

Book Reviews

The Death of Legal Torture

Torture and the Law of Proof: Europe and England in the Ancien Régime. By John H. Langbein. Chicago and London: University of Chicago Press, 1977. Pp. x, 229. \$16.50.

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I

Torture and the criminal law have a long and ignominious association that continues to the present day. In his short book, poised gracefully between simplicity and learning, John Langbein discusses only one of the many forms of this association. He is concerned with torture as a legally permissible technique of obtaining evidence from the defendant in the course of judicial interrogation. In a further narrowing of focus, the author approaches judicial torture as a student of the law of evidence. He centers on the relationship of torture to standards of proof sufficiency. His main purpose is to propose a novel thesis about the abolition of judicial torture on the continent of Europe.

The story begins with the collapse of the early medieval vision of reality, which assumed a continuing interpenetration of the human world and the world of the deity. This conception of reality was reflected in the magical modes of proof predicated on the assumption of divine intervention in legal proceedings. When this operative assumption became problematic, sacred legitimation of judgments had to be replaced by a secular one. One answer to this problem developed in the Roman-canon procedure, where judges, no longer able to consult the deity, began to interrogate persons likely to possess information about crimes. But, says Langbein, the subjective beliefs of terrestrial judges as to what evidence was sufficient to support a judgment could not be accepted in the afterglow of a world where court decisions were legitimated by divine intervention—especially when serious crime was in-

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volved for which the “blood sanction” of capital punishment or maiming had come to be regarded as the normal sanction.

To solve this legitimation problem, judges were required to evaluate evidence according to legal rules, so that a system of *legal* proof came into existence. The prescribed standard of proof sufficiency was very demanding. Conviction of serious crime required either the testimony of two unimpeachable eyewitnesses or the defendant’s confession before the judge. The required witnesses were seldom available, and, in view of the draconian punishments, voluntary confessions were also in short supply. In consequence, the Roman-canon system turned to the practice of coercing confessions. Langbein is cautious enough to avoid suggesting that judicial torture would not have appeared but for the demanding proof-sufficiency standard. He maintains, however, that once this standard was adopted, it inevitably led to judicial torture.

In pausing briefly to consider whether judicial torture was inefficient in terms of screening the guilty from the innocent, Langbein displays, I think, good sense in avoiding the well-motivated but uninformed opinion that would dismiss torture on an epistemological plane as an irrational institution pure and simple. He points out that the defendant could not legally be subjected to torture in the absence of cogent incriminating evidence and suggests that most legally prescribed evidentiary prerequisites to torture were so stringent that many a modern judge would convict on such interim proof alone.¹ In addition, he identifies a number of measures, such as the requirement of verification, designed to avoid convictions on false confessions. Continuing with his focus on epistemological issues alone, he then discusses the important defects in the safeguards designed to prevent the condemnation of an innocent man.² Most of these, he points out, were known at the time but were accepted as a necessary price for the operation of a system that relied on a demanding law of proof.

1. See J. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 8-9 (1977) [hereinafter cited by page number only]. On the results of archival studies leading to the same conclusion, see I. H. KANTOROWICZ, *ALBERTUS GANDINUS UND DAS STRAFRECHT DER SCHOLASTIK: DIE PRAXIS* 134 (1897). The fact that even today many agencies continue to extract information by force should make us cautious about subscribing too readily to the view that torture is “irrational.” For these agencies do not so much lack means-ends efficiency as they do humanity.

2. In discussing these defects, Langbein blames the slipshod determination of the *corpus delicti* for the massive execution of witches on the Continent. There was, he says, no “objective proof” of the commission of the crime. See pp. 9, 14. I think that more cognitive empathy is needed here. The law of evidence cannot be separated from the substantive criminal law and the world view of a period. If dangerous magic is part of social reality in a culture, its law of evidence cannot help but establish the existence of magic. What proof is “objective” is not independent of the world view. There were other defects of the inquisitorial system that can, I think, more properly be blamed for having facilitated massive convictions for witchcraft.

Notwithstanding the preference for an objective proof standard, Roman-canon law did not totally eliminate the subjective evaluation of evidence by the judge. It survived, says Langbein, in two areas. In investigations of serious crime, the sufficiency of evidence for the interlocutory decision to impose torture rested ultimately on free judicial evaluation of evidence. Although the law attempted to regulate this evidentiary problem as well, circumstantial evidence sufficed for the interim decision, and such evidence depends on subjective evaluation for its efficacy. More openly, free evaluation survived in the case of petty crime, where torture was prohibited and circumstantial evidence could support a conviction.

Created in the thirteenth century, this evidentiary system continued, basically unchanged, for three hundred years. Having thus far mainly followed traditional scholarship, Langbein now leaves the ground trodden by conventional teaching altogether. His new approach to the problem of torture begins with penological history. In the late Middle Ages, death and maiming were thought to be proper punishments for all serious crime. But in the course of the sixteenth and seventeenth centuries, these afflictive punishments went into decline for a congeries of reasons. Various forms of penal servitude came into use and were responsible for the eclipse of the old "blood sanction."³ It is during this period, Langbein argues, that a covert but important change occurred in the Continental law of evidence.

Courts suddenly began to hold that the demanding Roman-canon standard of proof for serious crime applied only when the imposition of the harsh, old punishments was contemplated. The new and milder punishments (*poenae extraordinariae*) could be imposed for serious crime on the less stringent standard of proof that had applied from the inception of the system to less serious offenses. In Langbein's theory, the consequences of this evidentiary change were formidable and far-reaching. Under the old régime, he tells us, defendants accused of serious crime had to be acquitted in the absence of full proof, which in practice meant the absence of in-court confessions. Acquittal was imperative no matter how much the judge happened to be persuaded that the defendant was guilty. The milder punishments opened up a *via media*. When judges could not gather full legal proof (for example, because a defendant withstood torture without confessing), but were subjectively persuaded that the defendant was actually guilty, the

3. See pp. 43-44. Attempts have been made elsewhere to attribute the penological changes primarily to the decline of feudalism and the great economic transformations of the period. See E. BLOCH, *NATURRECHT UND MENSCHLICHE WÜRDE* 277-79 (1961).

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judges were no longer forced to acquit. Henceforth they could convict and sentence the defendant, albeit to a milder punishment.

Obviously, then, the defendant's confession ceased to be a practical prerequisite for conviction in most cases of serious crime. With this reliance on confessions gone, judicial torture lost its *raison d'être*. As a technique for gathering evidence, it had become otiose already in the seventeenth century and in many places had been transmuted into a form of punishment. As torture became useless, denatured, or both, the Roman-canon system of legal proof lost its practical importance too. It continued to live, says Langbein, mainly as law on the books, deprived of vitality, a delayed mortal spasm of the Middle Ages.

The abandonment of judicial torture on the Continent, argues Langbein, was therefore essentially an internal, "juristic" event. It was primarily a consequence of an "evidentiary revolution," perpetrated covertly under the guise of milder forms of punishment. This "revolution" ushered in the era of free evaluation of evidence and must be viewed as the proper starting point for all accounts of the abolition of torture. Moderating some stronger claims at the beginning of his book, Langbein concedes that factors outside the legal system have some force in explaining the abolition of torture. But, unlike traditional scholarship, his account downplays the importance of the Enlightenment propaganda against torture. The *philosophes* and other publicists are even castigated for the inefficiency of their efforts. They harped on old criticisms of torture, says Langbein, mainly trying to create a sense of moral outrage against the continuing use of legally permissible judicial brutality. But they failed to advance the decisive argument. They should have pointed out to Enlightenment monarchs and public opinion (where it existed) that, after the evidentiary changes, criminals could be convicted on less than full proof, so that criminal procedure was free from its reliance on confessions and the coercive means of inducing them.⁴

Langbein's central thesis deviates in most important respects from conventional accounts of the abolition of torture. These accounts the author dismisses in a somewhat parodistic sketch as a fairy tale.⁵ While the orthodoxy is silent on the matter, in Langbein one finds for the first time the idea that the need for judicial torture did not continue unabated until the eighteenth century. It is, I think, his formidable

4. P. 67.

5. See pp. 10-11, 64-69. The author attributes to the orthodoxy his own understanding of the essence of legal proof, and by accomplishing this switch, he makes the conventional account appear slightly ridiculous.

achievement to have demonstrated how the adoption of milder forms of punishment based on less than full proof affected the need for coerced confessions, thereby changing the role of judicial torture and paving the way for its abolition. Conventional teaching has recognized the intimate relationship between the Roman-canon law of proof and judicial torture at the beginning, in the thirteenth century, but has held that torture and Roman-canon proof died separate deaths: torture met its Nemesis in the eighteenth century, while legal proof continued to live until the middle of the nineteenth. Langbein's thesis re-establishes the symmetry in their terminal phases. Not only were legal proof and judicial torture born together, but they were also both fatally wounded before the eighteenth century in the evidentiary revolution. After judicial torture had been abolished, legal proof continued to live only a phantom life in nearly abandoned statutes. In practice free evaluation of evidence already reigned supreme, although the procedural system was for a while sailing under the false colors of legal proof.

To this basic theme Langbein adds a counterpoint—the English experience. In England the judgment of God was replaced by the judgment of representatives of the local community. Why did this alternative system remain free of judicial torture throughout the late Middle Ages? Surely it was not because English society of the period was more humane and enlightened than Continental societies. Following Maitland, Langbein argues that the English were simply “beneficiaries of legal institutions so crude that torture was unnecessary.”⁶ Before the sixteenth century, when the jury was transformed from a body of both witnesses and triers into a panel of adjudicators, the law of evidence did not develop even minimal standards for the sufficiency of evidence, let alone standards so demanding that judicial torture would become, as on the Continent, a practical necessity. To this day, Langbein states, an English jury can convict on less evidence than was required on the Continent as a mere precondition for putting a defendant to torture.⁷

Although not necessary, judicial torture could still have developed in the sixteenth century as a useful device to help justices of the peace

6. P. 77.

7. Pp. 9, 149 n.30. Langbein assimilates the Scottish jury to his treatment of its English counterpart. See p. 149 n.29. But the Scottish jury seems still to operate under a variant of the legal proof system. See A. SHEEHAN, *CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE* 121, 161 (1975). If the needs of “corroboration” introduced by the negative legal proof system created proof difficulties, there may have been greater pressures to judicial torture in Scotland than in England. See I. WILLOCK, *THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND* 200 (1966).

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in obtaining confessions from suspects and thus in gaining guilty verdicts. Apparently, however, torture for interrogative purposes was legitimate in England only for a brief period during the reign of the Tudors and Stuarts and was limited to the practice of a central governmental agency—the Privy Council.⁸ Discarding here his focus on the interdependence of proof standards and judicial torture, Langbein tries to explain this phenomenon by arguing that, while judicial torture presupposes a bureaucratized judiciary, there was no such judiciary in England during the period.⁹ In short, England remained free from judicial torture because it did not develop a constraining, rigid standard of proof sufficiency in its criminal procedure, and because its administration of criminal justice remained decentralized and unprofessional. Torments, other than punitive, that could legitimately be inflicted on defendants were aimed at compelling them to submit to the jurisdiction of the court by entering a plea at arraignment.¹⁰ Torture was not inflicted for interrogative purposes.

II

I have three reservations about Langbein's interpretation of the Continental experience. This triptych of interlocking reservations was not conceived in a spirit of dismissal. It does not attempt to undermine Langbein's main thesis, but rather suggests a number of corrections and qualifications to it, while attempting a rapprochement between Langbein's book and more conventional views.

The first reservation concerns the developments that Langbein calls a "revolution" in the law of proof. There are a number of reasons why Langbein's account, stressing the initial rigidity in the Roman-canon law of evidence, appears *prima facie* suspect. Early Roman-canon conceptions of judicial office accorded a great deal of weight to the beliefs or "conscience" of the judge in resolving conflicts between equity and the rigidity of the law. In the early period one also finds more opportunity for the judiciary to arrive at subjective convictions as to guilt than was true later. Decisions were not yet systematically rendered on the basis of a cold file, as later became the prac-

8. The book contains a short study of torture warrants from the registers of the Privy Council covering the period from 1540 to 1640. See pp. 81-128. This study indicates that the Privy Council used torture primarily to discover accomplices and to prevent future sedition. Those who dislike history on a grand scale will find Langbein's little study among the most rewarding pages of his monograph.

9. P. 137.

10. This was the ill-famed *peine forte et dure*.

tice; judges still interacted with defendants and witnesses.¹¹ It is also true that the later Middle Ages evinced an unusually strong desire to repress and punish crime. The maxim *ne crimina maneat impunita* (lest crime go unpunished) frequently sealed arguments. One would thus expect that, from the beginning of the Roman-canon system, conviction with a sentence to a lesser punishment would have been a natural solution for the situation where "conscience" told the judge that he must punish, while the rigidity of the law did not authorize the legal punishment.

Even before the sixteenth and seventeenth centuries, when Langbein believes the "evidentiary revolution" occurred, contemporary scholarly writings show that nonafflictive punishments did serve this purpose. These writings were much more than the theoretical musings of sheltered academics. The opinions of some scholars—including the ones considered here—may be likened without exaggeration to high court decisions in terms of their weight and influence on the life of the law. There were even occasional statutory directions to this effect. The relevant passages in the medieval literature are those dealing with "indicia" or with "presumptions." Indicia are facts not directly relevant to legal issues but of inferential value for the ascertainment of relevant facts.

Analyzing indicia, the thirteenth-century writer Gandinus, for instance, rejected the view, shared by some of his scholarly contemporaries, that those indicia possessing persuasive force (*indicia indubitata*) sufficed for the imposition of capital punishment. In his view, however, such indicia did suffice for a sentence to a milder punishment, "because crimes must not remain unpunished" (*quia maleficia non debent remanere impunita*).¹² In the next century, passages permitting

11. For civil procedure, see R. VAN CAENEGEM, HISTORY OF EUROPEAN CIVIL PROCEDURE (16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 17 [undated]). On the problem of judicial office, see, e.g., N. HORN, AEQUITAS IN DEN LEHREN DES BALDUS 112, 134-44 (1968).

As far as proceedings before ecclesiastical courts are concerned (and the latter possessed wide jurisdiction in secular causes), one must bear in mind that the Church was initially opposed to judicial torture. Torture was permitted only as of the mid-thirteenth century as an instrument of obtaining confessions before special courts prosecuting heresy.

12. See A. GANDINUS, TRACTATUS DE MALEFICIS, as edited in 2 H. KANTOROWICZ, ALBERTUS GANDINUS UND DAS STRAFRECHT DER SCHOLASTIK 94, 176, 288 (1926). Conclusive indicia (*indicia indubitata*) "are so compelling to the conscience of the judge that he believes them." See P. FARINACIUS, PROSPERI FARINACII RESPONSA CRIMINALIA (*Liber 2, Consilium* 108) 22 (A. Ciaconi ed., Rome 1615). At another place in his book, Gandinus offers the example of a decision from Parma where a defendant, accused of homicide, could not be convicted on full proof. Upon the advice of "learned lawyers," a frequent practice in Italy of the time, he was nevertheless not acquitted but fined. See A. GANDINUS, *supra* at 288. In the seventeenth century the German authority Benedict Carpzov invoked Gandinus's authority for the imposition of *poena extraordinaria*. See B. CARPZOV, PRACTICA

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judges to convict on conclusive *indicia* can be found in the writings of the famous Bartolus and of his student Baldus de Ubaldis, probably the most penetrating scholar of the law of Roman-canon proof.¹³ In the fifteenth century, the ill-famed *Malleus Maleficarum*, a how-to-do-it book for the prosecution of witchcraft, advocated the use of punishment milder than death on less than full proof of sorcery.¹⁴ Ironically, it is only in the sixteenth century—the era of Langbein’s “evidentiary revolution”—that one sporadically encounters signs of hardening demands for full proof, with the accompanying insistence that there be acquittal unless the legal standards are met. An example of such rigidity is the famous *Carolina* of 1532, Emperor Charles V’s codification of criminal law and procedure for his domains. It may well be doubted, however, that sixteenth-century judges treated such provisions in royal ordinances as a nineteenth-century Continental judge approached a legislative text. It should be no wonder, for example, that almost immediately after the *Carolina*, the practice in German countries shows ample signs that the *poena extraordinaria* was used in the absence of the required Roman-canon proof.¹⁵

NOVA IMPERIALIS SAXONICA RERUM CRIMINALIUM (*Pars* 1, qu. 15, no. 50) 71 (B. Wust ed., Frankfurt 1677).

Gandinus is not the only great thirteenth-century authority to have displayed a “flexible” attitude toward full Roman-canon proof. The somewhat older Durantis also would have permitted criminal convictions, short of full proof, on “presumptions.” See G. DURANTIS, *SPECULUM IURIS GULIELMI DURANDI* (*Pars* 2, *partic.* 2, *rubrica: De praesumptionibus*, no. 6) 742 (G. Bindoni ed., Venice 1576).

13. See BARTOLUS, *CONSILIA, QUESTIONES ET TRACTATUS BARTOLI A SAXOFERRATO* (*Tractatus de Questionibus*) 500 (Basel 1588). It is significant that when a sixteenth- or seventeenth-century Italian authority suggests the application of *poena extraordinaria*, he cites back, as a rule, to Bartolus and Baldus for support. See, e.g., P. FARINACIUS, *supra* note 12, (*Liber* 2, *Consilium* 108) at 24. See also J. LÉVY, *LA HIERARCHIE DES PREUVES DANS LE DROIT SAVANT DU MOYEN-ÂGE* 123 (1939).

14. *MALLEUS MALEFICARUM* (*Pars* 3, qu. 25) 247 (M. Summers trans. 1971). For a number of lesser fifteenth-century authorities, see 2 P. FIORELLI, *LA TORTURA GIUDIZIARIA* 27 n.18 (1954). At the transition into the sixteenth century, the continuity of the treatment of *indicia indubitata*, reaching back to Gandinus, is crystal clear in HIPPOLYTUS DE MARSILIIS, *TRACTATUS DE QUESTIONIBUS, folio 113 verso*, no. 14, *folio 114 recto*, no. 17 (A. Vincent ed., Lyons 1542).

15. For a good essay on the limited binding nature of the *Carolina* in various German political units, see S. SCHMIDT, *STELLUNG UND BEDEUTUNG DER CAROLINA IN GEMEINEN RECHT* 30-33 (1938), cited in Sax, *Zur Anwendbarkeit des Satzes “In dubio pro reo” im strafprozessualen Bereich: Eine historisch-dogmatische Untersuchung*, in *STUDIEN ZUR STRAFRECHTSWISSENSCHAFT* 151 n.7 (G. Spindel ed. 1966). The seventeenth-century authority Carpvov advocates *poena extraordinaria*, but under conditions more restrictive than the contemporaneous French practice. If the defendant withstands torture without confessing, he must be acquitted, unless new *indicia* appear. There is no mention in his work of the French practice of “reserving *indicia*” so that torture does not “purge” them. See, e.g., B. CARPVOV, *supra* note 12, (*Pars* 3, qu. 116, no. 49) at 149.

Until quite recently, the view prevailed that *poena extraordinaria* was imposed on defendants when judges only *suspected* but were not persuaded that the defendants were guilty. Modern research has amply shown that this view rested on a terminological con-

If, as these sources suggest, the possibility of imposing a milder punishment for serious crime on less than full proof existed from the inception of the Roman-canon system, what does this do to Langbein's thesis? It is not as damaging as might appear on first inspection. Despite early acceptance of the idea of milder punishment, Langbein could argue that the practice first came into its own and drastically expanded in the sixteenth century. And, as the phenomenon is not susceptible of exact statistical inquiry, one can argue endlessly how many swallows we have to see before saying that spring has come. In the absence of statistics, I believe it quite plausible that there was a significant expansion of *poena extraordinaria* in the sixteenth century.

The question then becomes how to account for this sudden change. Is it attributable to a mutation of the internal evidentiary structure—Langbein's "evidentiary revolution"? I think Langbein would himself agree that the explanation should be sought in penology. In the formative years of the Roman-canon system, only the blood sanction was regarded by secular courts as the proper punishment for all serious crime. Perhaps it is not too much of an exaggeration if one says that only death and mutilation were regarded as criminal punishments in the strict sense of the word. Where a thirteenth-century judge was forced to fine or banish a criminal he thought guilty of murder, the judge and his contemporaries would hardly have considered the defendant to have suffered *criminal* punishment. It was only in the sixteenth and seventeenth centuries that, in some Western countries, various forms of penal servitude, usually "garnished" with flogging, began to appear as an acceptable or preferable alternative to the blood sanction in many cases of serious crime.¹⁶ Put differently, it is in this

fusion. Terms such as "suspicion" referred in the old sources to lack of certainty under the *objective* proof theory, rather than to the *subjective* suspicion of the judge. Langbein espouses the modern view that *poena extraordinaria* was imposed in situations of incomplete proof where judges were *persuaded* of the defendant's guilt.

I believe, however, that one idealizes the repressive inquisitorial procedure if one states that judges imposed a *poena extraordinaria* only when they were persuaded of guilt. That the residuum of uncertainty should be resolved to the benefit of the defendant is the product of more modern thinking on the relationship of the individual to the state. It seems to me more likely that cases of *poena extraordinaria* embraced not only situations where judges were fully persuaded, but also instances where guilt appeared only probable to the judges. Inquisitorial judges quite clearly distinguished between the irreparability of blood sanctions and milder modes of punishment. In the jargon of modern decision theory, acceptable error margins depended on the magnitude of punishment. Besides, where judges considered a defendant dangerous, but were not too sure he perpetrated the crime *sub judice*, it would once again be unrealistic to assume that conviction and sentence to *poena extraordinaria* required persuasion as to guilt.

16. In discussing extraordinary punishments for serious crime, Langbein leaves the impression that only punishments entailing deprivation of freedom with forced labor were involved. At least in the Habsburg territories, criminal punishment and infliction

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period that the range of applicability of the death penalty began to shrink.

These developments are either discussed or strongly implied in Langbein's book. Ultimately, then, my first reservation concerns solely the author's *characterization* of these events. The law of evidence did not change; modes of punishment did. If one wishes to use dramatic language and speak of legal revolutions, there was a revolution in substantive criminal law and not in the law of proof.

My second reservation concerns Langbein's dismissing as a "fairy tale" the conventional views on the watershed between Roman-canon legal proof and free evaluation of evidence. The orthodoxy claims that, in most countries, legal proof survived the abolition of torture for almost a century. Langbein, on the other hand, maintains that the spread of the *poena extraordinaria* delivered a mortal blow to Roman-canon legal proof at the same time that it made torture unnecessary.

According to the conventional view, the crucial test for the separation of legal proof from free evaluation of evidence lies in whether or not the law attempts to regulate factfinding by assessing a priori the weight of informational sources. The Roman-canon system was formed in the golden age of scholastic philosophy, with its preoccupation with logic and deduction. The system's founders believed that a hierarchy could be worked out, through a combination of rational observation and deduction, that would rank informational sources according to their aprioristic cogency. At the top of the hierarchy they placed the judge's own perception of relevant facts.¹⁷ Next in rank came certain types of direct evidence.¹⁸ Here, the defendant's confession held a spe-

of physical pain continued inseparably well into the eighteenth century. In abolishing torture in Croatia in 1776, Maria Theresa realized that the absence of torture would reduce the range of the death penalty. She therefore treated penal servitude as a substitute and ordered that it be accompanied by periodic flogging "so that criminals experience that such public works are actually punishment." See the essay, based on archival studies, by Bayer, *Kazna batina u kontinentalnoj Hrvatskoj*, 23 ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 41 n.39 (1973) (punishment of flogging in continental Croatia).

I will later indicate how closely the blood sanction was associated with the criminal law. See pp. 874-75 *infra*. This link is reflected in etymology. For centuries continental European law referred to criminal jurisdiction as "*jurisdictio sanguinis*" (jurisdiction of blood) or "*jus gladii*" (law of the sword). Criminal courts in Germany were frequently called "*Halsgerichte*" ("noose courts"), and the Russian expression for criminal law is *ugolovnoe pravo* (capital law) even in modern Russian.

17. Strictly speaking, no evidence was needed here, because observation established *perfecta scientia* (perfect knowledge) or *notorium facti* (notice of fact). See the lucid observations of Baldus de Ubaldis in J. Lévy, *supra* note 13, at 44.

18. There are many reasons for the preference of direct over circumstantial evidence in the legal proof theory. What must especially be emphasized, however, is that there was little understanding that all perception is inferential and that the distinction between direct and circumstantial evidence is one of degree only.

The importance of confessions was increased because the substantive criminal law of

cial place; it constituted a link between judicial perception of fact and other direct proof. At the bottom was circumstantial evidence (*indicia*).¹⁹ This hierarchy applied to civil and criminal cases alike. The standards of sufficient evidence differed, however, for the two branches of adjudication, with internal subdivisions, so dear to the scholastics, within each branch. This was only the scaffolding. Within it detailed rules were established that regulated weight and admissibility of evidentiary items and constrained judicial discretion in factfinding.

The degree of rigidity in such a system depends significantly upon whether evidence is weighed directly or on the basis of a cold file. Demeanor evidence introduces the messy welter of life and resists regulation. With the elimination of demeanor evidence, other direct proof assumes great force, and the whole process of evaluating evidence, removed from emotional involvements of the interrogation process, becomes a logical enterprise for which rules may be fashioned. Legal proof, in the traditional view, is not automatically abandoned if, in certain situations and for certain decisions, judges are authorized to decide on circumstantial evidence alone. For the legal system may continue to constrain messy spontaneity and to regulate the weighing of evidence. The weight and sufficiency of circumstantial evidence can themselves be subject to more or less detailed regulation. Moreover, since *indicia* too must be proven, the law may continue to require that facts of inferential value be established by two eyewitnesses. And if the evaluation of evidence continues to exclude the witnesses' demeanor by concentrating on the cold file, legal proof may still reign.

Langbein has a different understanding of "legal proof." He does not explicitly define his concepts, but their contours can easily be extrapolated from a number of passages in his book. For him, the sum and substance of the Roman-canon system is the demand that there be no conviction for serious crime without the defendant's courtroom confession or the testimony of two eyewitnesses. In other words, full proof for serious crime and the Roman-canon system of legal proof are coterminous. Where, as with minor crime, a judgment may be predicated on circumstantial evidence, the evidentiary system is one of

the time required an "internal" or subjective element of crime (premeditation, motive, etc.). For such "internal" facts the defendant's confession remained the only direct evidence. The move on the part of Continental law away from ritual and oracles, which was stronger than in England, was accompanied by a greater emphasis on ethical motivation. This Durkheimian hypothesis could profitably be explored by studying the impact of the church confessional literature on profane law.

19. *Indicia* had themselves to be proven by two eyewitnesses. See P. FARINACIUS, *supra* note 12, (*Liber 2, Consilium* 138, no. 29) at 168.

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free evaluation.²⁰ I think that Langbein's understanding rests on the realization that the cogency of circumstantial evidence may never be regulated exhaustively and that a large measure of judicial freedom in this area is unavoidable. Where, however, a judgment must be based solely on direct evidence, especially if the decision is mediated by the file, the room for judicial discretion is significantly more circumscribed. Centering on this significant point along a continuum from air-tight legal regulation to complete freedom in evaluating evidence, Langbein regards the possibility of deciding on mere circumstantial evidence as the dividing line between legal and free evidentiary systems. This view is tenable and may be fruitful in the analysis of evidentiary systems. But it is idiosyncratic and obviously narrower than conventional teaching. According to conventional views, Langbein is plainly wrong. His conception would lead to the conclusion that Roman-canon law never applied in civil procedure²¹ or for minor crimes, since full proof was unnecessary. Full proof, conventional scholarship would argue, is only one part in the elaborate structure of the Roman-canon law of evidence.

As a test of Langbein's idea that Roman-canon legal proof and torture died together, the situation in the German countries after the abolition of torture deserves closer scrutiny. Even a cursory look at the law of evidence reveals that the old hierarchy of proof did not collapse: the preference for direct proof remained enshrined in statutory provisions prohibiting the imposition of the death penalty, and sometimes even the imposition of long prison terms, on less than full Roman-canon proof. The caution in regard to circumstantial evidence continued to be reflected in provisions requiring automatic review by a higher court of all judgments based on *indicia*.²² Legislation continued to prescribe what kind of circumstantial evidence was legally sufficient for conviction. True, legal provisions did not mandate conviction when a certain quantum of *indicia* had been assembled, but

20. Pp. 10, 49. The author tells us, for instance, that the Roman-canon system is "unworkable" without torture. P. 11.

21. A civil judgment could always rest on *indicia* alone. In contrast to criminal cases, in civil litigation the judge was permitted to reach the required full proof by adding proof fractions. One eyewitness was half proof, for instance, and one would add documents and the like until one reached full proof. See, e.g., G. DURANTIS, *supra* note 12, (*Part* 2, *partic.* 2, *rubrica: De presumptionibus*, no. 2). Although this arithmetic was extensively regulated, it left much room for judicial discretion. For a conventional view that legal proof continued in nineteenth-century civil procedure, see, e.g., I M. CAPPELLETTI, *LA TESTIMONIANZA DELLA PARTE NEL SISTEMA DELL' ORALITÀ* 137 n.16 (1962).

22. For felonies, see, for example, the Austrian Penal Code of 1803. 17 SAMMLUNG DER GESETZE (*First Part*) § 435(a), at 513 (J. Kropatchek ed., Vienna [no date]). For minor crimes, see *id.*, (*Second Part*) § 400, at 663.

the law frequently prohibited conviction in the absence of specific circumstantial evidence.²³ Finally, evidence as reflected in demeanor was not assessed: decisionmakers saw neither the witnesses nor the defendant. They assessed testimony, sometimes in summary form, as it appeared in the file. It must be admitted that this system permitted a great deal of judicial discretion. But in some instances a legal provision would preclude the possibility of conviction, no matter what the subjective persuasion of the judges. At least, this is what contemporaries thought. Some found these constraints desirable; others fought them, wishing for the French system of *conviction intime*, which allowed the judge or jury to convict upon subjective persuasion.²⁴ I do not think that Langbein would argue that German lawyers—for more than fifty years after the abolition of torture—were plainly quixotic and fought imaginary battles. But he could maintain that free evaluation of evidence won its decisive battle in the seventeenth century and that nineteenth-century lawyers, who were involved only in mopping up operations to remove minor constraints on their freedom, were overly impressed by the importance of ongoing hostilities. Their ignorance that they were actually operating under a system of *conviction intime*²⁵ Langbein could liken to that of Molière's *Bourgeois Gentilhomme*, who failed to realize he was always talking in prose.

In short, my second reservation suggests that Langbein underestimates the constraints on free evaluation of evidence remaining in the nineteenth-century inquisitorial process, much as my first reservation was that he overestimates the rigidity in the early Continental law of proof. And there is an independent critical point. The author should have made it clear that his idea on what is legal as opposed to "free" proof is novel and that the words used by him and by conventional writers are only homonyms. By making clear this definitional difference, he could have provided a firm basis for mounting an attack

23. For an analysis of such provisions by a contemporary, see C. MITTERMAIER, *DIE LEHRE VOM BEWEISE* 450-58 (1834).

24. In the absence of the jury, Mittermaier seems to have favored a sort of mild legal regulation of the weight of evidence. See *id.* at 84-94.

25. I hope it is not merely a pedantic cavil if I express a regret that Langbein's approach lumps together the French *conviction intime*, as reflected in a jury verdict, and the evaluation of evidence by early nineteenth-century German judges on the basis of a "blush-proof" dossier. One system relies on the direct evaluation of evidence, thus including demeanor; the other is "mediate," and centers on logical cogency of statements. Factfinding in one need not be explained and is recalcitrant to review. In the other it must be explained and is reviewed by higher courts. Where the system of the blush-proof dossier obtains, case law usually develops low visibility rules regarding evidentiary questions, including those about the cogency of evidence. For a similar view on the relationship of immediacy and free evaluation, see M. CAPPELLETTI, *supra* note 21, at 109.

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on conventional theory. Langbein could have complained, for instance, that the accepted definitions are too formalistic: they focus on the law-giver's intention to constrain judicial freedom in evaluating evidence, rather than on the actual judicial freedom in the performance of this activity.

There is yet a third aspect of Langbein's central thesis that must be taken, I believe, with a grain of salt. It is his position that, in the wake of the *poena extraordinaria* revolution, Continental criminal procedure liberated itself from its dependence on confessions and that, in consequence, judicial torture lost its *raison d'être*.²⁶ This, no doubt, is another statement designed to stir the sediments of conventional thinking. But before I examine it, I must quickly review four senses in which one can claim that judicial torture had a *raison d'être* in the inquisitorial process.

The first assumes that Roman-canon legal proof was so rigid as to preclude conviction in the absence of the testimony of two eyewitnesses or a courtroom confession. If such a rigidity existed, the defendant's confession would be practically a *sine qua non* of conviction, and judicial torture would be required to extract it. In the second sense, torture was needed to force the defendant to confess so that the blood sanction could be applied. In both situations a judge could be fully persuaded of the defendant's guilt. Still, confessions would be required, either as a *sine qua non* of conviction or of the death penalty. Accordingly, in both situations the use of judicial torture was logically linked to legal proof and to the discrepancy between a required objective proof standard and the judge's subjective evaluation.

The next sense in which judicial torture was needed is logically independent of legal proof. Assume that the judge only suspected the defendant's guilt without being fully persuaded. Here the judge would desire a confession as a vehicle for transforming his subjective state of uncertainty into persuasion as to guilt, while at the same time securing the legally required mode of proof. Even if there were no legal proof in inquisitorial procedure, confessions would still be valued in this situation, and coercive measures would be used to obtain them. The fourth and last sense in which torture had a *raison d'être* is also independent of legal proof, whether in the traditional or Langbein's variant, but is linked to the deeper, underlying issue of judicial interrogation of defendants in the inquisitorial process. The explicit or implied threat to order torture was used as a back-up mechanism to sustain

26. See, e.g., pp. 12, 59.

the coercive atmosphere during interrogations, an atmosphere thought necessary to produce the desired self-incrimination.

Returning now to Langbein's thesis, one can easily see why he reaches his strange conclusion that, in the wake of the *poena extraordinaria* expansion, the inquisitorial process was liberated from its reliance on confessions and torture was no longer needed. With his myopic focus on the demanding proof standard and with his conception of its rigidity, he perceives nothing but the first sense in which one can say that judicial torture is needed. Before his evidentiary revolution, the proposition "no confession, no conviction" was true. After the revolution, the confession ceased to be a *sine qua non* of conviction, and in this sense the procedure was liberated from the need for judicial torture.

But what about the additional senses? After the advent of the new forms of punishment, the need to extract confessions disappeared only where judges managed to persuade themselves that the defendant was guilty on evidence other than his confession, and the crime involved was such that a penalty short of death appeared acceptable or even preferable to the old blood sanction.²⁷ But in the sixteenth and seventeenth centuries, the *poena extraordinaria* did not always satisfy the urge to punish. The strong desire to impose the death penalty, even aggravated by torture, continued to flourish for quite a number of crimes. Magic and witchcraft spring to mind most readily as dramatic examples.²⁸ But the almost hysterical urge to impose the punishment of death was not limited to demoniac offenses. Many types of homicide, treason, and some transgressions of the sexual code continued to be viewed as *crimina atrocissima*, crimes so heinous that death was the only appro-

27. Where the substantive law considers, for instance, imprisonment to be the appropriate punishment, judicial torture, as a procedural measure inflicted on the guilty and the innocent indiscriminately, is vulnerable to the objection that the procedural measure is disproportionate in its harshness to the punishment imposed on the convict. From its inception the Roman-canon proof theory was sensitive to this objection. This is why torture was not permitted for minor crimes.

28. The seventeenth century was the era of the great prosecutions for magic and witchcraft. As a good illustration of the temper of the times one can take a frightening little book by a French judge, H. BOGUET, *DISCOURS DES SORCIERS* (I. Pillehotte ed., Lyon 1603). In the dedication the judge offers figures about the number of witches in France (at least 30,000) and boasts about his experiences in putting them to death. He recognizes the practice of imposing a milder punishment upon defendants convicted on *conjectures indubitables*. But if witchcraft is involved, he expresses his readiness to depart from the majority view, which would not apply capital punishment on less than full proof. He advises that witches and sorcerers still be put to death, but only be spared burning on the stake. The judge must devise "[une] mort . . . plus douce"! *Id.* at 251.

Late in the eighteenth century the Austrian Empress Maria Theresa was still agonizing over what to do with witchcraft prosecutions. She never really abolished the crime, but only surrounded prosecutions with great safeguards and restrictions. See V. BAYER, *UCOVOR S DJAVLOM* 302-13 (2d ed. 1969) (contract with devil).

ropriate punishment. Because of this attitude it would have been vain to try to persuade judges of the period, such as Boguet in France or Carpzov in Saxony, that a defendant accused of such a crime should not be put to torture because of the alternative opened by milder punishments.²⁹

The perceived need for torture survived the penological revolution also in all those cases where, having assembled enough evidence for the interlocutory decree, the judge was not sure whether the defendant had committed the crime. It would be erroneous to think that the subjective persuasion of guilt was a prerequisite to judicial torture. Although it may have been the case with defendants belonging to the social elite or as to the most extreme torments, it is clearly false as a general proposition.³⁰

Perhaps most important, torture continued to play an important role in connection with the interrogation process. From the inception of the inquisitorial procedure, the examination of the suspect was considered to be the principal mechanism for discovering truth. The suspect was legally bound to answer truthfully and unambiguously the questions asked of him.³¹ The violation of these legal duties constituted one of the *indicia* required for the interlocutory order to apply torture. It is frequently overlooked, however, that this was not the only sanction to induce self-incrimination. There existed a special kind of torture used not only in the unlikely case that a suspect refused to talk, but also when he was caught in contradictions or pretended—in the opinion of the examiner—that he did not remember or know the answer. “This sort of torture,” said the seventeenth-century judge Carpzov, making one of his slippery distinctions, “is imposed not so much

29. Except for cases of witchcraft, *see* note 28 *supra*, it would also have been difficult to persuade these judges that mere circumstantial evidence sufficed for the irrevocable death penalty. This Langbein seems to recognize. *See* p. 177 n.18.

30. Although conviction and sentence to a milder punishment could occur on *indicia indubitata*, less compelling *indicia* sufficed for torture, provided that a local statute did not stipulate otherwise. *See* BARTOLUS, *supra* note 13, at 500; I. CLARUS, IULII CLARI OPERA OMNIA (*Liber 5 (Practica Criminalis)*), qu. 20, nos. 4-5) 446 (Bailly pub., Lungduni 1672). According to Carpzov, persuasion of guilt was necessary only for imposing the most serious degree of torture—the rack, aggravated by torments with a flaming torch. B. CARPZOV, *supra* note 12, (*Pars 3*, qu. 177, no. 65) at 158. Some opponents of torture in the eighteenth century tried to limit its applications to cases where the judge was fully persuaded as to guilt, but wanted to impose the ordinary punishment. M. BODO, JURISPRUDENTIA CRIMINALIS SECUNDUM PRAXIM ET CONSTITUTIONES HUNGARICAS (*Pars 1*, art. 29, § 3) 68 (Posonii 1751).

31. Sometimes, as in the Italian practice reported by Clarus, the defendant would have to take an oath to speak the truth before the examination began. Usually, however, the practice of requiring an oath was not followed, on the ground that it led to perjury. *See* I. CLARUS, *supra* note 30, (*Liber 5*, qu. 45, no. 9) at 551.

in order to discover the truth as to extract an answer."³² It does not take a great deal of imagination to realize how helpless inquisitorial judges would have felt at interrogations if these coercive measures had been taken away from them.

In light of all these various uses of judicial torture in inquisitorial procedure, Langbein's criticism of French abolitionist writing seems unjustified. He takes the publicists to task for failing to demonstrate the workability of the criminal process without torture. The clincher, in Langbein's opinion, should have been the argument that confessions were no longer essential because criminals could be punished on evidence short of full proof.³³ Were the royal entourage and the judicial establishment not aware of this possibility without the Enlightenment propaganda efforts? If one asks what pragmatic arguments would have fallen on more receptive ears among those responsible for criminal law enforcement, the following argument would probably do: "We realize that the system needs coercive measures to make defendants talk. But there is no reason why it should hold onto the archaic and barbarous ways of inflicting physical pain. The coercive atmosphere can be achieved by subtler, more civilized methods, methods less disproportionate than judicial torture to the milder character of most modern punishments." Had the publicists argued this way, they would have anticipated the developments in Continental inquisitorial procedure following the abolition of torture. I think it can hardly be disputed that the abolition did produce difficulties for law enforcers.³⁴ But soon milder coercive devices designed to produce self-incrimination

32. "Quae tortura imponitur, non tam ad veritatem eruendam, quam ad extorquendam responsonem." B. CARPZOV, *supra* note 12, (*Pars* 3, qu. 113, nos. 56, 57) at 126. An almost identical passage appears in Clarus, who praises the effectiveness of this torture on the basis of his practical experiences. I. CLARUS, *supra* note 30, (*Liber* 5, qu. 45, no. 6) at 550. For detailed instructions on the application of this form of torture, see I. FRÖLICH, NEMESIS ROMANO: AUSTRIACO: TYROLENSIS (*Buch* II, tit. 2, no. 1-4; *Buch* III, tit. 5, no. 8) 97-99, 182 (J. Wagner ed., Innsbruck 1696). Much later Beccaria, though an enemy of judicial torture, would believe in "punishment . . . of the severest kind" for obstinate refusals of the defendant to answer questions during his interrogation. C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 150 (London 1801). As we shall see, the nineteenth-century *poenae inobedientiae* bear a not so strange resemblance to this *tortura ad extorquendam responsonem*.

33. See p. 67.

34. Langbein apparently thinks this to be part of the "fairy tale." See p. 10. Let me offer two illustrations in support of the statement in the text. After the Swiss cantons in 1803 obtained the power to regulate their own criminal procedures, they quickly reintroduced torture. See Pfenninger, *Die Wahrheitspflicht des Beschuldigten im schweizerischen Strafverfahren*, 53 SCHWEIZERISCHE JURISTEN ZEITUNG 130, 133-34 (1957). Or consider the Austro-Hungarian monarchy. Although Maria Theresa abolished torture in 1776, monarchs were repeatedly forced to ban torture in some parts of their lands until 1818, for torture continued to be applied in practice. As we shall later see, this was especially true of lands where the estates and nobility successfully opposed absolutism.

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appeared on the scene, and the chase for confessions continued, only in ways less brutal though sometimes more perfidious.³⁵

If my criticism of Langbein's view on the need for confession and the *raison d'être* for torture were accepted, how would this affect his thesis? His strong claim that torture had lost its purpose would have to be weakened. The perceived need for confessions and thus for torture had decreased but had not been eliminated. It had decreased in equal proportion to the shrinking of the number of crimes for which capital punishment continued to be viewed as the only proper sanction.³⁶ And, in fairness to the author, I must admit that, in the majority of Western European countries, the decrease seems to have been quite substantial. To have brought out the subterranean connections between the decline of the old "blood sanction" and the eclipse of judicial torture remains Langbein's significant contribution to the literature on the subject.

35. The example of the Austrian system under the Penal Code of 1803 is as telling as it is representative. After torture was abolished, no matter how incredible it may seem, the defendant was denied a number of rights he enjoyed under the older variant of the inquisitorial process. He lost the right to inspect the *dossier*, and provisions on preliminary detention were made stricter so as to enable the investigating judge to hold the defendant incommunicado. This practice was widespread in Europe. See Waiblinger, *La protection de la liberté individuelle dans l'instruction*, 24 REVUE INTERNATIONALE DE DROIT PÉNAL 225, 250-52 (1953). In contrast to prior practice, the investigating judge was now authorized not to reveal to the defendant the exact charge against him. See SAMMLUNG DER GESETZE, *supra* note 22, § 292, at 462. The idea of the provisions was quite clear. By playing one's cards close to the vest, one hoped to exploit the nervous state of the guilty defendant's mind and his uncertainty about how much his interrogators already knew, possibly persuading him that his persistent denials of guilt were useless. Besides, with a vague idea of how much was really known, the guilty defendant found it harder to invent a plausible but false story. Of course, skimpy information about charges prevented the innocent defendant, also languishing in detention, from an early successful defense. But this prospect was not disturbing in the absolutist police states of the era.

At the same time, various disciplinary punishments for improper behavior at interrogations came into vogue, reminiscent of the old torture "to extract answers." At the beginning of the examination the defendant would be warned by the judge that his failure to speak (and confess if guilty) would result not only in increased punishment, but also in special penalties for "disobedience," frequently consisting of flogging. Inconsistencies in the defendant's answers were also a ground for such disciplinary penalties. The German legal philosopher Gustav Radbruch was not exaggerating when he remarked that the difference between the abolished torture and the new "punishments for disobedience" was largely one of rationalization: the mistreated defendant was told that he was being beaten "not in order to tell the truth, but because he has told a lie." G. RADBRUCH, *EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT* 187 (K. Zweigert ed. 1964).

36. Linkages between judicial torture and the death penalty were clearly perceived by contemporaries, and abolitionist strategies were mapped accordingly. Some abolitionists, like Beccaria, criticized the death penalty. Others, like Maria Theresa, conceded that abolition would decrease the range of application of capital punishment, but viewed various forced labor schemes, accompanied by flogging, as an acceptable alternative. See note 16 *supra*. Finally, Frederick the Great of Prussia took yet another tack: he permitted imposition of the death penalty on indicia alone, but his reform was quickly abolished in subsequent legislation.

But if Langbein's thesis is modified, a new problem is unveiled. As long as the cessation of the evidentiary necessity for judicial torture is thought to be the principal ground for its abolition, one is justified in focusing solely on the epistemological aspects of the institution. The "humanistic perspective," being less important, may safely be left out. This, in fact, is what Langbein does. Discussing, for instance, the defects of torture, he leaves moral problems aside and centers instead on the efficiency of torture as a device for screening the guilty from the innocent.³⁷ Throughout his book he remains consistent and persists in this self-imposed anesthesia of the heart. But, if I am right, and the need for coerced confessions survived the penological changes, surely the abandonment of judicial torture cannot be explained within Langbein's narrow evidentiary perspective.

III

Judicial torture cannot properly be understood unless one realizes that from the very beginning the "human cost" of its use did not pass unnoticed. Like most other procedural institutions, judicial torture was never evaluated exclusively in terms of its use in controlling crime. Quite naturally, the human costs were assessed according to the moral temper and ethical yardsticks of the epoch. I shall examine only one aspect of the perceived human costs—exemptions based on social status—since this factor helps to explain both the origin and abandonment of judicial torture.

Insofar as the faded fresco of its origin can reliably be restored, judicial torture seems never to have been a generally permissible institution. In the thirteenth century, society was permeated by considerations of rank and status that affected all social institutions, including those of criminal procedure. Small wonder then to discover in the contemporary sources that the permissibility of torture depended greatly on the social class of the defendant. Broadly speaking, one can state that the thirteenth-century elites were not subject to torture, unless involved in mutual struggles for power.³⁸ In later developments it

37. See p. 861 & note 2 *supra*.

38. For classical feudal exemptions from torture, see the legislation promulgated in 1265 for Castile and Leon, one of the first medieval kingdoms to develop an estate system. *LAS SIETE PARTIDAS (Partida 7, tit. 30, ley 2)* 1458 (trans. S. Scott 1931). Very similar exemptions appear in scholarly works of the period and in collections of customary law. See, e.g., E. VERBÖCZY, *TRIPARTITUM JURIS CONSUETUDINARI INCLYTIC REGNI HUNGARIAE (Pars 3, tit. 20)* 519-20 (1775).

Italy is a special case, for—with the exception of Piedmont and Sicily—no political units with an estate system developed. It is well known that quite a few doubt the feudal cre-

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would, however, be simplistic to assume that the defendant's station in society affected only immunities from torture. The defendant's dignity, the irreparable consequences of torture inflicted on an innocent, and similar considerations were assessed in deciding not only whether to torture the defendant at all but also for what offenses to torture and how severe to make the torments.³⁹ No matter how coarse and brutal the epoch may seem to us, sensitivity to human suffering and even moral refinement were not totally absent. What was missing, however, was a general human empathy independent of social class, a universal conception of human rights transcending status. Equality was still illegal. Therefore, although human suffering was taken into account in regulating torture, this factor was weighed differently depending on the station in society of the individual defendant.⁴⁰

The French developments are especially revealing of how human costs affected the evolution of torture. As far as exemptions of nobility

dentials of Italy. Privileges of nobility were frequently not recognized by Italian city-states, and instances are known where torture was used as a weapon in the persecution of "magnates." See H. KANTOROWICZ, *RECHTSHISTORISCHE SCHRIFTEN* 318 (1970). Even so, torture from the beginning was not a generally permissible instrument. "Persons placed in a position of dignity" enjoyed exemptions from torture. See I. CLARUS, *supra* note 30, (*Liber* 5, qu. 64, no. 17) at 691.

39. A good example is at B. CARPZOV, *supra* note 12, (*Pars* 3, qu. 117, nos. 1-5) at 152-53. In a surprisingly poetic moment, the author compares the irreparable damage done to the tortured innocent to "lost virginity."

Soon after the inception of torture, immunities were no longer absolute. They did not apply to treason, heresy, and similar serious offenses of the time, some of which we would today term political. B. CARPZOV, *supra* note 12, (*Pars* 3, qu. 118, no. 87) at 167. Exemptions were particularly strong in lands where nobility was powerful. For Poland, "the democracy of noblemen," see Z. KACZMARCZYK & B. LESNODORSKI, *HISTORIA PAŃSTWA I PRAWA POLSKI* 195, 207 (1957). For Hungary, see E. VERBÖCZY, *supra* note 38, (*Pars* 3, tit. 20) at 519-20. Even if subject to torture, the privileged received less harsh treatment. Farinacius states that, according to the "doctors," the last degree of torture must not "by any means" be applied to nobles. See P. FARINACIUS, *supra* note 12, (*Liber* 2, *Consilium* 175, No. 21) at 343. Clarus indicates generally that "*nobiles satis minus . . . sunt torquandi.*" See I. CLARUS, *supra* note 30, (*Liber* 5, qu. 64, no. 17) at 691 (marginal gloss). See B. CARPZOV, *supra* note 12, (*Pars* 1, qu. 117, no. 71) at 159. Sometimes the sufficiency of indicia for torture would depend on social status. See P. FARINACIUS, *supra* note 12, (*Liber* 2, *Consilium* 175, qu. 22) at 343 (sufficiency of indicia for crime of forgery).

40. Langbein is too conscientious a student of history to overlook this body of law, but he does not focus on it. He notes, in passing, only the most visible regulations, those pertaining to status-based exemptions from torture. And, as he does not find them in the *Carolina*, and because they had fallen into disfavor with the French writers of the *ancien régime*, he does not attach particular importance to this aspect of the law of torture. P. 13. The French developments will be considered in the text that follows. See pp. 880-81 *infra*. The absence from the *Carolina* of status-based immunities from torture should not be taken to mean that the political units of Germany ceased to exempt the privileged classes from torture. For a time noblemen could even claim to be exempted from the inquisitorial process altogether and be treated according to the milder "accusatorial" procedure of the period. Status exemptions from torture, as well as privileges as to the degree of torture when the latter was permissible, remained a matter of customary law. That this body of law continued to live in the next century is witnessed by Carpov's authoritative work.

from torture are concerned, in the mid-sixteenth century these privileges were already in decline before French courts. As of the fifteenth century, however, royal courts, staffed by persons of non-noble background, began to displace customary law and triumph over the competing jurisdiction of feudal and ecclesiastical courts. The decline of exemptions from torture was thus only part of a more general eclipse of the privileges of hereditary nobility in the increasingly bureaucratic and absolutist state.⁴¹ The social nature of absolutism and especially the relationship of the state toward nobility are subject to a great deal of dispute. But few would question that the absolutist state tried everywhere to break down feudal privileges or at least to move the locus of privilege from feudal status to important functions in the state apparatus and at court.⁴² It strived ultimately to create a single class of subjects and a legal system of generally applicable norms.⁴³ It never totally succeeded and, although curtailed, status and privileges continued to play a role in social life generally and in criminal procedure particularly. For a long time it remained only a remote practical possibility for a member of the upper strata to be prosecuted and subjected to judicial torture. When this occurred, the crime involved was usually of such a character that immunities from torture would not have applied even under the "classic exemptions," and torture was postponed until after judges became convinced of guilt. Inevitably, any such prosecution became a *cause célèbre*.⁴⁴

41. The magistrates gradually turned into a hereditary nobility of their own (*noblesse de robe*), and bitter animosities between them and the hereditary peers continued until the end of the *ancien régime*. This is clearly illustrated in the memoirs of the Duc de Saint-Simon. See 2 HISTORICAL MEMOIRS OF THE DUC DE SAINT-SIMON 367-71 (L. Norton trans. 1968).

42. This shift, so dear to the judicial bureaucrats, may be observed in the writings of Clarus, who is aware of developments in France. Speaking about the Continental *ius commune* generally, he claims that exemptions based on occupancy of high office are recognized everywhere. This was not so with the privileges of noblemen. In Clarus's view, "real" nobles should enjoy immunities from torture. But who is really of noble descent? "Nowadays," he writes, "the blossom of nobility has been corrupted by vile and unworthy marriages, and hardly anywhere can one tell whether a person is really noble." I. CLARUS, *supra* note 30, (*Liber* 5, qu. 64, no. 17) at 691. Ultimately, then, Clarus relegates the problem to the customs of the place where legal proceedings occur.

43. On this aspect of the absolutist state, see the perceptive passages in F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 181-83 (1957). In the criminal process, this tendency required the separation of procedural roles from roles in society. Creating a single class of subjects did not imply, in the criminal process, granting defendants procedural rights and safeguards against officials. In this respect monarchical and bourgeois interests clashed. See generally M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 266-67 (M. Rheinstein ed. 1967).

44. For a flavor of cases involving hereditary nobility, see the seventeenth-century prosecution of Mme. de Brinvillier, accused of parricide and fratricide through poisoning. I GAYOT DE PITAVAL, CAUSES CÉLÈBRES ET INTÉRESSANTES 203 (J. Neaulme ed., The Hague, 1765). For a treason case (which would also have provided no exemption under classic

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But this was by no means the case with *hoi polloi* who were subject to torture on much less evidence.⁴⁵ As time went by, the process of curtailment of feudal privileges by the absolutist state continued.⁴⁶ With the further blurring of social distinctions in the eighteenth century, the elite came increasingly in contact with an instrument first designed for lower orders. The chances that a noble would be caught by the inquisitorial procedural machine were no longer negligible. As torture was about to become truly a general procedural technique, the perceived human cost of the technique increased dramatically. The upper strata could now more easily than before recognize themselves in the tormented defendant. This identification process must be viewed against the background of strong coeval currents in ideology. The idea of universal human rights, gaining strength with the rise of the bourgeoisie within the old order, ended up by contaminating substantial segments of the nobility itself. As the decline of the old blood sanctions affected the evidentiary status of judicial torture, diminishing its importance, so the costs of torture in terms of recognized human suffering increased. Sensibilities became more delicate. And considerations of humanity, heretofore confined to some, had now to be given weight with respect to all defendants. In consequence, torture appeared increasingly as an "irrational institution," surely a strong indictment in the Age of Reason.⁴⁷ Its legitimacy was undermined even within the absolutist state.

This brings us back to the role of the Enlightenment propaganda for abolition. Langbein is right in pointing out that the publicists, by

law), see the prosecution of the Marquis de Cinq-Mars, in J. IMBERT, *QUELQUES PROCÈS CRIMINELS DES XVII^e ET XVIII^e SIÈCLES* 77-100 (1964). In such cases torture was ordered after the judges had already persuaded themselves of the defendant's guilt, and torture thus turned into a sort of punishment. The run-of-the-mill cases, in which torture was used with more abandon, were viewed without much animadversion, as contemporary literature attests.

45. The fact that less evidence was needed to apply torture to vagabonds is noted by Langbein. P. 149 n.40.

46. Early in the eighteenth century, Saint-Simon compiled a long list of privileges taken away from the aristocracy, and wondered whether, as a result, peasants and noblemen could still be distinguished—surely an exaggeration of a frustrated aristocrat. See 2 SAINT-SIMON, *supra* note 41, at 450. Mirabeau and Beccaria both thought that formal equality before the law did not contradict the true principles of the absolutist state. C. BECCARIA, *supra* note 32, at 77-80. See H. JACOBY, *THE BUREAUCRATIZATION OF THE WORLD* 53 (1973).

47. The idea that torture was unreasonable was partly due to the change in the strength of religious beliefs as well. As religion lay very close below the surface of thirteenth-century institutions, it offered a rationalization for judicial torture. If a confession "freely" repeated after torture could save a sinning defendant from eternal torments, was it not "rational" to immerse him for a while in the absolving sea of pain? Unperturbed by Pascal's wager, the Enlightenment period no longer had much sympathy for this kind of rationalization.

harping on ethical issues, mainly repeated old criticisms of torture. Nor is it easy to imagine that the *philosophes* could have acted differently. It is precisely their dizzying and exaggerated belief in the possibility of ever-increasing civility that generated their creative afflatus. Assume that, as Langbein desires, they focused instead on demonstrating the workability of the criminal justice system without torture. As I have pointed out before, trying to persuade the law enforcers of the absolutist state that torture was no longer needed would have called for much stronger pragmatic arguments than the one advanced by Langbein, that is, that torture was no longer necessary in the narrow, evidentiary sense of a *sine qua non* of conviction.⁴⁸ These stronger arguments, however, would have required a substantial dose of skepticism about the position of defendants in the procedure of the "enlightened" future, a pessimism quite alien to the temper of the publicists. They would hardly have argued that the state now had subtler but still inhumane means of coercion.

Whether the propaganda of any of the great abolitionists influenced the promulgation of the abolition decrees is open to conjecture. But this is not to say that the propaganda was doomed to failure because it focused on stirring a sense of *moral* scandal at the continuing use of torture. Abolition was the work of enlightened despots. Although not importantly constrained by pressures and concerns of judicial bureaucracy, they all displayed, in one form or another, uncertainty about the practical impact of the abandonment of torture on the administration of criminal law. Surely, then, something beyond the pragmatic needs of criminal procedure impelled them to act. In France the impetus may have been public opinion, which was imbued with the new ideology and sensitive to the human suffering involved in torture. But what about the monarchs of central and eastern Europe, where most abolition decrees were passed? It has been suggested, and quite plausibly I think, that rulers of central and eastern Europe were motivated in their reforms by a great desire to impress the more advanced West, whose culture they embraced as ardent "dilletantes."⁴⁹ If the abandonment of judicial torture is considered such a reform, the publicists' effort to maintain a vital sense of moral outrage at the continuing use of torture may not have been such a bad policy after all.

The discussion of moral aspects of torture takes us away from Lang-

48. See p. 877 *supra*.

49. See P. ANDERSON, *LINEAGES OF THE ABSOLUTIST STATE* 233 (1974). Public opinion as a pressure factor existed only in France. See *THE WIDENING CIRCLE: ESSAYS ON THE CIRCULATION OF LITERATURE IN EIGHTEENTH CENTURY EUROPE* (P. Korshin ed. 1976).

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bein's focus, which lies on the crime-control aspects of the institution. Returning to the pragmatic aspects, let me register a final note of regret. Within his chosen, pragmatic field of vision, Langbein studies the interlacings of judicial torture and legal proof in total isolation from the larger, underlying problem of the defendant's interrogation in the inquisitorial criminal process. Unless, in addition to these interlacings, some attention is given to the deeper phenomenon of interrogation, at least two precious perspectives are lost. First, torture does not appear, as I think it should, as only an episode in the history of coercive measures to assure the defendant's cooperation with law enforcement officials during interrogation. Its abolition seems a much more momentous change than is warranted by actual developments. Second, interesting linkages to modern methods of inducing defendants to incriminate themselves are severed. Before I close, let me substantiate these two claims.

If in the thirteenth century the demanding Roman-canon system of legal proof had not developed, defendants in the inquisitorial type of process would still have been required to answer questions truthfully. And the authorities would still have desired to examine the defendant under the coercive atmosphere thought to guarantee the reliability of information. Given the climate of the times, does it not appear inevitable that torture for extracting answers⁵⁰ would also have remained and have been used at least toward the lower orders? To use a convenient Freudian term, judicial torture was overdetermined in late medieval inquisitorial procedure. Once this is realized, the precise form of such torture (*tortura ad eruendam veritatem*) to which Langbein's book is devoted begins to fall into proper perspective as just one weapon from the arsenal of coercive measures designed to compel self-incrimination in the interrogation process. More important, its abolition assumes a less dramatic character than might appear otherwise: in essence, one coarse medieval form of coercion was replaced by less cruel ones. And starting with disciplinary punishments for disobedience in interrogation, one can construct a continuum leading to contemporary nonadversary procedures that still contain, more or less disguised, legitimate devices to induce self-incrimination and to discourage silence at interrogations.⁵¹

50. See pp. 875-76 & note 32 *supra*. Langbein does not rule out the possibility that torture would have appeared in the period even in the absence of legal proof. P. 8. In fact it was used in medieval Europe independently of such proof and for a long time in China by the nonlegalistic mandarin bureaucracy.

51. I have examined only some of the devices that encourage loquacity in my article, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Compara-*

Had Langbein followed this connection, his provocative historical juxtaposition of the common law and Continental systems would also have assumed a clear contemporary relevance. The reader will recall Langbein's emphasis on divergent standards of proof sufficiency in the two legal cultures and on the different loci in which legitimate pressure was applied on defendants.⁵² Both contrasts, I think, survive to this day. While pressure is still brought to bear on Continental defendants during their interrogation, it is applied against common law defendants at the pleading stage. And although the Continental locus of pressure is directly related to the desire to obtain information about the out-of-court event, the common law plea bargain is less directly related to the desire to establish the truth. I realize that the monographic method requires the narrowing of perspectives. But even a slight attention by Langbein to the deeper problem of the defendant's interrogation would have suggested connections between his theme and our modern concerns and thus would have added significantly to his interesting and provocative book.

tive Study, 121 U. PA. L. REV. 506, 526-30 (1973). For an interesting new account, see Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361, 377-81 (1977).

52. See, e.g., pp. 9, 77, 184 n.20.