"PER OMNE FAS AC NEFAS, SECUTI SUNT:"

Interrogative Torture in the Tudor Dynasty

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ABSTRACT

Drawing on the personal writings of 16th and 17th century English legal scholars, Privy Council records, secondary source analyses of Tudor administration, and accounts of prisoner interrogations, this paper examines the practice and legal justification of interrogative torture in England during the Tudor dynasty. Arguing that an English legal distinction between interrogative and punitive torture had been forming since 1166, the paper contends that the Tudor period broke starkly from England's developing common law tradition; a break that was made possible not only by the willingness of the royals themselves to circumvent the boundaries of legality, but also by the willing civil servants who actively carried out and defended the actions of the crown. Though fervent in their outward opposition to interrogative torture used by Romano-canonical civil law systems on the mainland continent, English jurists and civil servants under the Tudor monarchy nonetheless were engaged in the rationalization and institutionalization of interrogative torture themselves. Critically however, they understood its application in England as uniquely different—as an *extra*ordinary tool of royal power to proportionally combat what they believed were *extra*ordinary threats from criminal behavior. Interrogative torture in the Tudor period thus became a joint endeavor constituting a unique and important, though admittedly transient chapter in what is today often regarded in historic academia as "Tudor Despotism."

> "Hensfourth no maner of persone ne persones whatsoever he or they be, that attend upon the King and Sovereign Lord of this lande *for the tyme being* in his persone, and do him true and feithfull service of alliegeaunce in the same…he or they be *in no wise convycte or atteynt of high treason* ne of other offences

> for that cause by acte of Parliament or otherwise by any processe of lawe, wherby he or any of theym shall… forfeit life landes tenementes rentis possessions hereditamentis godes catelles or eny other thingis."[1]

Forty-five years before the dawning of Henry VIII's English Reformation, long before the first recorded torture warrant issued by the Privy Council in 1540, Henry VII shepherded an intriguing revision of England's treason laws through Parliament. Nearly ten years after his victory at the Battle of Bosworth Field, Henry Tudor, the father of England's notorious apostate king, was daunted by the prospect of losing the throne he had recently won to ambitious rebel claimants organized around the "illegitimacy" of the Tudor dynastic line.[2] In 1495 Henry assuaged his concerned subjects by having Parliament declare that it "was not treason to obey a *de facto* ruler, whatever the legal merits of his title," even if an alternative claimant's lineage proved stronger.[3] Despite the "illogical and… extremely doubtful validity" of the law within the context of previous English legal tradition, the legislation produced the desired effect.[4] Dressed up as a revision to extend legal protection to soldiers in Henry's service should he be overthrown, the wording of the statute was so cleverly constructed that it also absolved his supporters of their obligation to support rivals with stronger claims to Henry's titles ultimately leaving them free to support Henry (as the *de facto* ruler of England) even if another claimant wielded a clearer lineage.

There is something to be said of the extraordinary pragmatism that characterized the rule of the Tudor dynasty. Despite having won the English crown essentially through conquest, Henry VII was not able to rule by will alone. The threats and crises that abounded during his kingship never permitted Henry to ignore the problem of legitimacy, but the looming threat of civil chaos offered a unique opportunity to exploit the very laws that constrained him. Crises, in effect, blurred the division between the legitimate and the necessary, thus catalyzing expansions of royal power and galvanizing efforts to mask royal initiatives that in many cases broke starkly from English legal tradition and expectation. Crises gave such changes an aura of justification, appreciated by both the councilors who carried them out, as well as the people who lived under them. Even Henry VIII, the

monarch who ushered in a grim era of royally authorized interrogative torture, never abandoned the aim of securing the appearance of legal legitimacy for his actions, and never once publicly claimed to operate entirely "above the law."[5] On the contrary, the Tudors by and large recognized the importance of the perception of legality in this period of chaos, yet found themselves at various times in unique positions to mask dubious or unpalatable policies with the trappings of legal support.

For immensely good reason, however, the enduring legacy of the Tudor line has not been one that casts their dynasty charitably as champions of long-standing tradition or as stewards of the status quo. Far from regarded as the good Catholic King of England, Henry VIII would long be remembered for precipitating an era characterized by overwhelming upheaval, which in its course, would fundamentally alter longstanding boundaries of power among previously symbiotic English institutions of culture, politics, and religion. By the end of just two generational transitions in the Tudor dynasty, the death of the "Virgin Queen" Elizabeth I in 1603 left behind a kingdom profoundly changed from the England her grandfather, Henry VII, once ruled—a product, decades in the making, and born of defiant, momentous, and violent reformation. The very nature of kingship, royal authority, and above all, the unique power of the crown's prerogative were among the most affected as they were swept up in what began as Henry's struggle to secure a male heir, but in due course became the genesis of a royal enterprise that wrestled the shores of England from the mastery of Rome.

In many respects throughout this period, the crown was engaged in an altogether more difficult kind of struggle—one that strained the Tudor legacy of pragmatic maneuvering to its limits, and pitted it against some of the most basic longstanding principles of England's system of common law. Despite English legal custom's implacable opposition to its use and practice, interrogative torture increasingly became a tool of the royal prerogative, and a unique, though transient, hallmark of "Tudor Despotism."[6] Seen as a means to safeguard the regime, the prominence and severity of torture grew proportionally to what the crown and its councilors perceived as a radically more threatening atmosphere of rule, regardless of the actuality of danger. Beginning under the political

and religious instability of Henry VIII's reign and reaching its peak during the Elizabethan years, interrogative torture was rationalized and institutionalized by many of the same jurists and councilors who lambasted its use under the Romano-Canonical system of continental Europe but who also understood its application in England as uniquely different—an *extra*ordinary tool of royal power to combat *extra*ordinary threats from criminal behavior.

"England does not torture"

Before venturing to explore how and why torture was employed during the Tudor dynasty (or even why the emergence of interrogative torture in the Tudor period is significant at all), it helps to begin first with a consideration of the long-standing and prevailing attitudes of English officials on the legality, effectiveness, and general utility of this particular use of torture.

> "Torment or question, which is used by the order of the civile law and custome of other countries, to put a malefactor to excessive paine to make him confesse of himself, or of his fellowes or complices, is not used in England. It is taken for servile. For how can he serve the commonwealth after as a free man who hath his bodie so haled or tormented? And if hee bee not found guilty, what amends can be made him? And if he must dye, what crueltie is it so to torment him before!" [7]

Sir Thomas Smith remains one of the few men in the history of the Tudor period to have served as Principal Secretary under three separate monarchs. Appointed during the reign of Edward VI following the passing of Edward's father, Henry VIII, Sir Smith became a prolific apologist of England's "virtuous" legal and administrative character. A professed Protestant, his fortunes turned for the worse however in 1548, after the ascension of Queen Mary I—a Catholic—to the English throne. Stripped of most of his titles after only a month of service and cut off from England's administrative circle, Sir Smith remained on the country's political periphery until the reign of Elizabeth. Reinstated once more to the office of Principal Secretary in 1572, Smith proved himself a valuable asset to the Queen's inner circle of advisors. His avowed Protestant allegiance earned him numerous allies in the Queen's expanding, but increasingly centralized

bureaucracy, and curried no small amount of trust during his years of dedicated service. Smith's major written works, notably his *De Republica Anglorum* passionately defended England's perception of law and torture, as well as the Kingdom's unique divergence from the laws of the continent.[8]

Torture, as Smith claimed, was not English. In his estimation, at best, it was an unnecessary cruelty that was just as likely to muddle the truth as it was to reveal it, and at worst, a morally outrageous transgression against England's longstanding legal customs. England was, in a sense, uniquely removed (according to Smith) from the general adoption of interrogative torture on the European continent, and in this view he was certainly not alone.[9]

Sir John Fortescue, living almost a century before Smith, published bitter indictments of Roman civil law in France. A prominent English jurist during the reign of Henry VI, Fortesque also authored numerous written works on English jurisprudential customs.[10] His enduring magnum opus of English legal scholarship, *De Laudibus Legum Anglie*, notoriously admonished French Romano-Canonical law for its treatment of criminal suspects, insisting "criminals and suspected criminals [were] afflicted with so many kinds of tortures… that the pen scorns to put them into writing."[11]

England's particular resistance to utilize torture as an investigative tool, seemingly in such stark contrast with the legal systems of the continent, also features prominently in the works of more contemporary historians. For the 19th century historian, Henry Charles Lea, the proposition that England did not formulate a legal regime for applying torture was taken as a historical fact —verging perhaps, even on an academic dogma. Although his analysis suffers from a notably anglophilic narration, Lea's ultimate point, that England's system of justice evolved largely without the widespread adoption of Roman law, remains strongly substantiated by the writings of English jurists themselves. Cutting through the tedium of Lea's pages of laudatory praise for English jurists "who could frame legal maxims so honorable to their sense of justice and so far in advance of the received notions of their age," one does get the general sense that, at least on the level of sanctioning torture, England really was in a league of its own from at least the 12th century onward.[12]

A European Divergence

Where precisely did this divergence occur in European history? Why was it that England's perception of interrogative torture diverged so starkly from the legal systems of the European continent? The answer largely lies in the legal reformations of the 11th and 12th centuries and in the separate paths England and the rest of Europe took as older legal systems fell away.

All determinations of guilt or innocence in any legal case, criminal or civil, must rest on some form of proof. Proof, in one form or another, grants legitimacy to a determination of innocence or guilt. Prior to sweeping legal reforms of the 11th and 12th centuries, much of Europe found that legitimacy in the form of ordeals. At their heart, the Germanically-derived ordeals were a series of ritualized tests, to which an accused was subjected with the intention of provoking God's judgment [*iudicum dei*] of innocence or guilt (e.g. tossing a defendant into a body of water to see if that person floated or sank).[13] The basis of this particular system, as judicial reformers (especially within the Church) pointed out in the 11th and 12th centuries, was an invocation of divine judgment, not investigatory discernment. By the time the Medieval Church's power had expanded to its zenith in the 13th century, however, many of the older, localized systems of ordeals in Europe had yielded to new legal revolutions driven by Rome's momentum to consolidate the primacy of its temporal authority. Efforts to consolidate and systemize legal codes and standards of proof in this period of expanded Church authority instigated two significant "revolutions" in Europe's legal development —firstly, a new "system of procedure [*ordo iudiciarius*] in which oral and written evidence presented in a court took the place of the hot iron [and] judicial combat…" whilst secondly, it precipitated a change "from an accusatorial to an inquisitorial mode of proof."[14] The divergence between England and the rest of Europe from this point on mostly lies within the second revolution regarding what constituted "proof" in capital criminal cases, and how that evidence should be examined.

In the rest of Europe, "one could condemn [an] accused [of a capital crime] on the testimony of two eyewitnesses *or* upon confession" both of which constituted a "full proof" under Roman

law, and without which no person could be found guilty of a capital crime.[15] Critically, circumstantial evidence (that is, essentially any evidence that was not an eyewitness account or confession) could only constitute partial proof, which according to the 11th and 12th century reforms, could not serve as the sole basis for conviction. Confessions therefore, often became the "*regina probationum,*" or "Queen of Proofs" under the new system, particularly in the prosecutorial systems against heresy and treason in France and Spain.[16] In the course of a trial, if "confession was not forthcoming, and …there were only one or no eyewitnesses…torture [often had to be] invoked, but on very different grounds from those of the previous ordeals."[17] Torture became focused on having the accused reveal elements of his or her crimes as a way of proving involvement and ultimate justification for punishment. Torture under the Romano-Canonical system thus became a tool of fact-finding for jurists on the continent, not divine judgment. Without a confession, crimes without eyewitnesses (particularly crimes pertaining to treasonous association, heresy, and other intellectual crimes devoid of actual action), were nearly impossible to prove under the new system. Torture then, as a judicial practice of evidential discernment, became ingrained in European legal practice as a necessary element of its high threshold of proof.

England's Separate Path

England's evolution away from the ordeal system, on the other hand, went in a substantially different direction from that of continental Europe's. England itself was no stranger to the ordeals, which had largely formed the basis of its system of proof since the recession of the Western Roman Empire and the subsequent invasions and settlement of Danish, Germanic, and later Norman groups on the islands. Then in 1166, England's trajectory towards an alternative system of proof and prosecution was changed by a series of promulgated *assizes* during the legal reforms of King Henry II. It seems important to acknowledge that the term "trajectory" actually has significant meaning here—England's legal system did not change drastically from the rest of Europe's in a short course of time, but did so as small differences in early customs became far more pronounced with centuries of development.

For all his blatant anglophilia in his comparative account of continental and English legal customs, Henry Lea does succeed in pointing to several critical differences in the way English legal scholars regarded torture from their continental counterparts.[18] Even a cursory overview of Lea's understanding of English law reveals a system in which "confession[s] obtained by fear or fraud" were not only "invalid," but also potential grounds for levying criminal charges at officials attempting to elicit them.[19] This is not to say, of course, that there are no recorded instances of English judges breaching ethical guidelines with regards to coercion (and the existence of specific appeals against judges who forced confessions suggest the practice occurred often enough to warrant protections and courses of redress); still, there is no evidence to suggest that these infractions were backed by the state or supported by any royal councilor. Instead, the use of coerced confessions remained an *abuse* of legal power under English law, not a tool for its execution.[20]

The Assize of Clarendon, widely regarded as the primary force that initiated this change in trajectory, included several key provisions that made England's transformation to a system of common law possible.[21] Instead of relying on a system of "independent prosecution" carried out by "royal officials," Henry "created a kind of lay version of synodal witness in the jury of presentment, or the grand jury."[22] For the first time in England's history, a body composed of "the more lawful men of each township," was authorized to determine innocence or guilt for capital crimes based, not upon the strict Romano-Canonical threshold of proof, but on a preponderance of presented evidence.[23] The Assize, though initially bound specifically to Clarendon, eventually became the model for other royal courts, and was, in a certain sense, "the ultimate origin of the jury trial in common law."[24] Following the precedent set by Henry, juries gradually became an integral part of the English legal system by the "second half of the thirteenth century,"and "the kind of evidence that was acceptable in [criminal proceedings]" ultimately proved "much broader than that was acceptable in Romano-Canonical procedure."[25] England's unique "rules of evidence, the absence of a state prosecutor, the different role of the judge [as a presiding force, not an investigative one], and the responsibility of the grand and trial juries," contributed both to the Kingdom's gradual

departure from the continental Roman law, and its transition from the old ordeal model to an evidentiary legal system.[26] Critical for the purposes of understanding England's odium towards interrogative torture, in the Kingdom's emerging system of common law, "the place of confession […] loomed far smaller than in continental law, and the problem of torture became generally irrelevant."[27]

By the dawning of the Tudor era, "deliberate torture on orders of the king was virtually unknown" in England. Exceptions, though a handful do exist, are noteworthily rare—with only three recorded periods of interrogative torture existing prior to Henry VIII, and in each case was conducted under special circumstances.[28] The first, documented by Sir Edward Coke (a jurist under Elizabeth), was a brief period in the mid 15th century when Duke Holland of Exeter attempted to *import* "imperial civil law to England" (perceived as largely distinct from and *foreign* to common law, not a part of it).[29] Prior to that instance, Edward II had in 1310, "approved [investigative torture's] use against the Templars, and since there was no one competent in England to inflict it properly, expert torturers had to be imported from abroad," operating under ecclesiastical, not common, law.[30] The only other period occurred in the chaotic 1460s, during a series of major Lancastrian revolts against the Yorkish king, Edward IV, who burned the feet of one courier to obtain information he exchanged with Queen Margaret of Anjou's Lancastrian sympathizers.[31] In each instance, torture was justified either under an altogether separate legal system, or as a necessary tool to maintain civil order in a time of crisis—and each time it died quickly when either the advocate for torture was stopped, or the crisis that necessitated the use of torture came to an end. The result was that no system of interrogative torture developed in England following its divergence from the rest of Europe's legal reforms in the 11th and 12th centuries. Punitive torture however, was an entirely different story.

Torturous Punishment

A simplistic understanding of "torture" as the intentional infliction of pain upon an individual may be suitable for the newfangled perspectives of ultramodern philosophers and ethicists vilifying the Romano-Canonical system of continental Europe, but such a broad

and superficial understanding of torture must be abandoned before any reasonable understanding of the nuances of pain, punishment, and guilt within the English legal system can be truly grasped. The question of "when should bodily harm be inflicted?" was of much greater consequence and importance to English jurists than the question of "should torturous pain be used at all?" Critically, inflicting physical pain alone did not constitute torture in the view of England's legal tradition. In fact, the role and spectacle of public punishment, with all its trappings of appalling violence and (oftentimes quite literally) gut-wrenching fanfare were traditions that died particularly hard in England.

In the years before, during, and after the Reformation, England *relished* in public execution and corporal punishment. Even up until the early years of the 19th century, English penal laws preserving public corporal punishment remained on the books despite longstanding efforts to relax the "severity" of their application.[32] The nauseating end of the criminally-meddlesome rabble-rouser, William Hacket (who, during the reign of Queen Elizabeth was publicly hanged, disemboweled, castrated, beheaded, and finally ripped to fleshy chunks by ropes fastened to horses), was but one example of a subject who met his gruesome fate by the notorious process of drawing and quartering—a punishment reserved specially for high traitors (Hacket had made the fatal mistake of declaring himself "Christ" on top of a merchant cart in the streets of London in July of that year).[33]

As shockingly painful and viciously sadistic as these acts of public punishment may appear in the view of modern eyes, they cannot be equated to the conceptualization of torture by English legal scholars who lambasted the "long history of legalized cruelty" in continental Europe.[34] Under various stages of development following the 12th and 13th centuries, English common law developed a specific *raison d'être* for the application of physical pain against persons who found themselves caught up in capital offense proceedings. Infliction of physical pain on any party in a legal dispute, criminal or civil, was not a viable means of securing or soliciting information under English common law. It was only after the accused had been tried and found guilty, under the weight of the evidence brought against him, that he was then subjected to a public punishment

commensurate with his crimes. Punishment therefore, and its many manifestations in England, could very well appear cruel, but pain's role here was solely, and purposefully punitive, not investigative.

England does not Torture?

Yet despite the hefty degree of dignity attributed to the high-minded ideals of English common law by her staunchest acolytes in the 15th and 16th centuries, even the "loftiest names of [England's legal] profession" seemed to have been servants willing to sanction the supersession of their service to the crown over both legal precedent and character—giving professional license to a practice that had been, at least since the 12th century, considered inherently at odds with the values of English law.[35] In the previously mentioned case of William Hacket, records of the Privy Council, cross-referenced against registrar records of the Tower of London, indicate that just days prior to his trial and subsequent grisly execution for treason, he was "put to the manackles and soch other tortour as [the Serjeant at Law] [thought] good" in order to "enforce [Hacket] to utter his whole knowledge and that which is mete to be discovered of [his] wicked practizes and conspiracies."[36] The great nephew of the same Sir John Fortescue who denounced French civil law, is recorded as one of the "Commissioners of Torture" on a torture warrant issued on August 24, 1589, authorizing the racking of John Hodgkins, Valentine Syms, and Arthur Thomlyn on suspicion of religious crimes (during the Marprelate printing controversy).[37] And perhaps most ironically of all, Sir Thomas Smith, the trusted royal minister, and the same man who boldly boasted England does not torture, signed no less than six warrants authorizing the torture of suspected traitors, burglars, and robbers during his tenure as a Principal Secretary to Queen Elizabeth alone.[38]

Strangely enough, while aversion to interrogative torture appears to have remained consistent in the realm's courts during the English Reformation, torture's relationship with state power, particularly with the power of the crown, changed dramatically. Even Henry Lea, who patently wrote from quite an Anglicized historical perspective, admitted bluntly that "as the power of the crown was largely extended," the policies pursued by Henry VIII and his successors constituted a shift in the relationship between the state

and torture.[39] While "under the law no one could [supposedly] be tortured for confession or evidence…outside and above the law the royal prerogative was supreme."[40]

Henry VIII : Reformation, Crisis, and the power of the Royal Prerogative

Beginning with the reign of Henry VIII, it seems appropriate to ponder why a state, which had previously abhorred interrogative torture, would suddenly reconsider its usefulness? The answer, at least from the royal perspective (and the perspective of its closest councilors), was that the crises and instability facing the crown and realm necessitated this "extraordinary" use of torture's limited and surgical application. When normal interrogation failed, the general thinking seems to have been, that some form of torture was necessary to extract information from accused persons whom officials believed were withholding it. This viewpoint does not seem to have been solely limited to the monarchs themselves, but also to a substantial portion of its supporting bureaucracy, which is evidenced by the fact that the very people who supposedly had the most power to check the monarch's ability to transgress upon English law were in fact oftentimes the principle architects and agents of the Tudor dynasty's most egregious periods of torture use. As the monarch increasingly "came to represent the nation in his [or her] person" under the Tudors, royal agents (Thomas Cromwell, Thomas Smith, and Edward Walsingham, to list just a few of the most prolific agents of royal torture), largely carried out these breaches of English law, not by openly disregarding legal "limitations on royal power," but rather by "realizing that within these limitations there remained a wide area in which the [monarch] could act freely."[41] It was in this realization of legal leniency that interrogative torture came to be justified as a tool of royal prerogative—to protect the English state against evolving civil threats.

By 1540, the time the first torture warrant was issued on royal authority, Henry VIII's reign had already become well embroiled in one of the most significant periods of social upheaval in the Kingdom's history. England's break from the authority of Rome, beginning initially over the issue of Henry's desire for an annulment of his marriage to Catherine of Aragon, had by this time already

seen Henry's marriage to his fifth wife, Catherine Howard, the passage of the Acts of Supremacy in 1534, the monastic purges of 1536 and 1539, as well as various amendments to the English line of succession. A bloody civil war had been narrowly avoided in 1536 between the king's forces and a powerful uprising of Church loyalists known as the "Pilgrimage of Grace" (which possessed a force numbering almost 40,000 strong, led by the London barrister Robert Aske)—a war which was only avoided after Henry's councilors, in a stroke of good fortune, convinced the pilgrims to disband by promising to reconsider monastic dissolution (which Henry had no intention of doing), then brutally suppressed the rebel cells once they had been disarmed.[42]

As Romano-Canonical jurists on the continent found in the 11th and 12th centuries, royal agents understood treason (particularly treason linked with heresy), "did not resemble ordinary grave crimes" that could be uncovered utilizing standard investigatory procedures.[43] Accusing a person of harboring treasonous thoughts is essentially to accuse that person of an "intellectual" offense, which in the absence of witnessed action, is immensely difficult to prove by any standard of proof—even more so for a system that did not, officially at least, permit torture.[44] Furthermore, even if a jury could find a person guilty of treason, discovering that person's co-conspirators without the use of torture became a game of coaxing information out of a convicted person with promises of a reduced sentence.

It was in this period of crisis that, "in the highest case of treasons, torture [came to be] used for discovery"—as a "tool to protect the state."[45] When it did occur, the legal justification was always that its intention was to "identify and forestall plots and plotters" from carrying out crimes that threatened the security of the realm.[46] Interestingly enough, the first official cases of torture use under Henry were not all cases of sedition or treason, but in fact reflected a much wider interpretation of acts the crown deemed threatening. Of the first three cases, two were on charges of sedition, but the third was conducted to secure information about an attempted robbery of Windsor Castle (which, in the eyes of the monarch and his Privy Council, constituted a direct crime against the crown).

The Privy Council itself played an instrumental role in facilitating the implementation of torture in the name of England's domestic security—across all periods of Tudor rule. In fact, no other factor appears to have been more crucial in each Tudor monarch's ability to effectively use torture than how organized and loyal their respective Councils were. Beginning under the reign of Henry VIII, the Council itself became significantly more streamlined as its responsibilities and legal privileges expanded.[47] Its executive powers, ability to legislate, and most critically, its ability to issue statutory orders on the authority of the monarch, gave the Council nearly "unchallenged authority over all the other [royal] councils, including even its own parent, the Council in the Star Chamber."[48] By the end of Henry's reign, "the council could impose torture without fear of formal legal or constitutional restraints," and in nearly every recorded case of torture conducted under the Tudors, was actively involved in carrying out interrogations.[49] Its numbers were intentionally kept small, with "Henry's limit of nineteen…only exceeded when the monarchy fell into the weak hands of Edward VI and Mary."[50]

Henry passed on a specific commission to advise his son, Edward. The will's provisions however, were almost immediately disregarded following Henry's death, and a new council was appointed (which ultimately proved much larger and more cumbersome for the young king to manage).[51] Even still, the number of torture cases doubled during Edward's reign, with his Privy Council issuing no less than six separate torture warrants over the course of his short tenure as king.[52] These cases consisted primarily of a general mix of capital offenses – from sedition, to robbery, to murder.

Torture use significantly expanded throughout Mary's reign as well, particularly during the most tenuous periods of her rule. Mary's tumultuous reign began with a complex series of political maneuvers to wrestle control of the government away from Lady Jane Grey following the death of Edward VI. Later in her reign, her marriage to Philip II of Spain and violent attempts to lead England back into the Catholic fold (which took the form of a series of brutal repressions against English Protestants—burning over 300 persons from 1555 to 1558), ultimately earned Mary the bitter enmity of many

of her countrymen. The records of her Privy Council indicate that no less than thirteen warrants were issued (in some cases, like one warrant dated to October 18, 1557, authorizing the torture of multiple suspects).[53] Prosecution of heresy-linked treason under Mary seems to have been justified under a unique legal rational promulgated early in her reign. Critically, in 1554, Parliament restored "the heresy laws, whereby Church courts [operating principally under the legal parameters of the Romano-Canonical system] tried [accused person] who, upon conviction, were given over to the secular government for burning."[54] By the time Mary had finally passed, "the mass of people associated" both her reign and faith "with torture, foreign influences" and interestingly enough, military catastrophe (following the loss of Calais).[55] But it would be under the reign of her sister that torture use in the Tudor period would truly reach unprecedented heights.

Torture and the Virgin Queen

By 1577, a young Catholic layman by the name of Thomas Sherwood had been attending secret masses for several years in Elizabethan England—held at the London residence of Lady Tregonwell.[56] He was publicly condemned by the Protestant George Marten (Tregonwell's son) as a traitor while walking through Chancery Lane, and according to Privy Council records, was detained by local court officials. At the time of his initial arrest, no evidence could be presented against him, but after he openly questioned the Queen's religious supremacy in court, the Queen's Principle Secretary (then Francis Walsingham) had Sherwood incarcerated in the Tower of London for interrogation in November of 1577. Interestingly enough, the subject matter of his interrogation was not the supposedly treasonous words that had landed him in state custody, but rather the location of other secret masses, and the identities of attendants—"wherin perhaunce he maie boult out some other matter or personnes worthie to be knowen."[57]

The Lieutenant of the Tower was commanded to carry out the interrogation, and was instructed that, if Sherwood did not cooperate, he should be confined "to the dongeon amongst the rattes."[58] Later, a second warrant was issued dating to December of the same year after Sherwood refused to talk in the dungeon, and

he was subsequently placed on the rack. Having refused to provide any information on masses he, or any other person had attended, Sherwood was finally drawn and quartered on February 7, 1579 after conviction in a hasty trial on charges of religious treason.

Sherwood's case is, in many ways, indicative of the character torture took on in the Elizabethan period. Within the security apparatus of the Queen's government, built largely by the work of Francis Walsingham, a keen obsession with treason and sedition became inextricably entangled with matters of religion. 53 of the 81 surviving torture warrants issued by the Privy Council in the Tudor period come from the reign of Elizabeth—with 42 of those 53 issued on charges pertaining to religious sedition and treason.[59] Like the reign of her sister, Elizabeth's warrants were rarely confined to the torture of a single person, and they were only satiated after entire groups of prisoners (most often transferred to the relative privacy of the Tower of London) found themselves caught up in a single state investigation. Warrant 45 alone, dated to December 23, 1586, authorized the racking of ten separate prisoners held in the Tower for "the manyfesting of such treasons against her Majestie and the Realme as they were charged with or suspected of," ordering, "yf the truth might not by convenient means be gotten of them, then [the Lieutenant is] to put them to the torture of the Rack."[60]

In many ways, Queen Elizabeth's reign was fraught with even greater threats (both internally and externally) than any of her dynastic predecessors. She was beset from the start by a precarious position—a Protestant Queen ruling a kingdom torn part way back into the Roman Church's fold following the reign of her half-sister, and still teeming with Catholic recusants. Furthermore, her mother's detractors continued to see Elizabeth as the product of an illegitimate union between the King and Anne Boleyn, while many of her mother's original supporters had since abandoned the daughter of the disgraced and executed former queen.

Elizabeth's poor relations with the Pope, characterized in the early years of her reign by a tenuous balance of titles (Elizabeth was not made "Supreme Head" of the English Church at her coronation, but rather "Supreme Governor") collapsed into outright hostility in 1570, following her excommunication by Pope Pius V.[61] The relationship between Elizabeth and her Catholic subjects

changed dramatically from that point onward. A small number of Catholic agents and splinter groups had certainly "been committed to a policy of subversion and rebellion" long before the bull was promulgated of course, but their actions had hardly reflected any sort of mass religious conspiracy supported by England's still vast number of Catholic subjects.[62] In a sense, the Pope's decree (in the view of Elizabeth's councilors) was a seminal development that rendered English Catholics, bound to their duty to the Pontiff, incapable of accepting Elizabeth as Queen. The personal religious convictions of individual subjects, at least in the first years of Elizabeth's reign, had remained largely unmolested until this point. So long as subjects openly professed their loyalty to the Queen, the state by and large did not delve into matters of conscience—a tacit allowance of Catholic recusancy that did not last long following Pius's declaration.[63] The association of Catholicism with treason was swift, as both took on the character of identical offenses in the eyes of England's security officials, particularly Secretary Francis Walsingham, who understood the papal bull as the initiation of a consorted "policy which, if successful, would necessarily [destroy] the queen and her government."[64]

Torture warrants issued following the bull's release nearly quadrupled those issued during the preceding decade with the vast majority categorized in the Privy records as crimes of sedition or treason. Elizabeth herself personally signed the execution warrants of no less than 200 people over the course of her reign, and the "persecution of prosecution" only increased in intensity as the "seditious" activities of Catholic groups mounted in the Kingdom.[65]

The "Rabble of vagrant friars," as Walter Mildmay described the Jesuit order in 1581 to Parliament, posed a significant threat to the regime's security in the views of the Queen's councilors.[66] Following its formation in 1540, the Order's members proved themselves to be adept users of propaganda and the printing press and effective agents of intrigue. Robert Persons, a Jesuit printer, set up the clandestine Greenstreet House Press near London and changed locations several times to avoid discovery by the Queen's spies.[67] Over the course of his operations, Persons's press quietly disseminated pro-Catholic literature that challenged Elizabeth's legitimacy and the "intellectual emptiness of Protestantism."[68] Francis

Walsingham greatly feared the Jesuits' ability to travel discretely, as priests without habits, to "corrupt the realm by false doctrine [and]… stir sedition," all while blending in with the least notable elements of society.[69]

Walsingham, who oversaw the Elizabethan period's most prolific use of torture (and kept a "box of examinations' of papists and priests" among his personal affects at his Seething Lane residence), served as Principal Secretary at a time when the realm faced internal plots unlike any in Henry's (or even Mary's) time.[70] In the early 1580s, as relations with Spain were rapidly deteriorating, Walsingham had yet again uncovered a plot to assassinate Elizabeth and restore England to the Catholic faith—only this time, on a level of intricacy unseen before. Its aims were not unlike previous failed conspiracies, but this plot's operational methodology, foreign allies, and contacts *within* England itself were matters of grave concern. Known as the Throckmorton Plot (for Francis Throckmorton, who passed messages between Mary, Queen of Scots, to several fellow conspirators), Elizabeth's assassination by Catholic agents was to coincide with the landing of an army, "bankrolled" by the Spanish crown and under the command of the Duke of Guise, on the English mainland itself, to place Mary, Queen of Scots, on the throne.[71] Notably, the plot included a collection of Catholic sympathizers within England's nobility, who had agreed to begin a general insurgency to support the invading force after it made landfall. [72] The plot ultimately collapsed after Walsingham had Throckmorton arrested and tortured for information, but the English spymaster never forgot that the plot "came into view, more or less by chance"—a stroke of luck, as previously his spy network had estimated a Pro-Catholic invasion would come from Scotland or Ireland, not in the form of a direct assault on England itself.[73] The Throckmorton Plot was a watershed moment for the Queen's security apparatus. As the perceived threat of a coordinated, foreign-backed Catholic insurgency loomed like a sword of Damocles over the heads of the Queen's advisors, the intensity of the methods used to root out Catholic recusants intensified in tandem.

But despite its more frequent use by agents of the Queen's will, the perception of torture remained as intolerable to the English public as ever before, and when accusations of its use circulated in

Jesuit propaganda missives detailing the torture of state enemies, most notably in the case of Edmund Campion, the Crown had to respond with a legal rationale for interrogative torture in the face of public outrage. Campion, a Jesuit Priest and author of numerous critiques of Protestant theology (notably, his *Decem Rationes)*, was specifically racked on three separate occasions (dated July 30, August 14, and October 29 of 1581).[74] The particular brutality of his treatment was not lost on Londoners, who witnessed Campion's physical appearance on more than one occasion during his forced public disputations. Jesuit printers and other Catholic propagandists seized upon Campion's treatment and subsequent execution, levying a litany of charges against the Queen's government for its use of interrogative torture. Public outrage was so threatening that one of the Queen's Principal Secretaries, William Cecil, penned a public declaration in direct response to the clamor, defending interrogative torture used by the Crown.[75] The claim made by the state was that torture was exclusively used for determining the depth and scope of treason in extraordinary circumstances—when a suspected criminal could not be interrogated by normal means. It claimed persons could only be tortured if they did not "tell the trueth though the queene command" them, and only insofar as the testimony revealed other plots or conspirators. The state also claimed that only persons who were sufficiently suspected to wield this information could be racked (though, as evidenced by the case of Thomas Sherwood explored earlier, this standard of suspicion was exceedingly low under Elizabeth). Campion, according to Cecil, "never answered plainly, but sophistically, deceitfully and traitorously," and was tortured for treasonous and seditious activity, not his spiritual beliefs. Despite this lukewarm defense of Elizabethan torture, by the end of Elizabeth's reign, the line between faith and treason became entirely indistinguishable, and torture's use had become largely accepted as a necessary tool to root out threats to the Queen's personal rule.

Torture and the Tudors: An Enduring Legacy?

Although the impetus for the use of torture under the Tudors stemmed from periods of perilous instability, it was also confined to them—limited in the sense that interrogative torture never became ingrained in Common Law, or part of England's general

legal legacy—ending, almost as soon as the atmosphere of crisis dissipated. Of the 81 cases that lie recorded in the documents of the Privy Council, only five take place after the reign of Elizabeth (and only two additional cases can be construed from other government documents during the reigns of James and Charles).[76] The progressive trend of disuse does not seem to have been part of a consorted royal policy to stop the implementation of torture; in fact, shortly before the end of her reign, Queen Elizabeth expanded the application of torture into Wales in 1602, "give[ing] full power and authority to the…[Council in Wales]…to put any person that shall commit, or shall be vehemently suspected to have committed any treason…to torture."[77] Rather, the progression seems to have been driven by both a calming of England's atmosphere of crisis in the early Stuart period and the end of Tudor Despotism.[78]

The Treaty of London, signed in 1604 during the reign of James I, ended England's long war with Spain, which began in 1585 under Queen Elizabeth. The official wording of the document, calling for "the common tranquility of Christendom," could not have been clearer in actuality.[79] In signing the treaty, Spain largely concluded its endeavor of actively plotting to restore the Roman Church by means it had pursued over the course of Elizabeth's reign. Spain's active financial backing of noble revolts, land invasions, and strategic naval maneuvering in and around England itself dwindled rapidly, as the Spanish Empire's resources progressively shifted to other wars involving its vast colonial and territorial holdings. England's spirited Catholic resistance to the Reformation, largely demoralized, "discredited," and battered by repeated plot failures and sustained persecution over Elizabeth's long reign, ultimately proved unable to continue the "Elizabethan epoch of domestic Catholic intrigue against the state."[80] In an important sense, James's coronation also "put an end to the conniving about royal succession" which "had troubled English politics since the time of Henry VIII."[81] As the chaotic instability that had characterized the English Reformation drew to a close, the use of unorthodox, or rather, extra-legal methods of interrogation increasingly took on the character of an extraordinary tool without any real extraordinary justification. Torture had, in effect, become an unnecessary privilege of the crown in an absence of political crisis, and after 1640, interrogative torture "was never again

warranted in England."[82]

In a certain sense, it seems easy to trivialize England's "sideline" endeavor with interrogative torture (as Langbien put it) treating it almost as an inconsequential anomaly in the larger legal tradition of English common law or as a sideshow of the English Reformation.[83] In terms of numbers alone, this view seems partly justified. Comparatively speaking, to the many thousands of English subjects who ultimately found themselves arrested, imprisoned, and even executed for crimes against the Tudor regime, the number of cases in which state agents actively tortured English subjects is miniscule at best. Yet these few cases, arising in a time of extraordinary crisis, reflect a dynamic of power and a forceful ingenuity distinct to the Tudor period—characterized by its despotic, though not totalitarian nature.[84] "Ruthless and autocratic though they were at times," the Tudors never amassed "the instruments essential to a totalitarian regime," and controlled no standing army, no authority to tax without the consent of Parliament, and no national police force.[85] And yet, driven by personal ambition, desire, and the counsel of willing advisors, the reign of a single family garnered power into the hands of monarchs like Henry VIII and Elizabeth I that others could have only dreamed of. The Tudors could not, for all their strength, ignore limitations of law and circumstance in times of crisis, but they could, and often did, expand those boundaries to afford themselves unprecedented and versatile authority. It is in this sense that the legacy of torture, long at odds with England's system of common law, reinforces and legitimizes the perception of a pragmatic, ambitious, and in many ways despotic Tudor dynasty.

NOTES

1. Act 11, Hen. 7, "An Acte that noe person going wth the Kinge to the Warres shalbe attaynt of treason," The National Archives, promulgated 1495.

2. The Battle of Bosworth Field, considered by most contemporary historians as the "end" to the War of the Roses, only seems a "conclusive" event from the privileged position of reflection centuries later. Even after his victory in 1485, Henry's reign was a far cry from secure - facing numerous Yorkist rebellions that threatened to thrust England back into the decades of violent dynastic wars from which it had just emerged. Henry's tenuous claim to the throne, which rested on a paper thin tracing of lineage back to his alleged grandmother, Catherine of Valois, was frequently used against him by his Yorkist enemies; most notably, Earl John de la Pole of Lincoln, who rebelled against Henry in 1487; John Wagner, *Encyclopedia of the Wars of the Roses*, ABC-CLIO, 2001, 211-12.

3. Colin R. Lovell, *English Constitutional and Legal History: A Survey* (New York: Oxford University Press, 1962), 230.

4. Ibid.

5. Ibid.

6. Ibid., 229.

7. Sir Thomas Smith, as quoted in David Jardine, ed., *A Reading on the Use of Torture in the Criminal Law of England* (London: Baldwin and Cradock, 1837), 28.

8. Sir Thomas Smith, *De Repvblica Anglorvm: The Maner of Governement or Policie of the Realme of Englande* (London: Henrie Midleton Printer, 1583).

9. Jardine, *A Reading on the Use of Torture in the Criminal Law of England*, 28.

10. Edward Foss, *The Judges of England: With Sketches of Their Lives, and Miscellaneous Notices Connected with the Courts at Westminster, from the Time of the Conquest* (London: Longman, Brown, Green, and Longmans, 1851), 249.

11. John Fortesque, *De Laudibus Legum Anglie* (London: John Streater, 1672).

12. Henry Lea, *Torture* (Philadelphia: University of Pennsylvania Press, 1973), 139.

13. Kennith Pennington, "Law, Criminal Procedure," *Dictionary of the Middle Ages: Supplement 1* (New York: Charles Scribner's Sons-Thompson-Gale, 2004), 309-20; John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977), 6.

14. Pennington, "Law, Criminal Procedure," 309-20.

15. Edward Peters, *Torture* (New York: Basil Blackwell, 1986), 47.

16. Ibid., 44, 51.

17. Ibid., 47.

18. Peters, *Torture,* 139.

19. Ibid.

20. Lea, *Torture,* 139.

21. A series of reform ordinances issued in 1166 during the reign of King Henry II. "Assize of Clarendon," as recorded in Ernest Henderson, *Select Historical Documents of the Middle Ages London* (London: George Bell and Sons, 1896).

22. Peters, *Torture*, 59.

23. "Assize of Clarendon," 1896.

24. Pennington, "Law, Criminal Procedure," 309-20.

25. Ibid.; Peters, *Torture*, 59.

26. Peters, *Torture*, 59.

27. Ibid.

28. John Bellamy, *The Tudor Law of Treason* (London: Routledge, 2014), 109-12.

29. Ibid.

30. Ibid.

31. Ibid.

32. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979), 14.

33. "July 1591, Torture in Bridewell," *Acts of the Privy Council,* (London: Her Majesty's Stationery Office, 1900), 300. Accessed through the Institute of Historical Research, University of London.

34. Lea, 135.

35. Ibid., 139.

36. "Manacles" : Essentially the English form of *strapaddo* – A form of rope torture whereby the victim's arms are bound and raised behind his/her back, contorting them unnaturally and eventually raising the victim off the ground, painfully overextending the arms and shoulders in the process to induce excruciating pain; "July 1591, Torture in Bridewell,"*Acts of the Privy Council* (London: Her Majesty's Stationery Office, 1900), 300. Accessed through the database of the

Institute of Historical Research, University of London.

37. "Religious Treason, Aug. 1589," *Acts of the Privy Council* (London: Her Majesty's Stationery Office, 1900) Accessed through the database of the Institute of Historical Research, University of London.

38. Ibid.

39. Lea, *Torture,* 140.

40. Ibid., 140-1.

41. Lovell, *English Constitutional and Legal History,* 230.

42. Madaleine H. Dodds, *The Pilgrimage of Grace, 1536-1537 and the Exeter Conspiracy, 1538* Vol. 2 (London: Cambridge University Press, 1915), 22.

43. Peters, *Torture*, 66.

44. Ibid.

45. Langbein, *Torture and the Law of Proof*, 90.

46. Ibid.

47. A. F. Pollard, *Council, Star Chamber, and Privy Council under the Tudors III* (New York: Oxford University Press, 1923), 55.

48. Ibid., 48.

49. Langbein, *Torture and the Law of Proof,* 88.

50. Pollard, *Council, Star Chamber, and Privy Council under the Tudors III*, 55.

51. Ibid.

52. Langbein, *Torture and the Law of Proof*, 94.

53. Lovell, *English Constitutional and Legal History,* 265; Langbein, *Torture and the Law of Proof*, 97-9.

54. Lovell, *English Constitutional and Legal History,* 265.

55. Ibid.

56. "High Treason, Nov. 1577," *Acts of the Privy Council,* (London: Her Majesty's Stationery Office, 1900), 92-4. Accessed through the database of the Institute of Historical Research, University of London.

57. Ibid.

58. Although seemingly less gruesome than other forms of torture mentioned previously, being left in a dark, unsanitary cell, deprived of sleep and sensory stimulus constitutes a rather nasty form of psychological torture…to say nothing of the poor health conditions.

59. Langbein, *Torture and the Law of Proof*, 82.

60. "The Rack, Dec. 1586," *Acts of the Privy Council,* (London: Her Majesty's Stationery Office, 1900), 271-272. Accessed through the database of the Institute of Historical Research, University of London.

61. Lovell, *English Constitutional and Legal History,* 265.

62. Ibid., 268.

63. Ibid., 267.

64. Ibid., 268.

65. Langbein, *Torture and the Law of Proof*, 128.

66. John Cooper, *The Queen's Agent: Francis Walsingham at the Court of Elizabeth I* (New York: Faber and Faber, 2011), 166.

67. Cooper, *The Queen's Agent*, 166.

68. Ibid.

69. Ibid., 165.

70. Ibid., 167.

71. Ibid., 159.

72. Ibid.

73. Ibid., 161.

74. Langbein, *Torture and the Law of Proof*, 106-7.

75. William Cecil, *A Declaration of the favorable Dealing of Her Majesties Commissioners, appointed for the Examination of certaine Traytours unustly reported to be done upon them for Matter of Religion*, 1583.

76. Langbein, *Torture and the Law of Proof*, 128.

77. Ibid., 134.

78. Ibid., 138.

79. "Treaty of Paris (1604)," as recorded in Davenport, *European treaties bearing on the history of the United States and its dependencies* (Frances G. Carnegie Institute of Washington, 1917), 254.

80. Langbein, *Torture and the Law of Proof*, 138.

81. Ibid., 128.

82. Ibid., 135-9.

83. Ibid., 139.

84. Cooper, *The Queen's Agent*, 230-1.

85. Ibid.