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Book Review, (reviewing Norman Doe, Fundamental Authority in Late Medieval English Law (1990))

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Book Reviews

Norman Doe, *Fundamental Authority in Late Medieval English Law,* Cambridge: Cambridge University Press, 1990. Pp. xxi, 197. $47.95 (ISBN: 0-521-38458-3).

This ambitious book attempts to reconstruct the theoretical foundations of late medieval English common law. As its aim is to make sense of basic assumptions about the nature and authority of law, it asks important questions not often asked. Vast—indeed overwhelming—resources exist for the study of the early common law, particularly in the form of official case records (the plea rolls) and of unofficial notes taken of court proceedings (the so-called Year Books). All too often, however, historians have approached these materials as though their significance were self-evident. It is assumed they record the workings of a legal system essentially similar to ours, that is, a legal system that defines its function as the consistent application of official substantive rules to the resolution of disputes between private individuals and between individuals and the state. It is also assumed that by careful study of the documentary record, the historian can uncover substantive doctrine in much the same way a lawyer today can find it in the law reports. This assumption about the plea rolls and Year Books is not unreasonable, because the records do bear some apparent similarities to modern legal materials. Yet it is only an assumption. If instead the premodern common law system rested on different conceptual and normative foundations, it is entirely possible that its records mean something other than what they are typically taken to mean and that they represent a legal system fundamentally different from ours. Unless we can make sense of the premodern common law on its own terms, we run the risk of misinterpreting the historical record. By emphasizing differences between premodern and modern legal theory, this book points us in the right direction, and invites us to think further about the questions it presents and their implications for our understanding of the workings, objectives, and basic presuppositions of the premodern legal system.

The difficulty that one confronts in attempting to reconstruct premodern legal theory is the relative lack of self-conscious, systematic writing about the nature and authority of the common law. Doe does the best he can with what's available. He has searched diligently through the Year Books for relevant remarks by judges and counsel and has drawn also on statutory preambles. In addition to these pragmatic sources, he also makes effective use of more theoretical writings. Here he draws extensively on the writings of John For-

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tescue and Reginald Pecock, who was a fifteenth-century English bishop and author of several theological treatises that include comments on secular law. The work of Christopher St. Germain and, less conspicuously, those of continental theorists are also consulted.

As thorough as Doe's research is, his sources are not without limitations for the task they are being asked to perform. The Year Books are of questionable value to the study of legal theory. These voluminous, intensely practical documents record points of pleading and procedure for use in litigation and capture more general statements about the nature of the common law only occasionally and incidentally. They include very few references to natural law, though, as Doe himself establishes, natural law was obviously a fundamental element of medieval legal thought. As for Fortescue and Pecock, the polemical and possibly eccentric aspects of their works may render them suspect as sources for mainstream legal theory. Doe stresses that English theorists turned to contemporary civilian, canonist, and Thomist thought, but ends up making only limited efforts to situate English legal theory within a broader Western European tradition. The result is a certain insularity that has always characterized most English legal historical scholarship. It should also be noted that the temporal scope of the work, which began life as a doctoral dissertation, is limited primarily to the fifteenth century.

Doe sees two fundamental—and inconsistent—conceptions of law at work. He convincingly elucidates the common law's firm grounding on natural law theory. This approach insists that mundane law reflect divinely ordained moral principle: "rules are accepted as laws only insofar as they conform to the requirements of abstract right and wrong" (6). Thus, judges and lawyers cite "reason," "equity," or "conscience" as sources of normative authority in the context of particular cases. For example, in a 1420 Common Pleas case, Justice Martin rejected a plaintiff's effort to recover an amount greater than that claimed in his writ because "for you to have more than is comprised in your writ will be against reason" (114). Here and elsewhere, basic moral ideas rather than humanly promulgated rules provide the basis for legal argument and decision.

Coexisting with this natural law approach, Doe argues, is what he calls an incipient "positivist thesis." According to this conception, secular law is entirely a creation of human will. Consent by the relevant actors, rather than conformity with divinely ordained moral precept, determines a rule's binding force; human law need not be congruent with natural law to be authoritative. Obviously, a notion of law's authority that does not depend on transcendant morality conflicts with one that grounds legality on principles of natural justice. Thus, Doe seeks to delineate "a basic tension in jurisprudence during this period" (60).

While Doe's illumination of the role of natural law thinking is well documented and persuasive, if not surprising, his effort to uncover an incipient positivism presents some problems. A distinction between divine and human law does seem to be pretty well established and it is recognized that the latter,

as a social artifact, is variable temporally as well as geographically. Fortescue, for example, made an interesting "sociological" comparison of English and French law. This view, however, is consistent with the idea that human law may often give expression to divine moral precept in various ways and may even supplement it, though it may not supersede it. Hence the commonly repeated belief that a humanly created rule contrary to reason lacks authority. In other words, self-conscious appreciation of the role of human agency in the creation of law need not imply a rejection of a belief that law's legitimacy must rest on its conformity to naturally existing moral norms.

Doe's emphasis on the importance of popular and royal assent as the sources of authority for parliamentary legislation does not establish a commitment to the separation of law from morality. One would like to see clear instances in which good arguments for a statute's unreasonableness or inequity were rejected solely on the basis of the statute's procedural regularity. Yet Doe offers precious little of this sort of evidence, and the two cases he does discuss (58) are ambiguous at best.

Doe sees local customs as norms "shaped by the will and consent of a community" (32). The common law courts' willingness to apply local custom is also taken to indicate a positivist outlook. However, the effort to discuss the authority of local custom as grounded on consent—and therefore essentially analogous to parliamentary legislation—is especially problematic. A. W. B. Simpson has written of the conceptual difficulties involved in attempting to assimilate custom to a strictly positivist conception of law ("The Common Law and Legal Theory," in *Oxford Essays in Jurisprudence* [2d ser. 1973]). The whole point of custom is that it is not legislated, it is lived. When a dispute arises, the community may refer openly to current understandings of right and wrong as the basis for resolution, but custom does not function as a preexisting code of rules, prospectively authoritative, that dictates results in particular cases. Rather, it reflects a basic store of moral understanding to which people turn, often instinctively, and, as such, it requires interpretation in the context of concrete controversies. Custom is therefore constantly being assessed and reassessed, and in this process its meaning is constantly being reconstructed as circumstances are deemed to require. It is a mistake to view this sort of activity as "legislative" and grounded on a distinction between law and morality. In any event, the orthodox view among common lawyers that customs contrary to reason are not enforceable clearly undercuts the view that custom as positive law could enjoy legitimacy despite its inconsistency with basic moral principle.

In one area in which Doe's rival conceptions of law seem to have come into direct conflict, Doe sees the positivist understanding coming out on top. In cases in which application of an existing rule would appear to threaten injustice ("mischief" was the usual term), judges seem to have been willing to tolerate an arguably unfair result in a single case in order to avoid the "inconvenience" of inconsistent rulings. One can, as Doe does, read such cases (and there are not many) as indicating an incipient commitment to stare

decisis, judges ought to apply duly established, accepted rules regardless of extra-doctrinal considerations of justice or morality. It seems, however, at least equally plausible, in light of the broadly evident commitment to understanding law in terms of reason or natural justice, to view a devotion to consistency as itself based on a basic moral idea, that similar cases ought to be decided in similar ways. In other words, the conflict is not between law and morality as much as it is between two conflicting interpretations of what morality requires under the circumstances.

If one steps beyond the language of statutes and Year Books, it becomes very hard to understand the premodern common law in positivist terms. Trial procedure lacked mechanisms designed to ensure the consistent application of official doctrine (David Millon, "Positivism in the Historiography of the Common Law," *Wisconsin Law Review* (1989): 669). Instead, juries possessed very broad discretion to make substantive judgments, and such decisions were immune from judicial scrutiny on grounds of inconsistency with common law substantive rules. Civil as well as criminal jurors were expected to apply their consciences to discover the concrete significance of natural principles of justice. In this respect, they functioned as judges did when they chose to make rulings of law (mostly on procedural or jurisdictional matters).

The origins of a conception of the common law as a body of humanly created substantive rules, intended to be applied consistently and predictably, does not emerge until the sixteenth century. The clearest indications are in the development of novel procedural mechanisms for jury control and a new judicial willingness to address and decide questions of substance (J. H. Baker, *An Introduction to English Legal History,* 97–101 [3d ed. 1990]). By the end of the sixteenth century, law reports appear that bear a far greater resemblance to what lawyers use now than they do to the Year Books, which had ceased production around fifty years earlier. A clearly understood commitment to a separation between law and morality did not crystallize until much later still.

A non-positivist understanding of premodern legal theory might lead us to a different reading of the historical record. Instead of finding a legal system centered around a body of officially sanctioned substantive rules, as ours is, one might see something quite different. Perhaps, instead, the institutions and personnel of the common law looked to reason and justice—typically and understandably assumed to be instantiated in living custom and established usage—as sources of normative authority. The jury's broad discretion suggests a willingness to commit legal decisionmaking to the dictates of conscience, which Doe (paraphrasing Aquinas) describes as "judgment about particular conduct which derives from a naturally given knowledge of first principles of right and wrong" (133). (The persistence of ordeal-type procedures like wager of law are also very hard to explain in terms of a commitment to consistent rule application.) To the extent premoderns thought about the common law as a body of rules, these rules seem to have been primarily procedural and jurisdictional, providing a framework within which dispute resolution according to reason and conscience might occur. In other words, one's assump-

tions about the common law's fundamental presuppositions may have a profound effect on how one approaches premodern legal history.

The great value of Doe's book is that he tackles the subject of premodern legal theory head-on. If his analysis does not always conclusively establish its claims, this is not to say that the effort has been futile. To the contrary, it is a strength of the book that he has not attempted to force all his carefully collected evidence into a single, overly simplistic theoretical construct. There are indeed indications of what can plausibly be described as an incipient positivism, though I would tend to think these instances are relatively rare and amenable to alternative interpretation. Nevertheless, by asking important questions, and presenting thoughtful, provocative answers, Doe challenges historians of the premodern common law to consider their subject within its larger jurisprudential context.

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Thomas Kuehn, *Law, Family and Women: Toward a Legal Anthropology of Renaissance Italy,* Chicago: University of Chicago Press, 1991. Pp. 248. $40.00 (ISBN 0-226-45762-1).

Much of the time, this book, a collection largely made up of previously published essays, is wonderful. Kuehn has all the virtues of a model social historian: He is a first-rate archive jock, capable of pulling the most revealing and delightful documents out of the Florentine archives of the fourteenth and fifteenth centuries, but he also makes good use of printed sources, such as Florentine belles lettres; he is up on all the theoretical social science literature, but he does not apply social science models mechanically or uncritically; and while his writing occasionally sinks under the weight of theoretical jargon, for the most part he writes engagingly.

The result is a book that is full of vividly recounted and stimulatingly analyzed tales of the world of Florence, in the best tradition of narrative social history—a book that (apart from some weak and unconvincing stretches) is memorable, provocative, and fun to read. To my mind, it is a book that falters, however, when Kuehn tries to mount grand arguments about the interrelationship between law and society. There are, it sometimes seems, two Kuehns writing here: One is a careful, learned, and ingenious historian of Florentine society; the other is a rather imprecise and unconvincing post-modern philosopher of law.

Kuehn lays out his methodological and philosophical claims in the book's Introduction. Those claims are mostly about ambiguity. "Ambiguity" is a favorite term of Kuehn's, but it is one that he uses without perfect philosophical precision. That is a pity, because to understand the book's great virtues and its failings, we must observe that Kuehn uses "ambiguity" in two distinct senses. First, when Kuehn emphasizes the "ambiguity" of legal sources, he