

**The Daycare Controversy: Articles, Letters, Replies**

**RIPON  
FORUM**

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ONE DOLLAR



**Humphrey's Rural Development Boondoggle**

by Oscar Cooley

**ALSO: Special Prize Supplement—Crimes Without Victims**

by Peter V. Baugher

# LETTERS

## Daycare Veto

I was pleased to see in the January 15th Ripon FORUM that there will be further consideration of your editorial on the President's Veto of the Comprehensive Child Development legislation (FORUM, January, 1972).

The fifteen member House Republican Task Force on Education and Training has worked since 1969 to secure passage of child development legislation. Because we were convinced that the bill recently enacted by Congress would not achieve our aim of assuring children the service they need to develop their full potential, we supported President Nixon in his veto. But we have not abandoned our interest in this legislation.

One of several reasons for our continuing attention to this legislation is our conviction that, despite the lack of adequate child development and day-care services in the U.S., women of all economic and educational levels are nevertheless entering the labor force in unprecedented numbers. The fact that child care services are not available does not deter them — but it does hurt many of the children whose mothers are not able to find adequate care for them. This dramatic change in the role of American women may be adding pressure to the job market, but this in no way excuses us from our responsibility to the children of working mothers.

We plan to continue working for comprehensive child development legislation in what remains of this Congress and into the next Congress if necessary.

Rep. ORVAL HANSEN (R-Idaho)  
Chairman, Task Force on Education  
and Training  
Republican Research Committee  
U.S. House of Representatives  
Washington

So you applaud the child-care veto because you don't believe in "encouraging women to enter the labor market at a time of high unemployment?"

Well, how do you feel about "encouraging individuals to support themselves and their families?"

Wake up, Rip! You sound like a 1935 civics lecture or a 1972 male chauvinist pig.

Women are a very large portion of the labor market. The burden of their responsibility varies only in degree whether it is faced alone or in partnership with a husband.

If they are making it without a national child-care plan, you may whimper, what is all the fuss about? Well, there is very little good child care, and it costs too much. Some parents pay anyway and then worry a lot — about the kids and about all their other bills. Some can't pay. Then the mother-alone stays home and she and the kids starve to death — slowly. (Don't give me that welfare/guaranteed income riff — prices never stop going up — assistance does. Working is better, as long as you can.) If there is a husband with low earning potential,

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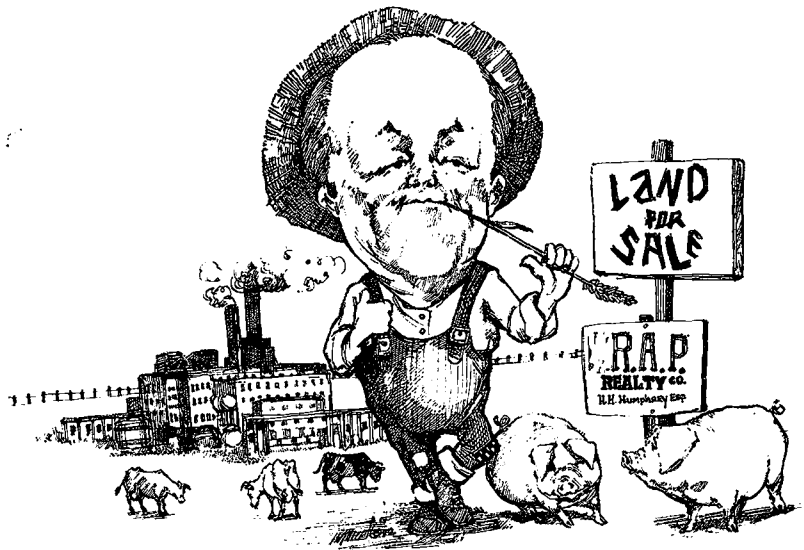
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# Humphrey's Rural Development Boondoggle



*The fashions of the subsidy trade seem to shift as rapidly as the styles in popular music. Just three years ago, for example, when the urban crisis was justifiably the rage — with riots in many of our major cities — Hubert Humphrey was advocating an Urban Development Bank to attract new industry to big cities through subsidized loans. Now rural "populism" is in style — the farmers are rebelling against the Republicans — and Hubert Humphrey is again running for President. Once more he is urging subsidized loans for industries that locate in favored areas. This time, however, Humphrey is stumping the country for a Rural Development Bank. Since the problems of the cities have not declined in the intervening years, we were skeptical of the Senator's new stance, which, together with the old, suggested a federally financed game of industrial push-me, pull-you. So we asked Professor Oscar W. Cooley of Ohio Northern University, author of two studies relating to the connection between population mobility and economic growth ("The Freedom to Move," 1951, and "Paying Men Not to Work," 1964) to examine Humphrey's bill. His article follows. In future issues we hope to present further analyses of the problems of national growth policy, new towns and urban regeneration.*

— THE EDITORS.

by Oscar W. Cooley

"Come and visit us again and again, but for heaven's sake, don't come here to live." Governor Tom McCall of Oregon is credited with this not-so-hospitable sentiment, which is said to be shared by other conservationist governors, to the dismay, one may surmise, of their state industrial developers, who for years have been inviting an influx of both people and firms.

McCall's statement illustrates the dilemma of planners, who first see an area's salvation as depending on an infusion of new blood, and next are appalled by the threat of pollution and congestion. Some see a hegira, such as the migration of 25,000,000 Americans from farm to city in the period of 1920-60 as a national disaster which calls for a gigantic federal rescue operation, while others see it as a blessing, enabling the remaining farmers to make a respecta-

ble living and at the same time supplying needed labor to urban industry.

Representative of those who deplore the farm-to-city migration are the promoters of Rural Development bills, now before Congress. These bills play in unison and the tune is familiar: Rural America, losing population, is depressed and disadvantaged. A new injection of financial aid from Washington is necessary. The farm boys have moved to the city, which is suffocating with people. The rural areas, by nature more habitable, are dying for want of employment. For the sake of both farm and city, the flow must be reversed.

Senator Hubert Humphrey, through his Consolidated Farm & Rural Development act (S. 2223) would do it with credit. He would set up a nationwide system of 10 regional rural development credit

banks and 300 to 500 local loan agencies on the pattern of the 40-year-old Farm Credit Administration. His system would provide easy credit for industrial firms to locate in rural areas and for local government agencies to improve their public services. To give the plan a cooperative flavor, the borrowers would buy stock in the development banks, as farm borrowers do in Farm Credit units, but the U.S. Treasury would furnish the initial capital — \$2 billion.

In the House, Congressman W. R. Poage's Rural Development Act of 1971 (H. R. 10867) seems to have the inside track. Also designed to revive the countryside by easy loans, it would not set up a new banking system but would vastly expand the Farmers' Home Administration, which was originally created to help tenant farmers become owners and to finance others who could not qualify for Farm Credit loans. The bill would authorize the FHA not only to lend to farmers on more favorable terms than at present but also to finance industrial development in rural areas and to aid and promote local public services more liberally than it now can. Thus it seeks to accomplish, through an existing agency, much the same objects that the Humphrey bill would achieve through a new one.

Congressman Clarence Miller of Ohio, co-sponsor of H. R. 10867, feels it "is a major step in redressing the problems of rural America which have been placed on the back burner too long." Considering the rather substantial aid which Congress has conferred upon farmers over a 30-year period, however, it would seem the back burner has not been cold.

Indeed, is it not remarkable that rural America is now deemed so sick after a generation of doctoring with price support loans, soil conservation payments, the "soil bank," crop insurance, subsidized farm credit, and billions of dollars of Rural Electrification loans at 2 percent interest? If government aid will save the ruralite, he should be in heaven by now. The present burst of rural complaint is an admission that the aid medicine already administered has not been effective. Congressmen may want to have this explained before they vote for another dose.

They might begin by addressing the question: is the present rural problem too much, or too little, rural population? Economists have long warned that the farm program, to the extent that it taxes urban dwellers and channels wealth into rural areas, has paid farmers to remain on the farms, slowing the farm-to-city migration, and keeping more people on the farm than would otherwise have stayed there. And says Everett Peterson, agricultural economist at the University of Nebraska: "We hear a lot of high-sounding phrases about rural development. There are still too many small farms, too many small towns."

Just how much the emigration from the farms has been impeded by the farm program is impossible to say, but it must have been some, unless the program has totally failed to raise farm income.

Nevertheless, many rural areas have lost large percentages of their population. Writing in the *New York Times* of February 14, 1971, Douglas Kneeland says that towns in the Great Plains region from Texas to the Dakotas are dying. Eight Plains states have lost 420,000 people in ten years, reducing them to 5,600,000. The basic cause seems to be the changes in the technology of agriculture which make it uneconomic to operate on the small scale of the past. The less efficient farmers sell their land to the more able ones, who equip with machines and set up large-scale operations. The drop-outs move to cities to take wage jobs or retire. As the farm population dwindles, the small-town retailers, garagemen, doctors, dentists, lawyers, teachers, preachers, etc., who serve them find their services in less demand. One by one, these close their shops and offices and move to towns that are large enough to support them. "The division of labor," as Adam Smith said, "depends on the extent of the market."

### The Role of the Auto

While the farm tractor has speeded this decline, its cousin, the automobile, has ameliorated it, providing a means by which farmers can travel farther to get services, as well as to hold wage jobs, without leaving their farm residences. Before bewailing the shrinkage of the rural villages, we should realize that not nearly so many trading centers are needed in the rural areas as were in the horse-and-buggy days.

The fact that many a rural village no longer has a resident physician is mainly due to the automobile and hard roads. The doctor opens an office in a nearby city or town, preferably one large enough to support a hospital, and thanks to the automobile farm folks within a radius of even 50 to 75 miles can travel to him for service — much better service than could be given in their homes — and he need not consume his valuable time in traveling out to them. There is a limit, however, to auto transportation as a method of distributing services. The farther a customer must go, the higher the cost of the service. At some point, it will pay him to move to the service center, especially if he is not doing very well economically on the farm.

The philosophy of the Rural Development movement — and it is a movement, with not only a spate of planned legislation but with a "Coalition for Rural America" set up to lobby for it — appears to be that rural communities must be preserved and that only federal funds can do it. The Coalition was organized by former Governors Edward T. Breathitt of

Kentucky and Norbert T. Tiemann of Nebraska and introduced to the press by Hubert Humphrey.

Its approach is based on the assumption that actions which may seem to be freely and voluntarily determined by the actors are not really so. If people move from farm to city, it is because they are "pushed" — the verb is Senator Humphrey's. It is not because they are attracted by what appear to them to be better opportunities to earn a living. It can't be, because as everyone knows the city is a slum, a "ghetto." They must be rescued from this fate. Rural homes, rural employment, and a salubrious rural environment must be provided for them.

In last summer's hearings on Senator Humphrey's S. 2223, many state governors and other officeholders, as well as agricultural economists, cooperative and farm organization functionaries, developers, do-gooders and assorted rural romantics testified to the decline and distress of rural America. Indeed the testimony was one long wail, all with one conclusion: federal aid. Many an upstanding farmer and the self-respecting ruralite would hardly realize the calamity-howlers were talking about them.

Of course, with enough money, it must be admitted, we could revivify every ghost town in the West, and halt the growing ghostliness of others. But when an area loses population, one may be sure it is over-populated in relation to its resources and production possibilities. The people are leaving to find richer resources elsewhere. If the people of an over-populated community are subsidized with grants from the outside, they will not be encouraged to move to greener pastures or to develop the latent resources of their own area, for in either case they stand to lose the subsidy. Thus they remain in partial idleness in their old rut, and the economy is poorer.

As for subsidizing industrial firms to move into the declining area, employing the people there and thus dissuading them from migrating, it will usually be found less costly for the people to move to the firms than for the firms to move to the people. Changing the location of an industrial plant can be costly operation. Then, too, the management must consider many location factors other than labor. Among these are nearness to raw materials, access to markets, supply of water and other utilities, taxes, and climate. New plants being built in the area would have all these factors to consider except the cost of moving.

Which raises the question: To the extent that rural locations are best for the firms, are they not now tending to choose such locations? Surely the supply of labor in such areas and the lower wage rates prevailing there (a study in 1962 showed that the average hourly wage in a typical small community was 70 cents lower than the national average) should be attractive.

In my book, *Paying Men Not To Work* (1964), I noted the extent of this movement: "Since about 1940 there has been a trend, especially among small to medium-sized firms, to locate in small communities, principally because of the quality of labor found there. The National Industrial Conference Board found that in the years 1946-51, about 40 percent of new industrial locations were made in towns of over 100,000 population, about 34 percent in towns of 10,000 to 100,000, and 25 percent in towns under 10,000. . . Yaseen stated that in 1961 eight out of every ten selections of factory location were away from large urban areas, while a decade earlier only about half of the new locations were rural." The back-to-the-land movement of industry is and will be continuing, if for no other reason than the magnificent system of interstate roads now nearing completion.

Both S. 2223 and H.R. 10,867 would make credit available to firms locating in rural areas. But many rurally located plants are owned by large corporations which can borrow from city banks at the prime rate and don't need government's "soft" loans. Even independent rural firms are hardly wanting for credit, due to the great number of local banks, eager to serve them.

Credit supplied below market rates moreover, is, in effect, a subsidy. If such credit is offered and accepted on condition that the firm locate in a rural community, resources are being directed to an uneconomic location. This being done nation-wide, one can foresee a considerable misallocation of resources — a kind of taxpayer-subsidized landward movement which is not economically justified.

The nation would surely not gain by having its industries, even if only its smaller ones, located in rural areas merely for the sake of the development of those areas. A firm does not, after all, exist to employ resources. On the contrary, it employs resources only as it must in order to exist and grow, and it tries to employ the right resources, in the right proportions, and at the right locations. If it does not, its competitors will.

In the history of the world, migrations have occurred mainly in response to economic forces. Certainly this was the chief influence which in the century prior to World War I lured some 40 million people from Europe to the New World. This greatest unplanned migration of all time created the human base on which the world's richest civilization has been built. We cannot expect better results by substituting for such relatively free economic processes the decisions of government officials responding to political movements like Senator Humphrey's Rural Development Coalition.

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Because of the exceptional interest evoked and provoked by our January editorial endorsing the President's veto of the Javits-Mondale Child Development Act — and because of strong support for the bill among Ripon members — we asked Virginia Kerr to write a defense of the legislation and its concept. Now a free lance writer in Washington, Ms. Kerr has served as Field Representative for the Day Care and Child Development Council. She is author of articles for the Washington Post and other publications and of a chapter on "A History of Day Care in America" for a forthcoming compendium on Day Care to be published by Basic Books. A reply by editor George Gilder follows on page 9.

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## Nixon's Daycare Folklore

# The Children Still Wait

by Virginia Kerr

President Nixon's message vetoing the comprehensive child development legislation may well go down as a seminal document for social policy in the 1970's. To read the message is akin to reading "The Waste Land:" one asks, what does this really mean? and goes back for a second and a third look. To spend any amount of time in this kind of close analysis of the message (along with such attendant documents as last month's FORUM editorial) is to be strangely drawn to the theory that both the "plan and the incidental symbolism" of Mr. Nixon's statement (as with Mr. Eliot's poem) were suggested by Jessie Weston's *From Ritual to Romance*. The theory, as applied loosely, serves to make the simple point that Mr. Nixon discussed the merits of the legislation only in the context of mythology.

Presidents, as we all know, do not always say what they mean, especially on the eve of election years, and, as with poets, may resort to code words and metaphor to reach out to the folklore of a nation. Such was the case last December when, with most of the voting population engaged in a ritual of nostalgia for Decembers gone by and childhoods gone with them, Mr. Nixon suggested that the Javits-Mondale bill might threaten the home lives Americans are accustomed to living and undercut the stability of the American family. "Fiscal irresponsibility" and "administrative unworkability" seem to have been only asides to Mr. Nixon's central theme that S. 2007 contained certain "family-weakening" implications and his underlying message that the bill would imperil the home and the woman's rightful place in it. Perhaps this was all ideological patronage for the right-wing in 1972; it was certainly reflective of this country's undistinguished rec-

ord of support for child care over the years.

Since 1909, when the first White House Conference on Children heralded home life as "the highest and finest product of civilization" and recommended mother's pensions (the forerunner of AFDC) as a more acceptable aid to the children of the poor than day nurseries, American social policy has assumed that home is the place for women with children. And while, over the past 60 years, families may have changed in response to economic pressures or individual desires, the policy hasn't, and it has effectively precluded any significant public support for child care. To quote Mr. Nixon, "there is a respectable school of opinion that such legislation would lead toward altering the family relationship." Such is the depth and breadth of Mr. Nixon's objection to S. 2007, and such is the simple stuff out of which social policy's ambivalent and grudging accommodations to the realities of American family life have been made.

"Day care" then, has grown up as a service for the poor, because *mores* allowed poor mothers to work; but, because of its ties to welfare, day care has been a low budget item, providing for mediocre to indifferent day-time programs. AFDC, at the same time, has provided bare subsistence payments to mothers who, by choice or fate, had no jobs.

"Child care," on the other hand, has been what middle class mothers (with the help of the pediatrician, Dr. Spock, Piaget, and an occasional babysitter) have given to their children. And "child care" (as opposed to "day care") has included clean, well-lighted homes, soft sheets, good food, medical help, educational stimulation, mother's attention during the day and, hopefully, the year-round affection of both parents.

Formal child care centers (for children of women or single men not eligible for welfare programs) have, historically, been the province of private entrepreneurs and philanthropists, available according to demand at any price the market could bear.

All things being equal (and if one doesn't mind different strokes for different folks), the nation's "child care" needs should have been met. All things, however, have not been equal — or so it seems if one goes by reports on American day care and child care services, most of which say a lot about unmet needs and very little about actual programs. In March 1970, according to the Department of Labor, there were 5.8 million children under six whose mothers were working. At the same time, licensed day care centers and family day care homes (meeting federal or state standards of adequacy) were available for around 750,000 children. This is not to imply that the mothers or fathers of the remaining 98 percent of children in need of care are waiting to storm the gates of child care centers — many of their children are cared for by relatives, baby-sitters and neighbors, in arrangements that are probably just as satisfactory and responsive to day-to-day family needs as the average existing group day care facility.

There are, however, thousands of other children who are not so well off, children left to fend for themselves or cared for at great sacrifice to their parents. I know of one woman — a widow — who became a cabdriver so she could avoid welfare and care for her child while she worked; she put the baby in a carrier on the front seat of her cab. She was lucky, she said, not to have been an office worker because on her salary she couldn't have paid for good child care. On AFDC, perhaps, she might have survived, had she been willing to accept a \$2000 per year cut in salary and loss of personal freedom.

There are more of these "child care" stories than are fit to print, stories far removed from the anecdotes parents tell to their children. Coupled with statistics on the need for child care programs compiled by federal and private agencies, such stories certainly suggest that America needs child care as much as it needs motherhood or, from a different point of view, that public support for child care would prove that America means what it says about motherhood. This brings us back to Mr. Nixon, who should, as the country's leader and a parent himself, know that motherhood (fatherhood or parenthood) costs money.

Instead, he spoke to the "woman's place — free of charge" tradition in American social policy when, in his veto message, he remarked that the "child care" bill was too expensive, contended (ominously) that no one had "demonstrated the need for a child development program of this character," and told the Con-

gress, in so many words, to forget it. Mr. Nixon has opted (if one can judge by the veto and the provisions of his Family Assistance Plan) for the way we have always done things, for the conventions and biases of the past as models for getting by in the here and now and as guideposts for shaping the future. This might be labelled "conservatism," but, on this subject at hand, it is probably more instructive to say that Mr. Nixon is closer to Camelot than his least favorite predecessor.

### Flaws of FAP

The rationale for the Family Assistance Plan and the past decade or so of programs for poor children, working poor children, and middle class children, has been based on the assumption that every person has a fair chance to compete for jobs and that, at some point, if the individual tries hard enough, the need for public assistance will stop. In practice, the only persons to whom the theory has applied have been male, white more often than not. When the persons in competition for jobs and money are women (over half the population, over 40 percent of the labor force), the rules change, folklore takes over, the salary scale is cut in half, and job titles are revised accordingly. Little wonder that rising employment of women is an indicator of an economic downturn, not because women are easing men out into the streets, but because women earn, on the average, about half as much as men earn. In other words, in bad times (which seems to be a fair description of where we are now) women may go to work because their husbands are unemployed, not to fill jobs previously held by men, but to work for "pin money" wages. In good times, the employment of women at those rates is taken for granted. In general, when a woman has to work to support or help support a family, her chances of earning enough money to do more than break even are slim, especially if "child care" (or "day care") costs are added to her other expenses.

So goes the economics of chivalry in America, where, in Mr. Nixon's own words "day care centers to provide for the children of the poor so that their parents can leave the welfare rolls to go on the payrolls of the nation, are already provided for in H.R. 1, my workfare legislation." (H.R. 1 has yet to pass Congress, so these day care centers are, without question, mythical.) Mr. Nixon went on to say that "to some degree, child development centers (also mythical) are a duplication of these efforts."

In light of the fact that most of the families living in poverty are headed by women and given the opportunities offered to women by the "payrolls of the nation" and the money available to help care for their children (in or out of the home), it seems fair to conclude that the President's proposals for easing

the welfare burden and ending the poverty cycle are not promising. They will not, in any case, pay for "child care" as defined in terms of total family needs.

The Javits-Mondale bill, in fact, in its most ambitious of versions, proposed little more than to provide "child care" for a "day care" constituency (people eligible for welfare and the working poor), on the theory that children, regardless of their parents circumstances, would be better off in programs designed to meet family, not welfare needs. The bill also reflected the sentiment that working mothers (or fathers) would be better off if they had a sense that their children were well cared-for during the day. Javits-Mondale also asked that all existing federal day care programs be coordinated under a single agency, so as to relieve the present situation in day care (with over 30 different programs) which encourages local planners to learn more about manipulating the bureaucracy than about setting up programs responsive to children and families. But the President, as we have seen, viewed the whole idea of "child care" and a comprehensive system of federal services as subversive (of folklore); at one point, he remarked that the program would "be a long leap into the dark for the American people."

It is interesting to note, in response to this last of Nixon's observations, that during World War II, when women were counted upon to keep both the home and the factory fires burning, the nation did make a major investment in comprehensive "child

care." Centers for the children of working mothers (administered along lines similar to those proposed in S. 2007) were set up around the country within a few months of their authorization under the Lanham act, centers designed (at the request of the government) to "coordinate with home and family life." In addition, the government, during the war years, cautioned employers in areas not eligible for Lanham to "set up *no* barriers to employment of women with children." After the war, as one might expect, the money for "child care" was no longer forthcoming, and the Lanham centers, which had served around 40 percent of the children in need of care at that time, were closed.

During the past decades, the number of working mothers has increased steadily, and, according to a 1970 study, the rate of increase of working mothers is also growing. If all of America's working mothers refused to work until granted a fair shake in economic and social planning, perhaps the President and his advisors could come to a less romantic, more realistic appraisal of the need for "child care;" perhaps then the families who are, in Mr. Nixon's world, the "cornerstone of civilization" would be planned for as they are, not as the President thinks they should be. Unfortunately, the prospects for such an exercise in reality are slim, the children are still waiting, and their working parents and welfare parents will just have to get by.

### Statement from New York Ripon

The New York Chapter of the Ripon Society wishes to put itself on record in opposition to the editorial published in the January FORUM, which supports President Nixon's veto of the Javits-Mondale bill. The Chapter supported that bill and continues to support other comparable child care and development proposals. The Chapter feels that such a bill and similar proposals offer women, for the first time, the opportunity freely to choose occupational roles without sacrificing adequate supervision and education for their young children.

We believe that child care should be available for all women who choose to work. To confine the mobility of one segment of the population, and indeed the majority of the population (women constitute 53 percent), on the supposed logic that there is not now sufficient employment for the males in our society is rank discrimination and ignores the very cornerstone of equality upon which our democratic society is based.

In addition there should be an opportunity for all children, regardless of their economic status, to obtain the best care. Often children of working mothers are left in the care of inadequate babysitters who have neither the training nor ability to properly take care of those children.

All children should have the opportunity, at a very early age, to learn with other children of varied social and economic backgrounds. To maintain that public funds for day care should be available only for those at the lower end of the economic scale is to further isolate and ghettoize the poor child.

To argue that the President should have used as a reason for vetoing the bill that there would not be qualified personnel to run the centers is skewed logic. Funds from the bill could have helped provide for utilizing and/or training personnel, either through direct expenditures of those funds for that purpose or by using those funds for equipment and facilities, thus freeing private money for training of personnel.

It is fallacious to argue that the passage of the Javits-Mondale bill would have made it impossible to pass the Family Assistance Plan. Since when does the passage of one bill preclude the passage of another?

In conclusion, we would quote Elinor C. Guggenheimer, writing in the *New York Times* on December 21, 1971: "The use of day care to force mothers to work is misuse. The denial of help to children whose mothers are working is a national tragedy."

— BERNA GORENSTEIN



# Nixon's Breakthrough In Social Policy

by George F. Gilder



If the effects of American social policy were determined by its intentions, the fervor, compassion and generosity invested in the Child Development Act could ensure a healthful, stimulating, loving environment for every American child and a meaningful emancipation for every harried mother. But thirty years of experience with other social initiatives should give us pause, at least to consider the social and economic conditions which will shape the results of the program.

For our present social crisis is virtually defined by the gap between the intentions of previous policy and its achievements. In the past not only has our anti-poverty effort often helped the well off more than the intended beneficiaries, but it also has seemed to worsen the plight of the poor even when it succeeded in ministering to their evident need for money and social services.

The problem of regressive income distribution affects even the very centerpiece of our social programs, the social security system. This effort has lost its character as an insurance fund and has become a device by which workers with relatively small incomes are compelled to finance the unchallengable

national responsibility to help the aged in their prolonged retirement periods in a time of inflation. The system is obviously regressive because its tax impact falls chiefly on wages below \$9,000 annually; all other forms and higher amounts of personal income are exempt.

Another regressive tendency comes in our under-financed war on poverty. Lacking sufficient appropriations to have a substantial impact on the nation's income distribution, these programs instead tend to hire the educated to distribute dubious services and promote procedural benefits, such as "participatory democracy" and "community action," among people preoccupied with the exigencies of subsistence. Also contributing to the problem are the financing of our public schools through inequitable local taxes, and housing programs that destroy more low cost homes than they build. The subsidies go chiefly to builders, when the real housing problem of the poor is not so much an absence of facilities as the excessive proportion of their income required for rent.

One of the chief defects of our anti-poverty strategy to date, therefore, is that it has not redistributed income progressively — from the affluent to the poor. Much of the time, in fact, it has had the opposite effect, using scarce federal funds to employ or subsidize the well-to-do.

A second problem of our previous social legislation has been its tendency to hurt the poor even in the rare cases when it gives them money. In particular, many programs have subverted the stability of families by radically changing the structure of economic supports and incentives within which they were created, held together and psychologically balanced. A persistent and cumulative, if understandable, bias has arisen in our public charity, favoring women and children over their "shiftless" men.

Long before our present crisis in the Aid to Families with Dependent Children program (AFDC), Edward Wight Bakke studied the impact of welfare on unemployed whites. Daniel P. Moynihan's *The Negro Family* quotes his findings: "Consider the fact that relief investigators and caseworkers are normal-

ly women and deal with the housewife. Already suffering a loss in prestige and authority in the family because of his failure to be the chief breadwinner, the male head of the family feels deeply this obvious transfer of planning for the family's well-being to two women, one of them an outsider. His role is reduced to that of errand boy to and from the relief office."

Then came AFDC, with its requirement for families without fathers, dictating that a man could often best provide for his children by abandoning them. AFDC is both incomparably our most important poverty program and the most important single economic influence on poor families. Costing some \$9 billion, it is in fact our only heavily funded instrument of progressive income redistribution. Unfortunately men share in the money only to the extent they can beg, borrow or steal it from women. Now the "man in the house" disqualification has been essentially eliminated by the Supreme Court. But because a man who feels superfluous will soon leave even if the woman does not ease him or throw him out, this change has not substantially affected AFDC's family damaging impact. The result is that over 70 percent of poor black children lack fathers in the home.

It is clear that the structure of incentives created by AFDC has contributed to this problem. Also important, though, has been a general lack of job opportunities for poor males — caused by the technological blurring of the line between male and female employment, the decrease in characteristically masculine labor, with a premium on physical strength, and the control of such remaining jobs by racially exclusive unions, especially in the construction trades. A further aspect of this phenomenon is that, overwhelmingly contrary to the white pattern, more black females than black males have gone to college.

The victimization of the poor male goes beyond his financial plight. As gruelling as the lives of poor women may be, they can find meaning and purpose — a sense of a future — through the raising of their children. Poor males, however, without families who need them — or fathers to emulate — are deprived of crucial supports for their identities and ambitions. An important family role is nearly essential to a poor man's consciousness that he partakes of a social entity that transcends himself and will in a sense perpetuate him. Without this inspiration, he becomes in a sense an exile from the continuing natural order. He loses motivation to enter the onerous competition for regular long term employment and careers, loses any apparently compelling reason to eschew the transitory gratifications and male identity supports of drugs, promiscuity and violence. Sometimes he can get all three in Vietnam. More often he turns to the culture of the street.

Thus emerges the key difference between poor men and poor women without jobs: women tend to go on AFDC and raise their families; men tend more toward drugs and violence. It is unemployed young men — usually without families or fathers, or other conventional sources of male identity and love — who have made the streets of our cities a combat zone, who clog our courts and prisons, and who have fomented the social tensions that have divided and embittered our people. Among the working poor, in particular, the combination of street crime and high AFDC payments provokes dudgeons of outrage that may at least in part reflect an anguished perception of a threat to the familial order of the lower middle class.

In sum, our most important previous social programs have suffered from two key defects: they have been either regressively distributive (housing and social security) or socially destructive (AFDC). These defects account for the persistence of dire poverty and rampant crime despite an evidently massive effort to stem them.

### The Pattern of Failure

Now we have the comprehensive daycare proposal. This plan is as important in its potential impact as any of the milestones of our earlier social history. It is designed to be as expensive as AFDC and as pervasive as public education. Because of its enormous cost and the strong constituencies it will create for itself, the program will deeply influence the future directions of our social strategy. And a close examination will show that it fully fits the pattern of our previous failures.

Like them, it seems superficially unexceptionable. A "child development" act, oriented toward women and children, it proposes consolidation of existing federal childcare efforts, like Head Start and the rapidly expanding Social Security Title 4 program (neglected children, etc.), in a comprehensive daycare system that ultimately will be made available to all children of working mothers. Lest anyone oppose the program on the grounds that such institutional care may be unsuitable for small children, the centers will be legislatively committed to provide a stimulating environment (full of mobiles and bright colors), with valuable intellectual experiences, social contacts, and even health and psychiatric care where needed: a commodious haven from damaging home conditions and a release for women seeking gainful employment.

The program will cost \$2.1 billion in the first year. Although 65 percent of this amount is initially to be devoted to provisions for the very poor (making less than \$4,320), the program is comprehensive in principle and will be made available for everyone. Its advocates stress the need to mix economic classes in the centers — to avoid "ghettoizing" poor children. As appropriations mount, therefore, so will the pro-

portion spent on the relatively well-to-do.

At the Administration's insistence families making more than \$4,320 will be charged initially in accord with their ability to pay as determined by the Secretary of HEW (an estimated \$12 an month for families making up to \$7,000). But a Democratic amendment to the tax bill signed by the President permits families making up to \$18,000 to take full exemptions for day and homecare expenses for children under age 15, at a rate of \$2,400 for one child, \$3,600 for two, and \$4,800 for three or more. Since these exemptions will bring significant expansion of private care arrangements, the public centers will have to be heavily subsidized to compete and attract their economically varied clientele. Indeed, many of the advocates envisage ultimate establishment of systems as universal as the public schools, but more fully subsidized by the federal government, more varied and sophisticated in the services provided, higher in "teacher"-children ratios, and more extensively available throughout the year and around the clock (for the off-hours employment often held by the poor).

The estimate of \$20 billion a year given by Georgetown economist Selma Muskin and by the President seems realistic to create and maintain the program if it is to fulfill its legislative prescriptions more successfully than our present facilities for public education, which for the first five grades cost around \$12 billion. Of course, the more likely prospect in the near future is lesser appropriations and inferior performance: daycare rather than child development, with the government excelling only the performance of absent mothers and with few of the current, more affluent daycare advocates submitting their children to public institutions. In this case, a greater proportion of the cost to the treasury will come in the form of tax deductions, but the total amount may not be substantially less.

The central fact to understand is that this course of social policy, if undertaken, will be our most important new domestic departure. Its constituency is far more powerful than the constituency for programs of direct aid to the poor, such as the President's Family Assistance Plan. The middle and upper class women, who benefit from the daycare scheme's comprehensive aspects, have made the bill a non-negotiable demand of several of their organizations. This imbalance between the influence of the women's movement and the interests of the inarticulate poor ensures that if the daycare scheme is established it will tend to win in competition for scarce social funds in the future as today.

Since the impact and financial cost of comprehensive daycare is likely to exceed AFDC, it is crucial to determine whether its likely effect will be similar. Close analysis discloses one clear difference. While AFDC is

progressive — transferring money directly from the better off to the indigent — comprehensive day care tends to be relatively regressive in its impact on income distribution. In this respect it more closely resembles other of our misconceived social programs. It is similar to AFDC, however, in its female orientation.

### Financially Regressive

The regressive impact takes several forms. In the first place, the program is relatively regressive in comparison to its chief competitor for scarce new social funds: the Family Assistance Plan. In its impact on income distribution, FAP admittedly is one of the most progressive programs proposed by a President since the Homestead Act, since all the money goes to the poor and virtually none is contributed by them. Yet it is to FAP — with its daycare provisions for the very poor — that comprehensive daycare should be compared when considering alternative uses for stringently limited federal funds. Other more progressive uses for funds come in such areas as prison reform, medical care and housing vouchers for the poor.

The comprehensive daycare proposal is regressive in other respects. In a great many instances, the subsidy will not chiefly aid the woman freed to take employment, since the money she receives (\$3,960 annual minimum wage) minus work related expenses like transportation, will not greatly exceed the real value of her presence at home plus welfare. Nor will her wages often much exceed the real cost of the daycare itself (about \$2,000 for *each* child) plus transportation. The real beneficiary is the low-wage employer who can exploit an artificially enlarged labor force and resultingly depressed wage rates.

None the less the real childcare crisis *is* among indigent mothers. Three quarters of such mothers with small children and without male providers *already* work much of the time and facilities for their offspring are desperately inadequate. Within this group familial disaster has already struck and FAP's daycare provisions



plus workfare subsidies can ameliorate the damage.

To extend doubly subsidized daycare to everyone, however — combining a vast federal program of centers with a massive offering of tax exemptions applicable to children up to age 15 — will artificially stimulate the 80 percent of mothers with children, not now in the labor force, to join it. Within this group, employment represents a much greater benefit for wealthy mothers than for the poor, because the difference between the real value of their work at home and work outside is much larger. While daycare will release the poor for unremunerative drudgery, it will permit the more advantaged — including millions of families that already have a breadwinner — to take the better jobs to which poor and lower middle class breadwinners might otherwise aspire.

The combined program also will regressively require taxpaying families with one breadwinner to doubly subsidize those with two — even though the families with two will be diminishing the job market for others and even though the average family with two breadwinners makes more income than the average family with one. Taking many of the “meaningful” jobs envisaged by daycare advocates are likely to be already advantaged women married to men already with “meaningful” employment. Helping to finance these women will be middle and lower class family heads and taxpayers who in addition will find the job market, their wages, and their own upward mobility proportionately contracted.

These men, moreover, have yet to be informed — and lack wives who understand — that the masculine role and psyche are no longer dependent on success as a provider. Lower and middle class men and most of their wives, as is conclusively demonstrated in the polls on the subject, inexorably believe that making money is where it's at for men, but not so much for women, in this society and the psychic wounds inflicted by a pervasive restriction of relative male earning capability are likely to have dire social and political consequences. The daycare subsidies, in fact, will tend to extend to the lower middle class the kind of familial catastrophe currently endemic to the ghetto.

Sensible plans for new federal expenditures must face the reality of a grave job crisis. With well under half of all women in the job force we already have 6 per cent unemployment. During the next decade, the post-war generation of young people who have been flooding our schools for the last decade will be entering the work force for the first time. To accommodate them at current ratios of male and female employment, we will have to create 40 per cent more jobs every year than we created annually during the last ten years. Only some of this employment can be generated in the public sector (perhaps eventually a million positions for women in daycare itself). Only some of the jobs

can be created by shortening the work week, which in a highly competitive world economy can be achieved only in proportion to productivity gains. Since greatly higher taxes for public sector projects will cause a contraction of private sector investment and job creation, most of the work must be provided through rapid national growth. Peter Drucker has estimated that approximately 5 per cent annually will suffice. But it is manifest that there are severe limits on the amount of new work that will be available.

### **The Disciplines of Scarcity**

Yet without the creation of vast numbers of new jobs, the comprehensive daycare program on which we are asked to lavish our scarce social funds will only exacerbate our social crisis. There will be fewer jobs relative to the work force, depressed wages, less well attended homes, more sexual tension and competition, and more serious maldistribution of income.

This account of the failure of our social programs and the flaws of comprehensive daycare suggests certain principles to be observed in enacting new approaches. Our social policies must face the disciplines of scarcity. With limited funds to invest in social programs, we have to be rigorously sure of our priorities or we will find ourselves repeating and extending the mistakes of the past.

We must acknowledge that when we allocate money to one social program, we may well deprive another; and that when we subsidize work force entry for one group (middle class wives, for example), we either directly or indirectly reduce employment, wages, and vertical mobility for others (black middle class breadwinners, for example). This rule increasingly applies across sexual barriers, as characteristic male employment, emphasizing physical strength, is steadily diminishing, even in Vietnam.

When we persistently orient our social programs and special subsidies to increase the self-sufficiency of poor and lower middle class women and to diminish their dependence on male providers, moreover, we needlessly intensify an already powerful trend. We exacerbate the social, economic and psychological crisis of young males, extend it to new classes and generations, and undermine familial constraints.

All these principles are governed further by the reality that when we respond in kind to the urgent, immediate needs of the poor, we may perpetuate an essentially sociopathic environment by subsidizing it. It is thus crucial to structure our assistance in a way that changes the sociopathic culture rather than reinforces it. We should attempt to abolish the poverty system rather than make it work better and deliver more efficiently its chief products: broken homes with young men uninterested in familial order or durable employment, who find their masculine identities in lives of drugs, violence

and crime.

The comprehensive day care programs and subsidies enacted by Democratic Congressional majorities do not respond to these problems or stipulations. They gravely distort our national priorities and delay the time when we can address the desperate problems of the very poor.

In the past, when conservatives made such a case against a new Democratic social scheme, they left themselves open to the charge of aimless obstruction. The Nixon veto of comprehensive day care, however, came as part of a total anti-poverty strategy based on a scrupulous inventory of our resources and priorities. The veto, in fact, was indispensable to carrying through a program that for the first time in our history gives promise of banishing from our land the most dire and debilitating forms of poverty. The centerpiece of the strategy is the Family Assistance or workfare plan.

### Identified with Ripon

This program, which was temporarily saved by the President's daycare veto, is distinctively Republican and should unite the party. Conceived by Milton Friedman, Barry Goldwater's economics adviser, it was adopted, refined and promoted by the Ripon Society. Ripon members and associates have been its most fervent advocates within the Administration. There is no idea with which the society is more deeply identified. There is no program on which the future reputation of the Administration and of Ripon so much depends. And in every respect the Family Assistance Plan avoids the flaws that have doomed Democratic poverty programs and that incapacitate the comprehensive daycare proposals.

FAP, to begin with, is progressively distributive. It gives money exclusively to the poor — all the poor, regardless of sex. In fact it would, in one fell enactment, eliminate the worst poverty in the country. Migrant farm workers, Southern share croppers, and destitute Indians would find their incomes as much as quadrupled overnight. (This gain will admittedly cause great hardship for Democratic Presidential candidates seeking exotic "compassion" scenarios).

FAP, however, will change the structure of incentives for the poor everywhere. One half of the poor already have jobs. The present AFDC system exerts continuous pressure on them to leave their work and depend on a combination of welfare and unreported parttime or criminal earnings. If FAP is not enacted, many of these men can be expected to succumb to the pressure and follow the route previously taken by so many ghetto males. With FAP they will be given a margin of assistance to allow a satisfactory performance as provider. If they lose their jobs the psychological damage may be serious; but there will be less incentive for them to leave their families since their presence means an extra \$600 in payments. If, moreover, the welfare wife is prevented by childcare responsibilities from

taking work she wants, daycare facilities will be provided. FAP includes a new \$750 million daycare effort within its initial \$5 billion in additional appropriations. On the other hand, by refusing to take proffered employment in the unlikely event it is available, she will forfeit her own but not her family's benefits.

The initial levels of FAP are necessarily low. But they are part of a comprehensive program of employment, housing and educational subsidies that are interrelated in an overall system of priorities "consciously designed to cement the family in its rightful place as the keystone of our civilization" as the President put it. There remain serious flaws. For example, the WIN program, a foolishly conceived effort to train welfare recipients for work, has failed to find jobs for 80 per cent of its trainees and thus reinforces their self-image as losers. But the overall strategy is sound and represents a major breakthrough in social policy for the Administration that contrasts strikingly with the regressive and uncoordinated priorities of recent decades — which would have been perpetuated in the Democratic daycare bill.

The daycare issue thus poses a severe test for America's liberals. It will determine whether, in their vaunted pragmatism, they have learned anything at all from the failures of our past social policy; and it will determine whether in their ostensible commitment to a war against poverty they can ultimately resist a movement led by upper class moralists and ideologues with a retrograde program inimical to the interests of the poor.

There is little hope, needless to say, that any of the liberal democrats can pass this test. They are already committed to the bill. One might almost say, in view of their incredible reaction to the veto, that they are fanatically committed. The usually sober Walter Mondale, for one example, called the President's generally sound message "irresponsible, cruel, hysterical, and false" . . . "one of the most irresponsible statements I have seen in my many years in public life." Other Democrats made only slightly more temperate charges.

In any case, the issue is likely to be resolved by the Nixon Administration, and the test it faces is even more formidable. The President is aware of the stakes. He is committed to a genuinely valuable anti-poverty program, responsive to the real needs of the poor. The test he faces is not of perception or policy but of fortitude and forensics. The President must have the courage to veto comprehensive daycare once again and he must have the polemical resourcefulness to persuade the people of the rightness of his position. Because the issue is complex, moreover — and because on the superficial level his opponents have the popular stance — he cannot prevail with postures directed toward mass majorities. He must persuade the national audience of intelligent and responsible opinion leaders. And the best

way to gain their confidence is to demonstrate beyond cavil his commitment to the alternative anti-poverty strategy exemplified by the Family Assistance Plan, which he has correctly identified as the most important new social program of the last thirty years.

### Author's Postscript

In conclusion I would like to address myself, without any great hope of success, to a likely misinterpretation of my argument. It will be maintained that this article implies opposition to women working, implies that with a limited number of jobs men should be given discriminatory priority. But my point is different. I do not argue against the increasing trend of women working. I argue against the high priority of spending many billions of dollars on double, regressive *subsidies* that will inopportunistically accelerate the trend: encouraging women to enter the work force at a time when there are few jobs except for the most advantaged women. I argue against the principle that families with a single provider should doubly subsidize more fortunate families with two. And I contend that the realities of employment for the poor in most cases make release from the home less of a liberation than an exploitation. I also focus on the psychological problems of males deprived of a crucial role of familial provider, and I warn against policies that might extend the crisis of poor families to the lower middle class. And I assert that comprehensive

daycare violates our first social priority: elimination of poverty through progressive redistribution of the nation's wealth.

It would be obviously wrong and futile, however, for me to oppose entry of women into the work force. They are already there in huge numbers and are expanding their participation. In the upper, most educated classes, women often have such attractive options that it already seems more than worth their while — particularly with the new exemptions — to pay for daycare.

What I protest is the perfervid inclination of upper class women — who may see their own homes and families as a form of bondage and their offices as a liberation — to generalize on their own self-interest: to transform their own personal choices into social imperatives to be promoted by heavy appropriations of scarce federal funds. I object to their failure to consider the full social and economic implications of proposals that they offer as unnegotiable demands. And I question their insouciant willingness to restructure the families of the poor and manumit others to substandard wages. The sexual roles and responsibilities of poorer Americans are shaped by a complex of opportunities far more marginal — form a social fabric far more delicate — than we have long understood. Our policies must from now on be based on this understanding. We should be grateful that the Nixon Administration shares it.

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## Political Notes

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### Richardson's Address

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WASHINGTON — Last December 17, Health, Education and Welfare Secretary Elliot Richardson delivered himself of a 53-page statement of administrative purpose and philosophy before his own HEW employees. He called it his "Castro Speech," but it was vintage Richardson with very little, if any, of the taint of a hired speechwriter smoothing off the rough edges. For in a speech from Richardson's own hand, there are only the sharp con-

tours of the finely-honed, carefully crafted argument.

In this case the "argument" was a precise statement of the problem — the Republican problem, the HEW problem and the Richardson problem. It is the problem of swimming even harder against the tide of media saturation and public opinion because you know in some very basic way you are right.

Richardson lays out the situation — a pervasive disillusionment with government which stems from the sheer difficulty of our goals, from our failures and, most important, from the gap between expectations and reality. And he calls for candidly facing the constraints of prior commitments and revenue expectations.

He can be excused for not trying to fit either the Austin, Texas, School desegregation case or the Nixon day-care veto into his scheme.

But there is real doubt as to whether public confidence and expectations can ever be affected as much by choices made in his department as by symbolic decisions articulated from the White House.

Richardson can be faulted for the "choices" he has made. He has adopted as a strategy the dual goals of preventing dependency, and of accomplishing real institutional reform. But these goals tell us little about real choices among alternatives when all HEW options seek to prevent future dependency, and institutional reform seeks more a structure for governing than a strategy for social change.

None the less, the best of Richardson unfolds as in his great faith in process and procedure, he elaborates this governing structure. What he is accomplishing at HEW, and has articulated in his speech, is a managerial revolution which may

narrow the expectations gap and restore public confidence.

The key elements are wider participation in decisions, more planning with evaluation and cost/benefit analysis, more decentralization, and less red tape. He wants to consolidate grants while maintaining technical assistance for the integration of social services, and involvement with general purpose governments at the state and local level.

His theories have led to better morale in the department, mention of his legislation (The Allied Services Act) in the President's State of the Union Message, and his notion of a dollar/time/energy unit (which he calls the HEW, pronounced "Hue") to be developed for use as a constant in measuring cost-benefit ratios among departmental activities.

For Richardson the medium is the message — the capacity to deliver well on commitments, to know what is going on, and to maintain a process which maximizes values without eliminating instincts. This approach is, if not an end in itself, the best way we know to carry on the public business.

The inability of his predecessors and his colleagues to appreciate the immense value of a candid, open and informed decision-making apparatus is a chief source of the disillusionment they all sense around them. But Richardson's overwhelming confidence in the potential of each man to assume responsibility leads him to believe that openness and decentralization can work.

And the fact that he resists simple colorful sloganeering panaceas for our ills is refreshing and, if you will, Republican at its best. Unfortunately, for Richardson and for Republicans, the little attention paid to this hard-nosed approach is discouraging, but symptomatic of the evils to which it is addressed.

— MARTIN A. LINSKY  
*(Assistant Minority Leader,  
Massachusetts General Court)*

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## Challenge to Shipley

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WASHINGTON — District Republican politics heated up considerably in January with the emergence of a serious challenge to incumbent national committeeman Carl Shipley, who announced his intention to seek re-election in the May 2 primary. Shipley opened the campaign informally while appearing at his request on the WTOP-TV local program "Washington News Conference" to strenuously oppose home rule. The District Republican Committee is on record supporting home rule, while its chairman, Edmund Pendleton, Jr., a Shipley supporter, serves on the D.C. citizens Home Rule Committee. Shipley created a furor by arguing that the District Republican party existed not to contest local elections, but to serve the national party.

Shipley's chief opponent is Robert Carter, president of a public relations firm, who has good ties to President Nixon despite his support of Nelson Rockefeller in 1968. In that year Carter ran on a slate, considered the more conservative, which lost to Shipley. Now he claims enough support, with the special help of Black Republicans, to gain endorsement from the Central Committee at its March 15th meeting.

The man in the middle appears to be Ned Pendleton, who in order to preserve party harmony has asked both candidates not to run separate slates for the central committee. Shipley has reportedly rejected the offer and could conceivably run a slate against the group which originally elected Pendleton to office.

A new entry into the race for the Republican nomination to oppose delegate Walter Fauntroy is Gen. Hassan Jeru-Ahmed, who recently resigned as Director of the Black man's Development Center, a heroin addiction treatment project. Hassan registered as a Republican

January 19 — the day he announced — because he said he supports President Nixon's efforts "to reduce welfare swindles" and to improve educational standards "for all people without bussing." Hassan's announcement followed by two weeks an HEW audit report charging the BDC with mis-spending the bulk of \$39,529 in federal vocational training funds.

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## Milliken's Surprise

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LANSING — Governor William Milliken on January 7 surprised members of both parties by proposing that Michigan hold a presidential primary.

The story of this move began in August, 1970, when Michigan held its precinct delegate elections to determine who will choose the state delegates, who in turn will choose delegates to the national convention. With the eighteen year olds being granted the vote a year later, pressure mounted to have the 1970 election annulled.

The Detroit-Ann Arbor Ripon Society joined with Common Cause to prepare a court case against both parties on the issue.

A week before the court case was to be filed, however, the Democratic Party filed an almost identical complaint and Democratic state legislators introduced legislation.

Ripon members continued their activities by urging Republican leaders not to make this a partisan matter. Unfortunately, the bill was backed by only two Republicans, but it did pass the state House of Representatives. At this time, the youth advisory council for the Republican State Chairman unanimously endorsed the bill.

It was at this point that Governor Milliken held his press conference, confounding the Democrats, who had been trying themselves to make it a partisan issue.

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## Rockefeller's Stance

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ALBANY — Through the generosity of the State Legislature in two turbulent special December sessions called by Governor Rockefeller, New Yorkers received as Christmas presents higher taxes, reapportioned legislative districts, and a clearer view of the directions in which the Governor's pragmatism is taking the state.

In first session, which convened December 14, the Republican-controlled legislature did just what was expected of it: drew tortuous district lines that potentially produce a GOP gain of 10 Assembly and 4 Senate seats, taking advantage of the fact that population has shifted away from Democratic New York City to the Republican suburbs. And, of course, the Democrats did just what was expected of them: let up a howl. A group of Democratic lawyers has filed a suit, but legislative leaders can maintain that the redistricting bill has bipartisan support, since a score of Democrats pleased with their districts voted for the bill. Congressional redistricting, in which both Manhattan and Brooklyn will lose one seat (bringing the state's delegation down to 39), may be tackled early this month.

The partisan battles of the first session served as a prelude to the second. Two days after Christmas, the lawmakers wearily trudged back to Albany to concern themselves with the state's fiscal crisis and a deficit of \$770 million for the fiscal year ending March 31, 1972. Lest anyone think this sum could be swept under the rug, the Governor also warned that the projected deficit for the *next* fiscal year was \$720 million, which meant that for the next 16 months the state would not be able to make ends meet, to the tune of \$1.5 billion (a sum greater than the combined budgets of Wyoming, Rhode Island, South

Dakota, New Hampshire, Nevada, and Alaska).

The staggering deficit is chiefly caused by the recession, by the lack of expected federal funds and welfare cutbacks, and by voters' defeat of the \$2.5 billion Transportation Bond Issue in November (some \$300 in capital funds from the bond issue had been included in the current expense budget — a rather questionable practice).

In early December Governor Rockefeller faced up to the fiscal realities and announced a pay-more-and-get-less program to close up the deficit, after working details out with Speaker of the Assembly Perry B. Duryea and Senate Majority Leader Earl W. Brydges. The plan called for new taxes, a freeze on state aid to schools and localities, temporarily delaying various state payments, and praying for increased federal funds. To make this fiscal pill a little easier for Democrats to swallow, a plan to limit the New York City subway and bus fare increase to a nickel (to 35 cents) was thrown into the package.

What the Governor had hoped would take a day or two dragged out for more than a week. After promises, deals, pleas, and arm-twisting, a compromise package calling for \$407 million in new taxes and a 35 cent subway fare was finally passed on January 4. The last regular session of the legislature, which made vicious cutbacks in wealth, welfare, and aid to cities had been seen by many as having unwillingly succumbed to the conservatism of Speaker Duryea and his upstate Republican colleagues (more than half of the GOP Assemblymen were elected with Conservative Party support). This special session was expected to show to what extent the Governor has been and will be a willing or unwilling victim of Duryea's conservative cabal.

It was obvious from the start that Democratic votes would be needed for passage — and their price was Rockefeller's promise not to cut

back next year's budget in the social service areas. The compromise Governor Rockefeller forged was a progressive and responsible one, and indicated he was willing to work with the more liberal Democratic elements, rather than the upstate conservative Republicans. In the Assembly, more than a third of the "yes" votes were provided by the Democrats.

In Mid-January Rockefeller presented a "hold the line" budget of 7.9 billion dollars (the same as last year) with increases slated only for prison reform, welfare and education, and a few days after that delivered his State of the State message which sharply attacked the Lindsay administration. The Mayor immediately inflated the event by denouncing the Governor as "a tool of the White House." The whole vituperative exchange boomeranged and did little good for either party in the exchange.

There is little doubt that in general the Governor's actions last year were increasingly pleasing to the GOP right-wing. John Hamilton, an editorial writer for the New York TIMES, has pointed to the handling of the Attica prison riot, the lessening of the flow of progressive legislation (and the concomitant increase in conservative bills), and the much warmer relationship with President Nixon as proof of a Rockefeller transformation from a liberal to a conservative. The speculation is of course that the Governor is doing all this to line up a Cabinet position (or even the Vice-Presidency) later this year.

The special session, however, showed that the trend of Rockefeller's actions is neither as clear nor as irreversible as some would believe. He has not, and will not, pass a point of no return; neither liberals nor conservatives should write him off: he is a superb politician and pragmatist, flexible enough to deal with conservatives or liberals when the electorate or occasion demands.

GLENN S. GERSTELL



# RIPON PRIZE ESSAY



A Special 14 page Supplement

## Crimes Without Victims

*by Peter V. Baugher*

### Editorial Introduction

The nation had reason to applaud when President Nixon reported in his State of the Union Message last month that "the rate of increase in crime has been slowed, and here in the District of Columbia . . . serious crime in 1971 was actually reduced by 13 percent from the year before." Yet police department statistics, not to mention the evidence presented each day in the morning newspaper, indicate that street crime remains one of the most pressing problems facing American society.

Despite this seemingly incontrovertible fact, law enforcement resources are presently being squandered

on such relatively minor, "victimless offenses" as drunkenness, disorderly conduct, possession of marihuana, gambling, and sexual deviance. Given the limited supply of men and money allocated toward preventing and punishing violations of the law, it is apparent that

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policemen, judges, and correctional officers could be better employed if they were permitted to concentrate their efforts on combatting the more serious crimes against property and persons.

The issue here is not, however, merely one of optimal allocation of scarce resources. A substantial portion of the crime problem is due directly to our overweening criminal law itself. By making it illegal to trade in such widely-sought goods and services as gambling, narcotics, and prostitution, we have cultivated significant amounts of "secondary" or "satellite" crime — offenses which would never have been committed had society not defined the primary act (gambling, for example) as an infraction of the penal code.

Important civil liberties are also threatened by the enforcement of laws against "victimless crime," those offenses in which the public can have no compelling interest because there exist no complaining victims. Prosecution of such statutes offers a ready mechanism for police harassment, and seems to insure frequent disregard of constitutional rights. What is more, the American philosophy of self-government and individual freedom militates against this kind of paternalism and scorns bureaucratic attempts to dictate the boundaries of legitimate private action.

The consequences of misusing the criminal law are thus highly troublesome. What is needed is a positive program of law reform; a program which would include the following elements: (1) Free exchanges of contraband goods and services — consensual acts between willing adults — should be permitted, but ought simultaneously to be licensed, regulated, and taxed. (2) Persons found guilty of injuring themselves, whether through drink or drugs, should be taken out of the criminal justice system and furnished with medical and counselling services. (3) Finally, indefinite nuisance statutes should be revised to limit their application to specific instances of misconduct of at least some severity.

Though the relaxation of laws against victimless crime may lead initially to an increase in conduct formerly proscribed by law, this increase must be measured against society's enhanced capacity to regulate such behavior, together with the termination of our futile and costly efforts at enforcement. With the adoption of recommendations such as those outlined above, America's criminal law would be leaner, stronger, more highly-respected, and more likely obeyed. Certainly it is now time that we relieved ourselves of the heavy burden imposed by the counterproductive crusade against crimes without victims.

## I. Our Crowded Courts: Embattled and Overburdened

America's system of criminal justice is today overloaded and under-achieving. In 1969, 1,110,000 serious ("index") crimes were reported to the Federal Bureau of Investigation. Police, however, were able to identify suspects in only 225,000 of these cases, or just over 20 percent of the total. These cases were adjudicated in scandalously congested courts, with judicial delays so pervasive, that the image of swift and sure justice for all offenders is at present little more than an illusion. And as for our correctional institutions, the dominant opinion was expressed recently by Supreme Court Chief Justice Warren E. Burger: "If one set out on a deliberate program to brutalize and dehumanize people and produce more criminals, this would be the way to do it." What is the problem?

One problem is that America's criminal law is overgrown with inappropriate and unenforceable statutes which seek to regulate what is essentially private behavior. Our exag-

gerated conception of the capacity of penal structures to influence men has lured us into playing the role of moral entrepreneur. For the preservation of our own best interests, we can no longer afford to indulge in this costly diversion. It is imperative now that the criminal law begin once again to live within its means.

Maintaining and caring for the "melange" of criminal prohibitions is a costly undertaking. The criminal justice system, like any of society's other institutions, has a variable but finite capacity. Its resources, both tangible, such as men and money, and intangible, including public respect for law, are not unlimited. Though one might wish that it were possible to deter all disagreeable behavior by the passage and enforcement of criminal statutes, such a hope is obviously far from reality. Some laws may be unenforceable, others, enforceable, but only at an exorbitant price. Because the criminal law is not omniscient, we must choose which conduct we most want

to curb, by comparing the cost of each proscription with the "cost" of the behavior to be banned.

The importance of these decisions is underscored by the fact that it is the criminal law which sets forth the minimum conditions of man's responsibility to his fellows, holds him to that responsibility, and serves as the community's last resort instrument of social control. The uses made of this most awesome and coercive of sanctions should be questioned closely, particularly at a time when changes in values and styles of life are placing great strain on many facets of the legal system.

What we require is a set of criteria for determining the circumstances under which a legislature should mobilize the resources of the penal system to discourage disapproved conduct. Stanford law Professor Herbert L. Packer suggests that criminal law is enlisted most effectively in situations where: (1) the prohibited behavior is considered socially threatening by

the preponderance of the population and is condoned by no significant segment of society; (2) the act may be dealt with through even-handed, non-discriminatory enforcement; (3) prosecution will not expose the criminal process to severe quantitative or qualitative challenges; and (4) the problem cannot be handled in any alternative (less stringent) manner.

Finally, even behavior that it is desirable and possible to deter or which is indicative of the dangerousness of individuals who engage in it, should not (on that account alone) necessarily be defined as criminal. The consequence of making an act criminal may be more distasteful in the long-run than the results of the banned activity itself.

In applying these criteria, it is helpful to divide all actions presently denominated as being criminal into two categories: (1) those in which there is an injured party in the conventional sense, such as crime of violence (murder, rape, assault) or against property (burglary, larceny, auto theft); and (2) those which lack complainants, such as offenses against morality or self (gambling, prostitution, drunkenness, drug abuse) or minor public nuisances (disorderly conduct, vagrancy). The second classification encompasses situations in which there is a willing exchange, among adults, of strongly demanded but legally proscribed goods and serv-

ices, coupled with absence of apparent harm to anyone outside of those directly involved. These offenses are commonly known as "crimes without victims."

Taken together, crimes without victims constitute the borderland of criminal law, the periphery around which swells the debate on what is private and what is public. Packer's formula, one discovers, can be stretched to cover these crimes only with the greatest difficulty. The public does not consider such offenses to be particularly socially threatening — at least not compared with murder and robbery. The covert and consensual nature of these offenses renders even-handed, non-discriminatory enforcement virtually impossible. And one need merely consult the FBI's annual arrest statistics or speak with law enforcement officers to conclude that criminalizing victimless crimes has exposed our legal system to severe quantitative and qualitative strains.

The penal code must be reformed to reflect these realities. Those "offenses" in which society has no compelling interest — i.e., where there are no complaining victims — should be excised from the criminal justice system. In this sense, writes Berkeley Professor Jerome H. Skolnick, "the 'complaint' may serve a very important function in the administration of criminal law, [for] it directs the activities of law enforcement to those asocial acts that are most dis-

turbing to the citizenry."

For the purpose of this inquiry, victimless crimes will be subdivided into three parts, each of which (though related to the other two) bears unique characteristics. The first of these categories is *consensual acts*, voluntary trafficking in illegal goods and services. Accounted for in this division are gambling, marihuana possession, prostitution, homosexuality, pornography, and abortion. Second, are *assaults against the self*, self-inflicted drunkenness (exclusive of driving while intoxicated), narcotics addiction and drug abuse. Lastly, one may identify the category of *nuisance and minor misconduct*, which encompasses disorderly conduct, vagrancy, and suspicion of malefaction.

Of the 5.8 million reported arrest in 1969, 2.5 million — 43 percent — were made for crimes of these varieties. Of the ten most frequent causes for arrest, those offenses ranked one, two, and eight — drunkenness, disorderly conduct, and narcotics — taken from the list of crimes without victims. Trailing this roster of crime, but still prominently employed, are laws against vagrancy, gambling, sexual offenses (pornography, abortion), prostitution, and arraignments made for "suspicion of wrongdoing," an unclassified infraction.

These, then, are the offenses that are overloading our criminal law. The costs of this process of criminalization must next be assessed.

## II. The Multiple Costs of Criminalization

In the realm of controlling crime, as in every other matter, one does not receive something for nothing. Enforcing laws against crimes in which there are no victims is extremely costly — resulting in four highly serious detriments to our system of law and to our society as a whole: first, *misallocation of law enforcement resources*; secondly, the *cultivation of secondary crime*; third, the *development of antisocial attitudes and groupings*; and, finally, the *abridgement of fundamental freedoms*. Together, these costs constitute a persuasive case for proposals directed toward sensible statutory reformation.

During the past four or five years expenditures for crime control have risen dramatically in all jurisdictions. The federal government has increased its outlays for the reduction of crime from \$355 million in fiscal year 1965, to \$1,900 million requested in fiscal 1972. State and local spending has also attained new — and ever more burdensome — heights, expected to push the combined crime reduction budget of federal, state, and local governments over the \$12 billion mark in 1972. Yet the crises of underfunding, inadequate manpower, coupled with evidence of rising criminality and a declining clearance rate,

continue to confound and embarrass us.

### Misallocation of Resources

One of the principal reasons for our difficulty is that we have employed the sanctions of the criminal law indiscriminately and inefficiently. How much money that could have been spent in solving murder and assault cases is instead allocated toward apprehending persons who wish to gamble, visit a prostitute, or take drugs? How many policemen that could be investigating robberies and burglaries are assigned instead to detain drunks or to make arrest for such

relatively inconsequential nuisances as disorderly conduct or vagrancy? How much rehabilitation might we be able to obtain for alcoholics and drug addicts if we were to transfer primary responsibility from the criminal justice system to medical treatment programs?

Although no one has yet assembled the data to provide a complete answer to such questions, certain preliminary estimates can be ventured. Over two-fifths of all arrests made in 1969, were for crimes in which there was no direct victim. Drunkenness, alone, accounted for almost one-fourth of the total number, or more than 1.4 million arrests. The expense of treating intoxication as a crime includes at least four elements: (a) cost of apprehension; (b) costs of maintaining accused prior to court appearance; (c) court costs (judges, bailiffs, prosecutors, public defenders, probation officers); and (d) cost of incarceration. Norval Morris and Jordan Hawkins of the University of Chicago place the charge for processing each drunk at \$50.

But the price of punishing drunkards exceeds these plain dollar projections. Speaking of the broader problem, the National Crime Commission reported its finding that: "The great volume of these arrests places an extremely heavy load on the operations of the criminal justice system. It burdens the police, clogs lower criminal courts and crowds penal institutions throughout the United States." According to the Council of State Governments, inebriates constitute almost 50 percent of the population in local county jails.

The point of view of law enforcement officers was expressed by Philadelphia District Attorney Arlen Specter:

The latest available police statistics show that of 97,688 total arrests in the year 1968, 41,660 were for intoxication. This heavy burden on the police department not only has been expensive but also has deprived us of the safer streets we might have had if the police were not busy with drunks.

What is true about the costs of the decision to prosecute drunkards and alcoholics is equally applicable

to each of the other crimes without victims. Californians spent \$75 million on enforcing marihuana laws in 1968, and outlays for this purpose are likely to top \$100 million for 1971.

Upholding the law is an expensive proposition in a democratic society. We must admit to ourselves that in the absence of truly massive increases in budgets for crime fighting, it will be impossible to protect the American people against *both*: (a) serious offenses (such as murders, rapes, assaults, and robberies); and (b) minor infractions in which there is not even a complaining party (such as gambling, possession of narcotics, drunkenness, or disorderly conduct). A choice must be made.



The present approach is profligate and haphazard; a necessarily unsuccessful attempt to undertake everything at once. Unless one truly believes that every "crime" is equally dangerous to the society, the logic of concentrating all available manpower on those offenses which are most threatening is obvious. As President Nixon urged last March 11 in an address to the National Conference on the Judiciary: "We have to find ways to clear the courts of the endless stream

of 'victimless crimes' that get in the way of serious consideration of serious crimes. There are more important matters for highly skilled judges and prosecutors . . . [and, one might add, for policemen and correctional officers, too]."

### Secondary Crime

A considerable portion of our huge problem is due directly to our overweening criminal law itself. By prohibiting widely sought goods and services, we have cultivated significant amounts of "secondary" crime — offenses which would never have been committed had society not outlawed the primary act (e.g. gambling).

Because of their illegal status, black-market goods and services are generally sold by restricted groups of highly-organized criminal entrepreneurs. The risk of being arrested greatly limits the number of sellers. And the high cost of overhead, the prospect of monopoly prices, anticipated economies of scale, and a desire for underworld power, act as incentives toward organization. The conjunction of what amounts in effect to a protective tariff on all illegal products, and the inflated potential for controlling the traffic (unhindered by antitrust laws), makes these "industries" extraordinarily profitable and attractive to organized criminal elements.

Of all illegal enterprises, gambling is today by far the most lucrative. Estimates of the annual volume of betting receipts vary from \$7 billion to \$50 billion, but most experts believe that this sum exceeds \$20 billion yearly, with profits of \$6 to \$7 billion (30-35 percent) going to the sponsors. Narcotics sales and prostitution are also remunerative to recreant financiers, and altogether, the National Crime Commission has found that: "Organized crime takes about twice as much income from gambling and other illegal goods and services as criminals derive from all other kinds of activities combined."

Not only does the functioning of our criminal law provide the financial underpinnings of organized crime, enabling it to prosper and expand into new ventures (both legal and illegal), but it also indirectly permits the accompanying victimization of the syndicate's clientele. Because wagering is

unlawful, those who wish to place bets must do so with representatives of criminal organizations. Since the entire operation violates the law, no meliorative restrictions may be imposed on the promoter. Gamblers, for example, are particularly vulnerable to the usurious practices of loan-sharks. And neither drug users nor anxious males have any recourse if products and services they purchase are defective, injurious, or diseased.

President Nixon's 1971 Budget boasted of a new \$74 million federal-state program to combat organized crime. Yet it is our overextended and counterproductive criminal law which has made the formation of extensive underworld enterprises economically feasible in the first place.

Secondary, or "satellite" crime is also generated in more specific ways. One of the leading causes of property offenses is that drug addicts often steal to support the (artificially) high cost of their habit. In 1965, the average daily expense for a heroin addict in New York City was \$14.34; the price in 1971 is probably closer to \$25. Because of the nature of his problem, as well as the fact that the drug user is not only a social outcast but also a criminal, few addicts are able to hold steady jobs. Where, then, is the narcotics user to obtain his \$15 to \$25 per day? For many, the answer is robbery; but not just in amounts of \$15 to \$25 daily (unless he has access to cash), for stolen property converts at a rate of only about four to one. Thus on this basis, the drug addict may be compelled to steal between \$60 and \$100 each day. In a country with nearly 200,000 addicts the criminogenic impact of the narcotics business can scarcely be exaggerated.

The final aspect of this vexing paradox — criminal laws which nourish crime — is the corruption of public officials. Where there is widespread violation of the law, and a lack of complainants who might focus the inquiry, law enforcement officers have considerable discretion over planning and conducting investigations, issuing warnings, and making arrests. The crucial concomitant to these powers is the ability of the police to restrict

the size of the market in contraband goods and services — that is, their capacity to shield and preserve organized crime's monopoly position: *at a price.*

For selective enforcement of the anti-gambling laws, that price is now estimated at a stiff \$2 billion annually in blackmail, bribes, and payoffs. Similarly, large profits are garnered each year from monitoring the narcotics trade. With large potential rake-offs, undercover investigations, criminal informers, and the knowledge that even the most diligent and honorable policeman, judge, or alderman could make little more than a dent in racketeering operations, the pressures are heavy upon law enforcement officers to participate in the illicit activities of syndicate crime. Such conduct, of course, not only weakens sanctions against gambling, narcotics, and prostitution, but also lowers respect for law and law enforcement officers, generally. A ghetto youth who has observed the local patrolman accepting money for "looking the other way," can hardly be expected to have a very exalted view of "law and order."

### Antisocial Groupings

No theme has received more concentrated or apocalyptic attention than the fragmentation of American society, the problem of national dissensus and disunity. The acknowledged effect of many of our criminal laws has been to exacerbate these tensions.

Many sumptuary laws (those enactments designed to regulate habits primarily on moral or religious grounds) are highly discriminatory in their impact. In fact, it would appear from arrest data that such prohibitions are passed by the dominant segment of the society merely to constrain the behavior of smaller or less-powerful elements within the social structure. This conclusion is far from new. Speaking about the inequitable enforcement of the anti-liquor laws during the 1920's, the Wickersham Commission wrote that:

It is much easier to padlock a speak-easy than to close up a large hotel where important and influential and financial interests are involved. Thus the law may be made to appear as aimed at and enforced against the insignificant while the wealthy en-

joy immunity. This feeling is reinforced when it is seen that the wealthy are generally able to procure pure liquors, where those with less means may run the risk of poisoning, through the working over of denatured alcohol, or, at best, must put up with cheap, crude, and even deleterious products.

More recently, these inequalities have become manifest in their harsh effects upon youths, Blacks, Indians, and poor people. In 1969, almost four out of every five persons arrested for possession of narcotics was under 25 years of age, a total 50 percent higher than this age group's share of overall arrests. In California, 30 percent of all marijuana violations (15,000 of 46,000 in 1968) were recorded against juveniles. The Black population accounts for 28 percent of all arrests combined, but two-thirds of all prostitution cases, and a like percentage of arrests for intoxicification.

Abortion laws are known to have their most stringent impact upon the poor, who can afford neither lawyers to squeeze them past the technicalities of the statutes, nor doctors who are qualified and able to perform safe and hygienic operations. Statistics showing the geographic and socioeconomic distribution of each crime further support the view that our sumptuary laws bear with greatest weight upon disadvantaged groups in the society.

The way men behave is determined to a significant degree by their relations with each other and by their membership in groups. When society brands a man as a criminal, that label alters the man's concept of himself and redirects his associations toward those who have been similarly condemned by the legal system. The homosexual, the gambler, the drug addict, and the drunk, all are told that they are criminals and come to think of themselves and each other as such. In order to continue their behavior they must associate with other law-breakers — and it is from these contacts (along with the inmates they meet in jail) that their criminal tendencies and expertise are reinforced and extended.

By designating certain acts as crimes, we are stimulating the formation of vast underworlds, sub-cultures, and

counter-cultures. These outcast groupings share one primary characteristic: their antagonism toward the dominant society. Resentment stemming from their ostracism manifests itself in many ways. Jerome Skolnick writes that "one consequence is a more threatening environment for the policeman." And as more conduct is included under the definition of illegality, the potential criminal population increases, further isolating and estranging the law enforcement officer from the people whose safety he is hired to protect.

Whatever its instrumental (as opposed to symbolic) effects, public designation of morality itself generates deep conflict. And such demands for adherence to a single standard of moral or social behavior may become even more insistent with what seems to be a rise in "status" politics — i.e., political issues which divide along lines of social cleavage. Indeed, the vengeance with which some persons would enforce the penalties against such non-critical offenses as smoking pot, is both a reflection and a cause of this trend. Paring down the moral excrescences of the criminal law would not eliminate the divisions within our nation. But it would reduce the frictions and frustrations which we so carelessly inflict upon one another and comport with the necessity of upholding pluralism and tolerance in a philosophically-disparate society.

### Damage to Freedoms

Just as there is concern over what appear to be growing rifts between competing segments of the society, so is there fear of an accompanying political reaction. In a speech at the Fiftieth Anniversary dinner of the American Civil Liberties Union, former Chief Justice Earl Warren warned that: "The atmosphere is again becoming repression-laden, and we may be in for another wave of hysteria in the name of safety." Unfortunately, laws regulating morality and seeking to influence personal behavior lend themselves to (and in many instances, constitute) serious violations of those now-jeopardized freedoms guaranteed by the United States Constitution.

Disorderly conduct, vagrancy, drunk-

ness, and dragnet laws for unspecified or unclassified crimes, delegate expansive authority to the police. The indefiniteness of proscribed actions, together with the wide potential for abuse, make these laws (as presently framed) a dangerous threat to civil liberties.

To end this subterfuge, the American Law Institute's Model Penal Code eliminates the generalized offense of disorderly conduct, replacing it with a list of more closely-circumscribed descriptions of misconduct, which carry far lighter criminal penalties. Vagrancy laws are extirpated from the Code altogether. "If disorderly conduct statutes are troublesome because they require so little in the way of misbehavior, the vagrancy statutes offer the astounding spectacle of criminality with no misbehavior at all." And what is valid for disorderly conduct and vagrancy laws often applies also to police enforcement of anti-intoxification statutes. A consultant to the National Crime Commission testified that police discretion — and harassment — in this area extends not infrequently to the practice of arresting sober or only slightly inebriated men, depending upon *who* is involved. Such a variable and contingent standard of justice cannot be sustained.

One of the more practical problems of attempting to enforce those criminal laws in which there is no complaining party is that extraordinary means must be adopted in order to obtain sufficient evidence to warrant apprehension and conviction. Since almost no one brings inculpatory information to the police concerning violation of gambling, narcotics, or prostitution statutes, law enforcement officers must procure documentation from their own, unsolicited investigations. And because of the semi-private nature of most of these crimes, invasions of privacy by means of informers, unreasonable searches and seizures, and eavesdropping are not at all uncommon. Indeed, most of the leading U.S. Supreme Court cases on entrapment, admission of evidence, search and seizure, and wiretapping, have stemmed from efforts to convict gamblers, drug users, and (during the 1920's) liquor distributors.

Writing about offenses which encourage illegal searches and seizures,

Thurman Arnold noted the effect of Prohibition upon abridgements of the fourth amendment. In six states selected for study, only 19 such cases were appealed in the 12 year preceding the passage of the Volstead Act. Yet in the 12 years which followed, appeals were instituted for no less than 347 alleged instances of unlawful search and seizure. More recently, the National Violence Commission has confirmed the persistence of this pattern in its discussion of police attempts to crackdown on marijuana use. "Enforcement of laws deemed harsh and unjust," contends the panel, "seem nonetheless to encourage police practices — e.g., raids without probable cause, entrapment — which infringe on personal liberties and safeguards."

Constitutional freedoms are also transgressed during the period from arraignment through the ultimate conviction. Drunks, vagrants, and those accused of disorderly conduct are particularly susceptible to such treatment. Little attention is paid in these cases to problems of proof and assignment of counsel. Most defendants plead guilty, and sentencing is accomplished on the spot, the entire process seldom taking more than five minutes.

Skid Row frequenters are often picked up and hauled — en masse — before a magistrate, tried without the assistance of a lawyer, and summarily deposited in the county jail for a thirty-day sojourn. Vagrants face similarly-questionable proceedings, being compelled to defend themselves against such vague charges as "living in idleness with no employment or visible means of support," "roaming, wandering, loitering," or "sleeping outdoors." As for disorderly conduct, it is usually a case of the policeman's word against that of the accused, and judges — harried by an overburden of other, more serious criminal matters — can hardly be expected to give full consideration to the wisdom or justice of quickly dispensing with the argument by imposing a short 30 to 90 day sentence.

The most salient threat to personal liberty resulting from the operation of these laws, however, is not that they offer a ready mechanism for police harassment, nor that enforcement of such statutes seems to insure fre-

quent violation of constitutional rights. The real question is more fundamental. Does the society have the authority to coerce its members to virtue? What is the interest of the community in legislating standards of personal behavior? And how does one truly ascertain and measure the "moral sense" of a neighborhood, state, or nation?

In the last fifteen years, the debate over law and morals has become the source of renewed interest in the wake of the Wolfenden Report (the final papers of Great Britain's Committee on Homosexual Offenses and Prostitution issued in 1957). Recommending the repeal of criminal sanctions against homosexual relations between consenting adults, the *Report* concluded that:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

English jurist Patrick Devlin, now a member of the House of Lords, took issue with this contention, arguing that no society can exist without shared ideas about morals and ethics and that therefore "the suppression of vice is as much the law's business as the suppression of subversive activities."

The American philosophy of self-government and individual freedom clearly militates against the latter interpretation. We have rejected pater-

nalism and scorned governmental attempts to dictate the boundaries of legitimate action. Our tradition — at least in theory — has been one of toleration, respect for the right to free choice, and belief in the protection of personal privacy. Recent Supreme Court opinions in such cases as *Griswold v. United States* (invalidating Connecticut's anti-birth control statute), and *Stanley v. Georgia* (reversing a conviction for private showings of pornographic films), have further expanded the legal conception of privacy, lending added support to our reluctance to transform the criminal law into a moral busybody. In short, the penal code, though reflecting community values, is an inappropriate field on which to prepare moral athletes for Armageddon.

### III. A Program For Judicial Reform

In view of the costs of criminalization, it should be evident that law is an ill-suited vehicle for preventing moral dereliction. Excessive reliance on this instrument of social control has diverted enforcement resources to crime objectives of comparatively marginal concern, provided an economic base for organized crime, and indirectly stimulated multiple forms of satellite offenses, including theft by narcotics addicts and corruption of public officials. It has abetted self-righteous and officious repression of minority interests, causing many persons to feel contempt for both themselves and their society and aggravating the antipathies already jeopardizing our cohesiveness as a nation. Finally, America's careless overenactment of penal statutes has led to arbitrary and unfair police practices, provided strong incentives toward the abrogation of constitutional guarantees, and acted to deny our citizens the freedom of choosing their own favorite path to perdition.

#### An Overview

A call for reform, however, ought not to be confused with a demand for across-the-board and unqualified legalization. A wide variety of alternatives exist between rigid enforcement and outright repeal. We know from the testimony of policemen, and from the yearly record of 2½ mil-

lion arrests, that sumptuary laws have been notably unsuccessful in deterring social deviance. We know also that recourse to criminal law is expensive and that to move in the direction of greater enforcement would only multiply those costs. But it must further be remembered that the society does have certain protective responsibilities which it cannot properly ignore. Although England's Wolfenden Committee, for example, urged repeal of the law prohibiting private homosexual acts between consenting adults, it did not propose to reduce the penalties attending potentially offensive public displays, instances involving minors, and situations in which force was employed. These concerns in mind, then, what approaches may be used in building a program for constructive penal reform?

One approach is to enforce the law only sporadically. Many cities, New York and St. Louis, among others, have virtually discontinued apprehending persons for drunkenness. The temptation to adopt such a formula is great. As Thurman Arnold said of these laws: "They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." In fact, this is precisely the manner in which we have dealt with the arcane statutory overgrowth prohibiting participation in

"unnatural sexual acts." These archaic abjurations cause us little concern, but only because they are so patently unenforceable and so uniformly disregarded.

The advantages of non-enforcement are readily discernible. It would on the one hand permit an open redeployment of law enforcement resources, enabling the police to raise their clearance rate, reducing the backlogs which hobble our courts, and freeing the prisons to concentrate full-time on rehabilitating their hard-core criminal population. On the other hand, regardless of the infrequency of prosecution, the mere fact of illegality would be sufficient to record society's explicit disapproval, thus discouraging many persons from even contemplating such action.

Though preferable to present ineffective and counter-productive efforts to prosecute victimless crimes, the "nullification" approach does have two significant drawbacks. The first is the deleterious effect upon law, generally, of paying lip-service to statutes we intend never to enforce. The danger also exists that long-dormant sections of the penal code could be revived and (on a discretionary basis) enforced discriminatorily at any time.

More straightforward — and less hazardous — solutions may be classified under three basic headings. Free exchanges of contraband goods and

services — *consensual acts* between willing adults — should be permitted, but ought simultaneously to be licensed, regulated, and taxed. Persons found guilty of *injuring themselves*, whether through drink or drugs, should be taken out of the criminal justice system and furnished with medical and counselling services. Finally, indefinite *nuisance statutes* should be revised to limit their application to specific instances of misconduct of at least some severity.

One of the apprehensions blocking any such program of revision is that many citizens view repeal as endorsement, and fear the effect of statutory relaxation on community behavior. To be sure, it is undeniable that there may be an increase in the conduct which was formerly proscribed by law. Against this increase must be measured society's enhanced capacity to regulate such behavior, together with the termination of our futile and costly efforts at enforcement. Our criminal law would be leaner, stronger, more highly-respected, and more likely obeyed.

### Consensual Acts

The elements common to gambling, pot smoking, prostitution, homosexuality, pornography, and abortion, are several. All are voluntary purchases or exchanges of goods and services now denominated as being illegal. None of these crimes shows any sign of disappearing on its own, nor of being successfully suppressed by vigorous and exorbitantly priced efforts at law enforcement. Yet each might be regulated, if it were permitted to operate in the open.

### Gambling

Many forms of wagering are already legal in the United States. New York and New Jersey authorize churches, fire departments, and other charitable enterprises to sponsor commercial-type bingo games. Twenty-eight states, including nine of the ten largest, allow on-track betting at horse races. In 1966, 63 million persons paid admission to thoroughbred and harness racing tracks, wagering in excess of \$5 billion. State-run lotteries have been present throughout American history (as well as in 85 foreign countries) and are now in use in New Hampshire, New York, and New Jersey. Private gambling establishments

are legal in parts of Maryland, and in the entire state of Nevada. Closely analogous to these games of chance are the more socially-prominent activities of the stock market and the national draft lottery. Obviously one can assert a moral justification for anti-gambling statutes only with the greatest inconsistency.

With all these legal outlets for wagering, what sort of offenses bring men into conflict with the authorities? The vast majority of violations stem from participation in off-track betting. Recent estimates by the New York Police Department indicated that every day an average of one million people play the "numbers" in New York City, spending more than \$250 million yearly. Most of these infractions are committed by poor people in ghetto areas to whom the numbers racket and the policy wheel (a similar game) may appear the most promising (and only realistic) means of escaping poverty. To the American middle-class, saving one's dimes would seem more economically sound than wagering them in a game with odds of 1000-1. But for those less fortunately situated the logic of laying down ten cents for the chance of winning a 600-1 payoff is at least understandable. Regrettably, no amount of understanding will alter the fact that the present gambling arrangement has caused a serious outflow of dollars from inner-city communities.

Victimization of ghetto residents will not cease with pledges of stricter enforcement or sterner laws. What is needed is a system of state-run off-track betting and lotteries that can compete with — and drive out of business — the crime syndicate's multi-billion dollar gambling monopoly. In order to supplant the numbers game, the new state-operated program must emphasize (1) ease of access, (2) low-price minimum bets, (3) high contest frequency, and (4) community acceptance.

As has become uncomfortably apparent to the New York Off-Track Betting Corporation, it is this latter requirement which may be the hardest to satisfy. The numbers racket is Harlem's most flourishing enterprise, supporting as much as 60 percent of the area's economic life. An estimated 100,000 men work for the numbers

syndicate, and most of those employed are Black. To challenge this structure is to threaten basic economic and social systems, and public-sponsored rivals (if they are to succeed) must convince suspicious ghetto dwellers of the comparative attractiveness of government profit-distribution and hiring policies, as well as persuade them of the general acceptability of the substitute product.

At present, off-track wagers can be placed legally in both England and Puerto Rico. Registered, and tax-paying "turf accountants" (a British term) accepts bets throughout the day, at prices, odds, and payoffs, fully competitive with illicit bookmakers. New York State, by means of its newly-created Off-Track Betting Corporation, is currently attempting to establish acceptable alternatives to the numbers game. And this objective was crucial, too, in the planning of the New Jersey state lottery. Distributed by banks, New Jersey lottery tickets are sold at 1900 retail establishments, including supermarkets, shopping centers, newsstands, and liquor stores. Chances are only fifty cents, and drawings are held weekly. Proceeds go the state whereupon they may become available for public projects of all sorts. In other words, though the amount of gambling here (as in New York) is not expected to decrease, its benefactors will be the citizenry rather than the Mafiosi.

Careful consideration should also be given to the selective legalization of private, commercial wagering. State-licensed and controlled gambling establishments operate most prosperously in Nevada, but a better nearby example is Puerto Rico. The combination of these models suggests a number of basic provisions. Licenses ought to be awarded only to applicants who are residents of the state and who are able to show an absence of criminal connections. In Puerto Rico licenses are priced at \$25,000 and are reviewed every 90 days. Casinos should also be regulated as to location, maximum stakes, and honesty of equipment (truth-in-betting). As a fully-sanctioned business enterprise, gambling houses would, naturally, be expected to pay the regular real estate, sales, income, and social security taxes. In addition, since betting is a luxury



(and a "vice"), a special excise on gross receipts might also be imposed.

The foregoing recommendations possess several significant advantages. They would, first of all, reduce law enforcement costs. No policeman need thereafter spend his time tapping the telephone line of a suspected bookie. Legalizing off-track betting, lotteries, and casinos would also imperil organized crime's monopoly over gambling. Third, it would lessen the number of discretionary arrests, remove strong temptations to violate constitutional rights, and exhibit greater respect for notions of tolerance and personal liberty. Finally, there is the advantage of some increased tax revenues, both in terms of income which previously went unreported, and levies on new monies generated for the first time.

#### *Marihuana*

Anti-marihuana laws are merely a new variation on an old theme: National Prohibition. Thirty years ago cannabis sativa (marihuana) was incorrectly grouped together in federal and state statutes with such hard — i.e., addictive — narcotics as heroin.

As everyone knows, of course, the ban is commonly ignored, particularly by students, servicemen, and young professionals. Despite the relative harmlessness of cannabis, more than half of all drug arrests made during the past few years have been for possession of marihuana. Current surveys place the number of Americans who have tried pot as high as 20 million (10 percent of the population), including at least one out of every three college students.

Faced simultaneously with pressures to convict all pot-smokers and resentment of any enforcement at all, prosecution of marihuana users (though heavy in the aggregate) has been haphazard and light in proportion to the total number of violations. The U.S. House of Representative's Select Committee on Crime scored present practices of handling marihuana infractions, declaring:

It destroys our criminal justice system to have penal statutes that are not uniformly enforced — and perhaps in some instances are unenforceable. . . . Nothing brings about a disrespect for the law more effectively than penal statutes which



are selectively enforced.

The pivotal issue here is social reality. Pot use has now become an entrenched part of our national culture. And frantic attempts to "clamp down" will not solve the problem — indeed one of marihuana's great attractions is its status as a symbol of rebellion against the "establishment." Three methods of avoiding the disadvantages of criminalizing pot, while still exercising some influence over how much and what quality is smoked have been given prominent notice.

The first alternative is proposed in the final report of the National Commission on Revision of Federal Criminal Laws (January 1971). The Commission argues that violation of anti-marihuana laws should be treated more or less in the same way traffic offenses are now handled. Persons might still be arrested for smoking pot, but only minimal fines — and no jail sentences — could be imposed. Sellers, by contrast, would still expose themselves to serious penalties. It may seem contradictory to permit persons to buy an item while prosecuting those who sell it, but the intention would be to place the onus on, and focus enforcement efforts against, those who do the most to spread the use of all drugs — the pusher.

A more radical proposal would be to repeal all marihuana penalties, prohibiting only (and perhaps by civil law) any attempts by individual salesmen or distributors to advertise or publicly promote their product. Qual-

ity standards might be imposed, along with taxes at a rate comparable to those paid on cigarettes and liquor. In both plans (i.e., this one and the Crime Commission's) special provisions should be included carrying heavy punishments for those found guilty of contributing (by drugs) to the "delinquency" of a minor.

These programs possess the advantage of removing the aroma of marihuana from the legal system without facilitating any wild escalation in the amount of drug use. Though cannabis is not thought to be physically hazardous, widespread overuse of pot, like similar overindulgence in liquor, ought in no way to be encouraged. The plans alluded to above would forestall mass prosecutions of young people, ease generational conflicts, and eliminate one cause of disrespect for law and police.

Finally, and perhaps most importantly, legalizing marihuana usage while maintaining strict controls over addictive or medically harmful narcotic drugs, would highlight for all users the signal difference between smoking pot and taking LSD or shooting heroin. In the past, the criminal law has blurred this distinction, leading many youths into the mistaken notion that if illegal marihuana was not bad for one's health then neither was illegal opium. Jettisoning this misconception would be an accomplishment of real value.

#### *Prostitution*

Whatever else one may wish to say about prostitution, it does enjoy a kind of enduring popularity. Alfred Kinsey's research indicated that 69 percent of all white males had had sexual relations with a prostitute at least once during his lifetime. And the American Law Institute estimated in 1959 that well over 200,000 women made their living through this occupation.

Anti-prostitution statutes have lent themselves to extortion, and to arbitrary and episodic prosecution. The temptations to engage in such abuses are considerable, and vice squad work is, in general, injurious to the reputation and dignity of a police force. Prostitution as currently practiced — that is, illegally and therefore without compulsory registration or medical examinations — is also a notorious

spreader of communicable diseases. In addition to these harms, finally, many experts hypothesize that without the outlet of prostitution, sex problems (and crimes) might be even greater than they are at present.

In order to control prostitution, it would thus be wiser to attempt to regulate the profession rather than uproot it. Replacing the absolute prohibition against pandering, would be a set of strict rules governing its operation. First, all prostitutes should be registered with the public health service and required to undergo periodic medical tests; those infected would be isolated until cured. Secondly, minors should be protected by law from premature contact. Lastly, propriety also suggests that legalization be confined to prescribed geographic areas, and solicitation conducted away from the public thoroughfares. Systems similar to the one advocated here have long existed in foreign nations, and there is no reason to assume that such a program could not be carried out satisfactorily in this country.

#### *Homosexuality and Related Laws Governing Sexual Behavior*

The act of homosexual relations between consenting adults is currently a felony in every state except New York, where it is a misdemeanor, and Illinois, Connecticut, and Hawaii, where it is legal. Though guilty of no offense other than the expression of different sexual tastes, the homosexual is subjected to demoralizing and humiliating treatment. He is often confronted with threats of extortion or blackmail, not infrequently made by the very undercover agents assigned to expose and convict him. Entrapment of homosexuals — police-initiated encounters — and other violations of constitutional rights are also common. And the self-respect and public image of policemen is hardly enhanced by the trooping past of plainclothesmen in tight-fitting trousers. In recommending repeal of the statutes banning homosexuality and other consensual sexual conduct, it should be stressed that this proposal is directed at activities conducted by adults, under conditions of mutual consent, and in private. Society has three primary duties in this area: (1) to protect the young, the infirm, and the immature; (2) to prevent force, violence,

or fraud; and (3) to insure that there is no open or public affront to decency.

#### *Pornography and Obscenity*

Americans — as we have seen — are a highly moralistic people. The confusion of sin with crime, the paternalistic use of the criminal law to battle personal vice, is of course the theme of my argument. That laws of this sort are practically impossible to enforce is demonstrated — once again — by estimates that the annual traffic in illegal sex materials is over \$500 million.

Aside from repugnance for "sin," the most frequent justification for anti-obscenity laws is that pornography induces sex crimes. The Kinsey Institute, after studying 15,000 sex offenders, determined that this was not the case, as did the 1970 report of the Commission on Obscenity and Pornography. Many commentators, in fact, have suggested that just the opposite is true. Without the release of pornography some men might be disposed to commit sexual and other offenses.

On this basis, the National Commission formed by Congress in late 1967, advocated the revocation of all existing federal, state, and local legislation prohibiting the sale, exhibition, or distribution of sex materials to consenting adults. None the less, in recommending repeal, certain qualifications must be appended. Youths should be excluded from the pornography market for their own protection. Nor should unsolicited mailings, flyers to the home, or door-to-door sales of sexually explicit materials be permitted. Public displays such as billboards or other outside advertising would be strictly barred. One pales at the thought, for example, of hucksters dragooning innocent and upstanding citizens into the "art films." Denmark has relaxed its restrictions on pornography in this sort of responsible manner with no reports to date of ill-effects. The United States should follow the example set by the Danes.

#### *Abortion*

Abortion on demand is already legal in Great Britain, Japan, Russia, and much of Scandinavia. In the last two years it has also become permissible by legislation in New York, Hawaii, Alaska, and by judicial decree in

numerous jurisdictions, including the District of Columbia, California, Wisconsin, Texas, and Illinois. Most significantly, the Supreme Court, in its decision on the subject of abortion (*United States v. Vuitch*, April 21, 1971), moved to give physicians considerable latitude and legal protection in carrying out such operations. In future prosecutions the government will be required to prove beyond a reasonable doubt that the mother's health was not endangered by her pregnancy. And, according to the rule laid down by Justice Hugo Black, in considering a woman's health, doctors may now take into account "psychological as well as physical well-being," even if the patient has no previous history of mental instability.

Abortions in New York are currently being performed at a rate of 150,000 per year, yet it is believed that nationally the number of illegal miscarriages amounts to seven times that figure, or over one million annually. Attempts at enforcement have served primarily to drive desperate women into the hands of criminal abortionists, many of whom are professionally unqualified and ethically unsuited. The terrible cost of this procedure is illustrated by the fact that although an abortion is a simple operation, hundreds of women die each year as a result of incompetent (illegal) surgery. The American Law Institute in presenting its *Model Penal Code* warned that:

Experience has shown that hundreds of thousands of women, married as well as unmarried, will continue to procure abortions . . . in ways that endanger their lives and subject them to exploitation and degradation. We cannot regard with equanimity a legal pattern which condemns thousands of women to needless death at the hands of criminal abortionists. This is a stiff price to pay for the effort to repress abortion.

The prime objection to abortion is its ambiguous moral status, its alleged kinship to murder. But when does life begin? Does it commence with the fertilization of an ovum, or does it start with birth, or might that elusive instant occur somewhere in between — or before — these events? The answers given to these questions

may readily be disputed — and usually are. As Chief Justice Joseph Weintraub of the New Jersey Supreme Court has noted: "Every argument [on this subject] starts from and returns to an ethical or religious assumption." What is not in doubt, however, is the moral reality of permitting hundreds of women to die each year as a result of malpracticed abortions.

A preferable approach is the law enacted last year in the State of New York. Under this system, abortions are performed by a licensed physician either in his office or in a hospital. All operations must take place during the first 24 weeks of pregnancy. (The eligibility period might be shortened to 20 weeks or even less to avoid problems of premature births and maternal dissembling as to the actual date of conception.) There are no residency requirements in the New York plan. It would also be desirable to include abortion under the medicaid program so as to further reduce the disparity between those services available to the wealthy and those that could be obtained by a poor person.

These reforms, though important, would ideally be utilized only as a last resort. If sufficient attention is devoted to the development of birth control methods — product improvement, better education and distribution — the problem of abortion may be recede into a much-preferred desuetude.

### Assaults Against the Self

Not all crimes without victims are truly victimless. In many cases men perpetrate great evils against themselves. Usually we do not denominate these acts as crimes, for the offense is its own punishment. Nor in general is our attitude as much anger, as it is pity. We wish to convert and heal more than we seek to upbraid and persecute. Moreover, we realize that the imposition of criminal sanctions is not likely to be an effective deterrent against men already bent on their own self-destruction. We do not, for example, hope to prevent suicides by announcing that those who fail in the attempt will be condemned to suffer the death penalty.

When striving to deal with the frightening problems of alcoholism and narcotics addiction, however, we

have lost sight of these truths. Our approach has been to denounce such forms of human weakness as heinous crimes and to brand those persons involved as dangerous criminals. One appealing alternative is to replace the law paradigm with a medical one, to shrink the concept of criminal deviance in favor of the concept of illness. Such a shift would have the salutary effect of both unburdening the legal system and offering at least some expectation of reducing the blight of drunkenness and drug abuse.

### *Alcoholism and Drunkenness*

The National Crime Commission has declared that it "seriously doubts that drunkenness alone (as distinct from disorderly conduct) should continue to be treated as a crime." A number of jurisdictions have already begun to alter their handling of drunkenness in accordance with this view. Three years ago Congress repealed criminal penalties for intoxication in the District of Columbia. The Attorney General of Massachusetts has given highest legis-



lative priority to the removal of such offenses from the criminal process. And New York State has virtually eliminated the crime by ordering that the assistance of legal counsel be given to defendants in misdemeanor cases. Because of this requirement, the New York City Police Department made fewer than six thousand arrests for intoxication in 1969.

Regardless of how far these reforms and related judicial decrees may actually go — and one would hope they would spread throughout the country — the government, however, does have two unshirkable duties in this area. The first, is the obligation to the public to protect its members from drunkenness-related, unseemly, disorderly, or criminal conduct. The second is the responsibility to provide those afflicted by drinking problems with at least a modicum of rehabilitation opportunities.

Public health agents (or, in their absence, policemen) should continue

to pick up drunks who are in physical jeopardy or who are incapable of taking care of themselves. But instead of locking these men up in the local stationhouse, they should be taken to a detoxification center where they would have a chance to "dry out" and an opportunity to obtain medical and referral assistance.

Attached to these civil detoxification centers, several of which are already in use in New York, St. Louis, and Washington, should be voluntary inpatient treatment facilities and half-way homes for outpatient care. Staffing the centers would be medical personnel, psychiatrists, and social workers. The cost of such a program, though large, would be offset in part by the accompanying reduction in law enforcement expenditures. Any amount above those savings could be justified by the promise of surer and more long-lasting results in the battle against liquor abuse. Encouragingly, Congress has already approved a three-year, \$180 million authorization for alcoholism treatment and rehabilitation. The states should be encouraged to emulate the national commitment.

The National Institute of Mental Health reports that "more than five million Americans are dependent upon alcohol." Labelling these people as criminals will not free them from their dependence. Only humane and expert professional care can do that.

### *Narcotics Addiction and Drug Abuse*

Like drunkenness, drug abuse is self-inflicted and disturbingly prevalent. President Nixon placed the number of heroin addicts at 180,000, and the National Institute of Mental Health thinks the figure may exceed 200,000. In response to the mounting severity of this problem, federal outlays for narcotics control have tripled in the last three years, from \$21.7 million in fiscal 1969, to \$61.6 million in 1972.

The results are ironic. The present level of law enforcement gives the crime syndicate monopoly power (and commensurate profits) over the market in illicit drugs, for only organized criminal elements have the manpower, financial ability, and international connections with which to procure and successfully smuggle large quantities of heroin. Yet the brunt of enforce-

ment has fallen on the user and addict.

The most instructive alternative model is probably the system currently employed in Great Britain. Until 1968, English addicts were able to obtain narcotics (primarily heroin) by prescription after registering with a physician. Because a few doctors regularly over-prescribed, patients were often able to remarket the surplus portion of their supply. But this open-ended practice has been discontinued, and addicts must now procure drugs, accompanied by treatment from specially-licensed physicians at government-run rehabilitation centers. In formulating a program for this country prudence might also dictate that addicts should be compelled to take their "fixes" at the center, so that there would be no opportunity for resale.

Narcotics should be sold at cost or distributed free of charge through state-operated health facilities. Only addicts, as proven by their reaction to nalline testing, would be permitted to register and apply for one of several drug maintenance or withdrawal programs. Each registrant would be required to consult with a doctor, psychiatrist, or other specialist, in planning his own road to rehabilitation. Methadone, cyclazocine, naloxone, or the problem drugs, themselves, could be made available at the physician's discretion, but only on the premises of an approved health center. Importation, manufacture, or sales of drugs would remain against the law. In short, the basic plan is to control and limit the supply of narcotics, but to leave the responsibility for treatment to the doctors and clinics.

A program designed along these lines will demolish organized crime's monopoly on the drug trade, eliminate the necessity for addicts to engage in secondary crime, and reduce opportunities for the corruption of public officials. No longer would the drug user be forced to buy a commodity of unknown quality and dubious content from a syndicate-employed pusher, who charges a viciously-prohibitive price and whose boss may well have bribed a policeman in order to protect his lucrative business from prosecution.

Finally, this reform would remove an unnecessarily heavy economic bur-

den on the society. New York City Corrections Commissioner George McGrath has testified:

[Addicts] can only exist a short period of time in the community on their own. They are going to go into some kind of facility, whether it is a prison or a hospital or some other facility and we are paying for it and should make no mistake about it. So why not pay for it intelligently? Why not have a fully funded program for these people where meaningful services are provided? Relatively it isn't expensive. It is expensive doing what we are doing now.

The point is well taken. What value is there in spending \$13 a day, or \$4,745 a year, to keep an addict in jail when for approximately \$2,000 yearly he can enter a treatment program that may free him from the drug-crime syndrome which resulted in his original incarceration?

Unfortunately, the proposals advanced above — both for handling drug abuse and for controlling most of the other problems of criminalization — do not go to the root of the difficulties. They do not explain why men use narcotics or what motivates them to drink themselves into alcoholism. But these recommendations should help to relieve the symptoms and in that respect they are a marked improvement over the present attempt to coerce behavior through the inappropriate mechanism of the criminal law.

### Minor Misconduct

One of the maxims of the criminal law is that a man should not be punished for acting in a manner which the law does not specifically prohibit. Another, is that a man must commit an offense before he may be convicted of a crime. No one would dispute these homilies, yet they are contravened daily by the operation of nuisance statutes — most notably, disorderly conduct, and vagrancy laws. Loosely-defined, requiring almost no misbehavior, such statutes are a major discretionary weapon of the police, always available for use — or misuse.

"Such laws," as Washington attorney William Dobrovir has written, "can serve a clear community interest. They can protect community tranquility and prevent annoyance of the

more quiet citizens by the pugnacious, the shiftless, the noisy, and the foul-mouthed." They can also be utilized as a more civilized substitute for the policeman's nightstick. But these beneficial usages are often overshadowed by the rancor and accusations of discrimination, as well as the systems cost, of the laws' implementation.

### Disorderly Conduct

Almost 600,000 arrests, 10 percent of the total for all offenses combined, were made for disorderly conduct in 1969. This unnecessary burden, along with the price of alienating those against whom the statutes is most frequently invoked, can be relieved by a relatively simple revision of our penal laws. Following the recommendation of the American Law Institute and the Federal Criminal Law Reform Commission, we should limit codes and sanctions to specific, carefully-defined, and serious misconduct. Such a limitation would narrow police discretion, minimizing community frictions, while still enabling each officer to apprehend persons for committing substantial violations of unambiguously-framed ordinances. Crowding of the prisons and their well-deserved reputations as breeding grounds for future crime, would also suggest that civil-type remedies (e.g., fines or "tort-like" damages instead of jail sentences) should be used wherever possible.

### Vagrancy

Vagrancy laws were first passed during the time of the Black Death in Europe, when depopulation and the fear of contagion were so severe that men were not allowed to leave their villages without prior approval, nor were travellers permitted to enter without giving an exculpatory account of their presence. As rewritten during the reign of King George II, vagrancy statutes were directed at "idle and disorderly persons, incorrigible rogues, and vagabonds." Two hundred and fifty years later, these laws (though qualified by recent Supreme Court opinions) are scarcely more sophisticated, and certainly no more precise.

It is still illegal in many jurisdictions, for example, to be an associate of known thieves, or for that matter, to be a wanton, dissolute, or lascivious person. Roaming, wandering, loitering, idleness, begging, and sleep-

ing outdoors are also causes for criminal prosecution and account for an annual toll of over 100,000 arrests. And an additional 90,000 persons were apprehended in 1969 on the nebulous count of "suspicion" of illegal doings.

The problems engendered by vagrancy statutes are the same as those encountered in relation to disorderly conduct. Of such minimal extent is the quantum of misbehavior sufficient to activate these laws, that one can be arrested (particularly on a vagrancy charge) for committing virtually no crime at all. Vagrancy-type ordinances have been used with distressing frequency against the poor and the ignorant, inflaming tempers and deepening antagonisms along the way. What is more, these statutes provide

## IV. The Practicalities of Reform

Before concluding, summary attention should be directed to some of the more pragmatic aspects of reform. Although some of these proposals would be expensive, taken as a whole the reform package could be expected to be a net revenue generator. Enactment would greatly reduce law enforcement cost, and the legalization of greatly desired goods and services would offer promising opportunities for new taxation. More important than money as an obstacle to reform is the fact that no single agency or governmental unit has exclusive jurisdiction over the criminal law.

What consequences might ensue, for instance, to a state that was one of only five such sovereignties to legalize marihuana, or to a municipality that was one of only three communities in its metropolitan area to repeal the laws against drunkenness? In the first hypothetical, the minority of states choosing to authorize pot-smoking could be deciding not only the discreet issue of what law should govern marihuana, but also whether by their action they might not become the new headquarters of the "youth culture." In the second, the city could discover that what had appeared to be a reasonable reform, had in fact turned its streets into a collection spot for alcoholics.

In order to avoid this problem — i.e., that particularly in the realm of

no counter-balancing advantages. Indeed, squandering law enforcement resources on petty or non-existent offenses only detracts from the capacity of the criminal justice system to cope with truly threatening crimes.

The solution is to specify which acts now included under the broad umbrella of the vagrancy concept, are really of danger to society. These offenses should be listed with precision and clarity and merged, then, into the revised section of the penal code pertaining to instances of disorderly conduct (as in the proposed new federal criminal code). This would help to redirect our criminal law toward crimes of greater warrant and would serve to remove at least one cause of police-community tensions.

morals legislation, no jurisdiction may wish to enact the first reform — the federal government should take the lead in carrying out the reform program. The large states and cities also have a share of the initial responsibility, much of which they have already begun to discharge: California (narcotics rehabilitation); Illinois (homosexuality and other aspects of the American Law Institute's *Model Penal Code*); and New York (drug abuse, abortion, and treatment of drunkenness).

A final note should be added about the prospects for future overcriminalization. Even should the proposed reforms be adopted, the debate over what elements are appropriate for inclusion in the penal code will continue to rage. Pressures for extending the use of the criminal sanction are strong and come from all points on the political spectrum. It is being strenuously advocated from some quarters, for example, that industrial polluters be punished with prison sentences. Though pollution is hardly a crime without victims, the preceding examination of the misuse of the criminal law ought to make one hesitant about exclaiming one's unqualified enthusiasm for such an expansion.

To monitor these additions and deletions from the penal code, criminologists Norval Morris and Gordon Hawkins urge creation of a standing

committee on law revision. The national government has, in fact, already allocated \$1.4 million in fiscal 1971 for a passel of projects concerning reform of the criminal law, and the 91st Congress authorized creation of commissions to review federal policy toward gambling, and marihuana and drug abuse. Among the most promising of these projects the National Commission on Reform of Federal Criminal Laws, which filed its report this past January, and whose recommendations should spur lively debate on the national penal code.

We have now evaluated our criminal statutes in the context of their respective costs to society and in contrast to alternative modes and degrees of social control. An inquiry of this sort is, of course, an invitation to controversy, for these are matters over which tempers flare and personal disagreements are sharp. But that is exactly the problem. The reason such issues are so emotion-laden and difficult to handle is that they are not appropriate targets for criminalization in the first place. By seeking to suppress conduct which is largely individual and of little or no direct harm to the society, the criminal law has overreached its capacity and overstepped the bounds of its proper authority.

A recent cartoon shows two men discussing the political scene. "How do you feel about Congress legislating morality?" asked the one. "I think they should stick to passing bills," replied his friend, "not commandments."

The criminal law may be effective to protect our persons against harm and the threat of injury. It may be competent to ward off major depredations against property. It may be useful to help guard important governmental processes. But that is about it. As an instrument for our salvation, or for making adults more virtuous, penal codes do not seem to have been particularly successful. And this is as it should be. For crime ought not to be punished as an offense against God or good taste, but only as it is truly prejudicial to the well-being of society.



## LETTERS *from page 2*

the family either starves more slowly or the husband works himself to death on two jobs and mother and the kids starve quicker. Is that in line with the proper, classic Ripon Society domestic image?

Pay attention now, Rip; raise your consciousness. That is what this is all about; to get you turned around not just on child care but in your whole attitude.

Forget M-E-N. Read it P-E-O-P-L-E. This is where the power is. Don't forget.

JO CAMPBELL  
Washington, D.C.

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Your usually astute judgement about political issues was sadly absent in the editorial on the day care veto, January 1972. The two-page defense of Nixon's veto action skipped around the vital issues, displayed a sorry lack of knowledge about the day care issue, and all in all appeared to represent a defense at any price of one of the President's least defensible actions.

To put it much more briefly than you did, an overwhelming majority of women who work do so not because they are bored with mah jong but because their families need the income. A large number of these working women have a real problem of disposing of their young children, so in the absence of proper facilities they deposit them with neighbors, with aged relatives, or put a doorkey around their necks and allow them to play in the street. Proper custodial facilities are an existing major need for these children and their parents.

Item two — early childhood education specialists tell us that the learning process begins at a much earlier age than we used to suspect, and children should be exposed to (not force-fed) learning opportunities at a younger age than heretofore. Again, day care facilities, by extending downward the learning process, would meet an existing need.

Finally, I don't know anyone who wants to see day care children segregated by income. Day care must be a community-wide facility, with provision for tuition for those who can afford to pay.

My union has built more day care facilities — for the children of our members — than any other private institution in the country, but we are fully aware that for several reasons this cannot be the answer to our day care needs. Only government can meet the need.

Virtually all the liberal Republicans in both Houses of Congress, whom you normally support, had these facts in mind when they voted for the day care bill, and a number of Republican liberals in the Senate even voted to override the President's veto. You should have supported the bill, too, except that perhaps the onset of the Presidential campaign is getting you nervous about the President's domestic failures and impels you to defend what shouldn't be defended.

Stay loose, Ripon!

HOWARD D. SAMUEL  
Vice President  
Amalgated Clothing Workers  
of America  
New York

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As the partly dependent husband of a working PhD. whose income goes disproportionately into day care expenses, I found your editorial, despite minor lapses of impropriety, well-reasoned. If one wishes to help liberate middle class mothers for workaday routines, one should look not to the Javits-Mondale bill, which the President vetoed, but to Senator Russell Long's (sic) amendment to the tax bill, which the President signed. Beginning in 1972, this amendment will permit families making up to \$18,000 a full deduction of up to \$2,400 in day care expenses for one child, \$3,600 for two, and \$4,800 for three or more children. This sum may be spent flexibly on nursery school fees, day care centers or home help for children up to the age of 15.

Long's tax deduction (like all tax deductions) already seems sufficiently regressive without the federal government also running its own cut-rate centers for middle class families or subsidizing independent franchisers to do so. Presumably, we resourceful middle income folk will be able to arrange facilities for ourselves, while precious federal funds are used, as in FAP, where they are most needed — for income support and day care for the children of the unemployed, the working poor and the disabled.

I appreciate the symbolic importance that women's groups attach to universal day care as a means of ratifying a woman's right to continue a full working career after the birth of her children. But they should not let this put them in the indefensible position either of espousing a double subsidy for their preferred life style or of taking bread from the poor.

All that said, there is a real problem at which the Javits-Mondale bill was aimed: the lower middle class mother, whose infant is left in a car or whose school age child wanders through the streets in the afternoon. Until the country is richer the best solution for her is to raise progressively FAP's levels of income and child support and to persuade employers to provide day care as part of the cost of hiring women at low wages. Some employers, such as the telephone company, and a few universities, have already done this; others will perhaps require legal suits, political demonstrations or new child-mother labor laws. These efforts I would recommend to these women's groups now embarked on essentially symbolic crusades for universal day care and an equal rights amendment to the constitution.

JOSIAH LEE AUSPITZ  
Somerville, Mass.

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Congratulations on your cogent discussion of President Nixon's "Daycare Veto" (FORUM, January, 1972). I admire the empirical style of your analyses in this and other recent articles. This style comes closer than I had thought possible to the basic goals of Party responsibility and objective criticism which we "founders" had in mind.

CHRISTOPHER T. BAYLEY  
Seattle, Washington

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Your editorial on President Nixon's veto of the Child Development Bill really bothers me. It is unlike your editorial staff to choose one element of a complex plan and attack the entire plan for the defects of the one chosen element. You make a William-Buckley-like premise (that "child development" equals "day care") and away you go.

Certainly your points on that issue are valid ones. But you fail to discuss intelligently the many other issues involved. There is a desperate need for early diagnosis of health problems including vision, hearing, etc. It is my understanding that this Bill would have included testing for these problems as well as for emotional disturbances.

A very large number of healthy, well-adjusted, much-loved children wouldn't need the services provided by the Bill. But how long can we continue to ignore the millions of children who do need them, including those who are not from the poor families who would be helped by the President's Family Assistance Plan.

When you slam a program the way you have slammed this one, I feel that you have a responsibility to suggest alternatives. The President's plan is an alternative as to a percentage of America's poor. It is not an alternative for millions of children. I respectfully request that you solicit articles from men such as Wilson Riles and John Gardner on constructive alternatives to help those of our children who are unhealthy, maladjusted, understimulated, or for other reasons will become failures in school and in society unless they receive early help.

CHRIS STROMSNES,  
Dunsmuir, California

## Two Nixons?

Josiah Lee Auspitz and I seem to live in different nations, although by odd coincidence we are both governed by men named Nixon.

As revealed in his article, "Why Nixon Needs Brooke," Mr. Auspitz's President has been pursuing a goal of racial integration; is amenable enough to the possibility of putting a progressive Northeasterner on his ticket to make it worthwhile for Mr. Auspitz to make the suggestion; and is capable, through eleventh-hour appeals and the addition of a black to the ticket, to garner a third of the black vote in 1972.

My President Nixon, on the other hand, has displayed a lack of sensitivity to racial reconciliation that we have not seen in the White House since the days before civil rights became an issue; ordered (or at least permitted) his Vice President to campaign against liberals, the Northeast, and in particular one noted progressive Republican incumbent in 1970; is unlikely to put anyone to the left of Nelson Rockefeller on the ticket this year; and, I presume, has lost the good faith of black Americans to a degree that will not be overcome by tokenism even at the highest levels.

By another odd coincidence, however, Mr. Auspitz and I share the good fortune to be represented in the United States Senate by an outstanding individual named Edward Brooke.

HOWARD W. REITER  
Cambridge, Mass.

Mr. Auspitz replies:  
Mr. Reiter's President Nixon and mine are the same person.

## Newsletter "Intemperate"?

I am writing this letter to let you know of my displeasure with the December 15 issue of the Ripon FORUM. It seems to me that this issue of the FORUM is guilty of using the same kind of extreme, and in some cases inaccurate, rhetoric for which the Society often criticizes its detractors, both within and without the GOP.

I specifically refer to the use of the term "right wing" at least six times in that issue. The FORUM could adequately characterize groups or individuals as "conservative" without resorting to the more extreme language. Furthermore, the use of the terms "perfervid," "world-tripping incumbency," and "vainglorious," in ad-

dition to "right wing," would seem to have no place in a publication which represents a group supposedly dedicated to reasoned, rational debate within the GOP. The same comment would apply to the repeated, and rather sarcastic, references to the White House "dog house" which appeared in the editorial column.

More substantively, I was somewhat amazed to find F. Clifton White described as an "overrated" organizer. While I might not agree with his choice of candidates, a look at the record will, I think, reveal that Mr. White is one of the most effective organizers and campaign strategists on the American political scene today. Finally, in the article on strategy for the 1972 campaign, the implication appeared to be that the sole reason for the establishment of an "in house" advertising agency was to prevent the writing of another Joe McGinniss-type book. It might have been appropriate to mention the substantial savings, which would result from such an "in house" operation, in commissions paid to a commercial ad agency.

In closing, it is my opinion, that such examples of overblown, intemperate rhetoric and inaccuracies can do nothing but damage the credibility and reputation for excellence which the Ripon Society now enjoys. I would hope that such an instance as this does not recur.

JAN J. SAGETT  
Washington, D.C.

Editors Note: Although many of the points made in this letter are valuable, the notion that "right-wing" is an unacceptable epithet is not shared by National Review which often uses the term itself. Since many Ripon society members regard themselves as conservative, we hesitate to contribute to the further deterioration of the concept. F. Clifton White's contributions to "conservative" campaigns, such as Goldwater's in 1964, were overestimated by the press, according to many conservatives interviewed by the editor, including the Senator himself. The subject is fully treated in *The Party That Lost Its Head* (Knopf, 1966).

## Kudos

Let me congratulate you on the general excellence of the Forum. Your articles and interesting and informative, well written, and, from what I can tell, your facts are accurate.

Yours truly,  
JIM MITCHELL  
Charlotte, N.C.

## 14a ELIOT STREET

● Richard Scanlan was appointed to the Ripon National Governing Board from New York. He is a Deputy Assistant Attorney General for the state of New York and a Vice President for Community Affairs for the New York Ripon chapter.

● William Toby, Jr. has been appointed Deputy Commissioner for State Programs of the Social and Rehabilitation Service of the Department of Health, Education and Welfare Region Two. He is the Chairman of the New York chapter's Governmental Affairs Committee. He resigned from the Lindsay administration (as the Federal Aid Coordinator of the Mayor's Model Cities Administration) to return to H.E.W.

● Glenn Gerstell has been appointed as an at-large member of the society's National Governing Board. He is the New York chapter Vice President for Politics and Publicity, a contributing editor to the FORUM and a junior at New York University.

● Senator Clifford P. Case (R.-N.J.) will speak at a meeting of the Ripon Society of New Jersey at 4:00 p.m. on Sunday, February 13, 1972. The meeting will be held at the Eagleton Institute of Politics on the Douglass campus of Rutgers University in New Brunswick, New Jersey. The public is invited.

● Ripon's National Political Director, Dan Swillinger, and President Howard Gillette, will be participating in the Southern Women's Regional Political Caucus in Nashville, Tennessee on February 13.

● Several chapters have held elections. The results are: in New Jersey, Richard Zimmer, a New York attorney residing in South Orange, is president; Richard Poole, a former Chairman of Summit New Jersey's Young Republicans, is executive director; John Brotschol of Union, a former Chairman of the N.J. Young Americans for Freedom, is vice president and research director; vice president in charge of politics is Al Felzenberg, a graduate student at the Eagleton Institute of Politics at Rutgers University; and Nancy Miller, the secretary of the Union County Young Republicans is the new Secretary-treasurer.

● In Memphis the new officers are: William B. Whitten, a third year law student at Memphis State, president; Linda Miller, vice president; Robert Lanier, Secretary; and Ed Miller (former Memphis chapter president), treasurer and research Chairman.

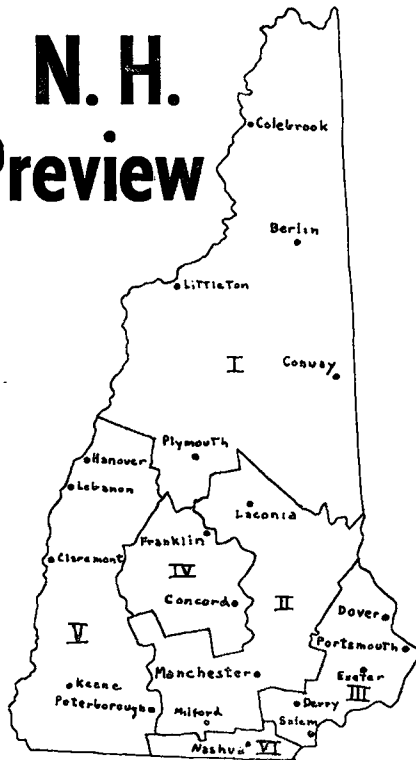
● Mrs. Richard Wurzburg of the Memphis, Tenn. chapter has been appointed to Governor Dunn's Human Development Commission.

● The Pittsburgh Ripon and 24 sponsors are holding a cocktail party on February 11 in honor of Senator Richard Schweiker.

● Philadelphia's new chapter president is Robert Moss; Stephen Simpson, vice president; Robert Hueglin, secretary; James Emerich, treasurer; and the two National Governing Board representatives are Ken Kaiserman and William Horton.

● Mark Bloomfield has resigned from the National Governing Board to take a job with the Committee to Reelect the President.

# N. H. Preview



There is a contest for the Republican Presidential nomination being fought in New Hampshire. Unlike most previous presidential races, two of the three contestants, Paul McCloskey and John Ashbrook, have denied any chance of winning — in the traditional sense of the word. The contest remains chiefly a referendum on the Nixon Presidency.

New Hampshire presidential politics is always treacherous for presidential hopefuls since they can lose the national race in the Granite State, but can never win it conclusively there. This year the greatest risks are for President Nixon and Senator Muskie.

The New Hampshire Republican party has been cleft by ideological and personal feuds since the death of Styles Bridges in the early '60's. Newspapers are tremendously important, as is demonstrated by the close correlations between voting results and circulation zones. The accompanying map divides the state into six such regions.

Region I, containing about 15 percent of the vote, comprises three northern counties and is traditionally a very conservative. The influential conservative daily, the *Manchester Union Leader* under publisher William Loeb circulates in the southern part. In 1964 Nixon carried the region on a write-in; his support in 1968 was solid. Congressman Ashbrook should do well here because of the *Union Leader's* endorsement, but McCloskey forces are planning a vigorous personal campaign.

Region II, comprising central Hillsboro County, Belknap County, and parts of Strafford, Rockingham and Merrimack Counties is extreme conservative territory, comprising 25 percent of the state-wide vote and dominated by the *Union Leader*.

Region III, most of Rockingham and Strafford Counties, comprising better than 25 percent of the vote, is the most rapidly expanding region of the

state. Burgeoning with immigration from Massachusetts and heavily under the influence of Massachusetts media, this area gave Lodge a tremendous margin in 1964 and McCarthy a strong edge in the 1968 Democratic primary. The *Portsmouth Herald* is quite friendly to moderate Republicans, and continually attacks Loeb. McCloskey is organizing in this region rapidly. A large number of independent newcomers who can vote in either primary will be the subject of a contest between McCloskey and McGovern.

Region IV, most of Merrimack county, with 10 percent of the vote, is dominated by the *Concord Monitor*. This newspaper has been friendly to McCloskey but it will probably not endorse anyone in the Republican contest. Lodge did well here in 1964.

Region V, Cheshire, Sullivan, and southern Grafton counties, comprising about 15 percent of the vote is traditionally "moderate" Republican territory. The Lebanon (*Hanover*), *Claremont*, and *Keene* newspapers cover the region in a way friendly to McCloskey, although they have endorsed no one as yet. Lodge swept the area in 1964.

Region VI, with somewhat under 10 percent of the vote is a rapidly-expanding area in population, is traditionally liberal, and Massachusetts oriented. Again, strong McCloskey potential.

In sum, McCloskey will presumably concentrate his efforts in regions III, IV, V, and VI, while Ashbrook presumably will focus on regions I and II.

The Nixon campaign in New Hampshire has received the endorsement of most of the Party's traditional leaders and elected officials, though the Governor's support comes at some cost to the President, for Peterson is one of Loeb's chief targets at the moment. Highly respected former Governor Lane Dwinell, is Nixon's chairman.

The McCloskey campaign, by contrast, is a very active effort with an impressive staff (largely volunteer), undertaking a massive McCarthy-style canvassing operation. It has over 50 candidate days scheduled in the state before the March 7 primary, and a surprising number of important traditional party figures: including Chairman Robert Reno, former New Hampshire House Majority Leader Harlan Logan, 1964 Lodge Chairman Richard Jackman, Former N. H. Bar-President Frederick Upton, former state Attorney General William Phinney, and several mayors and state legislators.

The Ashbrook campaign, not fully organized, has received the support of the organizational backbone of other conservative candidates such as gubernatorial aspirant Meldrin Thompson whom Loeb backed for Governor against Peterson in 1970.

What are the prognostications? Polls in New Hampshire are not usually indicative until late in the campaign — if then. In 1964 Goldwater was way in front on January 1, Rockefeller had drawn even by the middle of February, and Lodge pulled in front in March — and won.

Recently there were reports of an Administration poll attributing 22 percent of the vote to McCloskey. A recent mock primary in the Concord High School showed McCloskey defeating Nixon 209-190.

— CLIFFORD BROWN