

BOOK REVIEWS

THE DEATH OF CONTRACT. By GRANT GILMORE. Columbus, Ohio: Ohio State University Press, 1974. Pp. x, 151. \$8.00.

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No doubt every American law school curriculum includes Contracts as a required, first-year course. According to the AALS Law Teachers Directory, nearly 400 law professors are now engaged in teaching the course. The enduring importance of Contracts is evidenced by its primacy among Restatements and the massive treatises of Williston and Corbin. A host of recent casebooks and textbooks indicate that there is still much ferment; we are only part way through a Second Restatement. In light of all this, it is a bit unsettling, to say the least, to read the obituary of the subject. Grant Gilmore's little book, a set of lectures delivered four years ago, puts the matter starkly in the title: *The Death of Contract*.

Let me say at the outset that the book is not an elegy to lament the passing of a great and beloved friend. Rather it is a ringing declaration that the departed never really existed except as the figment of the fertile imaginations of Holmes, Langdell, and Williston. What they created as an abstract set of doctrines has been the skeleton of this thing we call Contract. Professor Gilmore's book is "a study in what might be called the process of doctrinal disintegration."¹ Contract has not been killed, Gilmore says, it has merely disintegrated before our eyes.

What has been demolished, according to Professor Gilmore, is a grand design that he calls the classical general theory of contract. Gilmore summarizes that general theory in three sweeping principles: First, contractual liability should be restricted to the narrowest possible limits. Second, within those limits, liability should be absolute. Third, returning again to the idea of restraint, the remedy available for breach should be kept in tight check. In elaborating on these themes, Gilmore uses the doctrine of consideration for the first point. The "ob-

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¹ G. GILMORE, *THE DEATH OF CONTRACT* 101 (1974).

jective theory" illustrates the idea of absolute liability. Subordination of specific remedies and limited measures of money damages demonstrate the third idea.

Professor Gilmore concludes that all three ideas have failed to win acceptance. The extent of contractual liability, rather than being constrained, has virtually exploded. Courts are increasingly willing to consider subjective matters in contract controversies rather than to deal only with external and formal acts. The once exceptional remedy of specific performance is rapidly becoming the order of the day, while damage measures are widening through many paths.

It is quite good fun to go along with Professor Gilmore as he examines microscopically the familiar cases and doctrines that the theorists used, or misused, in creating the general theory of contract. At this level, Professor Gilmore's wit and elegance of mind shine brilliantly. His analyses of *Stilk v. Myrick*, *Dickinson v. Dodds*, *Foakes v. Beer*, *Raffles v. Wichelhaus*, *Paradine v. Jane*, and *Hadley v. Baxendale* illumine those classics with fresh insight.

Professor Gilmore then shows "the devious process by which the 'cases' became the 'rules' of the general theory of contract."² The attack gives no quarter. "We need not concern ourselves with whether the process involved deliberate deception or merely unconscious distortion on the part of the theory-builders. What is clear is that some funny things happened on the way from case report to treatise."³ At one point, Gilmore notes that the post-Holmesian "objectivists," led by Williston, made no attempt to argue that their principle had any common law past, and comments: "Perhaps the attempt would have overtaxed even their own very considerable ingenuity."⁴

Professor Gilmore's stinging indictment of the "theorists" who gave us the classical theory is based in part on his obvious belief that no grand theory can contain or explain the rush of specific events. "The trouble was that businessmen, adapting to changing circumstance, kept doing things differently. The 'general theory' required that, always and everywhere, things remain as they had, in theory, always been."⁵ However, Gilmore does venture his own tentative theory of where we are now headed as we leave the ruins of the classic theory. The idea of contract, he suggests, is being subsumed into the general idea of tort.

² *Id.* 28.

³ *Id.*

⁴ *Id.* 43.

⁵ *Id.* 34.

We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. . . . When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort.⁶

My own prediction differs from the possible assimilation of contract into tort. I believe that the future of contract is found in its recognition as the foundation of commercial law. Perhaps the most pernicious consequence of the general theory of contract is the *unitary* quality of that theory. It purports to embrace in a single set of doctrines a wide variety of agreements that have no common basis in content or context.

Professor Gilmore alludes to this point in the beginning of his book:

Asked to locate the law of contract on the legal spectrum, most of us, I assume, would place it in the area usually denominated Commercial Law. It is true that our unitary contract theory has always had an uncomfortable way of spilling over into distinctly non-commercial situations and that what may be good for General Motors does not always make sense when applied to charitable subscriptions, antenuptial agreements and promises to convey the family farm provided the children will support the old people for life. But we feel instinctively that commercial law is the heart of the matter and that, the need arising, the commercial rule can be applied over, with whatever degree of disingenuity may be required, to fit, for example, the case of King Lear and his unruly daughters.⁷

While Professor Gilmore assumes that the unitary theory was shaped by commercial transactions, my sense is that classic theory was rather shaped by noncommercial transactions, or more accurately by noncommercial attitudes toward all transactions.

A book review is not the medium for declaring what a different book the reviewer would have written. Let me make

⁶ *Id.* 88 (citation omitted).

⁷ *Id.* 8.

briefly three observations that, I believe, do fairly relate to the thesis advanced by Professor Gilmore. Each follows from the separation of contract law from commercial law.

First, the unitary theory of contract focused attention on the relatively less important rather than the more significant issues. A large part of that theory is devoted to drawing the boundary line between the land of contract and the land of no-contract. Doctrines of consideration, Professor Gilmore's declared favorite topic, was largely of that nature. The recognition of the enforceability of bilateral exchange of promises, the common form of commercial exchange, means that a high percentage of the cases on the periphery of contract are not commercial problems. Students who are marched through the law of offer and acceptance find few examples of currently meaningful commercial issues. To some extent, Article Two of the Uniform Commercial Code removes threats to sales transactions caused by the classical theory of a unified body of contract law.

Second, the unitary theory necessarily diminished the attention to context. It elevated to paramount concern the words used in a transaction. This is quite topsy-turvy. In almost any commercial transaction of a normal type, the matters that "go without saying" are fundamental. The parties' implicit understanding is adapted more or less by their overt communication. The nature of that implicit understanding can be found only in the context of the transaction, which ought to be the primary rather than secondary source of inquiry.

Third, the unitary theory was relatively useless to the resolution of the contract disputes. The overwhelming number of issues that have arisen concern what contracts mean in application. The theory's tools for guiding or aiding interpretation were blunt and clumsy. Some, like the parol evidence rule, can be actually counterproductive and have been substantially altered by commercially sensitive courts. The doctrinal structure for handling unforeseen changes in circumstances is abysmally weak.

Because of the doctrinal emphasis on noncontextual matters, it is very hard to place a given set of contract issues into an analytic frame of reference that shows the proper role of market-based bargains in our twentieth century economic system. We struggle with the old and new devices for "policing" contracts, for example, but we act without any solid foundation for such policy analysis. For that absence, the classical general theory of contract is largely to blame.

PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE. By JOHN H. LANGBEIN. Cambridge, Massachusetts: Harvard University Press, 1974, Pp. ix, 321. \$14.95.

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Writing a few years ago about the state of modern scholarly knowledge of English legal history, G. R. Elton observed pessimistically "that the difficulties of knowing about crime and law-enforcement are greater in the sixteenth century than in the thirteenth . . ."¹ Elton's remark reflected his awareness of the loss of many Tudor court records and the skimpiness of the information which the surviving rolls convey concerning the incidence of serious crime in sixteenth-century England and the success of efforts to deal with it. Because of this problem of sources, relatively less attention has been given by modern historians to the early modern period of English legal history as contrasted with the medieval. We can be grateful that this situation appears to be changing for the better as a result of several recent contributions by English and American legal historians to the study of the common law and courts system of Tudor and Stuart England. From a number of vantage points—institutional, social, and conceptual—contemporary scholars have begun to expand our understanding of English law and its enforcement during the sixteenth century. Professors J. S. Cockburn and J. H. Gleason have examined, respectively, the offices and personnel of the assize courts and the peace-keeping and judicial functions of the justices of the peace.² More recently, Dr. Joel Samaha has attempted to calculate the crime rate of Elizabethan Essex and to correlate the gritty data of legal history with those economic, social, and religious changes which demarcated the medieval from the early modern phase of English history.³ Now Professor John Langbein has published his history of the invention and application of pretrial criminal process,⁴ one of the most significant procedural innovations in the history of English law. This new scholarly effort gives rea-

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¹ G. ELTON, *ENGLAND, 1200-1640*, at 62 (1969).

² J. COCKBURN, *A HISTORY OF ENGLISH ASSIZES: 1558-1714* (1972); J. GLEASON, *THE JUSTICES OF THE PEACE IN ENGLAND, 1558 to 1640* (1969).

³ J. SAMAHA, *LAW AND ORDER IN HISTORICAL PERSPECTIVE* (1974).

⁴ J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* (1974) [hereinafter cited as LANGBEIN].

son to hope that Elton's despairing aside is becoming less accurate as a description of the state of scholarly knowledge of Tudor legal history.

A famous and frequently quoted explanation for the apparent "modernizing" trend at work in English criminal procedure law from the mid-sixteenth century forward ascribed this development to the borrowing of continental criminal processes, particularly the Roman-canonical inquisitorial practices adopted by various European states during the late middle ages. This "officialization" and "rationalization" (to use Weberian terminology) of English criminal procedure, which entailed the substitution of public prosecution of criminals for the old method of private prosecution and, supposedly, the replacement of the oral testimony of victims and witnesses by officially prepared written memoranda as the basis for future judgments, was explained as the result of the "reception" by the common law of continental legal precedents and models.⁵ Langbein disputes this "reception-thesis," insisting that it is based on a superficial and quite mistaken comparison of the preliminary criminal procedure established by two Marian statutes of 1554-55, which encumbered the justices of the peace with responsibility for investigating accusations of felony and manslaughter, certifying the justices of gaol delivery of the facts of the case, and of prosecuting the accused in the assize courts, with the system of public prosecution of serious crime (*Offizialmaxime*) and dossier-compiling (*Instruktionsmaxime*) of sixteenth-century continental *Inquisitionsprozess*.⁶ The "reception-thesis" has been very fashionable among historians of English law. Even Maitland toyed with it, once musing that the popularization of continental legal process in Renaissance England may have been due to the influence exerted by a Spanish lawyer imported into the country by Mary Tudor's husband, Philip II.⁷ But it was Holdsworth's *History of English Law*⁸ which gave it wide currency in Anglo-American historical circles. Langbein takes as his task the refutation of the "reception-thesis," with all its implications and insinuations for our understanding of the development of Tudor law and justice. He has discharged that burden admirably, with considerable benefits for modern scholars trying to recover the true history of the common law in the early modern period.

⁵ See *id.* 55-56 & n.5, and sources cited therein.

⁶ *Id.* 130-31.

⁷ F. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* 11-12, 54-55 n.21 (1901).

⁸ W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1903-38).

Langbein's book consists of two interrelated parts. The first, and also the most original, explores the procedural "revolution" entailed by the Marian legislation which made the old law enforcement officer, the justice of the peace, an official investigator and public prosecutor of crime.⁹ This was the achievement of the important statutes of 1 & 2 and 2 & 3 Philip and Mary—the "bail statute" and the "committal statute," Langbein calls them—which, in the first instance, tried to prevent the collusive bailment of accused felons by corrupt or negligent justices of the peace, and, in the second, created the fully formed procedures of the public investigation and prosecution of crime by these same officials. Disputing the false analogy which attributed these changes to the adoption of continental models, Langbein shows both that the "docket memorandum" prepared by the justices of the peace for use by the justices of gaol delivery was qualitatively different from the inquisitor's dossier, and that it did not supplant the oral testimony of victims, witnesses, and local officials before the assize courts as the basis for final judgment. The common law's fierce bias in favor of oral pleading¹⁰ prevented the justice of the peace's examination from acquiring evidentiary force and thereby obviating the need for oral testimony. Langbein carries our understanding of the justice of the peace's judicial role forward from where Bertha Putnam left us and considerably expands Gleason's recent description of the investigative and prosecutorial functions of these officials, who, as he shows, had been prepared for the role of public prosecutor by parliamentary legislation stretching back to the late fourteenth century. While not minimizing the significance or novelty of the Marian statutes which created these important new judicial procedures, the author forcefully advocates an "evolutionist" point of view, which ascribes these changes to natural native developments. In the course of his analysis he exposes our profound ignorance of the history of the trial jury during the late middle ages and the Tudor and Stuart periods. It is quite apparent from his discussion that the assumption of an investigative and prosecutorial role by the justices of the peace had the effect both of supplanting the jury of presentment as an accusatorial agency and of facilitating the transformation of the petty jury from a self-inform-

⁹ Langbein has contributed some other thoughts on the history of public prosecution in English law. See Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313 (1973).

¹⁰ Michael Clanchy has studied this phenomenon from an anthropological point of view. See Clanchy, *Remembering the Past and the Good Old Law*, 55 HISTORY 165 (1970).

ing reporter of neighborhood gossip into an objective "trier of facts"—developments which probably had their beginnings in the fourteenth century.¹¹

Although the English section of the book is the more original part of it, the second half, consisting of a study of sixteenth-century German and French criminal law and procedure, is in many ways the more interesting. As in his account of the background to the Marian statutes, Langbein feels compelled to reach back into the middle ages to trace the evolution of criminal processes contained in the imperial German Caroline code of 1532 and the French ordinance of Villers-Cotterets of 1539. Summarizing the scholarship of such modern German legal historians as Eberhard Schmidt,¹² Langbein shows how the adoption by German secular courts of the techniques of inquisitorial procedure¹³ actually came in two waves: a steady domestication of *Inquisitionsprozess* through the agency of canonists and church courts in Germany during the middle ages, followed by the wholesale adoption of the rhetoric and rationale of Roman or Italianate criminal law and procedure in the sixteenth century. His most important departure from Schmidt's views comes with his recommendation that historians investigate the influence exerted on German secular law by the medieval ecclesiastical courts, which, he believes, encouraged the adoption by the lay tribunals of inquisitorial practices.¹⁴

Langbein is an exceptionally well informed, sensitive, and subtle practitioner of the art of comparative historical analysis; and he realistically stresses the substantial differences which separated the German and French legal systems with respect to criminal procedure. In France, as Langbein and his principal guide, John Dawson,¹⁵ explain, there evolved a rigidly hierarchical native judicial system, which, beginning like the medieval English, ended in the fifteenth and sixteenth centuries very much like the German. The end result of this medieval development, which was promoted and shaped by ecclesiastical

¹¹ There are hints that the change in the character and composition of the trial jury dates back to the fourteenth century. See Toms, *Medieval Juries*, 51 *ENG. HIST. REV.* 268 (1936).

¹² Schmidt's two most famous works are: E. SCHMIDT, *EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE* (3d ed. 1965); E. SCHMIDT, *INQUISITIONS-PROZESS UND REZEPTION* (1940).

¹³ This is exemplified by the public prosecution of crime and the basing of judgments on a selective statement of the facts contained in the magistrate's dossier.

¹⁴ LANGBEIN, *supra* note 4, at 152-55.

¹⁵ J. DAWSON, *A HISTORY OF LAY JUDGES* (1960). The disparity in quantity and quality of German and French scholarship on early modern legal history reveals a striking lack of interest by French historians in their nation's legal history.

example, was a royal criminal law and procedure only analogous to and derivative from the Roman-canonical traditions which had determined more directly and positively the German system. The key factor which made France and England alike in their institutional and legal development, and distinguished both from Germany, was a political one—the consolidation and centralization of power in a strong French monarchy from the thirteenth century forward. It was this royal French court system which borrowed from the church courts a “highly officialized criminal procedure,” based on the public instigation of criminal judicial action by the *lieutenant-criminel* or *procureur du Roi*, who investigated and prosecuted the case, and whose written examination of witnesses and accused effectively determined the magistrate’s final judgment. Not only has Langbein refuted the “reception-thesis” with respect to England, but he has considerably diminished its usefulness for explaining continental developments, which were native and medieval, not imported and Renaissance, in their origins.¹⁶ Particularly valuable in this part of the book are the two subchapters, entitled “The German History in Comparative Perspective”¹⁷ and “The French Procedure in Comparative Perspective,”¹⁸ in which Langbein contrasts and tries to account for the differing criminal laws and procedures employed by these three “new monarchies” of early modern Europe. His argument is a compelling one: that the tendency of historians to distinguish between medieval law and legal institutions and those of the era of the Renaissance and Reformation should not lead them either to minimize the importance of medieval precedents or to assume, as Holdsworth put it, that a generally homogeneous end result appeared throughout western Europe in the sixteenth century as the product of the adoption by Renaissance state-builders of “those new and effective codes of procedure with which the modern European states were arming themselves”¹⁹

It is precisely at this point that *Prosecuting Crime in the Renaissance* becomes useful to the general historian of European society, politics, and public morality. As one might suspect of a book which originated as a Cambridge University doctoral thesis,²⁰ Langbein’s work is aimed primarily at the specialist in

¹⁶ Langbein is in agreement with political historians such as Joseph Strayer concerning the indebtedness of Renaissance statecraft and public administration to medieval institutions. See J. STRAYER, *ON THE MEDIEVAL ORIGINS OF THE MODERN STATE* 91 (1970).

¹⁷ LANGBEIN, *supra* note 4, at 202.

¹⁸ *Id.* 248.

¹⁹ 5 W. HOLDSWORTH, *supra* note 8, at 169-70.

²⁰ See LANGBEIN, *supra* note 4, at vi.

law and legal history. But it makes itself relevant to the interests of a larger audience by virtue of what it states or suggests concerning such matters as the different procedures employed by European nations at various points in their history to cope with serious crime, the relative responsibilities of state and subject to punish antisocial behavior, and changing popular attitudes toward criminals and criminality. For example, on two occasions Langbein raises the question of public attitudes toward crime and their possible effect on the development of criminal law and procedure. In the course of his analysis of the Marian committal statute of 1555, which created pretrial criminal process, Langbein speculates on the causes or motives for this procedural innovation. Although he subscribes (without strong evidence for doing so) to a "catastrophic" explanation of the government's decision to change the criminal procedure—suggesting that a single incident, a "*cause célèbre*," provided the immediate inspiration for the enactment of the bail statute²¹—he speaks elsewhere of contemporary "public interest in law enforcement,"²² thereby implying his belief that there was a psychological commitment on the part of the English crown and people at the middle of the sixteenth century to devise and apply more effective procedures for dealing with serious crime. Joel Samaha, using an entirely different approach to the study of Tudor criminality, has commented on this same phenomenon—the apparent hardening of community attitudes toward crime in sixteenth-century England. On the basis of his statistical studies of the nature and incidence of crime in Elizabethan Essex, Samaha concludes "that society as a whole grew less tolerant of lawbreaking,"²³ eventually prompting the government to bureaucratize and rationalize the existing machinery of justice "so that society's hardening attitude toward lawbreaking could be translated into reality."²⁴ It is in his brief comparative analysis of criminal law and procedure in Germany and England that Langbein makes his most exciting suggestions concerning this possible interrelationship between the new systems of criminal law and procedure and changes of popular opinion and public morality within early modern Europe. Speaking of the restrictions imposed by the German Caroline code on the judicial use of torture, he writes: "It strikes one as a matter of crushing weight that the reception [of *Inquisitionsprozess*] in

²¹ *Id.* 55-62.

²² *Id.* 35.

²³ J. SAMAHA, *supra* note 3, at 109.

²⁴ *Id.*

German criminal procedure meant not a movement of enhanced crime repression, but of safeguard for individual rights against the existing machinery of repression”²⁵ Contrasting the Tudor English “hard line” on “law and order” with apparent Teutonic “permissiveness,” Langbein notes that “the English under a far more centralized government encountered the need for more organized means to repress crime,”²⁶ whereas “the Germans of that time, with governmental authority dispersed,”²⁷ found themselves possessing “repressive powers that needed to be contained.”²⁸ If these different approaches to law enforcement in Germany and England were solely the result of contrasting judicial conventions or even official governmental policies, then Langbein’s historical account of the evolution of formal legal concepts and routinized patterns of judicial behavior sufficiently explains their appearance. On the other hand, Langbein evidently supposes (and I think rightly so) that these differing approaches to the problem of law enforcement reflect powerful forces of popular opinion and public morality at work—a view which Samaha’s research strongly supports. It is a truism that legal ideas reflect the organization and deep-seated beliefs of the societies which espouse them; and it is sobering to remember, particular when we immerse ourselves in such an authoritative exposition of legal concepts as Langbein offers, that the intellectual content of law is very much shaped and colored by society’s myths.

Langbein succeeded in surmounting the problem of the poverty of source materials—the problem which troubled Elton—by a skillful use of a wide range of direct and indirect sources of information. For instance, the manuals of the office of justice of the peace by Lambarde and Dalton provided him with sketches of the investigative and judicial functions of the justices of the peace, which he was able to deepen and enrich with hard data drawn from the surviving court records. Especially useful to him were those examinations of accused felons (only haphazardly preserved), which the justices of the peace prepared for use by the justices of gaol delivery.²⁹ Further, Langbein has followed the lead of Alan Macfarlane in making good use of the little Jacobean chap-books on crime, which had been

²⁵ LANGBEIN, *supra* note 4, at 204.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ If Samaha fulfills his promise to publish the Colchester depositions, we will have available added evidence to illustrate Langbein’s description of how the system actually worked. See J. SAMAHA, *supra* note 3, at 15 n.21.

composed and published to titillate "the sensation-loving London literary market."³⁰ These cheap "penny horrors," catering to that fascination with the murderous and the morbid which seemed to pervade the literary tastes of the seventeenth-century English reading public, provided Macfarlane with considerable information to supplement the evidence of the Essex quarter sessions concerning witchcraft accusations and prosecutions. Langbein has recognized the value of this odd literary genre for understanding the investigative and prosecutorial role of the justices of the peace outlined in the patchy court records.

Specialists will probably find useful his translations of a substantial part of the German Caroline code and the whole of the ordinance of Villers-Cotterets and the famous Marian statutes, which constitute appendices of the book. In light of his painstaking translation of the difficult German dialect in which the Caroline code was written, it is puzzling that the author chose to quote throughout the book the translations, with their archaic orthography, of the English statutes appearing in *Statutes of the Realm*. Finally, we might note that the lack of a formal bibliography is offset by an especially rich and informative set of footnotes conveniently printed on the relevant pages of the text.

Writing in another context, Professor Langbein has recently argued for the more intensive study of the "internal life of the legal system,"³¹ by which he means those legal ideas as distinguished from the institutionalized structure of courts and officials which were responsible for enforcing them. The implication of this argument is that legal concepts—the ideational aspect of the common law—must be understood in order to comprehend the purely institutional development of law. This is certainly a valid recommendation to historians of English law. But an even more important message emerges from Langbein's suggested approach to legal history and his excellent performance in this book: that the history of legal ideas is legitimately part of the larger intellectual and moral history of mankind. The arbitrary restriction of the "history of ideas," intellectual history strictly speaking, to the speculations of poets and philosophers, scholastic theologians and formal political theorists, to the exclusion of those usually anonymous and undramatic formulators of legal concepts and practices, denies us as social scientists a full understanding of the whole

³⁰ A. MACFARLANE, *WITCHCRAFT IN TUDOR AND STUART ENGLAND: A REGIONAL AND COMPARATIVE STUDY* 81 (1970).

³¹ Langbein, Book Review, 18 AM. J. LEGAL HIST. 88, 90 (1974).

range of human intellectuality. It also keeps from us insight into that one area of intellectual and moral experience which has, probably, been most intimately connected with physical reality and life as actually lived. The best contemporary legal history, such as that represented by the works of van Caenegem and Coing in Europe and Baldwin, Brentano, and Langbein himself in America, makes a serious effort to discern and describe the interconnectedness of law and legal institutions with other areas of human experience viewed historically.³² *Prosecuting Crime in the Renaissance* is a fine contribution to this effort to recover in all its richness and complexity the story of the intellectual life of the law.

³² It would be interesting to apply Michel Foucault's approach to the study of the history of ideas to the history of legal concepts and procedures. See M. FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1970).

