

# Reviews

## Foul Is Fair

Robert L. Birmingham†

*Science and Justice: The Massachusetts Witchcraft Trials.* By Sanford J. Fox. Baltimore: The Johns Hopkins Press, 1968. Pp. xix, 121. \$6.95.

Twenty persons died as a consequence of prosecutions for witchcraft in Salem, Massachusetts, in 1692. These proceedings were not the product of isolated irrationality but, rather, were the culmination of a period of excesses: at least eighty-three witchcraft trials resulting in twenty-two executions were held in the American colonies between 1647 and 1691.<sup>1</sup> The European experience was far more pervasive:

Nicholas Remy boasted in his book on demonology that within fifteen years he had sent eight hundred persons to death for witchcraft in Lorraine, and added that "justice has been so ably administered at my hands that in one year sixteen witches have taken their own lives rather than come before me." A bishop in Würzburg claimed 1900 in a five year period; another in Como, 100 in one year; another in Nancy, 800 in 16 years; another in Bamberg, 600 in 10 years, while at Geneva, the home of Calvin, 500 were executed in three months and the Parliament of Toulouse distinguished itself by burning 400 in a single day. A total of 7000 were said to have burned at Treves. Boquet boasted of having burned 600 lycanthropes, and it has been asserted that the Lutheran, Benedict Corpzov (1595-1666), who claimed that he had read the Bible 53 times, passed sentence on 20,000 Satanists. The slaughter was less in England, but the official count puts the figure at not less than 1000 people hanged or burned between 1542 and 1736. How many people were tried or otherwise persecuted for witchcraft in Europe during the whole Christian Era is unknown; estimates run as high as several million . . . .<sup>2</sup>

On both continents policies of persecution seem to the modern mind to have been extended almost to self-parody: "[A] dog was put to death

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1. Drake, *Witchcraft in the American Colonies, 1617-62*, 20 AM. Q. 694, 697 (1968).  
2. H. SMITH, MAN AND HIS GODS 292-93 (1952).

at Andover for bewitching several people, which balanced accounts between the Eastern and Western Hemispheres: in the year 1474 a diabolical rooster, for the heinous and unnatural crime of laying an egg, had been solemnly tried, condemned and publicly burned at the stake by the church authorities of Basle."<sup>3</sup>

In this book, Professor Sanford J. Fox of the Boston College Law School examines the relationship between law and science by analyzing the Massachusetts witch trials in the light of contemporaneously evolving societal standards of verification and the resulting accumulation of empirical knowledge. He is particularly concerned with rationalizing the continuing vitality of an increasingly anachronistic set of beliefs in an extension of the civilization which in 1687 had witnessed publication of Newton's *Principia*. His success in reconciling the prosecutions with evidence of keen local interest in scientific advances is best measured by one of his conclusions: "[T]he witchcraft trials cannot be viewed as entirely, or even largely, the products of superstition and collective insanity. . . . Nothing short of a profound and unreasoning devotion to the concept of monomania could maintain the belief that the witchcraft trials are simply manifestations of mental illness."<sup>4</sup>

As Fox notes, the Puritan leaders of the Bay Colony sought to build a community characterized by intense regard for the spiritual duties which they recognized. They considered intolerance of nonconforming views or actions necessary to the success of their undertaking.<sup>5</sup> Their religious commitment included unhesitating acceptance of an essentially medieval *Weltanschauung*:

[I]t was an unquestioned fact that the world and man in it had been created in six days by God the Father, an omniscient and benevolent intelligence, for an ultimate of inscrutable purpose. Although created perfect, man had through disobedience fallen from grace into sin and error, thereby incurring the penalty of eternal damnation. Yet happily a way of atonement and salvation had been provided through the propitiatory sacrifice of God's only begotten son. Helpless in themselves to avert the just wrath of God, men were yet to be permitted, through his mercy, and by humility and obedience to his will, to obtain pardon for sin and

3. *Id.* 294. See Huch, *Der Hahn von Quakenbrück*, in *DIE DEUTSCHE NOVELLE 1880-1950*, at 106 (rev. ed. H. Steinhauer ed. 1958).

4. S. FOX, *SCIENCE AND JUSTICE: THE MASSACHUSETTS WITCHCRAFT TRIALS*, at xv, 10-11 (1968) [hereinafter cited as FOX]. See P. MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* 191 (Beacon ed. 1961).

5. "Puritans left England . . . not because they were persecuted for their religious beliefs but because they were forbidden to persecute others for *their* beliefs." G. VIDAL, *SEX, DEATH AND MONEY* 21 (1968) (emphasis in original).

error. Life on earth was but a means to this desired end, a temporary probation for the testing of God's children. In God's appointed time, the Earthly City would come to an end, the earth itself be swallowed up in flames. On that last day good and evil men would be finally separated. For the recalcitrant there was reserved a place of everlasting punishment; but the faithful would be gathered with God in the Heavenly City, there in perfection and felicity to dwell forever.<sup>6</sup>

Since the criminal law was considered primarily an instrument for promotion of the godly commonwealth, many penal statutes deviated little from their Mosaic counterparts. The Bible commands: "Thou shalt not suffer a witch to live."<sup>7</sup> That the Massachusetts settlers enacted and enforced a statute implementing this admonition is therefore readily explicable in terms of their heritage. The use of parallel English legislation, which applied automatically in the Colony on revocation of its charter in 1684, was similarly motivated.<sup>8</sup>

Analysis is required not to affirm the internal consistency of Puritan patterns of belief but to isolate the causes of their seeming immutability in the face of extrinsic pressures produced by scientific discovery. The medieval system of thought had condemned empirical research and concomitant speculation as either dangerous or irrelevant. Thus St. Augustine had declared: "Whatever knowledge man has acquired outside Holy Writ, if it be harmful it is there condemned; if it be wholesome it is there contained."<sup>9</sup> For centuries scholars discouraged experiment while seeking to deduce the nature of the world from traditionally authoritative pronouncements. Attempts of Galileo to demonstrate the existence of Jupiter's moons by persuading doubters to view them through his telescope proved largely abortive, since many either refused to look on grounds of religious principle or denounced what they saw as an illusion inspired by the devil. Confronted with Galileo's findings, the Florentine astronomer Francesco Sizzi argued:

There are seven windows given to animals in the domicile of the head, through which the air is admitted to the tabernacle of the body, to enlighten, to warm, and to nourish it. . . . Two nostrils, two eyes, two ears, and a mouth. So in the heavens . . . there are two favourable stars, two unpropitious, two luminaries, and Mercury undecided and indifferent. From this and many other similarities in nature, such as the seven metals, etc., which it were

6. C. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 6 (1932).

7. *Exodus* 22:18.

8. See G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 141-62 (1960).

9. Quoted in H. INNIS, *THE BIAS OF COMMUNICATION* 48 (1951).

tedious to enumerate, we gather that the number of planets is necessarily seven. Moreover, these satellites of Jupiter are invisible to the naked eye, and therefore can exercise no influence on the earth, and therefore would be useless, and therefore do not exist. Besides, the Jews and other ancient nations, as well as modern Europeans, have adopted the division of the week into seven days, and have named them after the seven planets. Now, if we increase the number of the planets, this whole and beautiful system falls to the ground.<sup>10</sup>

Early scientific efforts were impeded by inability to discard established patterns of verification. Preconceptions of necessary symmetry led Kepler, who incorrectly attributed inconsistent empirical evidence to faulty observation, to modify the Copernican system to make the sun its central point.<sup>11</sup> Both Descartes and Newton placed great weight on scriptural authority. The latter struggled to discover the exact plan of the temple of Solomon, believing it the best guide to the topography of heaven.<sup>12</sup>

The scholastic approach was discredited by Francis Bacon almost a century before the Massachusetts trials:

In the year of our Lord 1432, there arose a grievous quarrel among the brethren of a monastery over the number of teeth in the mouth of a horse. For thirteen days the disputation raged without ceasing. All the ancient books and chronicles were fetched out, and wonderful and ponderous erudition, such as was never before heard of in this region, was made manifest. At the beginning of the fourteenth day, a youthful friar of goodly bearing asked his learned superiors for permission to add a word. Straightway, to the wonder of the disputants whose deep wisdom he sore vexed, he beseeched them to unbend in a manner coarse and unheard of, and to look in the mouth of a horse to find an answer to their questionings. At this their dignity being greatly hurt, they waxed exceeding wroth; and joining in a mighty uproar, they fell upon him, hip and thigh, and cast him out forthwith. For, said they, surely Satan hath tempted this bold neophyte to declare unholy

10. Quoted in J. FAHIE, *GALILEO: HIS LIFE AND WORK* 103 (1903). See W. JONES, *THE SCIENCES AND THE HUMANITIES: CONFLICT AND RECONCILIATION* (1967). A syllogism of the Spanish theologian Tostatus, devised to verify the flatness of the earth, is a paradigm of Scholastic reasoning: "The apostles were commanded to go into all the world and to preach the gospel to every creature; they did not go to any such part of the world as the antipodes; they did not preach to any creatures there: ergo, no antipodes exist." Quoted in I. A. WHITE, *A HISTORY OF THE WARFARE OF SCIENCE WITH THEOLOGY IN CHRISTENDOM* 108 (Dover ed. 1960).

11. A. HALL, *THE SCIENTIFIC REVOLUTION 1500-1800*, at 122-23 (2d ed. 1962).

12. N. HAMPSON, *A CULTURAL HISTORY OF THE ENLIGHTENMENT* 19, 34, 36 (1968).

and unheard of ways of finding truth contrary to all the teachings of the fathers!<sup>13</sup>

Critics of traditional thought were groping toward the new methodology of scientific inference. Acceptance and refinement of their techniques ultimately rendered witchcraft prosecutions unjustifiable by destroying the world view on which they were based and by making untenable the procedures necessary to determine the guilt of those accused. Nevertheless, as Fox asserts: "[T]he law was keeping very much in step with the scientific thought of the day. What emerges as the really difficult historical task is to identify any way in which law enforcement against witches actually conflicted with science."<sup>14</sup>

Although some scientific discoveries called old beliefs into question, most could be rationalized so as not to conflict with and often to support the religious doctrines of the times. Copernicus died in 1543. By the end of the seventeenth century his arguments positing a heliocentric universe were widely accepted. Rejection of geocentric concepts was not accomplished without protest from the religious community:

Luther said that "People give ear to an upstart astrologer who strove to show the earth revolves, not the heavens or the firmament, the sun and the moon. Whoever wishes to appear clever must devise some new system, which of all systems of course is the very best. This fool wishes to reverse the entire science of astronomy; but sacred Scripture tells us that Joshua commanded the sun to stand still, and not the earth." Melancthon was equally emphatic; so was Calvin, who, after quoting the text: "The world also is established, that it cannot be moved" (Ps. xciii, 1) triumphantly concluded, "Who will venture to place the authority of Copernicus above that of the Holy Spirit?" Even Wesley, so late as the eighteenth century, while not daring to be so emphatic, nevertheless stated that the new doctrines in astronomy "tend toward infidelity."<sup>15</sup>

Fox points out, however, that early cosmological discoveries were frequently thought to buttress rather than undermine Biblical authority. He notes that Joseph Glanvill, "the black villain in the witchcraft con-

13. Quoted in E. COOK & W. GARNER, *PERCENTAGE BASEBALL*, at viii (2d ed. 1966). The conclusiveness of esteemed authority is revealed by a statute of Oxford University which decreed "that Bachelors and Masters who did not follow Aristotle faithfully were liable to a fine of five shillings for every point of divergence . . . ." RICHARD E. JONES, *ANCIENTS AND MODERNS: A STUDY OF THE RISE OF THE SCIENTIFIC MOVEMENT IN SEVENTEENTH-CENTURY ENGLAND* 4 (2d ed. 1961).

14. Fox 110.

15. B. RUSSELL, *RELIGION AND SCIENCE* 23 (1935).

troversy,"<sup>16</sup> employed Copernican principles to demonstrate the existence of demons. Robert Burton based speculation concerning their prevalence on contemporary calculations of the size of the universe:

The air is not so full of flies in summer as it is at all times of invisible devils . . . . [S]ome of our Mathematicians say: if a stone could fall from the starry heaven . . . and should pass every hour an hundred miles, it would be 65 years, or more, before it would come to ground, by reason of the great distance of heaven from earth, which contains, as some say, 170 million 803 miles . . . . [H]ow many such spirits may it contain?<sup>17</sup>

Newton himself, accused of substituting gravitation for Providence, asserted that "natural philosophy is subservient to purposes of a higher kind, and is chiefly to be valued as it lays a sure foundation for natural religion and moral philosophy . . . by leading us, in a satisfactory manner, to the knowledge of the Author and Governor of the universe."<sup>18</sup>

Having established the insufficiency of evidence negating the existence of witches, Fox examines the impact of science on the procedures employed during the trials to separate the guilty from the innocent. In particular, he carefully analyzes the actual and potential contributions of medical knowledge, which had been greatly augmented during the seventeenth century. Fox argues that the Massachusetts practitioner remained ignorant of many contemporary European discoveries. More importantly, he concludes that medical advances could have had little effect on the judicial process because witches were believed to act by exercising supernatural power over natural agents: "[N]o matter what *natural* causes of death an autopsy might reveal, the

16. Fox 28.

17. Quoted in A. HUXLEY, *THE DEVILS OF LOUDUN* 171 (1965). Scriptural interpretation yielded an alternative structure: "According to Cosmas, the earth is a parallelogram, flat, and surrounded by four seas. It is four hundred days' journey long and two hundred broad. At the outer edges of these four seas arise massive walls closing in the whole structure and supporting the . . . firmament, above which live the angels, a main part of whose business it is to push and pull the sun and planets to and fro." I. A. WHITE, *supra* note 10, at 93-94. St. Philastrius "pronounced it a heresy to deny that the stars are brought out by God from his treasure-house and hung in the sky every evening . . . ." *Id.* 115.

18. Quoted in C. BECKER, *supra* note 6, at 62. Early discoveries led to the conjecture that prayer might prevent storms not through the direct intervention of God but by the displacements it caused in the atmosphere. H. BUTTERFIELD, *THE ORIGINS OF MODERN SCIENCE* 1300-1800, at 47 (rev. ed. 1965). Vestigial traces of the admixture of science and theology persist: "Space research is made all the more fascinating by the possibility that there are higher forms of life on other space bodies, perhaps some unaffected by original sin." Statement by the Reverend Lawrence W. Friedrich, S.J., quoted in P. KAEL, *KISS KISS BANG BANG* 152-53 (1968).

witch could still be held guilty for having brought about those causes."<sup>19</sup> His efforts unduly divert attention from the methodology of science to the discoveries resulting from application of this methodology. Scientific analysis entails not merely use of inductive processes but also disregard of those hypotheses which are not, at least in theory, empirically refutable.<sup>20</sup> The tenuousness of tests relied on to justify conviction of the witches was apparent even to those who did not doubt their existence. In 1672 one believer admitted: "[I]f anything in the world, (as we know all things in the world are) be liable to fraud, and imposture, and innocent mistake, through weakness and simplicity; this subject of Witches and Spirits is."<sup>21</sup> Development of new modes of thought should have led initially to inquiry concerning the efficacy of techniques of proof. That it did not appear was in part a consequence of the importance of fundamental community religious beliefs. Doubt once recognized could not long remain narrowly focused.

One test, used on the continent as late as 1836, offered little hope to those accused regardless of their culpability: "Proof of their guilt was mainly established in this wise: their feet and hands being bound together they were thrown into the water. If they sank and were drowned they were innocent; but if they remained floating on the surface they were pronounced guilty, and were burnt."<sup>22</sup> Other procedures were ritualistic preludes to a predetermined conclusion: "The magistrate had to put thirty-five questions to the suspect. The first question alone was enough to send the witch to the stake, irrespective of the others. It ran: 'Believest thou in witches?' If the accused answered 'yes' she was versed in witchcraft; if she answered 'no' she was guilty of

19. Fox 61 (emphasis in original). A similar view is prevalent in modern Africa. See M. GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* 81-108 (1965).

20. K. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 33-37 (1962).

21. Quoted in Fox 65. Parallel difficulties afflict modern decision processes. See Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967). Archaic German law occasionally tested charges of rape through combat between the accused and the alleged victim: "The chances between such unequaled adversaries were adjusted by placing the man up to the navel in a pit three feet wide, tying his left hand behind his back, and arming him only with a club, while his fair opponent had the free use of her limbs and was furnished with a stone as large as the fist, or weighing from one to five pounds, fastened in a piece of stuff. . . . If the man was vanquished, he was beheaded; if the woman, she only lost a hand, for the reason that the chances of the fight were against her." Lea, *The Wager of Battle*, in *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 233, 244 (P. Bohannan ed. 1967).

22. H. HEINE, *RELIGION AND PHILOSOPHY IN GERMANY* 30 (J. Snodgrass transl. 1959). British practice permitted some control over result: "It was easy to produce the desired verdict, for a rope was tied around the victim's waist and each end was held by two men on opposite banks of the stream or pond. It required very little ingenuity to prevent the victim from sinking by a slightly camouflaged strain on the rope." R. SETH, *STORIES OF GREAT WITCH TRIALS* 99 (1967).

heresy."<sup>23</sup> Torture to elicit confession was rationalized not only as a safeguard, preventing execution of the innocent, but also, and more reasonably, as a means of inducing penitence and thus saving the soul of the person charged.<sup>24</sup> The reliability of accusations made by demons tormenting the possessed was vociferously debated by theologians. Although all agreed that such spirits were generally untrustworthy, some argued that under priestly constraint they could not speak falsely. The most authoritative statement concerning this problem was issued in 1610 by doctors of the Faculty of Paris. Quoting St. Thomas, they urged that "[t]he devil must not be believed, even when he tells the truth."<sup>25</sup>

Those involved in the colonial trials manifested a greater concern for due process than their European counterparts. A 1692 essay vigorously attacked the proposition that legal safeguards should be restricted because they made conviction difficult:

This is a dangerous Principle, and contrary to the mind of God, who hath appointed that there shall be good and clear proof against the Criminal; else he is not Providentially delivered into the hands of Justice, to be taken off from the earth. Nor hath God exempted this case of Witchcraft from the General Rule. Besides, reason tells us, that the more horrid the Crime is, the more Cautious we ought to be in making any guilty of it.<sup>26</sup>

Modes of proof nevertheless remained questionable. Judges relied on spectral evidence, believing on theological grounds that no innocent person could be represented by an apparition. Reactions of a sufferer to the touch of the accused were also weighed. Midwives searched defendants for witch marks, held to include a wide but poorly defined range of dermatological irregularities. Inability to weep on demand and even apparent extreme piety could indicate guilt.<sup>27</sup> The propensity of the Salem judges to hang those protesting innocence and release those admitting guilt makes the infrequency of their use of torture to coerce confession appear uncharitable.<sup>28</sup>

23. R. LEWINSOHN, *A HISTORY OF SEXUAL CUSTOMS* 126 (1958).

24. Willingness to discount earthly suffering given the prospect of eternal life is best illustrated by the perhaps apocryphal directive of Amalric Arnaud, Abbé of Cîteaux and later Archbishop of Narbonne, during the Albigensian Crusade. At the sack of Béziers in 1209 his soldiers asked him how they were to distinguish between Catholics and heretics. He reputedly replied: "Tuez-les tous, Dieu reconnaîtra les siens." *A BOOK OF FRENCH QUOTATIONS* 8 (N. Guterman ed. 1963).

25. Quoted in A. HUXLEY, *supra* note 17, at 153.

26. Quoted in FOX 75-76.

27. I. C. UPHAM, *SALEM WITCHCRAFT* 409-11 (1959); 2 *id.* 39.

28. Drake, *supra* note 1, at 712-13, 725.



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Humanitarian concern was an uncommon motive for scrutiny of trial procedures. Isolated protests against cruelty could be answered from utilitarian premises by demonstrating the need to protect the uncorrupted from infection. The disparity between seventeenth-century and modern attitudes is perhaps best grasped by the realization that “[t]o define the pleasure of the elect as the sight of their brothers burning and howling in fire and brimstone no longer seems a satisfactory account of beatitude.”<sup>29</sup>

From his evaluation of the impact of scientific advances on the adjudicatory process Fox concludes that the procedures employed in the Massachusetts trials seem rational in the light of the beliefs concerning witchcraft which formed the basis of the persecutions. That these beliefs are compatible with other elements of the culture in which they were embedded seems to be accepted as evidence of their rationality. In one sense such reasoning is tautological, since any practice can presumably be explained by reference to societal patterns. The response selected remains undifferentiated from other intuitively plausible responses to the same environmental stimuli unless scrutiny is extended to the less conscious needs of those involved. A more penetrating analysis of community beliefs would arguably reduce them to a set of rationalizations which permitted constrained satisfaction of elemental drives. That witchcraft myths facilitated expression in fantasy of culturally disallowed desires is indicated by the prominence of sexual associations among the thoughts of the persecutors. *Malleus Maleficarum*, their guide, informed them that “God permits more bewitchment to be performed in relation to the generative powers than in any other department of human life, the reason being that, since the Fall, there exists in everything that pertains to sex ‘a greater corruption than in the case of other human actions.’”<sup>30</sup> A psychoanalytic explanation of the colonists’ unwillingness fully to adopt scientific methodology in investigating accusations of witchcraft is at least tenable.

Professor Sheldon Glueck opens his foreword to the book with a reminder by Holmes that historical research has value primarily as an aid in solving present problems. Fox relates his study to modern legal

29. G. BOAS, *THE CHALLENGE OF SCIENCE* 87 (1965).

30. A. HUXLEY, *supra* note 17, at 127. In 1484 Pope Innocent VIII “issued the Bull *Summis desiderantes affectibus*, in which he expressed his anxiety about intercourse with the devil: ‘Not without immense grief have I recently learned that in certain parts of Germany, particularly in the regions of Mainz, Trier, Salsburg and Bremer, very many persons of both sexes, forgetful of their own weal and straying from the path of the Catholic Church, have sinfully consorted with devils in male and female form.’” R. LEWINSOHN, *supra* note 23, at 125-26.

practice by making it the basis of a plea for greater use by the courts of the techniques and findings of science. His analysis is instructive in additional ways.

Persecution for witchcraft remains common in much of the world.<sup>31</sup> Eradication of the practice requires not only scientifically adequate refutation of the specific beliefs which support it but also negation of the underlying cultural attitudes which induce rejection of scientific methodology: "Of course it is pretty obvious that there are good scientific reasons for preferring science to magic, but then, presumably, there would be good magical reasons for preferring magic to science."<sup>32</sup> The effectiveness of demonstrably false accusations against racial and political minorities in communities sharing the Western heritage indicates that the availability of objective decision processes may limit but cannot preclude irrational intolerance. Trevor-Roper characterizes the European persecutions as the articulation of social pressure formed from reactions to psychological stereotypes dictated by popular superstition operating within an approved cosmology.<sup>33</sup> Kluckhohn states:

[U]nless there are some forms of hating which are socially approved and justified, everyone will remain in an intolerable conflict situation, and neuroticism will be endemic in the population. . . . It would be too much to say that all societies *must* necessarily have their "witches," i.e., persons whom it is proper to fear and hate and, under defined circumstances, to behave aggressively toward. . . . But no culture which has yet been described leaves "witches" out of its definition of the situation for every sector of life or for every group within the society.<sup>34</sup>

Nor has modern man completely abandoned the discredited evidentiary techniques employed in witchcraft investigations:

If . . . the commander of a "Huey Hog" helicopter . . . finds nothing overtly suspicious, he is entitled to stir up some action by dropping smoke grenades in places where he suspects something might be going on. If people run from the smoke and explosion, the

31. "Seven witch doctors arrested here admitted they had created hailstorms and destroyed crops because villagers had refused to pay their annual fee for occult weather control." *Tanzania Jails 7 for "Magic"*, N.Y. Times, Mar. 13, 1968, at 16, col. 6.

32. J. SMART, *BETWEEN SCIENCE AND PHILOSOPHY* 16 (1968). "[O]f all forms of mental activity, the most difficult to induce . . . is the art of handling the same bundle of data as before, but placing them in a new system of relations with one another by giving them a different framework . . . . It is easy to teach anybody a new fact . . . but it needs light from heaven to . . . break the old framework . . . into which he will fit . . . new information . . . ." H. BUTTERFIELD, *supra* note 18, at 13-14.

33. H. TREVOR-ROPER, *THE CRISIS OF THE SEVENTEENTH CENTURY: RELIGION, THE REFORMATION AND SOCIAL CHANGE 190-91* (1966).

34. C. KLUCKHOHN, *NAVAHO WITCHCRAFT* 51-52 (1944) (emphasis in original).

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pilot is then entitled to assume he has flushed Charlie and to call in any means of destruction at his disposal. . . . [W]hy would they run if they didn't have guilty consciences?<sup>35</sup>

Procedural safeguards offer only imperfect protection against the dangers of this approach.

Whitehead urged that before a discipline can become a science it must first lose its memory. Over the centuries witchcraft prosecutions acquired a patina of legitimacy. Glanvil, for example, asserted that denial of the existence of witches entailed the belief that "all Histories are Romances; that all the wiser would have agreed together to juggle mankind into a common belief of ungrounded fables; that the sound senses of multitudes together may deceive them, and Laws are built upon Chymera's; that the gravest and wisest Judges have been Murderers and the sagest persons Fools, or designing Imposters . . . ."<sup>36</sup> Institutionalization of responses was then and is today accompanied by the growth of groups within the community united by an interest in perpetuating the values it enshrines. Especially on the Continent, those charged with controlling witchcraft were frequently more interested in assuring the expansion of the industry<sup>37</sup> than in achieving social

35. Crichton, Book Review, N.Y. REV. OF BOOKS, Jan. 4, 1968, at 3, 4.

36. Quoted in Fox 30. Here suffering appears to provide its own justification:

An institution which is legitimate has the capacity to demand sacrifice, that is, negative payoffs. This means, however, that we easily fall into what I have called a "sacrifice trap." If we once begin making sacrifices for something, the admission that the sacrifices were in vain would be a threat to our internal legitimacy. Hence we tend to create the integrative relationship which would justify the sacrifices. People make sacrifices, for instance, for a king, or for their country, or for their religion. Even though these sacrifices may originally have been made in the expectation of eventual positive payoffs, where these payoffs are vague, abstract, hard to perceive, or perhaps in the distant future, the sacrifices have to be justified in the present in terms of the establishment of what might be called a legitimacy of sacredness. Sacrifices create sacredness and sacredness justifies sacrifices. . . . The pattern here is that sacrifice creates legitimacy, which demands more sacrifice, which creates more legitimacy, and this process goes on building up until somebody finally says, "To hell with it," and the whole institution collapses.

Boulding, *The Legitimacy of Economics*, 5 W. ECON. J. 299, 300-01 (1967).

37. Currie, *Crimes Without Criminals: Witchcraft and Its Control in Renaissance Europe*, 3 LAW & SOC'Y REV. 7 (Nov. 1968).

In twenty-two villages [in Trier] 368 witches were burnt between 1587 and 1593, and two villages, in 1585, were left with only one female inhabitant apiece. . . . Dietrich Flade, rector of the university and chief judge of the electoral court . . . judged the victims leniently. Consequently the prince-archbishop had him arrested, accused of witchcraft himself, tortured till he confessed whatever was put to him, strangled and burnt. This put a stop to leniency by judges, and the population of Trier continued to shrink. As it shrank, the executioner, like some solitary cannibal, swelled in pride and sleekness, and rode about on a fine horse, "like a nobleman of the court, dressed in silver and gold, while his wife vied with noblewomen in dress and luxury."

H. TREVOR-ROPER, *supra* note 33, at 150.

justice. Suppliers and consumers of military equipment may play a parallel role in modern America.<sup>38</sup>

In 1458 Chief Justice Fortescue asserted that a rule "laid down ever since the law began" must have been created "for good reason, though we cannot at present remember that reason."<sup>39</sup> This attitude is not peculiar to the common law:

In the year A.D. 61 the prefect of the city of Rome, Pedanius Secundus, was murdered by one of the slaves in his town house. Under the law, not only the culprit but all the other slaves in the household had to be executed, in this instance numbering four hundred. There was a popular outcry and the Senate debated the question. Some senators rose to plead clemency, but the day was carried by the distinguished jurist, Gaius Cassius Longinus, who argued that all change from ancestral laws and customs is always for the worse. When a mob tried to prevent the sentence from being carried out, the emperor personally intervened on the side of the law, though he rejected another proposal that Pedanius's ex-slaves should also be punished by banishment. That, he said, would be unnecessary cruelty.<sup>40</sup>

The Salem trials did not end in eradication of the local witch population. When the proceedings were discontinued, seven persons sentenced to death were yet unexecuted and more than fifty others were in prison awaiting trial. Accusations against at least two hundred additional individuals remained untested.<sup>41</sup> As is typical in such cases, the magnitude of the error which became evident ultimately compelled belated reevaluation of the attitudes which induced it.

38. See L. LEWIN, REPORT FROM IRON MOUNTAIN ON THE POSSIBILITY AND DESIRABILITY OF PEACE (1967).

39. Y.B. 36 Hen. 6, f. 25b, pl. 26 (1458).

40. Finley, Book Review, N.Y. REV. OF BOOKS, Jan. 26, 1967, at 6.

41. S. MORISON, THE INTELLECTUAL LIFE OF COLONIAL NEW ENGLAND 262 (2d ed. 1956).

## Populist in the Pulpit

Walter F. Murphy†

*Mr. Justice Murphy: A Political Biography.* By J. Woodford Howard. Princeton: Princeton University Press, 1968. Pp. xii, 578. \$12.50.

From 1924 until 1930 Frank Murphy was a criminal court judge in Detroit. His service there earned him a reputation as an active and effective reformer of the local judicial system. Moving upwards on the political ladder, he became a progressive mayor of that depression-blasted city, a mayor whose social conscience insisted on a massive public duty to help the jobless and the destitute. Appointed by Roosevelt in 1933 as Governor General of and later High Commissioner to the Philippine Islands, he viewed his task as essentially anti-colonial: to give the Filipinos self-determination as rapidly as possible while using the interval to strengthen political stability and to inoculate the new rulers with a concern for social justice. Still later, just after taking office in 1937 as the fourth Democratic governor in Michigan's history, he was confronted with the great sit-down strikes of the 1930's. He handled those crises with patience, tact, and courage, eventually settling them without bloodshed but at the price of defeat for reelection.

In 1938 when FDR gave him the Department of Justice as a temporary base until something better could be turned up, Murphy became a crusading Attorney General. Speaking loudly and carrying a small stick, he prosecuted the Pendergast boys in Missouri, chased some of the remnants of Huey Long's machine in Louisiana, and laid plans to battle Boss Hague in Jersey City. Following policies similar to those that he had established in Detroit and Lansing, Murphy tried to carry out his preachments on good government by reforming the personnel structure of the Department of Justice. As anyone familiar with the conspiratorial skills of lawyers-turned-bureaucrats would have predicted, his reform plans were largely sabotaged. In his external operations as Attorney General, Murphy displayed a typical mixture of methods and motives: at the same time that he was establishing the Civil Rights Section, he was cooperating with the Dies Committee and prosecuting Spanish Loyalists in Detroit.

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With America on the verge of involvement in World War II, Murphy coveted the post of Secretary of War. Roosevelt, however, had learned from Woodrow Wilson's experience with William Jennings Bryan and was unwilling to give a near-pacifist a critical cabinet post on the eve of war. Instead, the President nominated Murphy for the Supreme Court.

Murphy is now generally thought of as an avid New Dealer, both on and off the bench; but, as Howard shows, party was never a primary consideration in Murphy's thinking. Politics was to him a personal affair; he was far more at home—and effective—in the non-partisan campaigns of Detroit than in welding together a state organization or in playing a team role in a nation-wide coalition. Indeed, his friendships with men like William Randolph Hearst and Father Coughlin and his close affiliations with the American Legion were among the reasons why FDR was initially attracted to Murphy; the President saw him as a bridge to the political right.

These anomalies are all part of larger patterns of character and behavior. Murphy was a consummate and vain showman, a flamboyant extrovert, a lonely, restless bundle of political energy, an incurable dreamer, a populist mystic, a galavanting socialite, a devoted democrat and occasional demagogue, an intelligent politician but never an intellectual, an impetuous, impulsive, erratic, and at times creative administrator who always took deeply seriously his own pious pronouncements about good government. Where his own family was concerned, of course, many of the rules were off and Murphy could act as an honest though insensitive nepotist. Throughout his public life he saw himself as a dedicated knight, in search of some maidens to rescue and others, often from the chorus line, to romance. He took reform seriously, but as in all his work, he was a frequently sanctimonious, a sometimes frustrated and an always dramatic evangelist. These qualities made many professional politicians doubt the extent of his commitment to liberalism. They were wrong but Murphy helped them err. Felix Frankfurter once told Murphy that the critical problem with which his biographer would have to wrestle was the fact that he violated the constitutional command of separation of church and state: he was at the same time priest and judge. William Allen White was no less cogent when he commented that "Men like Murphy make poor heroes but they also make history that is easier to read."<sup>1</sup>

1. *Emporia Gazette*, Aug. 4, 1937; quoted in J. HOWARD, *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* 179 (1968) [hereinafter cited as HOWARD].

Murphy's political successes were mixed with failures, but while he was often depressed he seldom despaired. He truly believed in himself as a white knight with the holy mission of imparting social justice. Cervantes would have loved him; so would Sancho Panza. Leo XIII's *Rerum Novarum*, Murphy said, was the bedrock of his faith, supporting the "Goddess of Reason and the Sermon on the Mount."<sup>2</sup>

One would have expected Frank Murphy, whose virtues were of the heart and soul rather than of the intellect, to be neither happy nor successful on the Supreme Court, though FDR jokingly chided him that he had found his ideal place—with the Constitution behind him and the Bible before him. At times Murphy was not happy on the Court, and his victories there, as in other aspects of politics, were accompanied by defeats, some due to personal defects, some to the short-sightedness of others. But eventually he became reconciled to his judicial robes, or perhaps he reconciled his fellow Justices to Murphy. "The Great Pulpit" he termed the Supreme Court at the time of his nomination; and after a few groping and painfully insecure years, he made full—some said fulsome—use of that pulpit. "The greatest duty of a statesman is to educate,"<sup>3</sup> he claimed, and his opinions were efforts to make good that claim.

He made some contributions to labor law and Indian law, but it was civil liberties in general and the first amendment in particular that carried him forward and turned his initially unpleasant service on the Court into another crusade. His *Falbo* dissent expressed it all: "The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution."<sup>4</sup> This was not an isolated piece of eloquence. As one wag quipped, in the Supreme Court justice was often "tempered with Murphy." Alone among the brethren he prepared a dissent in *Hirabayashi v. United States*,<sup>5</sup> bitterly condemning Court and country for betraying the Nisei. Frankfurter talked him out of publishing that opinion, but Murphy was not to be budged when *Korematsu* came up.<sup>6</sup> His protest against the ugly racism of concentration camps can stand as good literature as well as good law alongside the warnings of Holmes and Brandeis against the dangers of lesser forms of intolerance.

For Murphy the judge no less than Murphy the politician, civil

2. HOWARD 443.

3. *Id.* 491.

4. *Falbo v. United States*, 320 U.S. 549, 556 (1944).

5. 320 U.S. 81 (1943).

6. *Korematsu v. United States*, 323 U.S. 214, 233 (1944).

liberties was simply "the idea of human dignity . . . translated into actuality."<sup>7</sup> "What a supreme joy it is," he said as he luxuriated in righteousness, "to have no other mission in life than to lift one's pen in defense of freedom of conscience and the security and equal justice to the inarticulate."<sup>8</sup>

Such is the portrait that comes out of Howard's book. Clearly the picture has been painted by a skilled artist. But a political scientist has difficulties in either writing or judging biography since by training and inclination he looks to the general, while biography deals with the particular—and, unfortunately, usually as a unique congeries of specific instances, not as a case study possibly representative of a larger set of phenomena.

If it were useful only as a guide to Murphy's character, as interesting as that may be, the book might not have been worth either the long years of drudgery<sup>9</sup> or the opportunity costs involved to the author or reader. For, though Murphy was a good judge, a better judge than more partisan and less well informed critics have claimed, he was still not a great judge. Nevertheless, a well-done biography of a Supreme Court Justice can perform a number of functions from which the lawyer and political scientist can share benefits, if not necessarily equally.<sup>10</sup> Among the more important functions of these are (1) to supply the lay reader with general knowledge about the judiciary and its surrounding political system and to increase the knowledge of the professional, (2) to analyze the character of the Justice and to outline the nature of the office he held and the uses to which he put that office, (3) to reconstruct the values that influenced the Justice in his decision-making, that is, to illuminate his jurisprudence, (4) to place the man and the institution in the context of their times, (5) to throw light on the group phase of the Court's decisional processes, (6) to describe at least some of the various sets of roles that the Court can play in the political system,

7. HOWARD 206.

8. *Id.* 299.

9. The book was 14 years in the making.

10. J. GARRATY, *THE NATURE OF BIOGRAPHY* 105 (1957) quotes one authority as saying there are "only three motives for writing biography; one wishes either to erect a monument to a departed loved one, or to set an example for future generations, or to make money." Cited in J.W. Peltason, *Supreme Court Biography*, in *ESSAYS ON THE AMERICAN CONSTITUTION* 217 (G. Dietze ed. 1964). Peltason goes on to list seven functions of judicial biography: (1) to inspire; (2) to instruct; (3) to supply a framework for a discussion of public policy and/or political philosophy; (4) to provide a means of holding judges to account; (5) to illuminate the part and so to establish the historical perspective necessary to understand law, courts, and judges; (6) to study the interaction and importance of psychological variables in the lives and work of government officials; and (7) to describe what happens behind the scenes, to get at those factors in the immediate environment of the judges which influenced behavior. *Id.* 217 *et seq.*



and (7) to provide useful data for scholars whose interest in a particular Justice or even in the Supreme Court is only incidental.

Certainly on the first four counts Howard's book comes off very well. It is written in a lively, often elegant style and is based on sound general scholarship and on a sensitive feel for the technical aspects of the judicial process as well as for the play of personality in that process. Not least it is grounded on prodigious research in literally millions of pages of unpublished letters, memoranda, conference notes, opinion drafts, and docket books that can be found in the papers of Justices Murphy, Burton, and Frankfurter. What is in this biography should teach the expert as well as the casual observer about Murphy, about the Supreme Court generally, about the politics of the two decades from 1929 to 1949, and a great deal about the American political system as a whole.

It is, however, on the final three counts that this biographical study will have its most lasting effect. The study focuses intense light on the inner workings of the Court, the high intellectual standards the Justices set for themselves, and the patient negotiations, even bargainings<sup>11</sup> required for majority, much less unanimous, opinions from intelligent, determined, strong-minded men. By illustrating how Murphy used the Supreme Court as his Great Pulpit, Howard has also given a convincing demonstration of one of the Court's more important roles, that of educator, or, in current jargon, that of political socializer of the better informed, and through a trickling-down process, perhaps also of the general public.<sup>12</sup>

On the last count, that of supplying raw material useful to other scholars, Howard again scores high. This book, coupled with Alpheus T. Mason's volumes on Stone and Taft,<sup>13</sup> forms a data bank for students with such diverse interests as the workings of the judicial process, decision-making—with or without particular reference to judges—political recruitment generally and judicial recruitment specifically, the politics of the New Deal, and the nature of political leadership in American society. Moreover, although he himself does not generalize,

11. See W. F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964), especially ch. 3.

12. Cf. H. BERMAN, *JUSTICE IN THE U.S.S.R.* ch. 16 (rev. ed. 1963), for a discussion of a more inclusive notion of socialization through law, what Berman calls the concept of "parental law."

13. HARLAN FISKE STONE, *PILLAR OF THE LAW* (1956); WILLIAM HOWARD TAFT, *CHIEF JUSTICE* (1964). Mason's *BRANDEIS: A FREE MAN'S LIFE* (1946) is still the best overall portrait of Brandeis the man, but Mason was denied access to Brandeis's papers pertaining to his work on the Court so the book's utility in understanding the judicial process is less than that of the two later studies.

Howard has left the way open for others to do so. A biography, whatever the intentions of the biographer, can be viewed as a case study. Even though one cannot prove or disprove explanations from a single instance or even from a number of single instances, case studies can sharpen understanding of the nature of the problems to be explained and suggest tentative solutions to those problems.<sup>14</sup> Howard's book does much to clarify a whole range of problems involving judges, though it does not proceed very far, at least explicitly,<sup>15</sup> in advancing solutions.

I wish that Howard had been more daring and had gone beyond his copious data to offer, however tentatively, some general explanations about judicial decision-making as well as about the legitimate political roles the Court can play in the American system. And I do not agree with Howard's assertion that statutory interpretation is apt to be as permanent as constitutional interpretation.<sup>16</sup> Finally, I believe that underlying Murphy's work was a coherent, however roughhewn, jurisprudence, which is evidenced by much of the material in this book, and I wish that Howard had further developed this aspect of Murphy's character. Still, when such cavils are registered, I cannot escape the conclusion that this is a major contribution to the literature on the American Supreme Court. *Mr. Justice Murphy* was begun as a doctoral dissertation under the direction of Professor Alpheus T. Mason. He must feel a deep sense of pride in what one of his very best students has achieved here.

14. See N. HANSON, *PATTERNS OF DISCOVERY: AN INQUIRY INTO THE CONCEPTUAL FOUNDATIONS OF SCIENCE* (1959).

15. In a separate article, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968), Howard has used some of the data from the Murphy Papers to challenge the assumption of some writers that a judge's values are accurately mirrored in his votes as published in official reports.

16. HOWARD 382.

## Data and Delinquency

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*Delinquents and Nondelinquents in Perspective.* By Sheldon and Eleanor Glueck. Cambridge: Harvard University Press, 1968. Pp. xx, 268. \$8.50.

Sheldon and Eleanor Glueck have devoted tremendous energy, persistence, and thought to problems of delinquency. In a less perverse world they would, before now, have been rewarded with the discovery of some very powerful answers. They have been no less successful than others, but it must be a great disappointment to them that despite their devoted and thorough work, their conclusions are challenged and their methods of analysis subjected to considerable criticism.

This new book<sup>1</sup> takes their previous studies further in one important respect—the follow-up period is still further extended. The juveniles studied and reported in their earlier work<sup>2</sup> are now studied at their twenty-fifth and thirty-first birthdays. Of the original 500 delinquents 438 were traced, as were 442 of the 500 nondelinquents. It is a demonstration of their own diligence and that of their associates that such a high proportion of the cases could be located after so many years. However, when they say, “We think the reader will agree . . . that there is a sufficient number of cases . . . to present reliable findings,”<sup>3</sup> a statistician would express some doubts. Bias due to attrition is a serious possibility, even with a high proportion of successful contacts. In a study of 700 cases carried out by the reviewer, among the first 300 cases recovered the recidivist rate was 30 per cent, while among the last 56 cases of the 700 recovered the recidivist rate was 82 per cent. The recidivist rate for the total sample was 55 per cent. If ways for tracing information about all the cases had not been available, this important fact would have remained unknown. Perhaps one should be less critical of this failure to recover some of the delinquent cases since about equal numbers of delinquents and nondelinquents were traced.<sup>4</sup> It appears, however, that probably more effort was put into tracing some individuals rather than others,<sup>5</sup> and certainly the number of information sources

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1. S. & E. GLUECK, *DELINQUENTS AND NONDELINQUENTS IN PERSPECTIVE* (1968) (hereinafter cited as *DELINQUENTS*).

2. S. & E. GLUECK, *UNRAVELING JUVENILE DELINQUENCY* (1951).

3. *DELINQUENTS* xvii.

4. *Id.* 438, 442.

5. See p. 734 *infra*.

differed as between the delinquent and nondelinquent cases.<sup>6</sup> In a balanced and matched sample it is difficult to assess the dangers of non-response and loss of information.

Despite the thoroughness with which the authors pursue their data, the phrasing of their comments is often loose. They say, for example, "It is common knowledge that the great majority of children . . . do not become delinquent. . . ."<sup>7</sup> There are studies, using self-report techniques, which would suggest that this "generally known" fact is not so.<sup>8</sup> In any event, only a small percentage of all juveniles are adjudicated delinquent or have been arrested, while the proportion of legally identified and defined delinquents is perhaps almost a fifth of the relevant population. In the "vicious environment" and "antisocial subculture" to which the authors refer in continuing this statement,<sup>9</sup> the proportion is certainly higher. The phrasing of this comment suggests a bias of the authors which deemphasizes the influence of poverty, deprivation, and other social factors as causes of delinquency and favors individual factors—nature rather than nurture.

It is, perhaps, not unexpected that this conclusion should be reached from the authors' data, since they matched their samples of delinquent and nondelinquents in relation to residence in under-privileged areas. Any variable which is "standardized" out of the experimental design in the first place cannot appear later in the analyses. If it did, it would only indicate that the standardization was not properly carried out. What is much more important, standardization by only one variable eliminates not only the probability of its appearing in the final analyses, but also the appearance of all other variables with which the standardizing variable happens to be correlated. These patterns of correlation are seldom, if ever, examined by any research workers using matching designs. The authors of this book are no exception.

Perhaps an example should be given of this problem. It has been shown that economic status and measured verbal intelligence are highly correlated. Standardization by intelligence test score will reduce or eliminate the probability of identifying economic status in other analyses as well as (obviously) that of intelligence itself. Given a fixed economic status (high or low) we may, of course, identify other factors

6. See p. 734 *infra*.

7. DELINQUENTS 3 (emphasis in original).

8. *E.g.*, Short & Nye, *Reported Behavior as a Criterion of Deviant Behavior*, SOCIAL PROBLEMS, Winter 1957.

9. DELINQUENTS 3.

related to delinquency. But since economic status is (by definition) *given*, we can make no statements about its effect. If all sociologists standardize by psychological factors, and all psychologists standardize by sociological factors, neither will ever need to recognize the significance of the other's discipline. The factors which form the basis of the other's study will not appear very significant in any analyses.

The authors matched cases not only by residential area but also by general intelligence as measured by the Wechsler-Bellevue Full Scale. As noted above, economic class and intelligence tend to be positively correlated. What if the more intelligent offenders were less likely to be caught? It is interesting to speculate what effect this further correlation might have on the data if it were so. An interesting item of evidence which reflects some unknown interaction with reference to the intelligence variable is revealed in Table XIII-4.<sup>10</sup> The table shows that for those who went into the Army, despite the standardization by intelligence test scores in the first place, these scores, where available, were lower for delinquents than nondelinquents.

In medical clinical trials and related fields it is accepted that comparative studies must be of the "double-blind" design—those performing the experiment must not be able to distinguish the placebo from the active preparation. The Gluecks noted in their book, however, that the "home investigators got the distinct *impression* that the *parents of delinquents* were actually unaware of many of the boys' activities."<sup>11</sup> Thus it seems that the interviewers knew whether the parent's child was a delinquent or a control. Studies in perceptual processes have established that the "set" of the observer has a considerable impact upon the observations. No matter how honest the field workers were, the knowledge of the group to which the interviewee belonged would probably bias their perceptions. Attempts to compensate for possible bias might be even more biasing; where the proper classification of the information recorded can be determined only with a fair degree of uncertainty, peripheral knowledge is likely to affect the classification given the data more significantly than in the case of recording of hard data. On the same page the authors present some figures and comment that "only a handful . . . of the delinquents' mothers, in sharp contrast to . . . the nondelinquents', met the happy and wholesome standard of both firmness and kindness in their disciplinary practices."<sup>12</sup> Assessment of this

10. *Id.* 133.

11. *Id.* 15 (emphasis added).

12. *Id.*

"standard" might cause a "halo effect"<sup>13</sup> to occur and be of some considerable size in relation to the proportion of cases involved.

The authors state further that they "made a determined effort to search for positive evidence of the presence of serious physical and mental disorders in at least one member [of the family group]."<sup>14</sup> The authors assure us that the "positive search" was as thoroughly conducted whether the case was delinquent or a control. This assurance, of course, can be accepted; but at the same time many scientists would take the view that it would have been methodologically more sophisticated to rely upon rigor in the design rather than to attempt to control the degree of effort. This is particularly true here, since there can be no quantitative measure of the effort expended.

A further design feature which subsequent studies should take into consideration is revealed in Table IV-1.<sup>15</sup> The sources of information for delinquents numbered more than 11 in 61.4 per cent and 18.9 per cent in the first and second follow-up studies respectively; for non-delinquents the same proportions were 20.4 per cent and 4.5 per cent. Thus more than three times as many sources were originally consulted in both parts of the study. People seldom agree completely with others in their assessment of people. And it has been shown in studies of parolees that the probability of an adverse comment is not independent of the number of commentators. Unfortunately, the authors do not give an analysis of the proportions of adverse comments in terms of the number of sources.

In sum, much more rigor in the research design would have been desirable. As a result, the findings are not sufficiently certain to risk acting as if they were true. They may be, or they may not be. Nonetheless, the general fact which the authors' work has underlined must be accepted, namely, that prediction of delinquency is possible—not complete prediction, but probabilities may be estimated within close limits. What then? It must not be assumed that because we can "predict" we shall be able to say what we ought to do. Bayesian estimates may be used to guide decisions if the available decision variety in the system can be spelled out. It is necessary to estimate the utilities as well as the probabilities if we are to discuss rational decisions. Any decision (even when

13. The "halo effect" is a commonly used term in psychological or sociological measurement. It refers to the demonstrated tendency of raters to assess any particular trait as concordant with their general impression of the person. For some recent detailed examples, see G. LINDZEY & A. ELLIOT, *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 488-90 (2d ed. 1968), or any other general textbook of psychological measurement.

14. *DELINQUENTS* 17 n.2.

15. *Id.* 47.

given the best "predictions" and the most reliable basic data) must accommodate the residual uncertainty. And this residue may never be small; in the present state of our knowledge it is very large indeed. Our problems concern what is rational action under conditions of uncertainty. Ways for modifying uncertainty are known and should be explored, but modified uncertainty is not the same as certainty, even in operational terms.

Apparently many think that if a person is likely to commit further crimes after being given a period of treatment, then that likelihood is reduced by giving him more or longer treatment. Unfortunately this hypothesis is not correct. On the other hand, in this book the authors emphasize again their theory of maturation out of delinquency. They point out, quite correctly, that as children get older the crime rates drop. Therefore, they conclude it is worthwhile to examine their hypothesis of "delayed maturation."<sup>16</sup> They summarize their own data by stating, "[T]he fact should be emphasized that, while an appreciable proportion of the original delinquents either abandoned crime altogether or became petty nuisance offenders, it still remains true that three-fifths of them were committing serious crimes during the 17-25 age-span and three-tenths of them were doing so during the second follow-up period."<sup>17</sup> In this factual finding the present results do not differ much from all other studies of this kind. The facts cannot be disputed; however, the facts do not necessarily support the simple inference of a "maturation" factor. The assumption of maturation would require that the probability of an individual offender committing further offenses decreases with increasing age. It is difficult to demonstrate this because it has also been shown that the probability that a person will commit a further offense *increases* with the number of prior offenses. (Indeed the authors themselves have shown this.<sup>18</sup>) Thus, *conditional probabilities*, not simple direct probabilities, must be considered before much can be said on this issue.

The authors, perhaps, find themselves in some dilemma in this connection because they see crime as a kind of "*state-of-the-individual*," not as an "*event*," the probability of which is our concern. Most criminals, most of the time, are not committing crimes. If criminal behavior were continuous behavior it would be a quite different phenomenon. It cannot be said that a person *is* a criminal, but only

16. *E.g.*, *id.* 170.

17. *Id.* 170.

18. See S. & E. GLUECK, FIVE HUNDRED CRIMINAL CASES (1930).

that in an interval of time he committed one or more criminal acts. Thus a much more complex model is in issue than that put forward by the authors, because the object is to determine the probability of an event occurring in an interval of time with reference to statements about age, prior records (*events* in prior intervals), and similar issues. There are methods whereby such data can be analyzed and estimates made; but these methods are much more sophisticated than those used by the authors. (The general term for such methods is "stochastic processes.")

Doubtless, the appeal of this book, as of others by the authors, is the apparent simplicity of their analyses. Unfortunately the phenomena examined will not yield to simple analyses, and the authors do not see anything deficient in their methods. They do conclude that the delinquency problem is "both enormous in scope and complex in content. But it certainly can and should be attacked with more forethought, intelligence, and patience than—according to the bleak evidence we have laid before the reader—it has thus far received."<sup>19</sup> This comment is related to what ought to be done about delinquency, rather than what ought to be done in delinquency research, but clearly the one is inseparable from the other.

The authors' concluding statement about scope and complexity is a welcome caution which the reviewer would like to have seen spread more thoroughly throughout the work. For example, the authors state, "The external, general culture . . . , while reflecting remote influences indirectly involved in the background of both delinquents and non-delinquents, are [*sic*] not nearly so determinative of delinquency . . . as the quality of the parents . . . and the under-the-roof culture of the home."<sup>20</sup> This may be so, but it is not proved (as has been noted) because of the standardization procedure. It may be possible that some parents in the "ghetto" areas can instill into their children sets of "values" so that they will not break the law (or get caught), but in general it is better to assume that those who commit delinquency are by the act commenting not only upon themselves and their upbringing, but also upon the sociopolitical cultural setting. To acknowledge complexity in our present social system should not be disabling of all action but only of certain types of dysfunctional action. The authors and the reviewer

19. *Id.* 198.

20. *Id.* 170-71.



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agree that the situation, problems, and possibilities of action present extremely complex issues. It is, however, most unfortunate that today the degree of confidence with which views about crime are expressed tend to be inversely proportional to knowledge.

