

Book Reviews

The Case for Black Reparations. By Boris I. Bittker. New York: Random House, 1973. Pp. 191 (including two appendices). \$7.95 (cloth-bound), \$1.95 (paperback).

Reviewed by Ewart Guinier†

James Forman burst into the Riverside Church in New York City in 1969 and demanded that white churches, Jewish synagogues, "and all other racist institutions" pay reparations to blacks for the wrongs done by America to slaves and the children of slaves.¹ Boris Bittker heard and listened, and was moved to write this book.² The complete lawyer, he removes the question of reparations from the black ghetto and subjects it to scholarly legal analysis. He discovers, first, that the notion of reparations is not "bizarre" but reasonable,³ and second, that it is replete with what he portrays as nearly insurmountable problems.⁴ He closes with a prayer for a national debate on the question.⁵

Reparations, as Professor Bittker uses the term, are an attempt to redress injuries caused by legally imposed segregation.⁶ The goal of reparations is equality. In seeking a remedy for the injuries of segregation, Professor Bittker turns to the legal system which once supported the wrong. He finds adequate precedent for damage actions founded on official misconduct which violates constitutional rights.⁷ Professor Bittker never satisfactorily explores the possible structure of a comprehensive reparations program, but he seems to believe that ultimately legislation would be required.⁸

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1. B. BITTKER, *THE CASE FOR BLACK REPARATIONS* 159 (1973) [hereinafter cited to page number only]. Forman's "Manifesto" was adopted by the National Black Economic Development Conference in Detroit, Michigan, April 26, 1969.

2. The book's genesis is outlined at pp. 3-7.

3. P. 68.

4. The problems are summarized at p. 136; the judgment that Professor Bittker has described them as insurmountable is the reviewer's.

5. P. 137.

6. P. 19.

7. His precedent is twofold. First, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), established the principle that the federal government may be liable in money damages for violations of constitutional rights. See *District of Columbia v. Carter*, 409 U.S. 418, 432-33 (1973). Second, anyone acting "under color of" state law might be liable for violations under 42 U.S.C. § 1983 (1970).

8. P. 21.

The book's argument is founded on 42 U.S.C. § 1983, the Civil Rights Act of 1871. Section 1983, he reasons, presently provides remedies analogous to reparations; thus the demand for full reparations is compatible with legal analysis.⁹ But Professor Bittker discovers in the difficulties of § 1983 analogues to the problems of potential reparations programs.

For instance, Professor Bittker notes, a system of reparations based on individual lawsuits of the sort authorized by § 1983 might be "ungainly to administer" and could lead to "haphazard results." The recipients themselves could feel the system "invidious."¹⁰ These ills might be mitigated by developing a doctrine of "unitary state liability,"¹¹ but Professor Bittker seems to concede—as one might have foreseen—that federal funds would be needed to insure adequate remuneration.¹²

In analogizing § 1983 to the reparations claim, the author is drawn rather too deeply into the complexities of the case law. He investigates the problems of municipal liability,¹³ good faith defense,¹⁴ and sovereign immunity.¹⁵ The discussion is neither complete nor necessary since he claims he is not primarily concerned with the technical possibility of using § 1983 to generate reparations suits.¹⁶ The analogy to § 1983 serves most of all to reveal reparations claims as legitimate. The nonlawyer should not lose track of this as Professor Bittker exposes the various implications of his analogy. Nor should the lawyer be frustrated by the incompleteness of the § 1983 discussion; this essay is not a litigation guide for reparations suits.

The book's real value—and indeed its self-confessed purpose¹⁷—is to rationalize the reparations issue and to initiate a national debate on the subject. Professor Bittker only hints at solutions to the problems he investigates. Nonetheless, he may be the first white lawyer to address the subject since Lincoln spoke of "the bondsman's two hundred and fifty years of unrequited toil."¹⁸

For blacks, however, the debate is an old one. Lincoln, for instance,

9. Pp. 68-69.

10. P. 66.

11. P. 65.

12. P. 16. Federal funding is also appropriate in view of federal complicity in maintaining a segregated society. *Id.*

13. Pp. 49-58.

14. Pp. 40-48.

15. P. 149 n.63.

16. P. 59.

17. P. 7.

18. Second Inaugural Address of Abraham Lincoln, March 4, 1865, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 792-93 (R. Basler ed. 1946).

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was quoting from black clergyman Henry Highland Garnet's 1843 call for slave rebellions.¹⁹ Earlier still, in 1829, David Walker had passionately protested the lack of compensation for the labor of slaves in his *Appeal to the Coloured Citizens of the World*.²⁰ After the Civil War Bishop Henry McNeal Turner called for reparations on numerous occasions.²¹

Calls for compensation have increased in frequency and amplitude since the Second World War. This reviewer suggested massive federal expenditures in 1950.²² In 1963 Whitney Young supported a "domestic Marshall Plan" to ameliorate the oppressed condition of blacks.²³ Martin Luther King proposed a "Bill of Rights for the Disadvantaged," arguing that the "moral justification for special measures for Negroes is rooted in the robberies inherent in the institution of slavery."²⁴

Money has not always been sought.²⁵ Just as § 1983 protects property rights as well as personal rights,²⁶ so have reparations demands sometimes been based on claims to property: In 1967 the Newark Black Power Conference passed a resolution to "initiate a national dialogue on the desirability of partitioning the United States into two separate and independent nations, one to be a homeland for white and the other a homeland for black Americans."²⁷

James Forman's interruption of the Riverside Church service was thus a dramatic presentation to whites of demands long voiced by blacks. And, as Professor Bittker notes, white reaction to a century of black demands for reparations was "consistent with a *New York Times* editorial observation [with respect to Forman's speech], that 'there is neither wealth nor wisdom enough in the world to compensate in money for all the wrongs in history.'"²⁸ Professor Bittker, to

19. Address by Henry Highland Garnet, Buffalo, N.Y., 1843, in S. STUCKEY, *THE IDEOLOGICAL ORIGINS OF BLACK NATIONALISM* 169 (1972) [hereinafter cited as STUCKEY].

20. Walker, *Appeal to the Coloured Citizens of the World*, in STUCKEY 87-88.

21. See, e.g., Speech by Henry McNeal Turner, in Georgia Legislature, September 3, 1868, in *THE VOICE OF BLACK AMERICA* 364 (P. Foner ed. 1972) [hereinafter cited as *THE VOICE OF BLACK AMERICA*].

22. Guinier, *The Negro Depression: A Warning for All America*, *National Guardian*, June 14, 1950, at 4, col. 1. I suggested a \$50 billion, five-year federal works program.

23. Address by Whitney M. Young, Jr., at the National Conference of the Urban League, New York, 1963, in *THE VOICE OF BLACK AMERICA* 967.

24. Pp. 8-9 (footnote omitted).

25. Nor does Professor Bittker believe that compensation need be only monetary. P. 84.

26. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (28 U.S.C. § 1343(3) (1970), the jurisdictional counterpart of 42 U.S.C. § 1983 (1970), makes no distinction between personal liberties and property rights).

27. R. BROWNE & R. VERNON, *SHOULD THE U.S. BE PARTITIONED?* 4 (1968).

28. P. 5. Professor Bittker recognizes black iteration of reparations demands. P. 6.

his credit, was not satisfied with white society's despairing approach to black reparations.

Professor Bittker seems to accept the idea that in the process of development American society created the problems to which the claim for reparations is addressed. He appears not to favor compensation for the years of slavery, but believes that reparations should be founded on the injuries incurred by a century of post-emancipation institutionalized segregation.²⁹ To redress past inequity and to assure future equal status in society some form of compensation must be paid to the injured parties.

Professor Bittker, however, foresees a dilemma in the administration of reparations. Individual reparations, according to Professor Bittker, might require racial classifications akin to Hitler's labelling of Jews³⁰ or South Africa's registration of Europeans, Bantus, and Coloureds.³¹ Furthermore, Professor Bittker argues, reparations to individuals may not be equally justified. Black professors and black welfare mothers are both descendants of slaves and products of a segregated society, but Professor Bittker suggests they can hardly make the same claim to a share of the national budget.³² Group reparations, on the other hand, he says, would require the government to select among different interests claiming to represent a race,³³ would place black organizations in the role of mendicants at the federal fisc,³⁴ and would not guarantee adequate distribution to individuals.³⁵

The dilemma, it seems to me, is more apparent than real. Broad legislation to achieve reparations can transcend the difficulties of administration. An administrative agency given adequate staff and proper statutory guidance could produce equity for individuals. The classification problems in this context should be no more insoluble than those faced in other affirmative action programs.³⁶ Moreover, resort to racial classifications for remedial purposes has received the imprimatur of the Supreme Court:

29. P. 28. The past century, of course, has been influenced by the period of slavery preceding it.

30. See generally p. 179 for a discussion of the subject of reparations to Nazi victims.

31. Pp. 97, 99.

32. Pp. 87-90.

33. Pp. 79-80.

34. P. 80.

35. The Indian Claims Commission hears claims presented "on behalf of any Indian, tribe, band, or other identifiable group of American Indians," p. 73, but Professor Bittker rejects this as "at best a weak analogy [to proper treatment of blacks] and at worst a misleading one." P. 75.

36. Professor Bittker discusses remedial racial classifications in the context of public employment, housing, municipal services, and union membership. Pp. 120-21.

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Just as the race of students must be considered in determining whether a violation has occurred, so also must race be considered in formulating a remedy.³⁷

Even if these administrative difficulties should prove insurmountable, the answer to the classification problem would not lie in abandoning reparations. Rather the answer is to expand the solution. As Al Smith said, the cure for democracy is more democracy; the cure for difficulties in correcting institutionally-imposed inequity is more correcting of inequity. In short, legislation for reparations could be generalized to erase societal disadvantages suffered by whites as well as blacks.³⁸

Our national social policies have clearly failed to solve the problems of poor Americans—both black and white. Black reformers, indeed, have previously noted that their aim was to better the condition of whites as well as blacks.³⁹ In May 1969, Charles Evers, black mayor of Fayette, Mississippi, told a New York audience, “[W]e . . . are going to make it better for blacks and whites There are thirty-nine million poor folks in this country, and we blacks are only twenty-two million.”⁴⁰ Furthermore, the aggressive efforts of black individuals and associations have served to galvanize other disadvantaged groups and to initiate a broad movement aimed at achieving social justice for all poor people.

Recognition of a minority's demands may depend on the continued reiteration of those demands, and Professor Bittker's book is important in this continuum. He clothes the reparations demand in the raiment of dispassionate academic analysis, and thus encourages prospects for wide recognition and discussion of the issue. His discussion of the practical difficulties of reparations also no doubt generates the impression that the problems are very great, the solutions very tentative, and the likelihood of success very small. This impression must be resisted; the problems of reparations can be solved and must be solved. National debate on the issue of reparations should be conducted with reason but also motivated by necessity.

37. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971). See pp. 120-21.

38. As Professor Bittker notes, a reparations program which singled out blacks for compensation might be subject to constitutional challenge. Pp. 105-27.

39. See, e.g., H. APTHEKER, *AFRO-AMERICAN HISTORY* 301, 307 (1971); W.E.B. DUBOIS *SPEAKS: SPEECHES AND ARTICLES 1920-1963*, at 202 (P. Foner ed. 1970).

40. Speech by Charles Evers, New York, May 1969, in *THE VOICE OF BLACK AMERICA* 1168.

Advances have been made in black education, for instance, but much remains to be done. Blacks' preparation for college is still inadequate⁴¹ and assistance in the form of scholarship funds is desperately needed—by whites as well as blacks.⁴² Job opportunities and income levels also need substantial improvement.⁴³ Twenty percent of blacks and eight percent of whites have yearly incomes below \$3,000.⁴⁴ Reparations in the broadest sense are owed to these poor people because the social structure has left them unable to earn a decent income. If no action is taken reparations will be owed their children.

Reparations might be a means for equality; the term might also be a metaphorical characterization for any program which achieves equality. In either case, there never has been equality in America, there is no equality now, and there will never be equality without remedial action. The problems of reparations outlined by Professor Bittker are, of course, not to be ignored. But the black minority's unflinching demand for reparations—and thus equality—cannot be left unrequited.

Political scandals and international concerns seem to dominate today's political processes. Problems of the disadvantaged, on the other hand, are neglected. This lack of action is not only unfortunate; it is, as Professor Bittker has helped show, unjust. And injustice, in a country ruled by law, must be remedied; damages must be paid.

41. N.Y. Times, May 20, 1973, § 4, at 11, col. 2 (city ed.).

42. A panel of educators in May issued a call for annual grants of up to \$2,000 each to college students whose adjusted family income is below \$9,622. *Id.*

43. All of these problems are, of course, interrelated. Even if industry makes job opportunities available, there may not be qualified blacks to fill them unless black educational opportunities are substantially expanded. Thus, J. Stanford Smith, Senior Vice President, General Electric Company, has said:

To put the challenge bluntly, unless we can start producing not 400, but 4,000 to 6,000 minority engineers a year within the decade, industry will not be able to achieve its goals of equality, and the nation is going to face social problems of unmanageable dimensions.

The only acceptable solution is to take bold, innovative, all-out action [to overcome what the] Ford Foundation study by Fred Crossland describes [as] the barriers of poor preparation; of poor motivations; of money and distance and prejudice on all sides Some forms of government support will be necessary *We are talking about an undertaking of staggering proportions that requires revolutionary action.* CONTACT, Spring 1973, at 36 (emphasis in original).

44. A. BALLARD, THE EDUCATION OF BLACK FOLK 144 (1973).

The Politics of a Guaranteed Income. By Daniel P. Moynihan. New York: Random House, 1973. Pp. xiii, 579. \$10.00.

Reviewed by Henry Aaron[†]

The Politics of a Guaranteed Income is Daniel P. Moynihan's political memoir of President Nixon's first effort to broaden and improve income supplements for poor Americans. To a subject as depressing and complex as the welfare system, Moynihan brings a sense of enthusiasm and involvement, wrapped in lively, if self-indulgent, prose.

The title is important. First, the book deals largely with politics, not with economic or legal issues, not even with the welfare system itself. Second, the book is limited to the Family Assistance Plan (FAP), the President's 1969 welfare bill. Moynihan devotes only a two-page afterword to H.R. 1, President Nixon's second attempt at welfare reform, which was introduced in January 1971 and defeated in the Senate Finance Committee in the summer of 1972.

The termination of the political narrative with the events of 1970 and the failure to explain the welfare system are the book's two greatest deficiencies. A second complete cycle of political efforts occurred in 1971 and 1972. These events cast considerable doubt on Moynihan's contention that the Administration wholeheartedly supported welfare reform and that blame for congressional rejection must be placed at other doorsteps. The sketchy description of the welfare system—the web of income-tested programs providing benefits in-kind as well as Aid to Families with Dependent Children (AFDC)—leaves the reader totally at sea at the dramatic crisis of Moynihan's narrative: After lengthy study within the Administration and revision in the House, the Family Assistance Plan was scuttled by Senator John J. Williams' simple but unanticipated¹ questions about the interrelations between FAP and other federally-supported benefit programs.

I

Moynihan describes the intellectual development and the political history of the Family Assistance Plan in partisan terms. The idea of a

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1. D. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* 483 (1973) [hereinafter cited to page number only].

negative income tax was conceived by a conservative,² developed into a legislative proposal under a Democratic administration, and finally proposed by a Republican President. In the House, sixty-three percent of the Democrats and fifty-nine percent of the Republicans supported FAP. The introduction by a Republican President of a bill which Moynihan regards as politically liberal but, at the same time, intellectually conservative put many off balance and kept them there.³

Response to the proposal did not conform to predictable party lines. Inside the Administration, Moynihan, Richard Nathan of the Bureau of the Budget, HEW Secretary Robert Finch and Undersecretary John Veneman favored the bill. Arthur Burns, then Counsellor to the President, and Vice President Agnew opposed it. In the House, support came from centrist and liberal members of both parties. Opposition came from Southern and Northern conservatives who thought FAP was too generous and would underwrite idleness and from liberals who thought it too stingy and punitive in its work requirement.

The reaction of groups outside government was equally diverse. Journalists of the left, center and moderate right announced support ranging from cautious to enthusiastic, but sharp opposition developed from the far right. Surveys indicated broad public support. Labor reaction varied, but no union opposed FAP outright. Among businessmen, the Chamber of Commerce opposed FAP, while the Committee for Economic Development supported it. Endorsements from organized religion ranged from warm to tepid. The social welfare profession and the National Welfare Rights Organization (NWRO), the only organization speaking for AFDC recipients (primarily those in the Northeast), opposed it with steadily rising passion.

FAP died in the Senate Finance Committee, Moynihan relates, partly because that committee was markedly more conservative than the Senate as a whole,⁴ partly because liberals whose support the Administration expected were not very well informed about welfare matters⁵ and were influenced by the NWRO's persistent, violent opposition to the proposal, and partly because Secretary Finch crumbled under Senator

2. Moynihan credits Milton Friedman with fathering the idea of a negative income tax. While the paternity can be argued, the care and nurture provided by liberal academics changed the negative income tax from a literary speculation into a serious proposal. See C. GREEN, *NEGATIVE TAXES AND THE POVERTY PROBLEM* (1967); Tobin, Pechman & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 *YALE L.J.* 1 (1967). The effort to bestow credit for discovery of an idea upon the political left or right may strike readers as a jejune exercise, of course, but it is significant in the context of this book, since Moynihan seems to regard the negative income tax as intellectually conservative, regardless of its level of support or implicit tax rate. See Part II *infra*.

3. P. 446.

4. P. 455.

5. Moynihan reserves his most caustic criticism for Senator Fred Harris. See p. 483.

Williams' interrogation.⁶ A swirl of last-minute maneuvers to revive the bill on the Senate floor failed despite the existence of a solid majority in favor of FAP.⁷

The moral of the political story, according to Moynihan, is that FAP had bad luck. If only the Finance Committee had been as workmanlike as the Ways and Means Committee in the House, if only Finch had been more capable or less worn-down when Williams questioned him, if only events had moved more swiftly, the Senate would have passed the bill.

Moynihan argues that FAP was a milestone in social legislation that deserved to become law. His argument rests on a pair of sharp distinctions. The first concerns the difference between poverty (lack of money) and dependency (the prolonged acceptance of support from others). Moynihan argues that FAP, in contrast to previous welfare programs, dealt innovatively with both. Second, Moynihan believes that FAP was meritorious because it represented an "income" strategy, which combats poverty through direct cash payments, rather than a "services" strategy, which provides in-kind benefits such as medical care, food, and education or training. Moynihan contends that the services strategy has done little more than humiliate recipients; an income strategy could at least sustain people in dignity, even if it did not make them self-supporting.

Also underlying Moynihan's view of FAP is his interpretation of why welfare roles grew rapidly in the late 1960's.⁸ He draws heavily on his previously enunciated concern over the decline of the family in general, and the nonwhite family in particular.⁹ Although job prospects improved during the 1960's, to be on the dole became acceptable. The solution to the problems of the poor in the 1960's had been services. This approach, Moynihan contends, largely failed to help the poor, though it aided members of the middle and upper class who dispensed services to the poor.¹⁰ These services, moreover, increased the attractiveness of dependency.

6. P. 474.

7. P. 525.

8. Pp. 82 *passim*.

9. U.S. DEPARTMENT OF LABOR, OFFICE OF PLANNING AND RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), popularly known as the *Moynihan Report*.

10. This plausible but illogical argument implies that when the government buys medical care and gives it free of charge to the poor, it is really helping doctors, but when the government gives the poor cash which they spend on medical care, it is helping the poor. The argument contains a kernel of truth: When the government sharply increases the demand for a service, such as medical care, the supply of which cannot be promptly expanded, the price of that service may rise. But Moynihan masks this point behind scornful criticism for the professionals who, like Tom Lehrer's old dope peddler, do well by doing good.

The most promising alternative to the services mess was an income strategy, exemplified by FAP. FAP proposed an income floor of \$1,600 (plus food stamps worth over \$800 per year) for a family of four. In the North most benefits would accrue to families headed by an unemployed male, then largely excluded from AFDC. In the South FAP would raise benefits for female-headed families served poorly, if at all, by stingy state welfare agencies. No family would have suffered by the enactment of FAP, Moynihan argues and the President stated in public,¹¹ and the most egregiously inadequate benefits would be raised.

The political acceptability and actual operation of FAP depended upon the structure of the work requirement: which recipients would have to work at what kinds of jobs, encouraged by what sanctions for refusal. The Administration's proposal required unemployed FAP applicants to register with an employment service and to accept suitable work or training. Mothers of preschool children and spouses of employed or registered mothers were exempt. The penalty for refusal was denial of a portion of benefits.¹²

II

Nearly every segment of Moynihan's argument is called in question by other participants in the struggle over FAP, by facts, by logic, or by Moynihan himself. To take the last point first, *The Politics of a Guaranteed Income* is laced with inconsistencies. For example, was the Family Assistance Plan a negative income tax, a guaranteed income, both, or neither? Moynihan approvingly quotes various Administration spokesmen who refer to FAP under varying labels.¹³ Although these semantic acrobatics may have been motivated by concern over the political impact of the various labels—the President was anxious to avoid the “free ride” connotations of “guaranteed income”¹⁴—Moy-

11. P. 223.

12. Under the Administration's proposal the penalty was \$300 per year. The House increased the penalty to \$500.

13. From the title of the book one gathers that Moynihan considers FAP a guaranteed income plan. See p. 3. Schultz, on the other hand, told the Senate Finance Committee, “This [FAP] is not a proposal for a guaranteed income. Work is a major feature of this program.” P. 404. Moynihan himself, in explaining why FAP experienced so much difficulty in Congress, writes, “The negative income tax was only dimly understood.” P. 434.

14. The President in announcing FAP contrasted it with a guaranteed income: A guaranteed income establishes a right without any responsibilities; family assistance recognizes a need and establishes a responsibility. It provides help to those in need and, in turn, requires that those who receive help work to the extent of their capabilities. There is no reason why one person should be taxed so that another can choose to live idly.

P. 224.

nihan himself seems confused about what FAP actually would have accomplished.

Whatever the label, all systems of cash assistance are defined by five characteristics: (1) The amount paid to families of various sizes with no income. (2) The extent to which benefits are reduced if family income increases, *i.e.*, the "implicit tax rate" which determines the net value of any increased earnings. (3) The voluntary actions (such as seeking or accepting jobs) which potential recipients must undertake to become eligible for benefits. (4) The population groups the program covered. (5) Other family characteristics, *e.g.*, excessive assets or brief residency, which lead to disqualification.

FAP would have created a uniform national minimum-benefit level higher than existing benefits in eight states, but below those of the other forty-two. It also would have increased sharply the "implicit tax rate" (although contrary claims were made), instituted a limited work requirement for eligibility, and, most importantly, included in its coverage intact families, few of whom were aided by AFDC. The real debate over FAP did not concern its name but, appropriately, these characteristics. While labels are politically significant, Moynihan's varying designations do not help describe the vital aspects of FAP.

According to Moynihan AFDC actually increased dependency, and a new program was needed to sever the link between welfare and rising dependency. Vital to the proof of this assertion is Moynihan's observation that the historically close correlation between the non-white male unemployment rate and the number of new AFDC cases disappeared in the 1960's.¹⁵ Why, Moynihan asks, did this well-established relationship break down? The appropriate question is why he thought one ever existed.¹⁶ Nonwhites, slightly under half of AFDC recipients today, were but a small fraction in 1960. More important, AFDC is paid largely to female-headed families; neither the total nor the rate of nonwhite male unemployment is correlated convincingly in any simple way with the growth of female-headed families.¹⁷ The rise in the AFDC caseload cannot even be correlated with growth in the number of female-headed families. In short, the correlation on

15. P. 83.

16. Moynihan's approach to these statistics is reminiscent of the hypothesis of the otherwise quite sensible nineteenth century British economist, Jevons, that because sunspots and business cycles were correlated the former caused the latter. The relationship eventually broke down. See J. KEYNES, *ESSAYS IN BIOGRAPHY* 255-309 (1951).

17. The number of AFDC recipients rose from 2.9 million in December 1959 to 7.3 million in December 1969, reaching 11 million in August 1972. From 1959, the number of female-headed families in poverty first fell from just over to just under 7 million, and then rose to 7.8 million in 1971.

which Moynihan builds his discussion of dependence was purely a coincidence. More probable explanations for the growing caseload, largely disregarded by Moynihan, are increasing welfare militancy, encouraged by NWRO and other groups, growing sympathy of welfare agencies for the poor, and court decisions narrowing the bases on which applicants for AFDC legitimately could be declared ineligible.

Moynihan's emphasis on dependency is even more puzzling because, as he reveals, the Administration did not believe that FAP could solve the dependency problem:

[W]ithin the White House it was judged that whatever was "wrong" with "welfare," a system of income conditioned on dependency, would stay wrong for a long while; that the situation would probably grow worse before it grew better; and that when it commenced to improve this would be the result of a concatenation of forces no analysts could prescribe, and certainly no government could contrive. *As a consequence of this belief, the thrust of the President's proposal was much more directed to the problem of poverty than to that of dependency.*¹⁸

Moynihan also confuses his analysis by muddying distinctions between various strategies for dealing with poverty. In general, the government may transfer income to people (an "income strategy") or to lower governmental units (a "revenue sharing strategy"), it may provide services to people directly or through other levels of government (the "services strategy"), or it may try to change economic or legal institutions (the "institution-changing strategy").

Moynihan begins well. After alluding to the disappointment he and others felt with many parts of the poverty program, he writes:

Legal strategies had uses: obtaining rights in being. Services, similarly, could be of value up to a point. But for most persons living in poverty it appeared that a direct income strategy would show the largest return. It would in any event show some return, and an immediate one. This was an outcome government might desire on many grounds.¹⁹

The Nixon Administration pursued the income strategy, Moynihan argues, and FAP was the principal element. Moynihan, however, does not consider AFDC part of the income strategy, although overburdened case workers do little else than approve checks. Other programs, such

18. P. 354 (emphasis in original).

19. P. 55.

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as food stamps²⁰ and housing programs, are inconsistently characterized as “services” or “income” depending on whether or not they meet with his approval. In his effort to place the honorific label “income strategy” on all good programs, he extends the term so broadly that it loses all analytical value.²¹

The Family Assistance Plan could solve both poverty and dependency if its participants were encouraged to work. To this end the Administration proposed to eliminate benefits for persons who refused work, but allowed recipients to keep more of each additional earned dollar than they could under AFDC. The effect of FAP as a work incentive measure was uncertain. Moynihan quotes with approval sources reaching seemingly inconsistent conclusions on this question.²² An

20. The following comments on food stamps and commodity distribution leave one nonplussed:

The food programs [food stamps and commodity distribution] pursued an income strategy through a service technique and combined the disadvantages of both.

P. 117.

The food stamp program was, in essence, a universal system of income support for the working poor.

P. 175.

In a conversation with his secretary of agriculture on a major proposed expansion of food stamps, President Nixon stated:

You can say . . . that this Administration will have the first comprehensive, far-reaching attack on the problem of hunger in history.

P. 121. But later Moynihan writes:

Richard Nixon, who was not the least disposed to utopianism, proposed a guaranteed income because he thought it must be dreadful to send one's daughter to the store with food stamps.

P. 304.

21. Moynihan argues that legislation proposed by the Administration would have converted federal housing programs to the “income strategy” merely by altering the rent computation formulas, p. 494; that Medicaid which provided free health care to AFDC recipients and to the medically-indigent promoted dependency, p. 492, while the Administration's Family Health Insurance Program (FHIP), which offered health insurance free to the very poor, with an income-tested premium for those with more income, was part of the income strategy and did not promote dependency; and that the various training programs of the 1960's were a part of the services strategy, while the training to be offered in conjunction with FAP advanced the income strategy.

The *reductio ad absurdum* of the “income strategy” comes on p. 212:

On July 18 [President Nixon] sent to Congress the first presidential message on population, in which *pari passu*, he asserted, “*It is clear that the domestic family-planning services supported by the Federal government should be expanded and integrated.*” . . . Large families being a fundamental source of poverty among the population “at risk,” this proposal, soon to be endorsed by the Congress, should be seen as an integral element of the income strategy the Administration had adopted and was now seeking to implement.

P. 212 (emphasis in original).

22. Moynihan quotes OEO Assistant Director John O. Wilson's report that a New Jersey negative income tax experiment showed that “[t]here is no evidence that work effort declined among those receiving income support payments.” P. 192. Later he quotes Hyman Minsky's statement that “a sizable negative tax would lead to withdrawal of labor from the market and increased consumption by those not directly beneficiaries.” P. 249. This makes the work incentive question sound settled—both ways at once—but it is in fact open. While Moynihan properly notes that the New Jersey findings were “preliminary,” he fails to mention that the study was limited to male-headed families and

understanding of the possibly complex effect of FAP on the work effort of different families is central to an assessment of FAP's social impact and political feasibility. The reader of *The Politics of a Guaranteed Income* is spared discussion of this vital point.

Probably no one in the Administration and very few outside it fully understood the marginal tax rate problem when FAP was proposed. *The Politics of a Guaranteed Income* makes one wonder whether Moy-nihan understands it even now. He demonstrates that FAP would have reduced the payoff from work for virtually all recipients. Yet he persists in regarding FAP as a lost chance to reverse the tide of increasing dependency sweeping over America.

Under AFDC regulations, benefits are reduced by two-thirds of earnings over \$360 per year. Under FAP, benefits would have been reduced by one-half of any earnings over \$720 per year. The effective tax rates under FAP would have varied considerably from state to state but would have been higher in nearly all cases than under AFDC. All but eight states would have supplemented the basic \$1600 grant for a family of four; reduction of these state benefits, as personal income rose, would mean an increase in the effective tax rate from 50 percent to about 66 2/3 percent. Furthermore, under FAP, intact low-income families, who were ineligible for AFDC, but paid no federal income taxes, would have become subject to a "tax" on their FAP benefits of at least 50 percent.

The interaction of any form of cash assistance, AFDC or FAP, with the welter of extant in-kind benefits further raises effective tax rates.²³ Each of these "service" programs charges an implicit tax by reducing service benefits as income rises. Furthermore, under FAP, state welfare agencies would no longer have paid the state and federal taxes, payroll taxes, and certain work-related expenses of AFDC recipients. In some cases cumulative tax rates would have exceeded 100 percent. A family might receive less money by increasing its income.²⁴

that research has suggested that different kinds of families respond differently to the negative income tax: The work effort of female-headed families is likely to respond more than that of male-headed families, that of older workers more than that of prime-age workers, and that of childless workers more than that of parents.

23. In a recent study for the Joint Economic Committee of the incidence of benefits for low-income families, the General Accounting Office discovered that among randomly selected families in six low-income communities, sixty percent of all households were receiving at least one kind of public welfare benefit. Of those receiving at least one benefit, sixty-six percent received at least two, forty-three percent received at least three, and nineteen percent received at least five. See Storey, Townsend & Cox, *How Welfare Benefits are Distributed in Low Income Areas*, in *STUDIES IN PUBLIC WELFARE*, SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 93d CONG., 1st SESS. *passim* (Paper No. 6, 1973).

24. Pp. 475-79. Under FAP, rates over 100 percent occurred principally at "notches"—the complete cessation of benefits under one or more programs when income rises a small

The full impact of reimbursement for work related expenses under AFDC has recently been shown in computations of effective tax rates. Persons who receive only AFDC face effective tax rates much below 66 2/3 percent; even families which receive a full range of benefits retain some portion of additional earned income.²⁵ Thus, the AFDC system, for all its faults, may discourage work less than does FAP.

Finally, Moynihan omits altogether any discussion of FAP's administrative features. One of FAP's most radical aspects was its promise of uniform federal administration. The federal government was to administer FAP and to assume administrative costs for both FAP and supplemental benefits if states surrendered administrative responsibility for state supplemental benefits. This step would have not only reduced the administrative inequities rampant in the current system, but also shifted power on the peculiarly sensitive question of public aid to the poor from states and localities to the national level. Inattention to this question in a book on politics is odd and regrettable.

III

Moynihan shows that a peculiar confluence of political needs and objective problems made possible in 1969 that most rare of legislative events, a sharp break with past practices. This break, however, did not occur.

Moynihan places part of the blame on the social work profession and NWRO. Confronted with a proposal which injured their constituents, even if it helped others among the poor, they did not try to improve the legislation but simply opposed it. In light of the fate of FAP, a \$4 billion program, NWRO's proposed floor of \$5,500 (later \$6,500), with an annual cost of \$60-\$100 billion, can only be regarded as fanciful.

Moynihan takes great pains to show that the President really cared about welfare reform. But he acknowledges that conservatives in the White House tried to convince senators "that the President's support for the legislation was waning, or even that he had never really sup-

amount. For example, medicaid benefits, sometimes worth more than \$1,000 on the average, are available in some states as long as the patient is receiving even \$1 in public assistance, but cease abruptly when eligibility for public assistance is lost.

H.R. 1, welfare reform's second incarnation, was even worse, in part because the implicit tax rate on benefits was raised from 50 to 66 2/3 percent and in part because of changes in the Medicaid program. See Aaron, *Why is Welfare So Hard to Reform?* 39 (The Brookings Institution, 1973) [hereinafter cited as Aaron].

25. Hausman, *Cumulative Tax Rates in Alternative Income Maintenance Systems*, in *STUDIES IN PUBLIC WELFARE, SUBCOMM. ON FISCAL POLICY, JOINT ECONOMIC COMM., 92d CONG., 2d SESS. 92-138 (Paper No. 4, 1972)*; Lurie, *Estimates of Tax Rates in AFDC* (University of Wisconsin mimeograph, 1973).

ported it to begin with" and that while these statements "released many conservative Republicans from obligations of loyalty . . . their influence was most notable among liberals of both parties."²⁶ Moynihan never explains why the President failed to stop these underlings from misrepresenting him. Senator Ribicoff, on the other hand, blames President Nixon for killing FAP with inattention after Moynihan and other supporters of FAP left the Administration and for assuming a rigid "take FAP or nothing" attitude when the Senate Finance Committee was trying to find a compromise.²⁷ Richard Nathan's defense of the President in this regard merely reinforces the judgment that the President was unwilling to compromise, a peculiar stance on the part of a political leader committed to reform.²⁸

FAP's rise and fall marked the end of an era in antipoverty legislation. For four decades, presidents have proposed and Congress has enacted programs to give money and services to the needy: cash grants, below-cost housing, free or below-cost medical care, free lunches and day care, subsidized or free food, college scholarships and loans, and a long list of other free, subsidized, or income-conditioned benefits. With few exceptions Congress has defined eligibility so broadly and set appropriations so low that not all eligibles could be served. To scale benefits to funding, agencies have narrowed eligibility by administrative devices not related to the purposes of the programs or they have let queues ration available benefits. Under many programs Congress has left considerable discretion in the hands of local government.

The political landscape is now littered with poverty programs which are impressively broad and expensive²⁹ but striking in the gross variation of services provided and the implicit tax rates generated.³⁰ As a result, families with similar earnings receive highly variable benefits and face widely divergent tax rates.

FAP ran smack into this system: By failing to integrate FAP with

26. P. 373.

27. Ribicoff, *He Left at Half-Time*, NEW REPUBLIC, Feb. 17, 1973, at 22.

28. Nathan attributes weakness in the White House "not to the President's changing his mind, as Senator Ribicoff and others argue, but to the departure of FAP . . . from the President's original design." Nathan, *Family Assistance Plan: Work/Welfare*, NEW REPUBLIC, January 24, 1973, at 19.

29. Of households that receive some assistance, nineteen percent receive benefits under at least five programs. Families living in generous states may receive as much as \$6,000 to \$7,000 in benefits per year, roughly fifty percent above the official poverty threshold. Cf. Storey, Townsend & Cox, *supra* note 23. On the other hand, many households qualify, or have the knowledge to apply, for few if any benefits.

30. In 1971 the average tax rates for a four-person family under AFDC in Chicago were 83 percent on the first \$8,698 in earnings (72 percent on the first \$10,724 under the unemployed father segment of the AFDC program), 61 percent on the first \$10,311 of earnings in St. Louis, 71 percent on the first \$6,850 in Wilmington, Delaware, and 91 percent on the first \$7,100 in Detroit, Michigan. See Hausman, *supra* note 25.

other programs and by failing to deal convincingly with the problem of work incentives, the Administration enabled senators who were perhaps unsympathetic to FAP's basic purposes to demonstrate that there could be no basic reform in AFDC without attention to numerous other in-kind programs.³¹

The next proposal to assist the poor must coordinate major existing programs. The age of myopic legislation is past. Legislators and social reformers can no longer ignore the fact that each program serves many who benefit from other programs, that coverage is spotty and highly uneven, and that each implicit tax rate interacts with others and may discourage additional earnings.

This lesson is sobering. The technical and political problems encountered by FAP and H.R. 1, bills that dealt principally with cash assistance for the poor, were difficult enough. Complete reform must alter several existing programs that pass through separate congressional committees, that are administered by separate bureaucracies, that meet distinct needs, and that are defended by independent lobbies and interest groups. The lesson is not that welfare reform must await a single millennial revision of all social legislation. Rather, the task is to design fair programs that mesh with one another, do not require utopian expenditures, and do not discourage work.³² The strength of Moynihan's book is that he graphically lays the last failure before us; the weakness is that he gives us no insight about how to do better next time.

31. H.R. 1, FAP's successor, did contain an income-related deduction for Medicaid recipients. And Senator Long did propose to convert Medicaid into a system of health insurance with premiums based on income. See generally Aaron, *supra* note 24. Both proposals only increased work disincentives. See Allen, *A Funny Thing Happened on the Way to Welfare Reform* (Urban Institute, 1972).

32. For an attempt to design a system of income maintenance, medical insurance, and housing allowances that meets this test, see Aaron 47-69. The system of cash assistance proposed there is predicated on the political presumption that elected officials are concerned more that recipients will curtail the number of hours worked than that they will take jobs at reduced hourly wages. Accordingly, the formula imposes a low tax on increases in earnings from longer hours worked but a high tax on increases in hourly earnings. This plan is integrated with a system of national health insurance, see Feldstein, Friedman & Luft, *Distributional Health Insurance Benefits and Finance*, 25 NATIONAL TAX J. 497 (1972), and with a small system of housing allowances based both on family income and housing expenditures.

Marihuana: A Signal of Misunderstanding. By National Commission on Marihuana and Drug Abuse. Washington, D.C.: Government Printing Office, 1972. Pp. x, 184. \$1.00 (paperback); 2 vol. app., pp. xi, 1252. \$10.75 (paperback).

Cannabis. By Commission of Inquiry Into the Non-Medical Use of Drugs. Ottawa: Information Canada, 1972. Pp. xiii, 426. \$3.00 (paperback).

Reviewed by Michael H. Tonry†

Widespread use of cannabis¹ in the United States, most commentators agree, was initiated by Mexican laborers early in the twentieth century.² By the early 1960's cannabis had become a major recreational drug in North America. Its use increased exponentially,³ and by 1971 24 million Americans⁴ and 1.5 million Canadians⁵ had used the drug.

Cannabis possession and transfer was legal in every American state until 1915, when Utah enacted the first state prohibition statute. By 1937 all forty-eight states had adopted laws relating to cannabis.⁶ As

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1. Marihuana and hashish are derivatives of the Indian Hemp plant, *cannabis sativa* L. Marihuana is a combination of leaves, twigs, flowers and resin of *cannabis sativa* L. and is the prevalent derivative in use in the United States. See NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA—A SIGNAL OF MISUNDERSTANDING 50 (1972) [hereinafter cited as SHAFER REPORT]. Hashish, which has a higher proportion of resin and is more potent than marihuana, is the more common in Canada, COMMISSION OF INQUIRY INTO THE NON-MEDICAL USE OF DRUGS, CANNABIS 188 (1972) [hereinafter cited as LEDAIN REPORT], and in England, BRITISH ADVISORY COMMITTEE ON DRUG DEPENDENCE, CANNABIS 9 (1968) [hereinafter cited as WOOTTON REPORT].

2. For a brief historical survey of American cannabis use, see LIGIT & ILLICIT DRUGS (E. Brecher, et al. eds. 1972) [hereinafter cited as CONSUMERS UNION REPORT]. For evidence of early use by Americans see, e.g., F. LUDLOW, THE HASHEESH EATER: BEING PASSAGES FROM THE LIFE OF A PYTHAGOREAN (1857); B. TAYLOR, THE LAND OF THE SARACENS: OR PICTURES OF PALESTINE, ASIA MINOR, SICILY AND SPAIN (1855).

3. Citing Federal Bureau of Investigation statistics, the Shafer Report noted a tenfold increase in state cannabis arrests in five years, from 18,815 in 1965 to 188,682 in 1970, an eighty percent increase in cannabis arrests by the Bureau of Narcotics and Dangerous Drugs between 1965 and 1968, and a 362 percent increase in cannabis arrests by the United States Bureau of Customs between 1965 and 1970. SHAFER REPORT 106.

4. SHAFER REPORT 32-33.

5. Canada's drug problem appears to be mostly a cannabis problem. In 1970, twenty-six of twenty-eight convictions for illegal import or export of drugs involved cannabis. Cannabis offenses constituted twenty-two of twenty-six import-export convictions in 1971. In 1970 convictions for trafficking or possession for the purpose of trafficking numbered 1005, of which 802 involved cannabis. LEDAIN REPORT 232-37.

6. Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marihuana Prohibition*, 56 U. VA. L. REV. 971, 1034 (1970) [hereinafter cited as *Forbidden Fruit*]. Bonnie and Whitebread reviewed legislative histories, contemporary newspaper accounts, and other sources to discover that enactment of the early state cannabis laws was relatively invisible, unheeded by the newspapers or the general public, and uninformed by scientific evidence. *Id.* at 1026. See also MUSTO, THE AMERICAN DISEASE 210-29 (1973).

cannabis consumption and controversy increased during the sixties, state legislatures reduced statutory penalties. At the writing of the report of the National Commission on Marihuana and Drug Abuse [Shafer Report], forty-two states and the District of Columbia classified marihuana possession as a misdemeanor and four labelled it a felony. In eleven jurisdictions casual transfers were treated as possession; in twenty-seven, conditional discharge was available for some classes of defendants.⁷

In 1937 Congress entered the field of cannabis proscription with the Marihuana Tax Act⁸ which required persons to expose themselves to state prosecution in order to comply with federal tax law.⁹ This self-incriminatory aspect of the statute resulted in its being declared unconstitutional in 1968.¹⁰ Two years later Congress reentered the cannabis controversy with the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹¹ The first national Canadian anti-cannabis law was passed in 1923. The current legislation, the Narcotic Control Act,¹² provides penalties ranging from a seven-year minimum sentence

7. SHAFER REPORT 108.

8. Act of August 2, 1937, ch. 553, 50 Stat. 551-56 (repealed October 17, 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292).

9. Transfers of cannabis under the 1937 Act were subject to a \$1 per ounce tax if made to a qualified transferee duly registered with the Internal Revenue Service. Act of August 2, 1937, ch. 553, 50 Stat. 551-56 (repealed October 27, 1970, Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 [codified at 21 U.S.C. §§ 801-966]). The tax was \$100 per ounce if the transferee were not suitably registered and qualified. The dismal alternatives facing cannabis users and traffickers were to use the approved order form and pay the prohibitive \$100 per ounce tax; use the order form, register as a trafficker and pay the \$1 per ounce tax; or sell and possess cannabis illegally. The alternatives exposed the individual to state criminal prosecution.

10. *Leary v. United States*, 395 U.S. 6 (1968).

11. 21 U.S.C. §§ 801-966 (1970). The 1970 Act is notable mostly because it reduced penalties for federal drug offenses and eliminated mandatory minimum sentences. The Act lists three types of controlled substances—marihuana, narcotic drugs, and depressants and stimulants—on five schedules on the basis of a specific substance's potential for abuse, the presence, absence, or extent of recognized medical uses, and the risk that it will cause physical or psychological dependence. Schedule I drugs have no currently-accepted medical use and may engender psychological or physical dependence. The Act implicitly endorses belief in most of cannabis' alleged ill effects; both cannabis and tetrahydrocannabinol, the principal psychoactive element of cannabis, are included in Schedule I with heroin, various natural and synthetic opiates, natural hallucinogens such as mescaline and peyote, and synthetic hallucinogens such as LSD and DMT. Cocaine, by contrast, is a Schedule II controlled substance.

12. CAN. REV. STAT. c. 35, § 12 (1960-61); CAN. REV. STAT. c. N-1 (1970).

The original Canadian cannabis legislation was the Opium and Narcotic Drug Act, CAN. REV. STAT. c. 22 (1923). Its origins are as clouded and ambiguous as those of the American statutes. The LeDain Report attributes passage to sensational magazine articles and a book which credited cannabis with capacity to immunize users to pain, void moral responsibility, and induce homicidal or sadistic behavior. LEDAIN REPORT 230. The LeDain Report also partially attributes the early cannabis laws to anti-asiatic feelings. *Id.* The LeDain Commission reviewed the proceedings of the debates occasioned by consideration and passage of the Opium and Narcotic Drug Act and located only incidental references to cannabis and no discussion of the reasons for its inclusion in the legislation as a dangerous drug. *Id.* The equivalent treatment of cannabis and heroin has continued to the present.

for importing or exporting to a six-month maximum for initial possession convictions.¹³

Thousands of publications have discussed cannabis in the past 130 years. Most have been dubious scientific analyses of the drug and its effects.¹⁴ Recent years have seen a proliferation of efforts at overall assessments of the drug's role in society. These recent reports treat the relationships of cannabis use to violence, sexuality, addiction, opiate use, physical and mental injury, social maladjustment, and the legal order.

The prototypical overall assessment was the Indian Hemp Drugs Commission Report of 1894.¹⁵ The Hemp Report,¹⁶ commissioned by the colonial government of India, rejected the traditional contentions that cannabis is physically dangerous, criminogenic, or morally debilitating,¹⁷ and anticipated the claim of modern drug law reformers that cannabis is a relatively safe intoxicant.¹⁸ Fifty years later the LaGuardia Report echoed the Hemp Report's general conclusions about cannabis and additionally found no significant evidence that cannabis use causes progression to the use of other drugs.¹⁹ Beginning in the late sixties, the trickle of overall assessments became a flood.²⁰

13. The Act specifies five categories of offenses: importing or exporting, unauthorized cultivation of cannabis or opium poppies, trafficking, possession for the purpose of trafficking, and simple possession. The law provides for maximum sentences of life imprisonment for trafficking and unauthorized importing or exporting convictions. Conviction for unauthorized cultivation of cannabis exposes a defendant to a maximum seven-year sentence. For simple possession offenses, the government may proceed by indictment or summary conviction. Conviction by indictment may lead to a maximum seven-year sentence while summary conviction subjects a defendant to a maximum six-month sentence or a fine of \$1,000 for a first offense with doubled maxima for a subsequent offense. CAN. REV. STAT. ch. N-1, §§ 2, 3 (1970).

14. See CANADIAN COMMISSION OF INQUIRY INTO THE NON-MEDICAL USE OF DRUGS, INTERIM REPORT 73 (1970).

15. INDIAN HEMP DRUGS COMMISSION, MARIHUANA (Jefferson Publishing Co. ed. 1969).

16. The Hemp Commission's inquiries into usage patterns, methods and extent of cultivation, and consequences of cannabis use were comprehensive, although by modern standards methodologically unsound. Hearings were conducted throughout British India. Opinions were solicited from relevant officials and 1193 witnesses were heard. *Id.* at 180.

17. The Hemp Report suggested that although cannabis use can become habitual, there are no injurious after-effects following cessation. It found that there was little or no connection between the use of cannabis and crime, *id.* at 264, that the drug did not have aphrodisiacal properties, *id.* at 198, and that it did not appear to cause insanity in those who were not heavy users, *id.* at 264.

18. *Id.* at 223.

19. MAYOR'S COMMITTEE ON MARIHUANA, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK (1944). In 1938 Mayor LaGuardia requested that the New York Academy of Medicine inquire into the use of cannabis in New York City. The two-part study employed New York City plainclothes policemen to observe the social use of cannabis and drew on results from medical experiments on seventy-seven volunteers, seventy-two of them convicts.

20. See AUSTRALIAN GOVERNMENT, DRUG TRAFFICKING AND DRUG ABUSE (1971); E. BLOOMQUIST, MARIJUANA (1968); BOARD OF HEALTH COMMITTEE ON DRUG DEPENDENCE AND DRUG ABUSE IN NEW ZEALAND, FIRST REPORT (1970); L. GRINSPOON, MARIHUANA RECONSIDERED (1971); HEW, MARIHUANA AND HEALTH, SECOND ANNUAL REPORT TO CONGRESS (1972); HEW,

Most recently offered for public considerations are the Shafer Report and the report by the Commission of Inquiry into the Non-Medical Use of Drugs [LeDain Report].²¹

The two reports cover the same substantive ground, but the LeDain Report is more comprehensive, detailed, and thoughtful. There is, however, little basis on which to distinguish their substantive findings. The Shafer Report observes that "no conclusive evidence exists of any physical damage, disturbances of bodily processes or proven human fatalities attributable solely to even very high doses of marihuana."²² The LeDain Report asserts that the short-term physiological effects of cannabis are insignificant and benign and notes that "from the point of view of lethal toxicity, cannabis must be considered one of the safest drugs in either medical or non-medical use today."²³ Both thus affirm the eighty-year-old conclusions of the Hemp Report that moderate cannabis use has no significant consequences for the user's physical well-being.

The reports note credible evidence that cannabis may cause transient impairment of short-term memory, occasional transient anxiety in inexperienced users, and possible psychotic reactions in predisposed persons.²⁴ Consequently the reports call for more study of cannabis' psychological effects.

They agree that cannabis causes no physical dependence²⁵ and that psychological dependence, if any, occurs only among chronic, heavy users,²⁶ who are rare in the United States and Canada. The reports find that there is a correlation between cannabis use and use of other drugs, but they agree that no causal relationship has yet been shown.²⁷ Nor, they agree, does cannabis use lead to the violation of laws other than those proscribing cannabis.²⁸

Some cannabis opponents charge that use causes loss of purpose, sloth, and lethargy: in short, cannabis is a weed grown at Lethe's wharf. The Shafer Report asserts that "chronic heavy use of marihuana

MARIHUANA AND HEALTH (1971); J. KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970); SWEDISH GOVERNMENT, THE NARCOTICS PROBLEM: PART III, COORDINATED MEASURES (1969); WOOTTON REPORT, *supra* note 1.

21. The proper names are the Canadian Commission of Inquiry into the Non-Medical Use of Drugs, called the LeDain Commission after its chairman, Dean Gerald LeDain of Osgoode Hall Law School, and the National Commission on Marihuana and Drug Abuse, called the Shafer Commission after its chairman, former Pennsylvania Governor Raymond Shafer.

22. SHAFER REPORT 56-57.

23. LEDAIN REPORT 114.

24. LEDAIN REPORT 79-80; SHAFER REPORT 57-59.

25. LEDAIN REPORT 123; SHAFER REPORT 62.

26. LEDAIN REPORT 124; SHAFER REPORT 62.

27. LEDAIN REPORT 130; SHAFER REPORT 88-89.

28. LEDAIN REPORT 110; SHAFER REPORT 76.

may jeopardize social and economic adjustment of the adolescent."²⁹ The Report fails, however, to clarify its logic. Adjustment may be jeopardized because the drug causes torpor in its users. Or perhaps society so stigmatizes cannabis either by general disapproval or criminal sanction that some users perceive no place for themselves in the competitive system. Depending upon the choice of rationale, one should blame the drug itself, society's attitude toward the drug, or cannabis laws. The LeDain Report, in any event, asserts that cannabis use alone does not cause youths to "drop out";³⁰ it stresses the impossibility of demonstrating that changes in aggressive and competitive drives result from cannabis use rather than from changes in basic personal values.

Among the subjects discussed in the LeDain Report but omitted in the Shafer Report are cannabis' chemical and pharmacological properties, methods of cultivation, means of distribution (both Canadian and international), and the history of North American cannabis use. Its conclusions are well documented; those of the Shafer Commission are not. The LeDain Report describes the existing evidence, summarizes conclusions of influential studies, suggests methodological shortcomings, and assesses credibility. The Report notes that many existing descriptions of the deleterious effects of chronic, heavy cannabis use are based on information collected without ordinary scientific controls and from subjects who were illiterate, impoverished derelicts. The unrepresentative nature of such samples, the Report contends, makes information derived from them virtually worthless.³¹ The Shafer Report, on the other hand, relies on those same discredited studies to argue the risks of cannabis use.³²

The risks are not to society, but only to the individual user. Thus the primary question concerning cannabis use is not the nature of danger involved, but whether individual use ought to be a criminal offense. The starting point for all thoughtful students of this problem is, or ought to be, John Stuart Mill's contention in *On Liberty*:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.³³

29. SHAFER REPORT 87.

30. LEDAIN REPORT 97-99.

31. LEDAIN REPORT 68-74.

32. SHAFER REPORT 41, 52, 55, 65, 66.

33. J.S. MILL, *ON LIBERTY* 13 (C. Shields ed. 1956).

Every serious consideration of cannabis laws since the East Indian Hemp Report has endorsed Mill's thesis. But not one has been able to show convincingly that criminalization of cannabis is justified by the state's right to "self protection" or that society can "rightfully" deter "any member of a civilized community, against his will" from cannabis use because such use will cause "harm to others."

The LeDain Report fairly states Mill's position and analogizes the cannabis controversy to the alcohol prohibition debate for purposes of deriving the appropriate libertarian position. Mill opposed prohibition of alcohol but noted that society may regulate sales primarily to protect juveniles from their own bad judgment. The LeDain Report suggests that Mill would have favored regulating cannabis distribution for the same reason, but notes that Mill apparently does not consider impairment of a person's usefulness to society a sufficient pretext for sanctions against the cause of the impairment.³⁴ Having thus touched upon libertarian principle, however, the Report undercuts itself by contending that Mill proposed only a balancing test between personal preferences and society's estimate of the danger such preferences pose to the state. The LeDain Report suggests that Mill differs with his critics in their advocacy of regulating purely individual conduct³⁵ not on grounds of principle but on the factual question of extent of risk. Because it gives society's interest in generally acceptable behavior undue weight in the judgmental balance, the Report reduces to inconsequence the basic libertarian notion that individual conduct harmless to others is not for society to proscribe.

In attempting to establish the danger cannabis use poses to society, the LeDain Report first notes that the debate over cannabis laws reflects a cultural conflict between two sets of disharmonious values: those associated with modern industrial society, including competitiveness, acquisitiveness, and ambition, and those associated with that society's critics, including cooperativeness, willingness to share, and satisfaction with simpler pleasures.³⁶ The two sets cannot co-exist, the

34. LEDAIN REPORT 279.

35. See J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1872); P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1959).

36. There is a widespread feeling that certain kinds of drug use adversely affect certain qualities which have played an important part in the development and functioning of our present society: aggressivity, competitiveness, acquisitiveness, goal-orientation, the willingness to defer present pleasure for future rewards, and the capacity to tolerate the tedium of routine tasks, particularly those requiring painstaking attention to detail. Those who are critical of modern industrial society . . . reply that it will be a good thing in the end if the old values and attitudes are undermined and replaced by new ones, less aggressive, less competitive, more cooperative, less activist, more contemplative, less materialistic and acquisitive, more oriented towards simplicity in demand and pleasure, less dependent on things, and more able to enjoy the simple pleasure of being human in the natural environment. LEDAIN REPORT 273-74.

Report implies, because the ethos of cannabis use threatens the "values and attitudes" of "modern industrial society."³⁷ The Report apparently assumes that because cannabis use might "adversely affect"³⁸ the work ethic, the drug can properly be proscribed. Thus Mill's requirement that society violate individual liberty only to prevent "harm to others"³⁹ is facily satisfied by defining "harm" to include threats to the values of the majority. Mill would surely be startled by such an understanding of his notions of "self protection" and prevention of "harm to others."

The LeDain Report's inadequate treatment of Mill is profound compared to the Shafer Report's cavalier discussion of the same problem. The latter Report merely gestures toward Mill's position:

Society may interfere with individual conduct only in the public interest, using coercive measures only when less restrictive measures would not suffice And we must recognize . . . the strong conflicting notions of what constitutes the public interest.⁴⁰

Conflicting notions notwithstanding, the Report concludes after very little discussion that the unfounded fears of the majority—fifty percent of American adults believe cannabis use is criminogenic and seventy percent believe it leads to heroin use⁴¹—should continue to be manifested in the criminal law.⁴²

While the LeDain Report's treatment of the libertarian ideal conveys at least the appearance of sympathy, the two reports share the fundamentally antilibertarian conclusion that the criminal law can legitimately reflect the moral attitudes, no matter how irrational, of the majority.

Though the reports do not advocate legalization of cannabis use, neither do they support severe criminal penalties. Special concern about the effect of cannabis on adolescents led the LeDain Report to conclude that cannabis use should be discouraged.⁴³ Since enforce-

37. *Id.*

38. *Id.* at 273-74.

39. *See* p. 1740 *supra*.

40. SHAFER REPORT 24-25.

41. *Id.* at 121.

42. The Report proffers a broad rationale for the regulation of cannabis:

The social policy planner is concerned not about the effects on the individual *per se*, but about the impact of any adverse effect on his behavior and on the larger society and about the bearing of his behavior on the larger social perspective.

Id. at 28.

43. The LeDain Report bases its recommendations upon remaining unresolved questions of cannabis' effects on adolescent emotional development, automobile driving, mental health, and multi-drug use. The Report admits there is no experimental evidence that

ment of possession laws is impossible without inordinate policing costs, the Commission suggests proscription only of trafficking with reduced penalties.⁴⁴ The Shafer Report echoes its Canadian counterpart in this recommendation.⁴⁵

President Nixon's forewarning that he would pay no heed to a recommendation favoring legalization⁴⁶ no doubt inhibited Shafer Commission members who might have favored a bolder approach. John H. Munro, Canadian Minister of Health, also rejected the recommendations of his country's commission,⁴⁷ but at least he waited until the LeDain Report was completed.

The recommendations of both reports should in any case sink into well-earned oblivion. The data compiled in the LeDain Report, however, will aid cannabis research and debate for years to come. That is perhaps the most one could hope for from a government commission report.

Indeed the two reports could only attain limited importance because they approached the subject incorrectly. Had they posed the central question as "Should cannabis be criminalized?" rather than "Should it be legalized?", their own findings would have argued—as does use by 24 million Americans and 1.5 million Canadians—for a negative answer to the former question. Fears for the stability of social structure, however, prevented the reports from reaching an affirmative answer to the latter question.

The proper analogy may be to the American prohibition experience of the 1930's.⁴⁸ The United States was unable to prohibit successfully alcohol consumption,⁴⁹ even though a majority had agreed through its elected representatives to criminalize the drug. The minority was too large and was insistent upon maintaining its drinking preferences. Successful policing of cannabis laws is similarly impossible. Occasional enforcement of the laws still muffles the protests of cannabis users,

cannabis use adversely affects adolescent maturation or that cannabis has been a significant cause of automobile accidents. It acknowledges that its concern about adverse effects on mental health and automobile driving are based on evidence of questionable reliability. LEDAIN REPORT 266-72.

44. *Id.* at 302.

45. SHAFER REPORT 192.

46. Quoted in R. KING, *THE DRUG HANG-UP* 101 (1972).

47. N.Y. Times, August 1, 1972, at 1, col. 5.

48. See p. 1741 *supra*.

49. Recent analyses of America's drug problem have begun to focus on alcohol as America's most worrisome recreational drug. See NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, *DRUG USE IN AMERICA—PROBLEM IN PERSPECTIVE* 143 (1973): "Alcohol is without question the most serious drug problem in this country today." See CONSUMERS UNION REPORT, *supra* note 3, at 260-64.

despite their increasing numbers. Persistent, though dubious, fears that legalized cannabis would seriously threaten social stability still suffice to support a repression of individual liberty. But continued increase in cannabis use will ineluctably result in the eventual legalization of the drug. A chorus of respectable authorities, including the American Bar Association⁵⁰ and the Consumers Union,⁵¹ have already urged abolition or a severe narrowing of the cannabis proscription. The North American cannabis reports could have been important new voices singing this refrain. Instead, both spoke more for the cause of repression than individual liberty.

50. N.Y. Times, August 18, 1972, at 10, col. 4.

51. CONSUMERS UNION REPORT 528-39.