

June 15, 1965

Dear John:

Thanks for the latest Doe reprint. The interplay of Doe and Holmes gives it special interest.

Doe continues to emerge for me from your careful analyses as a rather idiosyncratic cuss, to a degree that I find reduces rather than enhances his stature for me. Like you (p.435 of this essay), but perhaps with more feeling in the matter, I find him hard to take in his apparently almost unbounded willingness to turn over law making to a succession of pretty autonomous juries. And, related to this feature, I find him something less than a master conceptualist, or at best not a very good phrase maker. Specifically, I find Doe's repeated reliance on the distinction of questions of law and fact to be quite unconvincing, because under the name of "fact" he evidently means to commit the making of social value judgments to the jury, and it strikes me as clouding rather than clarifying analysis for him to treat this kind of operation as fact finding.

You might well anticipate that my own bias would lead me particularly to enjoy your Brown v. Collins pages here. What you have to say on p.419 draws a judicious distinction between (1) what Doe probably viewed as his prime objectives in analysis and decision here, and (2) what may plausibly be deemed the objective functional ties of his perceptions and his analytical choices to the nature of his society and its economy. I think I have raised a similar point before, but let me note again a question which bothers me if only because it seems both implicit and unresolved in what you've written: Granted that a biographer should clearly distinguish (1) what is in his subject's mind and heart from (2) what objective relation his subject's behavior may have to currents of thought and action outside his subject's mind and heart, quare whether #2 isn't yet as legitimate a part of telling a "life" as is #1. For in our common experience men's lives add up not just to what they themselves think they add up to, but also to what impact or connections they have with phenomena of which they may even be unaware or with which they are not particularly in sympathy.

Tangential to this last comment is another, which I pass on for any worth it may have as you confront sometime the task of making a synthesis of your essays. For the most part your essays present a picture of Doe

as a self-conscious maker of legal concepts and of the architecture of legal institutions. That is, for the most part, the "life" you are telling is Doe's life as a contributor to legal literature, within the frame of course of his responsibilities as judge. The question of definition of the scope of the "life" which I pose as one perhaps to be grappled with in an introduction or conclusion is, whether such an undertaking is a full-dimensioned biography of the judge, as such. As judge, Doe joined in many votes on his court, or perhaps dissented from some, in which he did not undertake to speak his own mind other than by the act of voting. I realize that in posing this issue, I may in effect be raising the question whether a full-dimensioned judicial biography can be written without writing the history of a man's whole court, and that this is as a practical matter to ask more than the biographer can usually find the time to undertake. I raise the question, therefore, not to suggest that you can't write an insightful book on Doe, or any other judge, without writing the whole history of his court, but simply to raise the question whether the enterprise should not, at some critical point of introduction or conclusion, explicitly define itself as primarily a study of the man as an articulator of legal concepts rather than as a full-dress study of a man helping to decide cases in the full flow of business of his court. The point is one which bothers me as to almost every judicial biography I've ever read, since most of them seem to me not to confront squarely the definition of just what dimensions of their subject's life they are purporting to explore in fullness.

Best wishes,

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