

Title

‘Historicizing waterboarding as a severe torture norm’

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Abstract

The debate on waterboarding and the wider debate on torture remains fiercely contested. President Trump and large sections of the US public continue to support the use of waterboarding and other so-called ‘enhanced interrogation techniques’ as part of the ‘War on Terror’, thus putting the anti-torture norm under pressure. This article demonstrates that the re-imagining of waterboarding as ‘torture-lite’ is contradicted by the long history of waterboarding itself. Examining pre-modern uses and descriptions of torture and waterboarding, this article highlights that the post-2001 identification of waterboarding as a relatively benign interrogation technique radically inverts a norm that has predominated for over 600 years. This historical norm unequivocally identifies waterboarding not only as torture but as *severe* torture. The article highlights the value of historically contextualizing attitudes to torture, reviews how and why waterboarding was downgraded by the Bush Administration, reveals the earliest explicit description of waterboarding from 1384, and argues that

the twenty-first-century re-imagining of waterboarding as torture-lite is indicative of the fragility of the anti-torture norm.

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Historicizing waterboarding as a severe torture norm

Among the American political elite, support for waterboarding and other so-called Enhanced Interrogation Techniques (EITs) waned after 2009, when President Obama stated: ‘I believe that waterboarding was torture... whatever legal rationales were used, it was a mistake’.¹ In contrast, American public support for torture, including waterboarding, has increased steadily since 2001.² Polls from 2009 and 2011 indicate that over 70 percent of the US public believe that torture can be justified in exceptional circumstances.³ Even after the 2014 Senate Intelligence Committee Report categorically established that EITs had not been effective in detainee interrogations, US public opinion maintained that torture generated ‘valuable intelligence’ and supported its use ‘by almost 2-1 margins’.⁴ In comparison to global averages, Americans are more likely to believe that torture is ‘part of war’ and that enemy combatants ‘can be tortured to obtain important military information’.⁵

The debate on waterboarding and the wider debate on torture remains fiercely contested. The 2016 presidential campaign and election of Donald Trump reignited the controversy over the employment of coercive interrogation by US intelligence agencies and armed forces. Trump appealed to and fostered an underlying public support for waterboarding during his 2016 campaign, promising that he would ‘bring back a hell of a lot worse than waterboarding’,⁶ and urging that ‘waterboarding is absolutely fine but we should go much further’.⁷ Responding to the June 2016 Istanbul airport bombing, Trump announced: ‘I like it [waterboarding] a lot. I don’t think it’s tough enough’. The reason for this, he explained, is that: ‘We’re living in medieval times... We have to fight so viciously and violently because we’re dealing with violent people, vicious people’.⁸ Trump’s election as president indicates that

many Americans approve of such statements or are simply indifferent to the US government's employment of waterboarding.

Trump's invocation of 'medieval times' as a synonym for viciousness and violence taps into widespread perceptions of medieval society as singularly barbaric and cruel; often posed in contrast to "enlightened" modernity.⁹ This construct of the Middle Ages includes assumptions about the widespread and almost casual use of torture, with torture being the 'most notorious aspect of medieval culture and society'.¹⁰ However, as will be shown, medieval attitudes regarding torture were far from simplistic and waterboarding was clearly categorised as a form of torture as early as the fourteenth century. Premodern evidence can therefore act as a corrective to modern attempts to reimagine waterboarding as 'torture-lite'. In downgrading waterboarding as a non-torturous interrogation technique, the Bush administration – and now potentially the Trump administration – permitted a practice that was openly recognized as torture during the Middle Ages. Thus 'violent' medieval society is revealed to be more cautious in its approach to waterboarding than post-9/11 America.

Whether President Trump will seek to fulfill his election promise and reinstitute waterboarding remains to be seen – there are certainly obstacles in his path.¹¹ Attorney General Jeff Sessions reversed his former approval of waterboarding during his January 2017 Senate Confirmation Hearing, asserting that waterboarding was now 'absolutely improper and illegal'.¹² CIA Director Mike Pompeo asserted that he would 'absolutely not' authorize interrogation techniques not approved by the US Army Field Manual.¹³ Regardless, President Trump has restated his approval of waterboarding, asserting that 'we have to fight fire with fire'.¹⁴

The willingness to justify waterboarding goes hand-in-hand with its characterization as ‘torture-lite’: unpleasant, but not real torture and not illegal. This phrase can be found throughout academic literature and the popular media.¹⁵ Arguably, increased media exposure has desensitized the public to torture and eroded moral sensibilities.¹⁶ The now open acknowledgement that waterboarding was occasionally incorporated into US armed forces Survival, Evasion, Resistance and Escape (SERE) training has encouraged a public impression of waterboarding as something less severe than torture.¹⁷ Public perception that military personnel have been routinely waterboarded feeds a belief that (a) terrorists deserve *at least* the same treatment, and (b) the technique must be relatively harmless. However, the creation of this fallacy risks a corruption of public discourse based on the illusion that waterboarding is ‘professional, restrained, and far removed from the brutal practices of authoritarian and tyrannical regimes’.¹⁸

This article seeks to establish that the image of waterboarding as torture-lite is contradicted by the history of waterboarding itself. Examining pre-modern uses and descriptions of torture and waterboarding, this article highlights that the post-2001 identification of waterboarding as a relatively benign interrogation technique radically inverts a norm that has predominated for over 600 years. This norm unequivocally identifies waterboarding not only as torture but as *severe* torture.

A historically informed understanding of waterboarding is imperative because the anti-torture norm is increasingly under pressure.¹⁹ The charade of actively employing but publically denying the practice of torture (rebranding it ‘torture-lite’ or ‘enhanced interrogation’) is highly damaging to the credibility of the anti-torture norm, as well as being morally, legally, and politically self-destructive.²⁰ The willingness of the US (and UK) to condone a practice that was openly recognized as

torture from at least the fourteenth century suggests either wanton dissimulation or worrying ignorance at a governmental level. It should also induce a sense of shame and, as Steele suggests, may encourage a process of ‘reflexive discourse’.²¹ More immediately, the identification of the waterboarding torture norm should inform contemporary judgments regarding the illegality (and immorality) of the technique.

The first part of this article briefly outlines some advantages of situating torture within a *longue durée* and offers a working definition of the term ‘waterboarding’ used throughout the article. The second part reviews how and why waterboarding was downgraded by the Bush Administration to a form of enhanced interrogation between 2001 and 2008, and why waterboarding specifically is vulnerable to being re-imagined as ‘torture-lite’. The third part turns to pre-modern attitudes to torture, focusing on a reported episode of torture contained within a fourteenth-century English chronicle. This episode from 1384 is the earliest explicit description of waterboarding to be identified thus far. In the final part, I conclude that the inversion of the waterboarding torture norm is indicative of the fragility of the anti-torture norm.

A long view

Placing waterboarding within a long historical context might invite charges of either presentism or antiquarianism. Yet torture has long been a diachronic conversation and practice in the West: Roman law deeply influenced medieval jurisprudence and judicial process; medieval legal traditions were adopted and adapted by early-modern jurists; and Enlightenment scholars and lawmakers self-consciously rejected torture as yet another proof of their “modernity” and superiority over their forebears. As cultural and legal heirs of the Enlightenment, contemporary Western society continues to

interact with this trans-historical phenomenon. Scholars can ‘agree with, dispute, adopt, modify, mobilise and simply reflect upon ideas generated by thinkers’ that precede us,²² but that need not imply a careless misinterpretation of those ideas in their original context. We can (to the best of our abilities) contextualize historical ideas and practices while also considering how they help us to think about contemporary issues. If nothing else, this can aid our understanding of how and why certain norms have evolved, persisted, or perished over time.

A long view can highlight the ways in which the recent discussion and utilization of waterboarding has reflected pre-modern historical trends. Perhaps most notable are justifications of “necessity”, although even in antiquity such justifications were embedded within discourses that cast serious doubt on the credibility of information extracted through torture.

Utilising a range of pre-modern evidence further highlights the ways in which International Relations scholarship can expand its sometimes narrow canon of sources. The benefits of broadening the canon and adopting an approach that is sympathetic to historical contextualisation have recently been discussed in this journal.²³ In the field of warfare and just war studies there is a strong and persisting influence of the medieval and early modern traditions.²⁴ The pre-modern roots of modern institutions and political and legal thought have been considered at length.²⁵ ‘Neomedievalism’ is now an identifiable analogue within IR thought (albeit one that often lacks historical veracity), and arguably contributed to the reintroduction of waterboarding by the neoconservative Bush administration.²⁶

A historical view is also important because the language we use to describe waterboarding has a range of implications, not least, legal. Identifying waterboarding as torture matters because torture is *illegal* and breaches both American domestic law

and international law. Revealing a long-standing historical norm that identifies waterboarding as torture clearly challenges modern attempts by the US Department of Justice (DoJ), Office of Legal Counsel (OLC), and Central Intelligence Agency (CIA) to create a legal grey area by reimagining waterboarding as non-torturous. This was followed by conservative commentators presenting waterboarding as something unpleasant but fundamentally different to torture.²⁷ Historical contextualization should reinforce the modern illegality of waterboarding, and this is fundamental in preventing the practice becoming institutionalized.

It remains legitimate to ask whether we can meaningfully compare pre-modern examples of waterboarding with the techniques used by the CIA and others in the twenty-first century. The physical and cultural contexts are obviously very different. Nevertheless, there are sufficient commonalities to justify direct comparison. In referring to waterboarding, I assume a technique which includes the following characteristics:

- 1) A common operating procedure, including forcing the victim into a supine position, covering or stuffing the mouth, mouth and nostrils, or entire face with some type of textile, and pouring water over the face in order to suffocate the victim and induce the sensation of drowning.

- 2) Ends-driven objectives – that the physical actions described above are intended to *persuade* the victim, either to provide information or to spur them to action (e.g. providing a confession, collaborating, etc.).

Variations of waterboarding – forcing water directly into the mouth of a supine victim without using a cloth (what Rejali classifies as ‘pumping’²⁸) – I refer to as ‘waterboard-like’ techniques. The waterboard technique employed in SERE training adheres to both the procedural and strategic elements of the definition above

(trainers attempt to “break” students). Of course, the key difference is consent. SERE students *consent* to be waterboarded and sessions are strictly limited, far removed from the ‘large number of applications’ experienced by certain Al Qaeda detainees.²⁹ Within hostile environments, factors such as helplessness, humiliation, and fear for one’s life play a much more powerful role, and may enhance the experience of suffering.³⁰ Each specific episode of torture, regardless of time or space, has its own unique identity; individual victims and torturers possess idiosyncrasies that will shape experiences of torture, thus qualifying any attempt to neatly categorise suffering. Consequently, I am not claiming that the waterboard produces an experiential uniformity, but I am claiming that the procedure and objectives of the waterboard are historically directly comparable, and therefore we can expect some degree of experiential comparability among victims. Put simply, if waterboarding was considered torture by medieval and early-modern victims and torturers, there is good reason to think that waterboarding should be considered torture in the twenty-first century.

Downgrading waterboarding and raising the bar for suffering

History offers a number of attempts to define torture. As a term, ‘torture’ has become increasingly nebulous, meaning many different things to many different people, dependent on a multiplicity of factors.³¹ While modern academics may distinguish between interrogational and terroristic, legal and extralegal, or public and private torture, the deliberate infliction of pain and suffering – usually for the purpose of extracting information or a confession of guilt – has been the constant, from antiquity to the present day.³² Both the United Nations *Convention against Torture* and the *United States Code* characterize torture as ‘severe pain or suffering, whether physical or

mental'.³³ This built on the Eighth Amendment of the US Constitution, prohibiting 'cruel and unusual punishments', which was, in turn, adopted from the English Bill of Rights (1689).³⁴

The legal process through which EITs were approved within the Bush administration between 2001 and 2008 has been examined in detail.³⁵ At no point did the Bush administration publicly condone torture; rather, President Bush declared: 'This government does not torture people... We stick to U.S. law and our international obligations'.³⁶ However, after 2001, definitions of torture were given increasing attention by the DoJ and CIA. A series of memos produced by the OLC between 2002 and 2005 reviewed whether ten EITs (including waterboarding) violated American obligations under domestic and international law.³⁷ Exploiting the interpretative ambiguities of defining suffering, Assistant Attorney General Jay Bybee's claimed 'that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within §2340A's proscription against torture'.³⁸ Unsatisfied with a subjective or contextualized concept of suffering, Bybee sought a concrete analogue to objectivize the concept of severe pain. To constitute torture, pain must be of 'an intensity akin to that which accompanies serious physical injury such as death or organ failure'; severe mental pain must constitute 'lasting psychological harm...like posttraumatic stress disorder'.³⁹ Bybee subsequently concluded that a 'significant range of acts...fail to rise to the level of torture'.⁴⁰ This restrictive and highly contentious interpretation of pain and suffering served Bybee's immediate purpose of creating a legal grey area in which coercive techniques might escape classification as torture.⁴¹ Yet the OLC's 'systematic and reasoned misinterpretation' of American domestic and international legal obligations regarding torture has been described as 'torturing the law'.⁴²

As early as 2002, the CIA and DoJ were arguing that waterboarding did not cause physical pain or severe suffering, therefore it could not be defined as torture ‘within the meaning of the statute [§§2340-2340A]’.⁴³ It was proposed (in stark opposition to international law⁴⁴) that the lack of a specific intent to inflict suffering – demonstrated by due diligence of care during interrogation sessions – would exculpate interrogators from the crime of torture.⁴⁵ An extremely severe definition of torture was constructed based on a number of domestic US court decisions pertaining to US Code §§2340-2340A. In particular, *Mehinovic v. Vuckovic* was used as a paradigmatic case of torture proper. The victim suffered beatings to the genitals, head and body with metal pipes, removal of teeth, breaking and dislocating of bones, having figures carved into the skin, denial of food and water, and games of Russian roulette.⁴⁶ Such treatment patently constitutes torture. But if one takes this as a *base* level for defining severe pain and suffering, then the bar has been set very high indeed. By using extraordinary cases of torture, and presenting them as normative of torture proper, government attorneys attempted to present waterboarding as relatively benign by comparison, not capable of the requisite level of suffering to be legally defined as torture.⁴⁷

The ‘raising of the bar’ approach was combined by a blinkered denial of the severity of waterboarding itself. Testifying before a House Judiciary Committee in 2008, Assistant Attorney General Stephen Bradbury insisted that waterboarding was not akin to ‘the “water torture” used during the Spanish Inquisition...but was subject to “strict time limits, safeguards, restrictions.”’ He claimed that, ‘The only thing in common is, I think, the use of water’.⁴⁸ Bradbury also rejected any comparison to the use of waterboarding and waterboard-like techniques on American prisoners-of-war during World War II, for which a number of Japanese guards were subsequently

convicted of War Crimes and Crimes against Humanity.⁴⁹ Given that the operating procedure of waterboarding is almost identical across time, Bradbury's claim was either insincere or ill-informed. Even if one were to accept that the technique approved by the DoJ was substantially more restrained than historical precedents, the CIA Inspector General concluded that the Agency's use of waterboarding 'went beyond the projected use of the technique as originally described to DoJ'.⁵⁰ The duration and frequency of sessions, as well as the amount of water used, were all increased in the field.⁵¹

Not 'lite' torture

The lack of external physical scarring or mutilation produced by waterboarding has been crucial to its modern characterization as 'torture-lite'.⁵² The fact that it can be so easily hidden has made it highly attractive to democratic governments, who value the deniability of 'stealth' techniques.⁵³ Waterboarding clearly inflicts less obvious harms than mutilation. However, medical and psychological research shows that the degree of *physical* violence experience by torture victims, as well as any long-term physical scarring, is a poor indicator of the severity of the effects of torture on the victim.⁵⁴ A survey of torture survivors from the former Yugoslavia found that 'physical pain per se is not the most important determinant of traumatic stress in survivors of torture'.⁵⁵ Internal damage can be caused by waterboarding and suffocation is itself a pain-producing sensation.⁵⁶ But assessing waterboarding principally on the basis that it leaves no external scarring is to misconstrue the nature of this particular torture technique. The efficacy of waterboarding is its capacity to produce an experience of drowning, stimulating the "mammalian diving reflex" by filling the airways (rather than the lungs) with water, thus causing asphyxiation and severe panic. Put simply,

waterboarding can kill, and to describe waterboarding as merely ‘the perception of drowning’ or a ‘sense of suffocation’ detracts from the potential lethality of the technique.⁵⁷

Waterboarding is also distinctive in its capacity to quickly induce a sensation of impending death. The ‘poor wretch is in the same agony as persons ready to die’, as a seventeenth-century Dutch chronicler described waterboarding.⁵⁸ The French-Algerian journalist, Henri Alleg, recalled the ‘insupportable agony’ of being waterboarded by French soldiers during the Battle of Algiers (1957): ‘I had the impression of drowning, and a terrible agony, that of death itself, took possession of me.’⁵⁹ The British journalist Christopher Hitchens, who voluntarily subjected himself to waterboarding, offered the same conclusion.⁶⁰ In producing a sensation of imminent death, waterboarding shares some of the trauma induced by mock execution – illegal under US domestic law and international law⁶¹ – and the CIA’s own OMS report notes that Post Traumatic Stress Disorder is one possible outcome of waterboarding.⁶² Ironically, this actually fulfills Bybee’s requirement of torturous suffering to be pain ‘akin to that which accompanies serious physical injury such as death’.⁶³

Pre-modern torture

The association between violence and the Middle Ages is commonplace. Serbian forces were condemned of ‘medieval barbarity’ during the Kosovan War, while the prosecution at Slobodan Milošević’s trial at the International Criminal Tribunal accused him of ‘almost medieval savagery’ – thus implying that even systematized torture, rape, and murder falls short of medieval cruelty.⁶⁴ A former detainee of Guantanamo Bay described being ‘tortured in medieval ways’.⁶⁵ As noted above,

atrocities committed by ISIS and other terrorist groups cause President Trump to believe that we are living through ‘medieval times’. The link between extreme violence and the Middle Ages is also ubiquitous in popular culture, encapsulated in video-game franchises such as *Assassin’s Creed* or medieval-esque novels and television like *Game of Thrones*. Even the starkly post-modern film *Pulp Fiction* contains a disturbing scene in which torture involving ‘a pair of pliers and a blow torch’ is described as getting ‘medieval on your ass’.⁶⁶ Such representations of the medieval reflect and appeal to widely held assumptions that medieval Europe epitomized a brutal and cruel period of human history; torture plays a central role in this image of a brutal Middle Ages. The brutality of medieval society, contrasted against our own enlightened present, is a powerful ideological construct and taps into strong Whiggish elements in the reading of history. Even an otherwise nuanced sociological analysis offered by Norbert Elias informs us that in the Middle Ages the ‘pleasure in killing and torturing others was great, and it was a socially permitted pleasure.’⁶⁷ More recently, we have been reassured that the ‘better angels of our nature’ are progressively restraining the violent proclivities of our pre-modern selves.⁶⁸ Medieval societies *were* brutal in many ways.⁶⁹ But they were not uniquely so, and the modern construct of medieval barbarity both distorts historical reality and flatters our own sense of liberal progressiveness. The degree and nature of humanity’s irenic advancement is more complicated and contestable than Pinker suggests.⁷⁰

Torture provides an example of the potential brutality but also the caution and moral conflict at the heart of medieval violence. The use of torture within medieval judicial systems was subject to extended jurisprudential analysis and strict regulation. The primary function of torture during the Middle Ages was to elicit the ‘truth’ – that is, to extract a confession of guilt. Azo of Bologna (fl. 1150-1230) stated that:

‘Torture is the inquiry after truth by means of torment’.⁷¹ Torture was not intended to force an innocent person to confess, but rather to reveal what ‘no innocent person can know’, according to a sixteenth-century German ordinance.⁷² A lack of evidence makes it impossible to determine how frequently torture was used in secular courts in the period c. 400-1200, although the public judicial torture (racking and flogging) of slaves is prescribed in Clovis’s sixth-century *Pactus Legis Salicae* and repeated verbatim in Charlemagne’s eighth-century *Lex Salica Karolina*.⁷³ With the abandonment of trial by ordeal from the late twelfth century, torture was increasingly employed on the Continent, where judicial systems dominated by Roman law emphasized the importance of incontestable proof (and therefore confession) prior to sentencing.⁷⁴ By 1252, the Latin Church approved the use of torture in the interrogation of heretics.⁷⁵ In the common law jury-system of England there is little evidence of torture being employed prior to the early fourteenth century, although this does not preclude its practice.

Debates about the utility and morality of torture date back well beyond the Middle Ages. Aristotle observed that ‘those under compulsion are as likely to give false evidence as true...wherefore evidence from torture may be considered utterly untrustworthy.’⁷⁶ Similarly, Roman law warned that ‘confidence should not always be reposed in torture...as the evidence obtained is weak and dangerous, and inimical to the truth’.⁷⁷ Notwithstanding these reservations, torture was practiced in both ancient Greece and Rome because it was believed that extreme coercion is unique in its ability to reveal truth, therefore it remained an essential tool in the spheres of justice and security. The conviction that torture is a necessary evil is explicit in the Christian outlook of St. Augustine and this mirrors medieval and, it would seem, prevailing modern beliefs about the utility of torture.⁷⁸ Arguments in defense of torture have

always relied upon its perceived *necessity*. The so-called ticking time-bomb scenario, to which many scholars find a utilitarian solution persuasive, challenges moral prohibitions of torture.⁷⁹ In contrast, critics of the time-bomb case claim that the scenario is so divorced from reality that any moral, much less legal or political, conclusions drawn from it are of minimal importance.⁸⁰ Evidence such as that collected by the 2014 US Senate Intelligence Report also strongly indicates that torture simply doesn't work in the effective way that most people assume; quite the opposite, in fact.⁸¹ Many ancient, medieval, and early-modern jurists understood that torture's utility was restricted to 'confirming what they already knew' (extracting a confession based on compelling evidence) and that it was almost useless as a means of gathering information.⁸² The latter, of course, was the sole purpose for which waterboarding was utilized by the US after 2001.

Recognizing the potential risks of torture – both to innocent persons and the pursuit of justice – medieval jurists devoted considerable attention to the circumstances of its use. This went hand-in-hand with a growing emphasis on judicial due process, embodied within the *ordo iudiciarius*. Kenneth Pennington observes that medieval and early modern jurists 'believed that torture was a flawed instrument' and used it cautiously.⁸³ As a result, torture was strictly limited and it 'never became an accepted and normal part of criminal law in every case'.⁸⁴ Between the twelfth and fourteenth centuries, jurists, city-states, and kingdoms stipulated that torture could only be used in cases involving serious crimes, that there first had to be convincing evidence of guilt against the accused, and that certain members of the population were immune from torture.⁸⁵ Similar restrictions appear in criminal ordinances produced in seventeenth-century France. Notably, these French regulations forbade suggestive or leading questions being put to the victim during torture.⁸⁶ Medieval jurists even

classified the threat or fear of violence as a form of torture, something which the UN Torture Convention fails to include.⁸⁷ Jurists were also concerned that torture should not lead to permanent damage of the victim's body. As a result of the clerical prohibition against shedding blood, there was a particular concern within canon law that torture should 'not endanger life or limb' or become 'a judgment of blood'.⁸⁸ Such concerns regarding bloodshed and mutilation contributed to the widespread use of the *corda/strappado/estrapade/mannacles*⁸⁹ and the waterboard. In spite of these precautions, when French jurists rewrote the criminal code in 1670, they 'expressed two specific objections' to torture (which commonly included waterboarding): that it *did* cause permanent physical harm and that it *did not* obtain the truth.⁹⁰

Slaves, criminals, heretics, Jews, the poor and the 'base' were among those most likely to be tortured, even as witnesses. These internal "others", existing on the periphery of "civilized" society, were deemed inherently untrustworthy and subject to different treatment.⁹¹ This echoed Greek and Roman attitudes, and disturbing parallels to the modern treatment of non-state actors, terrorists, and minorities hardly needs stating. As Huysman and Steele suggest, the ontological security of the state transforms such persons into 'concretized dangers', allaying the fears of the majority but ultimately endangering significant portions of the state's own population.⁹²

Notwithstanding the careful demands of the jurists, in practice the use torture did not always adhere to such specific limitations. Torture was undoubtedly a means of "truth" extraction, but it was also a means of punishment, persuasion or intimidation (of victims and their associates). None of these functions were mutually exclusive, as is the case today. Public demonstrations of torture as a punitive measure, especially as a precursor to certain forms of capital punishment, were widespread. These displays of punishment – ranging from chaining criminals to the stocks to

hanging, drawing and quartering – made torture part of the public consciousness. The public’s exposure to pain-inducing techniques was intended to terrorize and to deter potential malefactors. Moreover, the infliction of pain as punishment was thought appropriate as a public spectacle because it was a way for authorities to communicate that justice and social order were being upheld. It also enabled the public to participate vicariously in the punishment of malefactors who had injured the community in some way. As such, pain was ‘viewed as a force for betterment’, for the victim as well as for the community.⁹³

Beyond the judicial system, torture was commonly employed during wartime operations, often against civilians. A fifteenth-century French bishop complained that even royal troops had ‘raped women and girls...captured priests, monks, clergy, and labourers; put them in shackles and other instruments of torment called “monkeys”, and then beat them, by which some were mutilated while others were driven rabid and lost their mind.’⁹⁴ Illegal uses of torture such as this remained ends-driven: it largely aimed at extracting money or enforcing a power hierarchy, and should not be dismissed as mere sadistic pleasure.⁹⁵

Thus it was a combination of legal, extra-legal, and illegal uses of torture, either debated, reported, or directly experienced, that formed medieval public opinion about torture.⁹⁶ Torture was not employed casually or haphazardly during the Middle Ages – despite modern images to the contrary – but it was enough of a reality that medieval assessments of *what* constitutes torture should be taken seriously.

A severe torture norm

Most of the earliest references to waterboarding or waterboard-like techniques date from the late fifteenth century. There were variations, but the supine position of the

victim and the pouring of water over the face or into the nose were integral elements; a cloth was sometimes used but not always, and could be inserted into the mouth or used to cover the mouth and nostrils. Invariably, waterboarding was viewed as a severe torture technique. In the 1480s, Franciscus Brunus observed in his *Tractatus de indicijs et tortura* that some torturers ‘force water down the nose, and some also insert a stone to block the drinker’s mouth. This type of torture, I have heard, is dangerous, for the suspect may suffocate.’⁹⁷ In 1490, the Spanish Inquisitor Pedro de Villada ordered that “*la toca*” (*toca* being a fine cloth or gauze) be used in the interrogation of Benito García, but only after the victim had undergone 200 lashes.⁹⁸ Given the escalating nature of torture processes, the authorities clearly viewed *la toca* (waterboarding) as more severe than flogging.

Further trial records show that in 1494, Spanish Inquisitors tortured Marina González of Toledo, placing ‘a hood in front of her face, and with a jar that held three pints...they started to pour water down her nose and throat’; this torture was repeated several times, using at least six pints of water.⁹⁹ In 1513, María González of Ciudad Real was subjected to the same torture, enduring several jars of water. The desperation of María is obvious in the fastidious recording of her pleas to the inquisitors during the waterboarding:

“I speak the truth, I have spoken the truth, I have already spoken the truth, I speak the truth, what I have said is true, I am telling the truth, I do not tell any lies, I have not lied, I have spoken the truth, I have spoken the truth.” The jar of water was finished. She said she had spoken the truth.¹⁰⁰

By the mid-sixteenth century, the French legal handbook *Praxis Criminis Persequendi* contained descriptions of suspects being interrogated using the waterboard, with the 1541 edition even containing an engraving of a supine victim with a cloth draped over his mouth, undergoing what the rubric describes as ‘*Torturae Gallicae Ordinariae*’ (‘Standard Gallic Torture’).¹⁰¹ This demonstrates that waterboarding was a routine technique within the French judicial system by the mid-sixteenth century and highlights Rejali’s error in identifying the use of cloth to asphyxiate in water torture as being a seventeenth-century Dutch innovation.¹⁰² As we shall see, the use of cloth predated even the *Praxis Criminis* by two centuries. The waterboard continued to be a common form of judicial torture in France well into the late eighteenth century, where it was named *le question d’eau*. In 1726 a certain Jean Bourdil was forced to endure the *estrapade* four times, followed by the *question extraordinaire (question d’eau)* five times, during which his face was ‘covered by a linen napkin’ and as much as sixteen liters of water was poured into his throat.¹⁰³

Earlier references to waterboard-like torture can be found in European legal treatises from the late fourteenth century. Bonifacius de Vitalinis (d. 1388) described when a victim has ‘had cold water poured...into his nose, or was subjected to the leg-screw, as is very often done’.¹⁰⁴ Vitalinis saw no conceptual distinction between the waterboard and the leg-screw, bracketing them together as severe forms of interrogative torture.¹⁰⁵ In the records of criminal trials from the Châtelet de Paris (1389-92), there are numerous references to prisoners being ‘put to the question’ (*mise à question*) on ‘the small and large trestle’ (*le petit et le grant tresteau*).¹⁰⁶ The records provide scant details regarding the exact physical procedure, but we can extrapolate from eighteenth-century French accounts that the difference appears to have been that trestles of varying height were wedged under the prisoner’s back

whilst he was bound by the hands and feet in a supine position. The greater the height of the trestle, the more acute was the angle of the victim's body and the more severe the pain when water was applied to the face.¹⁰⁷ Interrogations always began on the 'small trestle'; if it was deemed necessary, they were then escalated to the 'large trestle', on which victims could be subjected to multiple sessions.¹⁰⁸

In contrast to the rather oblique and opaque references to water torture found in the French legal records, the *Westminster Chronicle* offers a rare and explicit description of waterboarding being practised in England during the 1380s. The *Westminster Chronicle* covers the period from 1381 to 1394 and owes its name to the Benedictine Abbey of Westminster, London, where it was composed.¹⁰⁹ It contains a vivid description of the torture of a Carmelite friar named John Latimer in 1384, culminating in the use of the waterboard. This is the earliest explicit description of waterboarding discovered to date, predating Rejali's historical examples by more than a century.¹¹⁰

The chronicle recounts how Latimer accused John of Gaunt, duke of Lancaster, of being involved in a 'treasonable plot' against his nephew, King Richard II. Upon further questioning the friar had a change of heart and 'immediately shammed insanity'.¹¹¹ The friar was dismissed from the king's presence and escorted by the royal chamberlain and steward to be put into the custody of the keeper of Salisbury castle.¹¹² Unfortunately for Latimer, he was met by 'a party of knights...who vowed that they would make the friar confess who had prevailed upon him to tell his story'. These knights were associates of John of Gaunt and assumed that Latimer was merely the puppet of a more powerful enemy of the duke.¹¹³ The torture of the friar was therefore aimed at securing intelligence, not a confession.

The *Westminster Chronicle* provides a lengthy description of Latimer's interrogation in Salisbury castle.¹¹⁴ A range of tortures were employed and, importantly, the severity of torture was gradually amplified in response to the friar's refusal to name his presumed accomplice(s). To begin, the knights 'passed a rope over a beam, tied the friar's hands behind him, and, hanging from his feet a stone weighing as much as two bushels of wheat [about 100 lbs], hauled him up by the rope so as to make him dangle, suffering torturing pain, in mid air'. Latimer apparently endured the *strappado* 'with the patience of a servant of Christ', and so the interrogators 'proceeded to yet crazier excesses and brutally swung him to every corner of the room, alternately bearing him down and tossing him high and adding no little, through bruises of various kinds, to the distress of his frail body.' When this also failed to produce results, Latimer was hoisted over a fire. Then, adding 'outrage to outrage', his torturers hung a heavy stone from his genitals, which 'violently wrenched sinews and veins'.¹¹⁵ And the abuse continued:

They now took him down and forced his feet and the whole length of his shins up to the knees to rest for some time on the fire...[so that] a number of heat-cracks were plainly visible on his feet and shins until the day of his burial. *Finally they made him lie on his back and poured over his face, which they covered with a sheet, three gallons or more of hot water,* pressing him repeatedly the while to confess who it was who had arranged for him to prefer so serious a charge against such a great noble; but the friar, sorely distressed and exhausted as he was by his wrongs and sufferings, did not trouble to answer their questions.¹¹⁶

The brutal treatment of Latimer is shocking, but perhaps equally shocking is the clarity of the description of waterboarding. The use of hot rather than cold water is an incidental, not a substantial, variation of the technique. What is particularly striking is that the torture of Latimer *escalates* towards the use of the waterboard. The amplification of pain is a standard feature of the torture process, still practiced in the modern world.¹¹⁷ The horrors inflicted upon the friar intensify as he fails to provide his interrogators with the information they want. He is hoisted,¹¹⁸ his genitals are stretched and torn, his feet and legs are burned, and at last he is waterboarded. The sense of the passage is that the waterboard is the *finale* of Latimer's suffering, after which the duke's men are forced to give up. This may be compared with the case of Benito Garcia given above, who was waterboarded only after receiving 200 lashes. Another example of techniques analogous to the waterboard being utilised as an amplification of torture can be seen in the case of William Lithgow, a Scotsman tortured by the Inquisition in Malaga in 1620. After being stretched on the rack, Lithgow then had water poured down his throat, which he describes as, 'a suffocating pain...the water reingorging itself, in my throat, with a struggling force, it strangled and swallowed up my breath from yowling and groaning'.¹¹⁹

The perceived severity of the waterboard and its ability to produce pain is attested by early-modern French judicial distinctions between the *question ordinaire* (the *estrapade*) and the *question extraordinaire* (the *question d'eau*/waterboard). Male prisoners were subjected to the *question ordinaire* before being subjected to the *question extraordinaire*, while women were usually spared from the *question d'eau* altogether. In 1651 the diarist John Evelyn was illegally admitted into the Chatelet de Paris to witness a torture session, describing the prisoner as being 'to all appearances dead with paine' after the waterboard.¹²⁰ Perhaps most indicative of the severity of

waterboarding is the pain produced by what was deemed the “lesser” torture of the *estrapade*. Records from seventeenth- and eighteenth-century Toulouse tell us that one prisoner was ‘raised’ by the *estrapade* twice, and this was enough for him to exclaim: ‘You’re killing me wrongly’; another begged for death after being ‘raised’ three times. Yet another had the fortitude to endure the *estrapade* four times, denying all charges, but immediately began to confess after just one application of the *question d’eau*.¹²¹ In a more recent French example, Henri Alleg was waterboarded in 1957 after first enduring electric shock torture.¹²²

Here we must pause briefly and ask the question: should we believe that Latimer’s torture really occurred? The chronicler was not an eyewitness, and the account includes obvious parallels to torments suffered by saints in medieval hagiographies. The narrative also betrays political overtones, especially implicit criticism of the duke of Lancaster. The violent interrogation of friar Latimer, if true, was certainly illegal. The interrogators acted independently of any judicial capacity and had no authority to torture the friar. The king was apparently ignorant of the abuse suffered by the friar and disapproved of it when informed.¹²³ However, it is notable that the torture of the friar follows conventional late medieval judicial torture procedure quite closely, beginning with the *strappado* and culminating with the waterboard. Importantly, the historicity of the episode is bolstered by three additional contemporary sources recording the torture and death of the friar.¹²⁴ All repeat distinctive features of the friar’s torment, such as being suspended from the ceiling, the use of weights, and the mutilation of his genitals. The criticism of Gaunt’s henchmen as torturers is also unequivocal: ‘They were the judges, they were the serjeants, they were the torturers’, as Thomas Walsingham (d. 1422) put it.¹²⁵ Only the Westminster chronicler provides a specific description of waterboarding, but his

source was probably the keeper of Salisbury castle, who may have been an eyewitness to, or complicit in, the events described.¹²⁶

If not an eyewitness account, the description of waterboarding may have been added by the Westminster chronicler to enhance the dramatic narrative of suffering, drawing from some pre-existing knowledge of the technique. It seems highly implausible that the chronicler simply invented waterboarding from thin air, hitting upon a remarkably accurate description of the technique through a fluke coincidence. Whether a faithful eyewitness account or a literary flourish to exaggerate the torture sequence, both point to waterboarding being relatively common during the fourteenth century. The duke's henchmen were aristocratic men-at-arms, not professional interrogators; yet these members of the knightly elite knew enough about waterboarding to incorporate it into their interrogation. Alternatively, if the waterboard was a fiction of the chronicler, then we must wonder how a Benedictine monk, cloistered within an abbey, was able to give such an accurate description of the technique. The obvious conclusion is that knowledge of waterboarding and recognition of its status as a severe torture existed openly in the fourteenth-century English public sphere, and that the history of waterboarding must therefore predate 1384.

Conclusion

These medieval and early modern perspectives on torture and waterboarding establish three things very clearly. First, medieval attitudes to torture were far from simplistic. Judicial torture, which included waterboarding, was subject to intense academic debate and juridical regulation; but torture could also be utilized by the state or others to compel obedience or to satiate a public desire for justice. In the vast majority of

cases torture was strategic and its use restricted; it was not a sadistic pleasure indulged in by medieval “barbarians”. As the episode of friar Latimer illustrates, torture was used with the objective of extracting highly valuable political information. His torturers followed the conventional amplification of pain in proportion to Latimer’s resistance.¹²⁷ Second, waterboarding has a long history, dating back to *at least* 1384, and the technique has not changed markedly over time. This makes direct comparison between pre-modern and modern waterboarding possible. Third, during the medieval and early modern periods, waterboarding was recognized as a severe form of torture – a technique that was judged more severe than flogging, racking, and the *strappado*. It was normative that waterboarding was a form of torture *extraordinaire* – a *finale* of the torture process, not a beginning. Moreover, this norm remained uncontested even during the twentieth century: the US prosecuted Japanese prison guards in 1946 for waterboarding American POWs; the Khmer Rouge used the waterboard to torture political prisoners in Cambodia during the 1970s.¹²⁸

These conclusions inform the modern debate about enhanced interrogation and torture in a number of ways. Most obviously, they seriously challenge and undermine modern representations of waterboarding as ‘torture lite’. One assumes that even ultra-conservative commentators or law-makers in the US would balk at condoning flogging, racking, or the *strappado* as lawful interrogation techniques. Yet, historically, these were all considered “lighter” torments than the waterboard.

Taking a long historical view of waterboarding starkly reveals that the attempt to reimagine waterboarding as a non-torturous enhanced interrogation technique, used by dispassionate professionals, is essentially an attempt at myth-making. This myth-making was promoted through official government channels as well as through popular media. But waterboarding must not be sterilely termed an ‘enhanced

interrogation technique'. It should not be permitted on the basis that it is 'torture-lite'. Waterboarding is torture, and as noted at the beginning of this article, the language used to describe waterboarding is crucial because torture remains illegal under international law and the domestic law of liberal democracies, including the United States. Those who authorise or employ waterboarding are breaking the law and are liable to criminal prosecution. Hopefully, this criminal liability may deter those who may otherwise be tempted to once again incorporate waterboarding into interrogation procedures.

Important studies have already drawn attention to international pressures on the anti-torture norm.¹²⁹ The history of waterboarding can also tell us something about the current health of this norm, although the conclusions are potentially contradictory. On the one hand, the re-imagining of waterboarding as torture lite can be taken as evidence of the prevailing force of the anti-torture norm. The unwillingness of the Bush administration to be seen to violate the norm led them to expend considerable resources in order to present their coercive interrogation practices as conforming to the Torture Convention. This capacity – to oblige even the global hegemon to tie itself in knots in order to conform (albeit superficially and anti-historically) – may be taken as evidence of the anti-torture norm's abiding influence.

On the other hand, while the Bush administration and CIA may have been compelled to disguise and re-imagine waterboarding, that did not prevent its use. The relative ease with which waterboarding was reintroduced at an institutional level, and the continuing support it enjoys among large sections of the US public and the current White House incumbent, is evidence that the anti-torture norm is remarkably fragile. Perhaps this should come as little surprise. The anti-torture norm is, in historical terms, a youthful anomaly. Legal and extra-legal torture is the dominant norm in the

longue durée, and that norm continues to be dominant in much of the world today. One might also observe that the abolition of torture (including waterboarding) in the West was never absolute: imperial powers simply removed it to their peripheries, to be used against “uncivilized” enemies or colonial subjects.¹³⁰ In 1968 *The Washington Post* could publish a front-page photograph of a US soldier waterboarding a Vietnamese prisoner, commenting that the technique was ‘fairly common’.¹³¹

However, by refusing to acknowledge basic facts (i.e. that waterboarding is torture), the recent ‘enhanced interrogation’ narrative risks weakening the anti-torture norm to a point of fracture, placing liberal democracies on a slippery slope towards the erosion of combatant and civilian immunities. The actions of the Bush administration and, to a lesser degree, President Trump, indicates that the anti-torture norm has become something to be manipulated and even contested. If so, this so-called ‘norm’ lacks robust normative force, and is little more than a liberal façade hiding an ugly reality of torturous practices.

There is no reason to assume that modern democracies are immune from the kind of ‘torture creep’ experienced in imperial Rome, whereby a practice initially restricted to the legally dispossessed came to be extended to all free people of the empire.¹³² Indeed, the CIA Inspector General’s 2004 report on the Agency’s interrogative activities provides clear evidence of torture creep, with extreme coercive techniques quickly becoming normalized and resisting operational safeguards. Such techniques went beyond those sanctioned by the DoJ and were applied ‘without justification’.¹³³

During ‘states of exception’, extraordinary measures justified in defence of the state can quickly be transposed into measures that ensure the stability of the state, thus

entering the domestic criminal justice system.¹³⁴ Indeed, the insidious normalization of torture within the US domestic sphere is already observable. At an institutional level, accusations of illegal interrogation techniques against ethnic minorities have been levelled against the Chicago Police Department, with the senior police detective also involved in illegal interrogations at Guantánamo Bay.¹³⁵ Perhaps even more shocking, in 2017 a Pennsylvania couple were ‘charged with waterboarding their 12-year old daughter as a form of punishment’.¹³⁶ Historical precedent unequivocally demonstrates that systems which incorporate torture have never successfully implemented effective safeguards to protect the innocent.

The popular bravado of President Trump on the issue of waterboarding indicates that many people remain ill-informed regarding the severity of waterboarding and/or unconvinced of the illegality or moral impermissibility of torture. The anti-torture norm is ‘seen as a moral luxury in some circles’, with claims that politicians have to make ‘sacrifices of value’ to protect their communities.¹³⁷ Underlying this public and academic acceptance of torture is the belief, despite clear evidence to the contrary, that torture *works* and that it is necessary because it *works better* than any other interrogational method. Regardless of profound doubts and misgivings, this belief in the unique efficacy and thus necessity of torture is a belief that societies seem unable to shake: from Aristotle to Augustine, from medieval jurists to twenty-first-century OLC attorneys and Hollywood filmmakers, the conviction – or rather, fiction – endures that torture is necessary to defend justice and society.¹³⁸ This article has demonstrated that waterboarding *is* torture, but while society continues to be lulled by the torture-fiction, the anti-torture norm remains in peril.

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³ Brent J. Steele, ‘The insecurity of America: the curious case of torture’s escalating popularity’, in Eric A. Heinze (ed.) *Justice, Sustainability, and Security: Global Ethics for the 21st Century* (New York: Palgrave Macmillan, 2013), pp. 176-7.

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⁵ International Committee of the Red Cross (ICRC), *People on War: Perspectives from 16 Countries*, 2016, p. 10, <<https://www.icrc.org/en/document/people-on-war>>.

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¹⁰ Tracy, *Torture*, p. 1.

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¹² C-Span, 'Attorney General Confirmation Hearing', 10 January 2017, <<https://www.c-span.org/video/?420932-1/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing>>.

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³⁶ George W. Bush, ‘Press appearance in the Oval Office, October 5, 2007’, *Fox News*, 5 October 2007, <<https://www.youtube.com/watch?v=g6LtL9ICTRA>>.

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May Be Used in the Interrogation of a High Value al Qaeda Detainee / Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency', 10 May 2005, <<https://fas.org/irp/agency/doj/olc/techniques.pdf>> [henceforth Bradbury, 2005a]; idem, 'RE: Application of 18 U.S.C. §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees / Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency', 10 May 2005, <[http://www.therenditionproject.org.uk/pdf/PDF%2017%20\[Bradbury%20Memo%20to%20Rizzo%20Combined%20Techniques%2010%20May%2020.pdf](http://www.therenditionproject.org.uk/pdf/PDF%2017%20[Bradbury%20Memo%20to%20Rizzo%20Combined%20Techniques%2010%20May%2020.pdf)> [henceforth Bradbury, 2005b]; Bradbury, 2005c. Many of the pertinent documents are printed in Greenberg and Drattel (eds), *Torture Papers*.

³⁸ Bybee, 2002a, p. 1.

³⁹ Bybee, 2002a, p. 46.

⁴⁰ Bybee, 2002a, p. 46; cf. Bybee, 2002b, pp. 9-10; *Torture Victim Protection Act of 1991*, 1992, Public Law No. 102-256, 106 Statute 73, §3b, <<http://uscode.house.gov/statutes/pl/102/256.pdf>>.

⁴¹ The EITs used by the CIA after 2001 already violated American legal obligations pertaining to Geneva Convention, Articles 3 and 4: *Convention (III) relative to the Treatment of Prisoners of War, Article 3, Geneva, 12 August 1949*, <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590006?OpenDocument>>; *Convention (III) relative to the Treatment of Prisoners of War, Article 4, Geneva, 12 August 1949*, <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/375-590007?OpenDocument>>; Turner, 'What went wrong?', pp. 533-4, 551-6.

⁴² Jose A. Alvarez, 'Torturing the Law', *Case Western Reserve Journal of International Law*, 37(2), 2006, pp. 177-8.

⁴³ Bybee, 2002b, pp. 11, 15.

⁴⁴ Alvarez, ‘Torturing the Law’, pp. 179, 183-4.

⁴⁵ Bybee, 2002b, pp. 16-18.

⁴⁶ Bradbury, 2005a, pp. 21-4.

⁴⁷ Bradbury, 2005c, pp. 3, 15. The case *Hilao v. Estate of Marcos* is cited as indicative of torture under §2340. The victim was shackled ‘to a cot (at times with a towel over his nose and mouth and water poured down his nostrils)’, but this example of waterboarding is not presented as problematic: Bradbury, 2005a, p. 21.

⁴⁸ Dan Eggen, ‘Justice official defends rough CIA interrogations’, *The Washington Post*, 17 February 2008, <<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/16/AR2008021602634.html>>; Amy G. Remensnyder, ‘Torture and truth: Torquemada’s ghost’, in C. Chazelle, S. Doubleday, F. Lifshitz, and A. G. Remensnyder (eds), *Why the Middle Ages Matter: Medieval Light on Modern Injustices* (Abingdon and New York: Routledge, 2012), p. 154.

⁴⁹ Evan Wallach, ‘Drop by drop: forgetting the history of water torture in U.S. courts’, *The Columbia Journal of Transnational Law*, 45(2), 2007, pp. 471-94.

⁵⁰ Office of Inspector General, Central Intelligence Agency (OIG), *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003) (2003-7123-IG)*, 7 May 2004, <<https://fas.org/irp/cia/product/ig-interrog.pdf>>, pp. 103-104.

⁵¹ OIG, *Special Review*, pp. 37, 41-4, 70-2.

⁵² Luban, ‘Liberalism, torture’, pp. 1437-8; Rejali, *Torture and Democracy*, p. 8; Wolfendale, ‘Myth of “torture lite”’, pp. 47, 51-3; Barnes, “‘War on Terror’”, pp. 104-5.

⁵³ See Rejali, *Torture and Democracy*.

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- ⁵⁴ Ruth Defrin, Yael Lahav, Zahava Solomon, ‘Dysfunctional pain modulation in torture survivors: the mediating effect of PTSD’, *The Journal of Pain*, 18(1), 2017, <[http://www.jpain.org/article/S1526-5900\(16\)30235-8/pdf](http://www.jpain.org/article/S1526-5900(16)30235-8/pdf)>, p. 8; Metin Başoğlu, Maria Livano, and Cvetana Crnobaric, ‘Torture vs other cruel, inhuman, and degrading treatment: is the distinction real of apparent?’, *Archives of General Psychiatry*, 64(3), 2007, p. 283; Başoğlu, ‘A multivariate contextual analysis’, pp. 141-3; Leach, ‘Psychological factors’.
- ⁵⁵ Başoğlu, Livano, and Crnobaric, ‘Torture vs’, pp. 283-4.
- ⁵⁶ OMS, *Guidelines*, pp. 18-19.
- ⁵⁷ Bybee 2002a, p. 4; OMS, *Guidelines*, p. 17.
- ⁵⁸ Cited Michael Kerrigan, *The Instruments of Torture* (Stroud: Spellmount, 2007), pp. 85-6; Rejali, *Torture and Democracy*, p. 281.
- ⁵⁹ Henri Alleg, *The Question*, trans. J. Calder (Lincoln, NE and London: University of Nebraska Press, 2006), pp. 49-50.
- ⁶⁰ Christopher Hitchens, ‘Believe me, it’s torture’, *Vanity Fair*, 2 July 2008, <<http://www.vanityfair.com/news/2008/08/hitchens200808>>.
- ⁶¹ On the illegality of mock executions, see McCoy, *Torture and Impunity*, p. 42.
- ⁶² OMS, *Guidelines*, p. 19.
- ⁶³ Bybee, 2002a, p. 46.
- ⁶⁴ BBC News, ‘Ashdown accuses Serbs of “medieval barbarity”’, 30 September 1998, <<http://news.bbc.co.uk/1/hi/world/europe/183301.stm>>; BBC News, ‘Milosevic accused of “medieval savagery”’, 12 February 2002, <<http://news.bbc.co.uk/1/hi/world/europe/1815823.stm>>.
- ⁶⁵ BBC News, ‘Binyam Mohamed: his full statement’, 23 February 2009, <<http://news.bbc.co.uk/1/hi/uk/7905939.stm>>.

⁶⁶ *Pulp Fiction*, 1994, <<http://www.imdb.com/character/ch0001789/quotes>>, emphasis added.

⁶⁷ Norbet Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations*, trans. Edmund Jephcott (Malden, MA; Oxford; Carlton: Blackwell, 2000), p. 163.

⁶⁸ Steven Pinker, *The Better Angels of Our Nature: A History of Violence and Humanity* (London: Penguin, 2012).

⁶⁹ See Peters, *Torture*, pp. 40-73; Daniel Baraz, *Medieval Cruelty: Changing Perceptions, Late Antiquity to the Early Modern Period* (Ithaca: Cornell University Press, 2003); Piers Mitchell, 'The torture of military captives in the crusades to the medieval Middle East', in Niall Christie and Maya Yazigi (eds), *Noble Ideals and Bloody Realities: Warfare in the Middle Ages* (Boston and Leiden: Brill, 2006), pp. 97-118; Esther Cohen, *The Modulated Scream: Pain in Late Medieval Culture* (Chicago and London: University of Chicago Press, 2010).

⁷⁰ John Gray, 'Steven Pinker is wrong about violence and war', *The Guardian*, 13 March 2015, <<https://www.theguardian.com/books/2015/mar/13/john-gray-steven-pinker-wrong-violence-war-declining>>.

⁷¹ Peters, *Torture*, p. 1; Harries, 'Contextualising torture', p. 39.

⁷² *Constitutio Criminalis Carolina*, §54 (1532), in John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, MA: Harvard University Press, 1974), pp. 259-308, at 282; idem, 'The legal history of torture', in Sanford Levinson (ed.), *Torture: A Collection* (New York: Oxford University Press, 2004), p. 96.

⁷³ *The Laws of the Salian Franks*, trans. Katherine Fischer Drew (Philadelphia: University of Pennsylvania Press, 1991), pp. 102-104, 201-203.

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- ⁷⁴ Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Oxford University Press, 1988), pp. 100, 135-42; cf. Pennington, ‘Torture and Fear’, pp. 213-16; idem, ‘The Jurisprudence of Procedure’, in Wilfried Hartmann and Kenneth Pennington (eds), *The History of Courts and Procedure in Medieval Canon Law* (Washington, D.C.: The Catholic University of America Press, 2016), p. 125.
- ⁷⁵ Pope Innocent IV, Bull *Ad extirpanda*, §26, cited Jordan Bishop, ‘Aquinas on torture’, *New Blackfriars*, 87, 2006, p. 229.
- ⁷⁶ Aristotle, *Art of Rhetoric*, trans. J. H. Freese (Cambridge, MA: Harvard University Press), bk. I, 1377a, pp. 162/3.
- ⁷⁷ *Digest*, ed. Mommsen et al, 4, bk. 48.18.1.23, p. 841.
- ⁷⁸ Augustine, *Concerning the City of God against the Pagans*, trans. Henry Bettenson (Harmondsworth: Penguin, 1972), bk. 19, ch. 6, pp. 859-61.
- ⁷⁹ A sample of an expansive literature includes: Eric A. Posner and Adrian Vermeule, ‘Should coercive interrogation be legal?’, *University of Chicago Public Law and Legal Theory Working Paper No. 84*, 2005, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=690902>; Fritz Allhoff, ‘A defense of torture: separation of cases, ticking time-bombs, and moral justification’, *International Journal of Applied Philosophy*, 19(2), 2005, pp. 243-64; idem, *Terrorism, Ticking Time- Bombs, and Torture: A Philosophical Analysis* (Chicago: University of Chicago Press, 2012); Mirko Bagaric and Julie Clarke, ‘Not enough official torture in the world? The circumstances in which torture is morally justifiable’, *University of San Francisco Law Review*, 39(3), 2005, pp. 581-616; Richard Posner, *Not a Suicide Pact: The Constitution in Time of National Emergency* (Oxford: Oxford University Press, 2006), pp. 81-5; David Sussman, ‘What’s wrong with torture?’, *Philosophy and Public Affairs*, 33(1), 2005, pp. 1-33.

⁸⁰ Again, a sample includes: Henry Shue, 'Torture', *Philosophy and Public Affairs*, 7(2), 1978, pp. 124-43; idem, *Fighting Hurt: Rule and Exception in Torture and War* (New York: Oxford University Press, 2016), pp. 55-66, 133-8; Luban, 'Liberalism, torture', pp. 1425-61; V. Bufacchi and J. M. Arrigo, 'Torture, terrorism and the state: a refutation of the ticking-bomb argument', *Journal of Applied Philosophy*, 23(3), 2006, pp. 355-73; Bob Brecher, *Torture and the Ticking Bomb* (Malden, MA; Oxford; Carlton, AUS: Blackwell, 2007), pp. 14-39.

⁸¹ Steele, 'Organizational processes', pp. 80-1.

⁸² Pennington, 'Torture and Fear', pp. 237, 240.

⁸³ Kenneth Pennington, 'Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius', *Rivista internazionale di diritto commune*, 9, 1998, pp. 9-47; idem, 'Women on the Rack: Torture and Gender in the *Ius commune*', in Jan Hallebeek et al. (eds), *Recto ordine procedit magister, Liber amicorum E. C. Coppens* (Brussels: Royal Flemish Academy of Arts and Sciences, 2012), p. 1.

⁸⁴ Pennington, 'Torture and Fear', p. 216; idem, 'Jurisprudence of Procedure', p. 155.

⁸⁵ Pennington, 'Torture and Fear', pp. 217-18; Massimo Vallerani, *Medieval Public Justice*, trans. Sarah Rubin Blanshei (Washington, D.C.: Catholic University of America Press, 2012), pp. 52-3, 60-62.

⁸⁶ Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago: University of Chicago Press, 2001), p. 45; derived from *Digest*, ed. Mommsen et al, 4, bk. 48.18.1.21, p. 841.

⁸⁷ Pennington, 'Torture and Fear', pp. 224, 238.

⁸⁸ Henry Ansgar Kelly, 'Judicial Torture in Canon Law and Church Tribunals: From Gratian to Galileo', *The Catholic Historical Review* 101(4), 2015, pp. 769 n. 50, 775, 780, 785.

⁸⁹ The victim's arms are bound behind the back and s/he is hoisted off the ground by the wrists.

⁹⁰ Silverman, *Tortured Subjects*, p. 161.

⁹¹ Kelly, 'Judicial Torture', pp. 762, 765-6, 785.

⁹² Jef Huysman, 'Security! What do you mean? From concept to thick signifier', *European Journal of International Relations*, 4(2), 1998, pp. 237ff; Steele, 'Organizational processes', pp. 71-2.

⁹³ Cohen, *Modulated Scream*, p. 260.

⁹⁴ *Écrits Politiques de Jean Juvénal des Ursins*, ed. Peter S. Lewis, 3 vols. (Paris: C. Klincksieck, 1978-1992), 1, pp. 56-7, my translation; Rory Cox, 'Asymmetric warfare and military conduct in the Middle Ages', *Journal of Medieval History*, 38(1), 2012, p. 115.

⁹⁵ See also Warren Brown, 'Instrumental terror in medieval Europe', in C. Dietze and C. Verhoeven (eds), *The Oxford Handbook of the History of Terrorism* (Oxford Handbooks Online: Oxford University Press, 2014) <DOI: 10.1093/oxfordhb/9780199858569.013.003>.

⁹⁶ On seventeenth-century French torture: 'While few natives had the chance to observe interrogations, they were well aware of them.' Silverman, *Tortured Subjects*, p. 154.

⁹⁷ Franciscus Brunus, *Tractatus de indicij et tortura* (Siena, 1480s), fols. 225v-26ro, cited Cohen, *Modulated Scream*, p. 76.

⁹⁸ Remensnyder, 'Torture and truth', pp. 158-60.

⁹⁹ Lu Ann Homza (ed. and trans.), *The Spanish Inquisition, 1478-1614: An Anthology of Sources* (Indianapolis and Cambridge, MA: Hackett Publishing, 2006), pp. 45-6.

The cloth was placed across the face, not inserted into the mouth, as asserted by Rejali, *Torture and Democracy*, p. 279.

¹⁰⁰ Homza (ed.), *Spanish Inquisition*, p. 57.

¹⁰¹ Jean Milles de Souvigny, *Praxis Criminis Persequendi, Elegantibus Aliquot Figuris Illustrata* (Paris: Simonem Colinaeum, 1541), fols. 60 verso, 64 verso; engraving at fol. 61 recto, <https://archive.org/details/bub_gb_FOVih_cmHEC>.

¹⁰² Rejali, *Torture and Democracy*, p. 281.

¹⁰³ Silverman, *Tortured Subjects*, pp. 46-7, 95-7, 155.

¹⁰⁴ Cited Cohen, *Modulated Scream*, p. 73.

¹⁰⁵ Highlighting Posner's fallacious claim in *Not a Suicide Pact*, p. 79.

¹⁰⁶ *Registre criminel du Châtelet de Paris du 6 septembre 1389 au 18 mai 1392*, ed. H. Duplès-Agier, 2 vols. (Paris: Ch. Lahure, 1861-64), 1, pp. 162, 402, 487.

¹⁰⁷ Silverman, *Tortured Subjects*, pp. 46, 96-7.

¹⁰⁸ *Registre criminel*, ed. Duplès-Agier, 1, pp. 78, 80, 99, 104, 138, 145, 162, 274, 307, 376, 402, 438, 467, 487, 494, 507; 2, pp. 137-47, esp. 144-6; Adhémar Esmein, *Histoire de la Procédure Criminelle en France et spécialement de la procédure inquisitoire depuis le XIIIe siècle jusqu'à nos jours* (Paris: L. Larose et Forcel, 1882), pp. 126-7.

¹⁰⁹ The authorship remains anonymous, but it is likely that the text was produced by two monks, one responsible for the years 1381-1385, the other for 1386-94: *The Westminster Chronicle 1381-1394*, ed. and trans. L. C. Hector and B. F. Harvey (Oxford: Oxford University Press, 1982) [henceforth *Westminster Chronicle*], pp. xxx-xliii.

¹¹⁰ Rejali, *Torture and Democracy*, pp. 279-85.

¹¹¹ *Westminster Chronicle*, pp. 69, 71.

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- ¹¹² The keeper of Salisbury was probably the main source for the chronicler's account: *Westminster Chronicle*, pp. 68-9 n. 1.
- ¹¹³ *Westminster Chronicle*, pp. 71-2, 75.
- ¹¹⁴ *Westminster Chronicle*, pp. 71-5.
- ¹¹⁵ These injuries caused Latimer's genitals 'to fester internally', ultimately leading to his death: *Westminster Chronicle*, p. 77. Compare the similar account in *The St Albans Chronicle: The Chronica maiora of Thomas Walsingham, Vol. I, 1376-1394*, ed. and trans. J. Taylor, W. R. Childs, L. Watkiss (Oxford: Oxford University Press, 2003), pp. 725-7.
- ¹¹⁶ *Westminster Chronicle*, p. 74, emphasis added.
- ¹¹⁷ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), p. 28.
- ¹¹⁸ Paulus Grillandus, *De questionibus & tortura tractatus* (early sixteenth century) defined five levels of torture based on degrees of pain: the most painful was the *strappado* with weights. Cohen, *Modulated Scream*, pp. 77-8, 165.
- ¹¹⁹ Brian Innes, *The History of Torture*. London: Brown Books, 1998), p. 61; Kerrigan, *Instruments of Torture*, p. 85.
- ¹²⁰ Cited Silverman, *Tortured Subjects*, pp. 96-7, 154.
- ¹²¹ Silverman, *Tortured Subjects*, pp. 100, 155.
- ¹²² Alleg, *Question*, pp. 43-8.
- ¹²³ *Westminster Chronicle*, p. 79.
- ¹²⁴ *Chronicon Angliae ab anno Domini 1328 usque ad annum 1388, auctore monacho quodam Sancti Albani*, ed. Edward Maunde Thompson (London: Longman, 1874), p. 359; *Historia Vitae Et Regni Ricardi Secundi*, ed. George B. Stow, Jr. (Philadelphia,

PA: University of Pennsylvania Press, 1977), pp. 81-82; *St Albans Chronicle*, ed. Watkiss et al, pp. 725-7.

¹²⁵ *St Albans Chronicle*, ed. Watkiss et al, pp. 725-7.

¹²⁶ *Westminster Chronicle*, pp. 68-9 n. 1.

¹²⁷ On this ‘meta-rule’, see Nicholas Onuf, ‘Rules for torture?’, in Anthony F. Lang, Jr. and Amanda Russell Beattie (eds), *War, Torture and Terrorism: Rethinking the Rules of International Security* (Abingdon and New York: Routledge, 2009), p. 31.

¹²⁸ E.g. at Tuol Sleng prison: Steele, ‘Torture, honor, and US identity’, p. 257.

¹²⁹ Foot, ‘Torture’; McKeown, ‘Norm regress’; Steele, ‘Insecurity of America’.

¹³⁰ Anupama Rao, ‘Problems of Violence, States of Terror: Torture in Colonial India’, *Interventions: International Journal of Postcolonial Studies* 3(2), 2001, pp. 186-205; Alvarez. ‘Torturing the law’, p. 222.

¹³¹ Walter Pincus, ‘Waterboarding Historically Controversial’, *The Washington Post*, 5 October 2006, <<http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>>.

¹³² Harries, ‘Contextualising torture’, pp. 52-3. Also observable during the Middle Ages: Remensnyder, ‘Torture and truth’, pp. 157-8.

¹³³ OIG, *Special Review*, p. 104.

¹³⁴ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago and London: University of Chicago Press, 2005).

¹³⁵ Spencer Ackerman, ‘Bad lieutenant: American police brutality, exported from Chicago to Guantánamo’, *The Guardian*, 18 February 2015, <<https://www.theguardian.com/us-news/2015/feb/18/american-police-brutality-chicago-guantanamo>>.

¹³⁶ Elizabeth Eilzalde, 'Parents on the run charged with waterboarding 12-year-old daughter as form of punishment', *New York Daily News*, 4 October 2017, <<http://www.nydailynews.com/news/national/parents-charged-waterboarding-daughter-form-punishment-article-1.3541738>>.

¹³⁷ Linklater, 'Torture and Civilisation', p. 114.

¹³⁸ Pennington, 'Women on the rack', p. 14; Steele, 'Organizational Processes', pp. 80, 83.