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PIONEERS IN CRIMINOLOGY

XII. Charles Doe (1830-1896)

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The tides of judicial history sometimes exhibit a strange faculty of ignoring their chief benefactors.¹ A classical example is Charles Doe who at the age of twenty-nine, was appointed Associate Justice of the Supreme Court of New Hampshire and served in that capacity from 1859 to 1874, and as chief justice from 1876 until his death on March 9, 1896.² Probably not more than six judges in the United States and England have had a longer judicial career and none of them contributed as much to the advancement and improvement of the administration of justice and the judicial machinery to accomplish it expeditiously.³

While Doe's contributions are frequently overlooked, it is significant that those most qualified to judge his

work have recognized that he was "one of the great judges of the last



CHARLES DOE

¹ Cf. ABRAHAM, *John Marshall Harlan; A Justice Neglected*, 41 VA. L. REV. 871, 872, 890 (1955).

² ELMER E. DOE, *The Descendants of Nicholas Doe*, 230-250 (1918); *Charles Doe*, 5 *Dictionary, Am. Biog.* 354 (1930).

³ HENING, *Charles Doe*, in 8 GREAT AMERICAN LAWYERS 241, 243, 317 (LEWIS ed. 1909).

century,"⁴ "a great name in American Law"⁵ and one of "the ten judges who must be ranked first in American judicial history."⁶ Wigmore's monumental *Treatise on Evidence* was dedicated to Charles Doe and James Bradley Thayer "Two Masters in the Law of Evidence,"⁷ and Jeremiah Smith has written convincingly of Doe's ability to decide cases on their merits and not permit justice to be "strangled in the net of form."⁸ A more recent note has concluded that although Doe had "left a permanent impression on American jurisprudence . . . surprisingly little has been written about Doe either during his lifetime or since his death in 1896."⁹ Wigmore had no hesitation in expressing his opinion that Doe was "one of the greatest of American judges."¹⁰ Nor is modern authority from a respected source lacking since Professor Edmund M. Morgan, an indefatigable leader in the field of reform in the law of evidence, refers to the classic opinions of "the great Justice Doe of New Hampshire."¹¹

Within the limits of the few pages allotted to the title of this comment, it is possible only to take a birds-eye view of Doe the man, and his contributions as a judge to a more enlightened consideration of insanity and the criminal law. While Doe's substantial accomplishments in the field of evidence and procedure are the ones that may be remembered today,¹² it is the purpose of this comment to consider his single-handed and original contribution in making medical science the handmaiden of criminal law in its application to mental disorder. It is believed that Doe's early efforts prior to 1872 in that direction are just beginning to receive modern consideration.¹³ It may well be he is the only judge, excluding contemporaries,¹⁴ who can truly be denominated a pioneer in criminology.

⁴ ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 108 (1923).

⁵ CHARLES FAIRMAN, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 *STAN. L. REV.* 5, 86 (1949).

⁶ POUND, *FORMATIVE ERA OF AMERICAN LAW*. 4 and n.2, 30-31 (1938).

⁷ 1 WIGMORE, *EVIDENCE V* (1904).

⁸ J. SMITH, *Memoir of Charles Doe*, 2 *PROC. SO. N. H. BAR ASS'N*, 125, 144 (1899); Note 9 *HARV. L. REV.* 534 (1896).

⁹ Note, *DOE OF NEW HAMPSHIRE: REFLECTIONS ON A NINETEENTH CENTURY JUDGE*, 63 *HARV. L. REV.* 513 (1950). In addition to the references cited in this note, see also, 53 *ALBANY L. J.* 161 (1896); 27 *AM. L. REV.* 71 (1893); 30 *AM. L. REV.* 286 (1896); 3 *PARKER, COURTS AND LAWYERS OF NEW ENGLAND* 573 (1931); WEIHOFEN, *The Flowering of New Hampshire*, in *SYMPOSIUM ON INSANITY AND THE CRIMINAL LAW*, 22 *U. CHI. L. REV.* 356, 363 (1955).

¹⁰ 2 WIGMORE, *EVIDENCE* (3rd ed.) (1940) s. 445, p. 433.

¹¹ 1 *BASIC PROBLEMS OF EVIDENCE*, pp. 26, 172 (1954).

¹² "There can scarcely be a single Harvard Law School man here who has not heard of the great Chief Justice commonly known as "C. Doe of New Hampshire." He died as long ago as 1896, but he had the fire and he had the learning and the practical common sense which made him, wholly without aid from the Legislature of New Hampshire, the great leader in the improvement of the administration of justice in that state. Full of whimsies and sometimes as eccentric as a March Hare, he was imbued with the spirit of justice and fought for it all his life, fought for it in the hard, practical, matter-of-fact way that one would expect from a native of New Hampshire." Quoted from an address by JUDGE HAROLD R. MEDINA to the members of the Pennsylvania Bar, appearing in 36 *JOUR. OF THE AMER. JUD. SOC.*, 8 (June 1952).

¹³ *Durham vs. United States* (D. C. Cir.), 214 F. (2d) 862 (1954).

¹⁴ The series of articles under the general title, "PIONEERS IN CRIMINOLOGY" specifically eliminate

Charles Doe was born in Derry, New Hampshire on April 11, 1830. His father, a large landowner and well known in the community, sent his son to the academies of South Berwick, Exeter and Andover, and one term at Harvard College from which he transferred to Dartmouth where he graduated in 1849. After one term at the Harvard Law School he returned to New Hampshire to become county solicitor for Strafford county. From 1854 until his appointment as an associate justice of the Supreme Court of New Hampshire on September 23, 1859, he was engaged in a substantial trial practice, both criminal and civil.¹⁵ During this period he took an active interest in politics, first as a Democrat and later as a Republican, and made many friends and acquired an equal number of enemies.

Although Doe was financially independent, he lived simply, dressed as a country storekeeper or farmer rather than a judge of his era and was a thorough believer in fresh air.¹⁶ A typical comment was that he "was a man of simple tastes and eccentric manners, but of genuine legal talents and clear and impartial mind."¹⁷ There is not the slightest doubt that Doe was individualistic in thought and action but there is reason to believe that references to his eccentricities have been exaggerated. He was stern with cant, impatient with ceremony unless he conceived it fulfilled some essential function¹⁸ and was unawed by precedent unless it appeared to have a logical basis.¹⁹ It remains for someone to make a more adequate study of his life before we can say with certainty whether his thoughts were unique or whether their expression may be classed as eccentric.²⁰ However, the most recent evaluation of Doe confirms earlier opinions that his "treatment of substantive problems sometimes showed an almost unique originality."²¹ Doe's originality did not go unnoticed and it was inevitable that in addition to criticism there would also be parody. In a humorous sketch before a Bar Association Doe C. J. is pictured as rendering a certain decision and giving as his sole reason "that the law has hitherto always been understood to be otherwise."²²

Doe first gave serious thought to the problem of mental disorder in his dissenting

consideration of contemporary criminologists. "We confess to having been arbitrary in that we have selected no contemporary criminologist for inclusion in this series." 45 J. CRIM. L., C. & P. S. 1 (1954).

¹⁵ See HENING, *supra*, note 3, at 245: "We have been over the dockets again very carefully, and we feel sure that Charles Doe's name appeared as counsel in two hundred twenty-three different cases up to the time of his appointment to the bench." Letter to writer from W. H. Roberts, clerk of Superior Court, 1906."

¹⁶ "Judge Doe was eccentric in manner, dress and mode of living and was a confirmed believer in fresh air . . . Lawyers declare that to attend court in winter, when the chief justice presided, was equal to a trip to the Arctic regions." 53 ALBANY L. J. 161 (1896).

¹⁷ 20 GRANITE MONTHLY, 275 (1896).

¹⁸ EASTMAN, *Chief-Justice Doe*, 9 GREEN BAG 245, 250 (1897).

¹⁹ *Metcalf v. Gilmore*, 59 N. H. 417, 433 (1879): "As there was a time when there were no common-law precedents, everything that can be done with them could be done without them."

²⁰ John Reid, Esq. of Dover, N. H. is presently engaged in a careful and exhaustive study of all the existing material on Doe. In view of the inadequate material which exists today, students of Doe will welcome Reid's work as filling a void in American judicial biography.

²¹ 63 HARV. L. REV. 513, 518 (1950), *supra*, note 9.

²² J. SMITH, *Memoir of Charles Doe*, 2 PROC. SO. N. H. BAR ASS'N, 125, 149 (1897).

opinion²³ in *Boardman v. Woodman*. This was a will case in which the majority held that witnesses who were not experts and were not witnesses to the will could not testify as to the sanity of the testator. Doe objected to the majority ruling which affirmed instructions that delusions were the test of insanity. It was in his view that this was a question of fact for the jury and not a question of law for the court to instruct the jury. A summary of some "of his most forcible sentences"²⁴ appear at page 150 of the opinion: "If it is necessary that the law should entertain a single medical opinion concerning a single disease, it is not necessary that that opinion should be a cast-off theory of physicians of a former generation. That cannot be a fact in law, which is not a fact in science; that cannot be health in law, which is disease in fact. And it is unfortunate that courts should maintain a contest with science and the laws of nature, upon a question of fact which is within the province of science and outside the domain of our law. All inconsistencies and difficulties are avoided by adhering to the spirit and elementary principles of the law, which declare that a will cannot be produced by any form of mental disease, and that the indications and tests of mental disease are matters of fact."

In *State v. Pike*, Doe's views prevailed and the decision affirmed the following instructions to the jury:²⁵ "that whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury." In amplification of his criticism of the prevailing right and wrong test, Doe contended that it was an unsuccessful attempt "to install old exploded medical theories in the place of facts established in the progress of scientific knowledge"²⁶ "If our precedents practically established old medical theories which science has rejected, and absolutely rejected those which science has established, they might at least claim the merit of formal consistency. But the precedents require the jury to be instructed in the new medical theories by experts, and in the old medical theories by the judge."²⁷ (pp. 438-439).

In *State v. Jones*, 50 N. H. 369, 398 (1871) a unanimous court rejected the M'Naghten Rules²⁸ and adopted Doe's theory that criminal responsibility was a question of fact for the jury. If the defendant had a mental disease and the criminal act was a product of that mental disease, the jury was to acquit the defendant. The jury in the *Jones* case was given the same instructions that were used in *State v. Pike* and these instructions were upheld as correct: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant." Under the New Hampshire rule there is no legal test of insanity and the issue of criminal responsibility is a question of fact to be decided by the jury upon all the evidence presented to them including that of

²³ N. H. 120, 140 (1866).

²⁴ 9 HARV. L. REV. 534, 535 (1896).

²⁵ 49 N. H. 399, 407-408 (1869).

²⁶ *ibid.* p. 438.

²⁷ *ibid.* pp. 438-439.

²⁸ M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 ENG. REP. 718, 722 (H. L. 1843).

the experts.²⁹ "Whether the defendant had a mental disease, as before remarked, seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease, was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all."

For many years it has been well known in New Hampshire that Doe not only inspired many decisions but in some cases actually wrote decisions although they appeared under the name of another judge.³⁰ Dr. Reik has demonstrated clearly Judge Doe's part in the opinion by Judge Ladd in *State v. Jones*, and Doe's attempt to give credit to his colleagues rather than himself in establishing the New Hampshire rule on insanity.³¹ Judge Doe owed a great debt to Dr. Isaac Ray who is generally regarded as an American pioneer in forensic psychiatry.³² "As we have seen, Ray had long taken the position that the criteria of intellectual comprehension of right and wrong laid down in the M'Naghten Rules are wholly inadequate, and that, indeed, no legal definition or universally applicable test of criminal irresponsibility by reason of insanity can be devised. Judge Doe was thoroughly convinced that Ray was right, although he hesitated to quote Ray as his authority, preferring to confine his arguments to purely legal grounds. He concluded that 'the great masters of our law' never made the distinction between law and fact in cases of insanity, and that by setting up various theoretical criteria for legal responsibility they not only invaded the realm of science but also betrayed the spirit of the common law."³³

Long before Cardozo³⁴ and Pound had made forceful pleas for the necessity of integrating law and science, Doe was the first judge to insist that the law should collaborate with science and particularly in the field of criminal responsibility.³⁵ Even able commentators who think that the M'Naghten Rules should be retained with some modification would agree with Doe that we should continue to find a way to integrate the progress of medical science with the development of the law of mental disorder.³⁶

In 1953 the British Royal Commission on Capital Punishment issued its report after a five-year study. It recommended that the present legal tests of insanity be abolished and that the jury be allowed to decide whether the defendant was suffering

²⁹ A summary of the New Hampshire rule including the authorities that support it and criticize it may be found in WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE*. pp. 113-119 (1954).

³⁰ See HENING, *supra*, note 3, at 304; 63 HARV. L. REV. 513, 514, *supra*, note 9.

³¹ REIK, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*. 63 YALE L. J. 145 (1953).

³² OVERHOLSER, *PIONEERS IN CRIMINOLOGY: III ISAAC RAY (1807-1881)* 45 J. CRIM. L., C. & P. S. 249, 261-262 (1954).

³³ See note 32, *supra*.

³⁴ CARDOZO, *WHAT MEDICINE CAN DO FOR THE LAW* 32 (1930).

³⁵ See REIK, *supra*, note 31 at 196: "As to the New Hampshire rule itself, we can only conclude from the correspondence here presented that if it deals with matters too complicated for juries to decide unassisted, it nevertheless seeks to open the way for scientific progress in the jurisprudence of mental disease, and marks a step toward true collaboration between science and the law in the spirit of Judge Doe and Dr. Ray."

³⁶ HALL, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 768-785 (May 1956).

from such a mental disease or deficiency that "he ought not to be held responsible."³⁷ At long last the voice of Doe, the first judge who was a pioneer in criminology, at least received modern consideration for the views which he had expressed almost a century ago.³⁸ In 1954 the *Durham* case³⁹ decided "that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." While it did not give credit to Doe's pioneer efforts in this field, it did state that the "rule we now hold . . . is not unlike that followed by the New Hampshire court since 1870." Both the *Durham* case and the New Hampshire rule have been defended⁴⁰ as well as criticized.⁴¹ "What is the reason for the sudden attention now being shown to Judge Doe's octogenarian wallflower? Is the happening of the *Durham* case and the Royal Commission's report within a year of each other mere coincidence? I am inclined to think not. Rather, these developments seem to me a vindication of Professor George Dession's prophecy made in 1938, that 'the infiltration of psychiatry—and all psychiatrists into the administration of criminal law' will one day be recognized as 'overshadowing all other contemporary phenomena' in its influence on the evolution of criminal justice."⁴²

The American Law Institute is preparing a Model Penal Code and while it does not adopt the New Hampshire rule it is at least encouraging to note that the M'Naghten Rules are undergoing reconsideration in the light of modern medical science.⁴³ Whether one favors the New Hampshire rule, the *Durham* rule or whether one believes that greater progress would be made by the recommendations of the British Royal Commission or the American Law Institute is not material in achieving the real objective of integrating law and medicine in the light of modern knowledge. Improvements will be made even if we follow those psychiatrists who believe there is much merit in the M'Naghten Rules providing that they can be brought up to date in the light of modern scientific developments.⁴⁴

Doe recognized that the legal profession would not adopt medical science as law and that the only solution was to adopt "the venerable principle of the common law" that questions of medical science be left to the jury as questions of fact.⁴⁵ While Doe was convinced that the antagonism between medical science and law could be re-

³⁷ REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT (1949-1953), Cmd. No. 8932 at 116 (1953).

³⁸ STOCKLY, *Mental Disorders and Criminal Responsibility: The Recommendations of the Royal Commission on Capital Punishment*, 33 TEX. L. REV. 482, 485-486 (1955): "Nearly a hundred years ago, under the leadership of Judge Doe, the New Hampshire Supreme Court, believing that then-used tests of responsibility (the M'Naghten Rules and the irresistible impulse test) were ineffectual, held that the question of an accused's responsibility was for the jury without reference to any test other than an inquiry whether he had acted with a criminal intent."

³⁹ *Durham v. United States*, 214 F.(2d)862, 874-875 (D. C. Cir. 1954).

⁴⁰ SOBELOFF, *Insanity and the Criminal Law: from McNaghten to Durham, and beyond*, 41 A. B. A. J. 793 (1955).

⁴¹ HALL, *supra*, note 36.

⁴² DESSION, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L. J. 319 (1938). WEIHOFEN, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 363 (1955).

⁴³ AMERICAN LAW INSTITUTE, MODEL PENAL CODE, tentative draft No. 4 Sec. 4.01 (1955).

⁴⁴ WERTHAM, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955).

⁴⁵ REIK, *supra*, note 31 at 193.

moved, "my fear is very strong that it can be done within 100 years on no other basis than the principle which I have undertaken to establish. . . ."⁴⁶ Perhaps in 1969, Doe's prophecy may come true but in any event he would be the first to admit that any improvement on the traditional tests for insanity would be a major gain in criminal law even if his method was not adopted. We have already alluded to the fact that Doe was particularly impatient with sham and cant and he would probably agree with Mr. Justice Frankfurter's statements before the British Royal Commission on Capital Punishment: "I am a great believer in being as candid as possible about my institutions. They are in a large measure abandoned in practice, and therefore I think the M'Naghten Rules are in a large measure shams. . . . I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules."⁴⁷ While Doe's contribution to the difficult problem of criminal responsibility is not *the* only solution, at least it was "*a* tangible solution in an area where the law has long been criticized for inertia."⁴⁸

One may not agree with Doe's views on criminal responsibility and yet concede that he was the first judge in America who can be rated as a pioneer in criminology.

⁴⁶ See Doe's letter of March 23, 1869 to Dr. Ray quoted in REIK, *supra*, note 31 at 194.

⁴⁷ Note 37, *supra*, at 102.

⁴⁸ *Criminal Responsibility and Mental Disorder: New Approaches to an Old Problem*, 30 IND. L. J. 194, 217 (1955). While the quoted statement was made with reference to the Durham decision it is equally applicable to the New Hampshire rule.