witnesses and confession. Because witnesses were often absent, confession rockets in prominence as the queen of proofs. This leads on the Continent, as it did *not* lead in England, to torture. In the thirteenth-century torture became a routine confession-seeking instrument of state-governed western Continental justice. It remained a routine part of those legal systems until the eighteenth century.[24] In England, the lower

standards of proof available to the common law jury system permitted that system to avoid judicially-sanctioned, evidence-gathering torture.[25]

These legal developments are not by any means irrelevant to the sacramental practice of the pre-Reformation Church. The introduction of universal confession in 1215 itself expresses the new legal mentality that had subsumed penitential law: no longer was penitence primarily a matter of social reconciliation so much as a matter of forensic inquisition, for which confession became a required element. It is no accident whatsoever that this model of law was also adapted to the Church's pursuit of heresy, in precisely the period leading up to and beyond the Fourth Lateran Council of 1215, which introduced annual confession for all adult Christians. The key documents are the papal bulls *Ad Extirpanda* (1252) and *Ut negotium* (1256), issued by, respectively, Innocent IV and Alexander IV. I cite from Innocent IV's *Ad Extirpanda*:

> ...the official or Rector should obtain from all heretics he has captured a confession by torture [*cogere…errores suos expresse fateri*] without injuring the body or causing danger of death, for they are thieves and murderers of souls...They should confess to their own errors and accuse other heretics whom they know, as well as their accomplices, fellow-believers, receivers and defenders, just as rogues and thieves of worldly goods are made to accuse their accomplices and confess the evils which they have committed (Peters 236).[26]

This bull did not permit ecclesiastical authorities themselves to apply torture; that innovation was introduced by the bull of Alexander IV four years later. It permitted clergy to torture, and granted them the power to absolve each other for irregularities (Peters 237).[27]

As we return to our documents of the early 1580s, we can see why the Elizabethan perpetrators of judicial, evidence gathering torture deny its legality: it *was* illegal in England and had never been introduced there. We can also see why Catholic sufferers and protestors against torture chose to focus on its enormity rather than its illegality: for their Church, too, tortured people. The translator of *An epistle of the persecution of Catholickes in Englande* can confidently say of the English Church that "It is not practiced amongst us" to use "tormenting and racking"(image 4); he cannot, however, say the same of the Continental pre-Reformation Church.

The closest he can come to a legal attack on torture is not very close at all. He is certainly conscious of the charge that his Church also tortures (how could he fail to be conscious of such an obvious charge?), but he denies that the comparison holds:

> And as for the discipline of the Catholic Church, which is commonly accustomed to be laid against us, whereby she punisheth new-fangled devisers, and obstinate bringers in of new religion, it hath no comparison at all with this of yours (image 3).

He repudiates the comparison on two grounds: firstly, because his Church's

"discipline is old and ancient, and allowed by your own practice of burning other sectaries than of the part of Calvin." Secondly, Protestant persecution of English Catholics is much more ferocious even than Catholic persecution of English Protestants "in Queen Mary's time (for that is most of all brought and urged against us)" (image 3).

The translator of Person's *Epistle* plays his hand a little more openly in a further passage, in which he comes very close to saying that the error is not the torture, but rather the choice of torture's victim. Thus he declares that if one single priest should confess to treasonous behavior under "rackings, stretchings, wrestings, and dreadful tortures," then let him be punished openly. But nothing has been found, not one act or word or cogitation (image 19). The problem with torturing us, this passage says, is that we are innocent; if the torture produced evidence of guilt, then let punishment proceed.

Like the citizens of the United States and its allies in the wake of the Bush Administration, late sixteenth-century English Catholics had been robbed of a principal legal objection to torture (i.e. "we do not do that"). We are delineating the contours of a man-made tragedy here: historical forces are swallowing two sides of a bitter confrontation with nowhere to go but the torture chamber.[28]

III

I have broken my promise not to speak about torture. I had, you will remember, promised to retreat to the space of illuminating play, and to retreat historically. I have retreated historically, but so far this essay has not been especially playful. In this last section I will be truer to my word, and turn to play, for play turns out, as I said earlier, to have an especially close association with interrogation and torture. We saw that adjacency in the Abu Graib photos, and we can see it in this sequence of representative images from a Flemish Book of Hours, the so-called Spinola Hours of c. 1510-20.

Figure 2: Master of the Dresden Prayer Book, "Christ Before Caiaphas" [sic], *Spinola Hours*, fol. 120. Bruges and Ghent, c. 1510-20. (I think the title is incorrect, since Christ is nowhere sent from Herod to Caiaphas. He is sent from Herod to Pilate [Luke 23:8-11]).

The whole page [Figure 2][29] incorporates many scenes form the drama of interrogation, but let us observe the sequence starting with Christ before Herod on the upper right, silent under interrogation; after Herod's

disappointment with Christ, he is marched in carnivalesque procession dressed in white, while someone seems to grab, from behind, towards his genitals (middle right); below, the procession has become great public fun, as Christ is surrounded by mocking jesters. Christ will pass by a subtly obscured Mary (upper left), before arriving at what is presumably Pilate's palace for a further interrogation (main inset image), prior to crucifixion. These vivid visualizations of interrogation are picked up from gospel accounts of Christ's arrest, and at least five, possibly six, interrogations (before Pilate, twice, and before the chief priests, Annas, and Caiaphas and before Herod).[30] The scenes of mockery are picked up from incontestable references to mockery in these Gospel narratives of interrogation.[31] In the light of Abu Graib, with its scenes of mockery generally and of sexual humiliation in particular, these images will have gained new resonance. Before Abu Graib, indeed, we might not have noticed the hand grabbing the genitals from behind.

The *Epistle of the persecution of Catholickes in Englande* is also marked by references to play and plays. Not only do we have the author of the first Senecan tragedy in England, Thomas Norton, as the torturer,[32] but the text makes implicit or explicit parallels with dramatic activity in the pursuit of Catholic priests. If a priest is captured celebrating mass, then the public mockery is modeled on late medieval drama such as the *Croxton Play of the Sacrament* (1461):

> a man would marvel to see, how impiously and how despitefully they behave themselves. First, for the sacred yea and consecrated host, they take it away with violence, tread it under foot, thrust it through with knives and daggers, fasten it to a poste, and with great wonder show it to Catholics, insult and triumph against it in all scoffing and scornful manner, and call it (such is their blasphemy) the wheaten or bready god of papists (image 39).

Or the author describes the treatment of Campion as a "tragedy," when "a large paper was most spitefully written with great letters, which they forced him to bear upon his head in this triumph"(image 43).[33]

Even the rack itself is described as a game. Now that we understand the logic, might we say *especially*, and *obviously*, the rack itself is described as a game. Confronted by the fact of having racked Campion and pulled his finger nails, the accused make sport of it:

> Twit (said they) it was a merry pastime: he was cramped or pulled a little, not in earnest, but in jest. After the same manner they jested of others, which had been racked before. So great delight these merry conceited fellows do take, in making scoffs and sports of the afflictions of sorry poor men (image 45).

If, however, the environs of the torture chamber are described in terms of play for profound reasons, we need now to distinguish between play and plays. For some late medieval plays, and one early modern play,

represent the viciously playful environment of torture in deeply critical ways. Unlike the polemical documents so far considered in this essay, the plays protest not only torture's inhumanity, but also its illegality. I discuss two late medieval plays and one early modern example. Each makes considerable play, as it were, of the hideous playfulness of interrogation and torture, and each focuses on the illegality of official torture. Each play, that is, is critical of vicious play. Each uses the play of theatre to rebuke the "play" of torture.

Although the gospels offer inconsistent accounts of Christ's interrogation, they collectively represent interrogation sessions before Pilate, Herod and the Pharisees. They also offer direct cues for the playfulness of these interrogation sessions. Medieval English playwrights brilliantly developed these cues in a series of powerful plays, in which speech and silence generate enormous dramatic power. These plays make explicit reference to the legal constraints on interrogation of Lollards by bishops in fifteenth-century England. They also make sustained and brilliant use of strategic anachronism, identifying as they do ancient Pharisees and fifteenth-century bishops.

In the fifteenth-century Wakefield Master's "Buffetting," for example,[34] Caiaphas threatens Christ by marking his episcopal status: 'Lad, I am a prelate, / A lord in degré'.[35] This episcopal reference aligns the play with contemporary statute in force. The 1401 statute *De Heretico Comburendo*

determined that bishops should arrest, interrogate and, if appropriate, convict suspected heretics. Bishops were not, however, to visit punishment; they were instead to hand the convicted heretic over to the secular arm for burning.[36] Thus it is, we may assume, that the Wakefield "bishops" (Caiaphas and Annas) set to finding a charge against Christ that will persuade the secular authority to execute him. The encounter between the bishops and Christ, surrounded as they are by the bishops' torturers, veers menacingly between different models. Strictly an examination scene, it is also a game in which Christ is to play 'King Copyn'; Christ's refusal to play provokes, however, a third model, in which we are allowed to witness illegal yet judicial torture. Caiphas is represented as a manic hooligan, desiring only to inflict savage violence on Christ, and restrained by Annas, who counsels him to remember his ecclesiastical role, and to remember the law: "Sed nobis non licet / Interficere quemquam" ("And yet we are not permitted to kill anyone") (21.389-90). Caiaphas is barely restrained by the law: his heart will burst if he can't thrust Christ's eyes out. Finally restrained by Annas, Caiaphas hands Christ over to the "*tortores*" (named thus in the single manuscript)[37] for some preliminary beating. The *tortores* readily accede to their orders, promising to teach Christ "a new play of Yoyll" (21.498). The torturers promptly play their version of this popular Christmas game by beating Christ around the head.[38] In another Wakefield play, the torturers (so called) declare that Christ's pride would be brought low if only

they could have used the "rack."[39] The audience in this open air theatre is, then, taken inside the episcopal "play" house, where the euphemisms of brutality are publicly exposed by a Christ who resolutely refuses to play.[40]

We can see the same exposure of the dynamics of "play" in York's "Christ Before Herod." This play had been part of the York Cycle since at least 1415, but was reworked by the so-called York Realist sometime before 1477. It was performed by the litsters, or dyers, no doubt because of the cloths that figure so prominently in the play: the gorgeous clothes of Herod, and the white garment with which Herod mockingly clothes Christ.

Herod opens the play; it's bedtime and he needs silence. So he threatens his household (and by extension, the outdoor audience of this play) with violence to the head unless they quieten down.[41] The stage villain Herod's demand for silence is at once ridiculous and resonant, evoking as it does other, less comic demands for silence in fifteenth-century England. For at its outer reach, Herod's call for silence evokes national calls to silence on certain issues. The *Constitutions* of Archbishop Arundel in 1409 forbade, among other things, translation of the Scriptures into the vernacular.[42] All the York plays take liberties with a translated Scripture, and certain plays in the York and Wakefield cycles in particular act out dramas of interrogation and punishment that address critical prohibitions in fifteenth-century English society, especially the *Constitutions* themselves. I am not arguing that the plays express Lollard positions; their inclusive theology of labour is

far too broad-based for that to be true. I do argue that the plays often provoke sharply critical reflection on royal and episcopal mechanisms in the prosecution and management of "sedition" and "heresy." Along with many other orthodox fifteenth-century religious texts, the cycle plays addressed an environment constrained by censorship, repression, fear of aggressive interrogation and spectacular punishment.[43]

Herod's opening call to silence is met with Christ's silence. So far, however, from being a submissive silence, Christ's refusal to talk entirely reorganises the relations of power that the play so brazenly advertises in its opening. After Herod goes to bed for a peaceful night's sleep, he is disturbed by the arrival of Pilate's men, who bring the prisoner Christ; they gain entry to Herod's court by first promising some "fun" with the prisoner whom, before the judgment of any trial, they openly intend to execute. Herod at first refuses anything to do with Pilate's men, until the messengers flatteringly insist on Pilate's recognition of Herod's jurisdiction in Galilee. Once the point about jurisdictional boundaries has been made, the "fun" of some late evening torture mixed with a trial of sorts begins: "we shall have goode game with this boy" (31.165).

Through Herod, the playwright promises a play within a play, with Christ providing the entertainment. In vain, however, Herod cajoles and threatens Christ by way of getting the performance going, only occasionally asking the questions proper to an interrogation. By refusing to play, Christ

redraws the jurisdictional boundaries of theatricality itself. For in the face of Christ's deafening silence it is Herod and his henchmen who are themselves finally reduced to the level of the court's unwitting fools. Precisely by attempting to make a spectacle of Christ by having him don a fool's robe (in this case a white robe, following Luke 23:11), they become the spectacle themselves. There *is* a play within this play, but Christ is its director. By realigning the force lines of Herod's theatre of trial and torture, Christ realigns the force lines of secular society. Herod's opening boasts of absolute power are dwarfed by the very thing that that pretended power began by demanding: silence.[44]

My third, and final, example is from *King Lear*. Between the York realist and Shakespeare, Herod's threatening call for silence on various matters had of course been successful. Herod himself had been silenced by government fiat, since as England's first professional theater opened (in Whitechapel, in 1567) the cycles in York, Wakefield and Chester were successively closed down between 1569 and 1576.[45]

The development of a secular and professional metropolitan theater in the later sixteenth century is often hailed as a moment of liberation from a religious theater governed by an oppressive Church. From the evidence of our two cycle plays we can see the weakness of that position. The cycle plays take street audiences to an imagined indoors, to witness the spectacle of interrogation as a menacing game played beyond the law by sadistic kings

and bishops.[46] Elizabethan legislation of 1559 censors such drama. It may well be that the issuance of licences for plays that dealt with matters of religion or the governance of the state was not directed at the mystery plays.[47] The reign of Elizabeth did nevertheless demand the abolition of the religious theater, in April 1559 banning plays "wherein either matters of religion or of the governance of the estate of the commonweal shall be handled or treated… but by men of authority, learning and wisdom" (Tudor Royal Proclamations 2: 115-116).[48] From the perspective of the late medieval plays considered here, one can see why monarchs and bishops may have wished to silence such a theater.

The Elizabeth and the Jacobean stage was, then, unable to represent scenes of religious interrogation and torture with the same freedom as the late medieval stage. Let me end, however, with one exception, and let me add one more hero to the list of Shakespearean heroes. We turn to an act "too horrid to be endured in dramatic exhibition"(Johnson et al. 35). I refer, of course, to the blinding of the Duke of Gloucester in his own home in Act 3.7 of *King Lear*, first performed between 1603 and 1605. The sheer horridness of this scene has blinded us in its way: we are left so dazed by the brutality that we fail to see the scene as an interrogation. Not only that, but it is an interrogation of someone repeatedly called a traitor, where the appellation is not without force from the perspective of Cornwall and Regan.[49]

Shakespeare certainly refers elsewhere to torture, almost always critically. In *2 Henry VI*, for example, he underlines the fact that torture is not part of the English legal system, when the Duke of Gloucester is charged with devising "strange tortures for offenders, never heard of, / That England was defamed by tyranny" (*Henry VI*, part II: 3.1.121-3). Even in apparently playful contexts, when torture is being used metaphorically, Shakespeare underlines the legal stupidity of using torture, since it produces bad intelligence. Thus in *The Merchant of Venice* Bassanio says he lives "upon the rack" out of love for Portia. Portia instantly associates the rack with reason and confession, demanding that Bassanio confess "what treason… is mingled" with his love. As soon, however, as Bassanio does confess his love, Portia, mistrusts the confession, precisely because it has been produced under torture: "Ay, but I fear you speak upon the rack, / Where men enforcèd do speak anything" (3.2.24-33).

In *King Lear* alone, however, are we taken into the torture chamber. The traitor Gloucester is tied to a chair and questioned about letters he has received and where he has sent the king. Gloucester himself begs that his erstwhile friends do him no "foul play," but Cornwall clearly has playful ideas. He uses the strategy of the torturer that we have observed so often, the euphemisms of delicate human intercourse whose delicacy is designed vividly to illuminate horror:

Though we may not pass upon his life

Without the form of justice, yet our power

Shall do a curtsy to our wrath, which men

May blame but not control.

(lines 22-25)

We observe that "gameful" appeal to the submissive feminine "(a "curtsy to our wrath") that we observed earlier with the "Duke of Exeter's daughter" as euphemism for the rack. Here the disgusting effect of the euphemism is all the stronger for its neutralization of law: feminine decorum and decent form are used with frightening, vicious and playful gratuitousness to underlines illegality: Cornwall recognizes though maliciously neutralizes the "form of justice."[50]

Certainly Shakespeare is the hero of this scene, since he trod where other playwrights, apparently, feared to go. There is, however, another, little-noticed hero of this scene, who gives us our own cue with regard to our political masters and servants of the immediate past and, possibly, the immediate future. I refer to Cornwall's servant, who seeks to stop the no-brained torturer:

I have served you ever since I was a child,

But better service have I never done you

Than now to bid you hold.

(lines 70-73)

[1] This essay was originally delivered as The *Religion and Literature* and Henkels Interdisciplinary Lecture, at the University of Notre Dame, on April 19, 2011. I warmly thank the Board of *Religion and Literature,* and especially Susannah Brietz Monta, for the invitation to deliver this lecture and for her editorial comment; I also thank audiences at the universities of Notre Dame, Munich, Augsburg, Tunghai (Taiwan), and Chengchi National University, Taipei, for questions both spirited and pointed about this difficult material. Tim Turner, at the University of Texas at Austin, kindly gave me some critical bibliographical leads, for which I am extremely grateful.

[2] See Lewis, "Furor over Cheney Remark."

[3] For an absorbing and detailed narrative of the Bush Administration's legal management of torture, see Sands, 32.

[4] See Bush, "Memorandum for the Vice-President." See further Sands, *Torture Team*, 30-36.

[5] For many examples of euphemism used to designate torture, drawn from the realms of technology (e.g. "the plane ride"), ceremonies (e.g. "the dance") and nature civilized (e.g. "the little hare"), see Scarry, 44. I cite some late medieval, early modern English examples later in this essay.

[6] Thus in November 2010 Ahmed Ghailani was acquitted on 280 charges most likely because the judge, in a civilian court, ruled that key prosecution evidence was inadmissible, produced as it had been under "abusive and

coercive techniques." See Savage, "Terror Verdict Tests Obama's Strategy on Trials."

[7] It should be noted that, at the time of writing (November 2011), three of the five candidates for the Republican Presidential nomination declared, in a debate of 12 November 2011, that they approved of waterboarding as an interrogation technique. See "The Torture Candidates," *New York Times*, A30.

[8] The evidence of this period of judicially sanctioned torture in England is gathered in Langbein, *Torture and the Law of Proof,* Part 2, 73-139. For the torture warrants, which record the date, suspect's name, venue, names of the commissioners, offense, and mode of torture, see Langbein, 94-123.

[9] Between 1581 and 1590, under Elizabeth (ruled 1558-1603), 78 priests and 25 laypeople were executed for religious reasons, with 53 priests and 35 laypeople executed for the same reason between 1590 and 1603 (a total of 191). Figures and comment cited from MacCulloch, 392. For a somber narrative of sixteenth- and seventeenth-century confessional persecutions in England, see Walsham, 106-59.

[10] Translated in Fortescue, *On the Laws and Governance of England*.

[11] Edward Coke, *The Third Part of the Institutes of the Laws of England*.

[12] For instances of torture involving Coke and Bacon as Commissioners see Langbein, 115-9.

[13] Smith, *De Republica Anglorum*, 2.24, page 117.

[14] Thomas Norton, *A declaration of the fauourable dealing of her Maiesties commissioners appointed for the examination of certain traitours and of tortures*. References to this text will be cited by image number of the facsimile edition available on Early English Books Online. For authorship, see Langbein, *Torture and the Law of Proof*, 191-2. For Norton's life, and his reputation as "Rackmaster," see *Oxford Dictionary of National Biography*, hereafter *ODNB*.

[15] For which see "Edmund Campion," *ODNB*, consulted online.

[16] Cited from "Edmund Campion," *ODNB*, consulted online.

[17] All spelling has been modernized.

[18] William Allen, *The Execution of Justice in England* and *A True, Sincere, and Modest Defense of English Catholics that Suffer for their Faith*. For Allen's life, see *ODNB*.

[19] See Allen, *A True, Sincere, and Modest Defense of English Catholics*, xxv.

[20] Richard Verstegan, *Theatrum crudelitatum haereticorum nostri temporis. Editio altera emendatior*, 39. For Verstegan's life, see *ODNB*. For this text, see Dillon, 243-76.

[21] Robert Persons [Parsons], *An epistle of the persecution of Catholickes in Englande.* References to this text will be made by image number in the EEBO text.

[22] Robert Persons [Parsons], *De persecutione anglicana, epistola.* For full bibliographical details, see Milward, 65.

[23] For which see Edward Peters, "Destruction of the Flesh."

[24] See Langbein, *Torture and the Law of Proof*, Chapter 3.

[25] See also the excellent essay by James Landman, "Proving Constant: Torture and *The Man of Law's Tale*," 7-9, and further references. Landman surveys and analyses the references to torture, and tormenting, in Chaucer's *Canterbury Tales.*

[26] The Latin text can be found in Eimeric, *Directorium inquisitorum F. Nicolai Eymerici*, 592-3.

[27] The Latin text can be found in Lea, 1: 575, Appendix, document 12.

[28] For the mutually dependent discursive relations between torturer and tortured in Elizabethan England, see the penetrating essay by Elizabeth Hanson, "Torture and Truth in Renaissance England," 53-84. Hanson focusses on the needs of both sides to use torture to declare their respective, mutually exclusive truths, whether that truth be treason or martyrdom: "Both sides constructed their work in the torture chamber as the establishment of torture's proper discursive ground. Torture was conceived as a self-consuming process, a struggle to annihilate the discursive duality that structured the relation between the torturer and his victim. Both sides called this goal the 'truth'" (61). For the intensity of the struggle between competing models of execution (martyr or traitor) in the late medieval and early modern England, see the excellent study by Dailey, *The English Martyr From Reformation to Revolution*.

[29] Reproduced in Kren, 105.

[30] The scenes of Christ's interrogations are as follows:

(i) Matthew 26:57-74: interrogated by Caiaphas and chief priests, followed by betrayal of Peter;

(ii) Matthew 27:11-27: interrogated by Pilate, after which Christ is sent directly to crucifixion, with purple cloak.

(iii) Mark 14:53-72, interrogated by chief priests, elders, scribes, followed by Peter's denial;

(iv) Mark 15:1-17, interrogated by Pilate, after which Christ is sent directly to crucifixion, with purple cloak.

(v) Luke 22:66-71, interrogated by chief priests and scribes;

(vi) Luke 23:1-7, interrogated by Pilate, and sent to Herod;

(vii) Luke 23:8-11, interrogated by Herod; dressing Christ in "a white robe," Herod sends him back to Pilate;

(viii) Luke 23:13-23, interrogated by Pilate with chief priests and scribes, after which Christ is sent directly to crucifixion;

(ix) John 18:12-26, interrogated by Annas, followed by denial of Peter;

(x) John 18:28-19:16, interrogated by Pilate, after which Christ is sent directly to crucifixion, with purple robe.

[31] See especially Mark 15:16-20: "[16] milites autem duxerunt eum in atrium praetorii et convocant totam cohortem [17] et induunt eum purpura et imponunt ei plectentes spineam coronam [18] et coeperunt salutare eum Ave rex Iudaeorum [19] et percutiebant caput eius arundine et conspuebant eum

et ponentes genua adorabant eum [20] et postquam illuserunt ei, exuerunt illum purpura, et induerunt eum vestimentis suis et educunt illum ut crucifigerent eum" and Luke 23: 11: "[11] sprevit autem illum Herodes cum exercitu suo et illusit indutum veste alba, et remisit ad Pilatum." *Biblia Sacra iuxta Vulgatam Clementinam*, ed. Colunga and Turado. I am much indebted to my colleague Hugo van der Velden for interpretation of the image from the Spinola Hours.

[32] *Gorboduc* first performed 1561. For *Gorboduc* scholarship, see Cavanagh, "Political Tragedy in the 1560s: *Cambises* and *Gorboduc*." See ODNB for citation from Sidney.

[33] For Richard Verstegan's visual representation of this scene, see Dillon, 128 and 134-5.

[34] I am persuaded that the plays of this cycle can reasonably be located in Wakefield.

[35] All citations of Wakefield Plays are taken from *The Towneley Plays*, Play 21, lines 222-3. All future references to this text will be made by play and line number in the body of the text.

[36] For the text of the statute, see *Statutes of the Realm*, 2 Henry IV, c. 15 , 2:127-8. For discussion of its context, see A. K. McHardy, "*De haeretico comburendo, 1401.*"

[37] For which see *The Towneley Cycle: A Facsimile of Huntington MS HM 1*, e.g., f. 77r.

[38] For the game, see *The Towneley Plays*, ed. Stevens and Cawley, 2:561.

[39] Play 23, "Crucifixion," lines 86-88, in *The Towneley Plays*, ed. Stevens and Cawley, 1:290.

[40] For the evidence aligning trials in the plays with contemporary legal practice, see King, "Contemporary Cultural Models for the Trial Plays in the York Cycle."

[41] See *The York Plays*, Play 31, lines 1-7. All further references to this play will be made by play and line number in the body of the text.

[42] For the text of the *Constitutions*, see *Concilia Magnae Britanniae et Hiberniae*, 3: 317.

[43] For fifteenth-century English censorship, see especially Nicholas Watson, "Censorship and Cultural Change in Late-Medieval England: Vernacular Theology, the Oxford Translation Debate, and Arundel's Constitutions of 1409." See also James Simpson, "The Constraints of Satire in *Piers Plowman* and *Mum and the Sothsegger*."

[44] My discussion of mystery cycle interrogation and torture scenes is drawn from James Simpson, *Reform and Cultural Revolution*, *1350-1547*, 506, 513-16.

[45] The case was first made, persuasively, in Harold C. Gardiner, *Mysteries' End*. New Haven: Yale University Press, 1946. For extensive confirmation, see Wickham, *Early English Stages 1300 to 1660*, 97-167. The "undeniable" "evidence of [state] interference" is summarized in Dutton, 290-291. The Gardiner argument has been qualified by more recent scholars, who point to

the economic crises of the sixteenth century, crises that militated against the expensive mounting of cycle drama by guilds; see Coldeway, 77-101. For the first commercial theatre opening in 1567, and not 1576 as is usually stated, see Gurr, 13.

[46] See, for example, Mullaney, *The Place of the Stage*. Mullaney seems unaware of a popular, non-metropolitan theatre; thus we read that "popular [metropolitan] drama in England emerged as a cultural institution only by…dislocating itself from the strict confines of the social order and taking up a place on the margins of society, in the Liberties located outside the city walls"(9).

[47] The legislation, and discussion thereof, can be found in Dutton, "Censorship."

[48]For discussion and broader context, including Edwardian and Marian prohibitions on playing of religious matters, see Wickham, *Early English Stages*, 4: 125-31.

[49] For the legitimacy of Cornwall's interests (not his methods) as the "legitimate, formally sanctioned ruler of the half the kingdom," as he seeks "information vital to national security," see Greenblatt, 85. Greenblatt also points to the evidence that *Lear* attracted what appears to be anti-recusant sanction (88).

[50] Andreas Höfele argues that in making a curtsy to wrath, Cornwall's power is not yielding to wrath so much as making itself an accessory to

wrath. Either way, the scene recognizes both Cornwall's inhumanity and his illegality. See his *Stage, Stake, and Scaffold: Humans and Animals in Shakespeare's Theatre*, 206.

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