Book Reviews


Reviewed by Benjamin W. Heineman, Jr.†

Eliminating racial discrimination in the United States through the rule of law was one of the significant hopes of the last decade. But whether the law, and reform through normal channels, can create a truly multi-racial society remains, unfortunately, one of the significant questions for this decade (and probably the next ... and the next). Few readers of this journal are prepared to conclude that the United States today faces an ugly choice between continued oppression or renewed violence—between a huge black population incapable of escaping from crippling socio-economic conditions or an angry black underclass committed to societal change through armed revolt. But most would admit that a just resolution of our complex and intractable race problem poses an extraordinary challenge to this nation's institutions, particularly its governmental institutions—for they alone may possess the force and legitimacy necessary to resolve race and class antagonisms in the pursuit of some concept of equality.

Race and Law in Great Britain† raises similar questions in the British context. Although British ships brought slaves to the New World, Britain's own multi-racial complexion is recently acquired. And despite Britain’s long colonial history of racial exploitation and discrimination, a significant race problem only surfaced in London, Birmingham or Leeds during the mid-sixties. Substantial postwar migration to the Mother Country from the Commonwealth increased the number of colored citizens in Britain from approximately 75,000 in 1945 (less than one-quarter of one percent of the total population) to more than one million (or about two percent of the population) by 1970.²

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1. A. Lester & G. Bindman, Race and Law in Great Britain (1972) [hereinafter cited to page number only].
This population of colored newcomers exhibits staggering diversity. The immigrants are of different nationalities—primarily Indian, Pakistani and West Indian—and, of course, come from countries with profoundly different histories. For example, the British legacy in the West Indies was slavery (and the suppression of the African past), while on the Indian subcontinent ancient civilizations were colonized but not erased. Even among the migrants from a single area there are marked differences: Those who voyaged to England from the Caribbean often identify with a particular island—Jamaica, Grenada, Trinidad, or St. Kitts—and feel rivalry, even hostility, towards those from other islands. Similarly, the two main elements of the Indian migration—the Gujaratis and the Punjabis—are of different ethnic origins and speak languages which, although Sanskrit in origin, are mutually unintelligible. Religion, too, divides the newcomers with the Indians largely Hindu or Sikh, and the Pakistanis, Muslim. Moreover, the political backgrounds of the immigrants reflect a numbing welter of ideologies and associational experiences. To give but one simple example, the hero of some activist Indians would be Gandhi, the embodiment of a nonviolent political tradition, while to some West Indians the violent revolt of Toussaint L'Ouverture during the Napoleonic wars was the great political act in Caribbean history.

Despite such differences in nationality, language, religion, and culture, most of Britain's colored immigrants suffer from the compound problems of powerlessness. They endure discrimination or deprivation because of race, class, and their newcomer status. Accordingly, immigrants and sympathetic members of the host society have pressed

3. Colored immigrants also came to Britain from British Guiana, Ceylon, Cambia, Ghana, Nigeria, Sierra Leone, Hong Kong, Malay, and Singapore.
4. The West Indies Federation, established in 1958, collapsed four years later. The constituent islands of the Federation became independent nations. See Bell & Oxall, Introduction, in The Democratic Revolution in the West Indies (W. Bell ed. 1967). Traditionally, the lighter one's skin the higher has been one's status in the West Indies, although this correlation is no longer so firm. Id. at 16; M. Smith, The Plural Society in the British West Indies (1963). Skin color, therefore, has also been a basic source of division among West Indians. See also H. Holm, The Two Variants in Caribbean Race Relations: A Contribution to the Sociology of Segmented Societies (1967), for an account of the varied impact on Caribbean life caused by different colonial nations.
5. Rose, supra note 2, at 58; R. Desai, Indian Immigrants in Britain (1963).
6. Some Indian migrants, who come from the central and southern areas of Gujarat, are Muslim.
7. See Rose, supra note 2, at 492-510; D. John, Indian Workers' Association in Britain (1969); S. Patterson, Dark Strangers: A Sociological Study of the Absorption of a Recent West Indian Migrant Group in Brixton, South London (1963).
9. R. Desai, supra note 5; C. Peach, West Indian Migration to Britain: A Social Geography (1968); Rose, supra note 2, at 177.
for legislation aimed at ending domestic racial discrimination. They have called, too, for the repeal of Britain's immigration laws which discriminate against the Commonwealth colored. But they have also recognized that some basic problems which afflict colored newcomers also beset other, lower-income groups in Britain, and they have therefore sought general legislation that would undertake the intricate task of reducing social inequality in such areas as housing, education, employment, and medical care.  

This book, despite its grand title, focuses narrowly on the Race Relations Act of 1968, Britain's anti-discrimination law. Both authors were intimately involved in the events which led to its passage. Bindman was one of three lawyers who, at the behest of the government's agencies in the race field, prepared an influential analysis—the Street Committee Report—of the legislative alternatives open to Parliament. Lester, who studied at Harvard Law School after undergraduate studies at Cambridge, was an energetic lobbyist for the Campaign Against Racial Discrimination, the leading British civil rights organization of the sixties. He played an important role in strengthening Britain's initial effort to legislate against discrimination—the Race Relations Act of 1965—and in preparing the way for the more comprehensive 1968 Act.

The purpose of the book, according to its authors, is to examine the "use of law to combat racial discrimination" and "to promote equality of opportunity and treatment regardless of race," although, as suggested above, they actually mean examination of the law explicitly curbing discriminatory behavior. What we are given is, in essence, a treatise. The authors spend the bulk of the book marching through

11. Rose, supra note 2, at 683-86. The authors in their recommendations note that: Problems of race relations in this country are closely linked with a whole series of difficulties arising from the problems of the inner city and can only be tackled in the context of a broader attack upon these problems, involving a wide range of agencies and government departments. Id. at 683.

12. Race Relations Act 1968, c. 71. This legislation superseded (and largely repealed) Britain's first modern anti-discrimination law, Race Relations Act 1965, c. 73. The 1965 Act includes prohibitions against racial incitement, as well as sections outlawing racial discrimination. The racial incitement provisions still remain in force. Race Relations Act 1965, c. 73, s. 6.


15. They hope to provide a "comprehensive discussion of the legal and political background to the legislation and of the practical operation of the present law." Such an analysis will be valuable to the "general reader and the social scientist" as well as "the lawyer and the law student"; the authors want their book to be a guide to the increasing number of public officials, voluntary bodies and private citizens who must deal with the problems of race in Britain. P. 11.
the provisions of the 1968 Act, discussing in detail the types of discrimination covered by its sections on employment, housing, and the provision of goods and services, and the procedures and remedies which give the Act effect. Case law (which is not yet extensive) and legislative history are integrated with analysis of the Act's language in explaining the current state of the law and its probable development.

Often using the Street Committee Report as their benchmark, Bindman and Lester also criticize the law as it now stands. Debates lost in Parliament during 1968 by the proponents of strong anti-discrimination laws are reopened. Accordingly, the authors recommend extending the law's scope and strengthening its enforcement mechanisms. For example, they urge that the law be amended to prohibit discrimination "not only by persons concerned with providing goods, facilities and services to the public, but also by those (e.g., professional firms, education institutions and working men's clubs) who provide facilities and services to their own members," and they suggest that "it should be unlawful for a police officer to discriminate on racial grounds in the exercise of his powers or the performance of his duties." The authors also propose that the Race Relations Board—the government unit charged with enforcing the Act—should have general investigative powers (rather than having to wait for individual complaints), should not have to refer complaints of employment discrimination to voluntary industrial machinery (as now required) and should have far broader subpoena powers (at present it generally cannot compel the attendance of witnesses or the disclosure of documents). They also argue that an individual complainant should have the right to bring an action under the law if the Board fails to take action.

As Bindman and Lester state:

\[T\]he Board has not been given the wide range of powers possessed by the American administrative agencies which originally developed the conciliatory technique [for dealing, in the first instance, with discriminatory acts], nor can it obtain from the courts the variety of remedies against a wrong-doer which are available in the United States.

16. The volume also includes: a background section on the way British law dealt with the problems of racial discrimination before national legislation; a section on the incitement to racial hatred provisions of existing law; and a lengthy appendix on the failure of Britain's first anti-discrimination law—a nineteenth century act prohibiting discrimination in the Indian civil service.
18. P. 376.
20. P. 290. For example, in order to obtain an injuction, the Race Relations Board must satisfy the court that the defendant had previously engaged in conduct which was of the same kind as, or of a similar kind to, the act which was unlawful. P. 330.
Although the Street Committee recommended anti-discrimination legislation modeled on laws in the United States and Canada (and Parliament followed these recommendations up to a point), this difference in administrative power is only one of many differences between the United States and Great Britain regarding the impact of law on problems of race.

Most striking, of course, is the absence in Britain of a written constitution that includes specific provisions treating relations between races, especially one securing equal protection of the laws. Until 1965 victims of British racial discrimination had to rely on the rights and remedies provided by the common law. Interpreting broad constitutional clauses is troublesome enough, but judicial “interpretation” and “lawmaking” is especially difficult in the common law context where the key referrent has been the concept of “public policy.” Not surprisingly, the British common law has manifested serious limitations as an instrument of achieving racial equality—its deference to private, contractual lawmaking, judicial reluctance to expand the concept of public policy, and “its essentially passive character.” Although Bindman and Lester criticize the English judiciary for its “ethical aimlessness” regarding racial discrimination, they readily acknowledge that the common law courts could not have been an “instrument for radical reform.” Obviously, too, statutes cannot be invalidated as discriminatory without a written constitution and judicial review. As an eighteenth century judge said: “An Act of Parliament can do no wrong, though it may do several things that look pretty odd.” Parliament’s most striking contemporary oddity, as noted above, has been to pass discriminatory immigration laws at the same time it attempts to outlaw racial discrimination within national boundaries.

In contrast to the United States, there was, during the sixties, a
sharp fear of a colored influx into Britain fanned by Little Englanders like Enoch Powell. This led to strong political pressure for immigration restrictions and to wide anti-immigrant publicity. Such fear, and the continuous debate about discriminatory immigration laws, undermined the symbolic value of the 1968 Race Relations Act. As the authors observe:

The hostile expression of our immigration law casts doubt upon the friendly expression of our race relations law. However much our legislators might wish it were otherwise, the hostility is taken more seriously than the friendliness—on both sides of the colour line.\textsuperscript{27}

There were other sharp differences surrounding the passage of anti-discrimination legislation in Great Britain and the United States. Both the 1965 and 1968 Race Relations Acts resulted from technical maneuvering at Whitehall and Westminster by a relatively small body of interested persons; the legislation did not have widespread public support and was not the result of pressure from a broad-based coalition of forces. The stark examples of racial violence in America stirred Parliamentary leaders who were trying to avoid future trauma but were not responding to sharply defined British problems. There was, in fact, little public awareness of the nature or extent of racial discrimination.\textsuperscript{28} Moreover, the claim of recent immigrants to equal justice did not have the same force as it had in the United States where blacks had so long and tortured a history.

These and other points of divergence between the United States and Britain, as well as the areas of congruence, suggest that this work should find a wider readership than those who are immediately concerned with the practicalities of securing racial equality in the United Kingdom. In America, students of race relations, experts on civil rights

Walter Act in 1952 migration to the United States from Jamaica was restricted to 100 a year.\textsuperscript{27} \textsuperscript{14}

Rose, supra note 2, at 67. Nonetheless, when civil rights legislation was being debated in the United States during the sixties, there was not, as in Britain, a parallel national debate about racially restrictive immigration laws.

\textsuperscript{27} \textsuperscript{14}

In order to answer this question, and to strengthen his hand in the government and at Westminster, the Home Secretary, Roy Jenkins, commissioned a study in 1966 to determine the extent of discrimination. Rose, supra note 2, at 523. The results are found in POLITICAL AND ECONOMIC PLANNING, SUMMARY OF THE P.E.P. REPORT ON RACIAL DISCRIMINATION (1967). The drama of cattle prods and police dogs was totally missing from the British political scene during the debates on anti-discrimination legislation. Approximately 200,000 marched on Washington, but in Britain during 1967 the civil rights movement could not organize more than twenty immigrants to hold a vigil near No. 10 Downing Street in an effort to pressure the government to introduce new legislation.
legislation, comparative lawyers, and constitutional scholars should find that the book illuminates their particular areas of concern.

Race and Law in Great Britain should also be of interest to the historian of legal ideas and institutions. In focusing on individual acts of discrimination and the legal remedies available to victims of racial bias, the authors' orientation reflects that of the American civil rights movement in the early sixties. Bindman and Lester are kindred spirits with those in the Leadership Conference on Civil Rights who spent many summers lobbying on Capitol Hill for anti-discrimination legislation. This book is an important source for any analysis of the influence of American ideas on Britain—and the distortions that those ideas underwent both because the British social context and political traditions were different and because events in America were outstripping those in the United Kingdom. 29

For, obviously, the United States has moved a great distance from the optimistic days of the 1963 March on Washington and the landmark Civil Rights Act of 1964. Attaining equal rights, in fact as well as before the law, has proven far more difficult than many imagined. And thus from a contemporary American perspective, the authors' treatment of their subject, race and law, seems extraordinarily incomplete. Huge chunks of descriptive material are missing: the distribution of power within British society; the structure and attitudes of the various immigrant communities; the nature of the interaction between immigrant and host, colored and white; the causes of discrimination; the extent to which problems of race and of class are interwoven; and the relation of legal and governmental institutions to all of these questions.

Regrettably, the authors' normative discussion is also slender to say the least. 30 The concept of "equal opportunities" is never explicated. And while the authors recognize that racial equality depends, in no small measure, on social equality, they make virtually no attempt to analyze the latter concept. Nor do the authors present the arguments (or even the considerations that would go into such arguments) about where to draw the line between the immigrants' responsibility for self-help and the government's obligation to provide remedial, supportive

29. For example, the British imperial and colonial tradition—and the loss of Britain's status as a world power—would clearly condition the acceptance in the United Kingdom of principles of racial equality developed in the United States. Or, to take a different example, when British civil rights lobbyists were pushing for strong anti-discrimination laws during the period 1965-68, the British public was made aware through lengthy press reports of the massive urban riots in the United States. These reports not only served as a spur to legislation but made many leaders of the colored community aware of the limits of anti-discrimination laws even before they were passed. This awareness undermined immigrant pressure for such laws.

measures for colored newcomers. Drawing such lines—and justifying them—is essential if one is to define the "proper" role of law in securing racial equality.

To say all this is not to tax Bindman and Lester for their failure to write a monumental, multi-volume study on law and race. Their aims are much more modest, and the dimension of the problem they explore is an exceedingly valuable one. But their perspective is limited and should be clearly recognized as such. Opportunities will not be "equal" if individuals do not have some minimum substantive reservoir of economic, political, educational, and psychological resources, even if the law theoretically guarantees that certain procedural routes to "equality" are open. And it is easy to state that such minimum substantive rights must be guaranteed to all citizens, but extraordinarily difficult to define and implement that observation through "law."

Bindman and Lester know this. They are too knowledgeable, and too familiar with the American experience, not to. But they give this fundamental point exceedingly short shrift, failing to examine its applicability in the British context with any sophistication. Given their role, this failing is understandable. Both are committed lobbyists for strong anti-discrimination laws. It is perhaps too much to expect that they will attempt the complex task of describing the limitations of anti-discrimination legislation. The struggle for such laws is difficult enough. For the obvious must not be forgotten: Britain's colored immigrants are still a relatively powerless minority. And leaders can retreat from principle when whites become exercised at the colored man's quest for equality. Especially where there is no written constitution, ideals of racial equality can become the plaything of majoritarian politics.

Eight years ago when the first Race Relations Act was passed, an American might have gone to Britain—perhaps as men from the Old World had once, long before, come to the New—feeling the weight of his continent's racial history and hoping to find a society that would avoid the errors etched so starkly on the United States. As advocates, Bindman and Lester today reflect a similar sense of guarded optimism. But much of the "reality" of race relations in Britain is missing from their book. And that American, living at home again amidst the shambles of his city and the deprivation of many of its inhabitants, may well wonder whether Britain and its growing colored population will, despite the many differences between the two countries, avoid the same predicament.


Reviewed by Barbara D. Underwood†

Each of these books could have been important. Both Professor Kittrie and Mr. Ennis seek to limit (or abolish) the use of government power to incarcerate people for compulsory psychiatric treatment. Kittrie1 approaches this subject with the apparatus of scholarship, offering a long review of the existing statutes and an extensive bibliography of the literature on the subject. Ennis2 writes as a practicing lawyer, offering a selection of outrageous cases drawn from his litigation experiences during three years as director of a special project of the New York Civil Liberties Union. Both books provide a wealth of information, much of it anecdotal, about the system of laws by which states impose psychiatric treatment on unwilling patients. But neither author has effectively organized his data or his arguments to support his conclusions, and both avoid most of the difficult questions that lie at the bottom of this legal morass.

I

The programs of "civil" or "quasi-criminal" compulsory treatment discussed in these books were generated by the same "rehabilitative ideal" that has so substantially influenced thinking about what to do with convicted criminal offenders. While this rehabilitative ideal has inspired efforts to prevent convicted offenders from repeating their crimes,3 it has also generated programs for identifying potential of-

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1. N. KITTRIE, THE RIGHT TO BE DIFFERENT (1971) [hereinafter cited as KITTRIE].
2. B. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS, AND THE LAW (1972) [hereinafter cited as ENNIS].
3. For the importance of rehabilitation as a goal of criminal sentencing, see, e.g., Trop v. Dulles, 356 U.S. 86, 111 (1958) (Brennan, J., concurring); Morissette v. United States, 342 U.S. 246, 251 (1952); Williams v. New York, 337 U.S. 241, 247-48 (1949); J. CONRAD, CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRAC-
fenders in order to prevent them from committing even a first serious crime. Mental disorder, juvenile waywardness, addiction to narcotics, and alcoholism have all been identified as conditions which in some circumstances are associated with crime. In programs for treating them, lawmakers have seen the twin virtues of prudence and charity: Compulsory treatment protects the public from anticipated crime and it relieves the patient of his troublesome condition. Such programs, however, have been subject to increasing criticism, and courts have begun to set limits on the power of the state to impose compulsory treatment other than that authorized as the sentence for a crime. Increasingly it has been suggested that courts or legislatures should not simply reform compulsory treatment laws, but abolish them.

The fundamental problems posed by compulsory treatment programs may be roughly categorized:

**Justification.** At the threshold there is the question whether the anticipation or prediction of harmful behavior can ever provide a satis-
isfactory justification for confining someone—for depriving him of the opportunity to prove that expectation mistaken. Perhaps only conviction of a crime should sanction such compulsion, and then only for the period specified as the sentence for that crime.

Definition. Assuming justification can be found in the prediction of harmful behavior, there remains the problem of defining with some precision the class of people who may be confined on that ground. Specifically, what kinds of predicted harms, and how confident a prediction, should be required to establish eligibility for compulsory treatment? Would it be appropriate to adopt a sliding scale, requiring greater confidence for the prediction of a small harm than a great one? Are there some harms punished by the criminal law which are nevertheless too small to justify confinement on the basis of a prediction?7

A corollary problem is whether there may be other satisfactory justifications for compulsory treatment, apart from the prevention of predicted harm. For example, is it sufficient that a person lacks the power to make decisions about treatment in his own interest? And if so, how limited must his decision-making powers be in order to justify overruling an expressed decision to resist treatment?

Identification. However the class is defined, there remains the practical problem of applying the criteria—the questions of what methods and techniques should be employed in identifying individuals, and which officials should have authority to make the decisions. Even if it is theoretically justifiable to commit persons on the basis of predicted harmful behavior, is it ever possible in practice to predict behavior with the necessary degree of confidence? Similarly, if it is justifiable to commit persons for lack of capacity to make decisions for themselves, is it possible to distinguish between a person who resists treatment because his judgment is impaired (and would welcome treatment if not impaired), and a person whose resistance to treatment amounts to a knowing, autonomous choice that should for that reason be respected?

Treatment. Finally, assuming that some people are identified as proper subjects for confinement and treatment, what measures and goals (beyond simple confinement), should be involved in treatment? Are there any treatment techniques sufficiently precise to bring about changes without side-effects? Do we even know with any confidence what kinds of changes are desirable?

7. For a preliminary but illuminating discussion of most of the questions raised here, see Dershowitz, Psychiatry in the Legal Process: “A Knife that Cuts Both Ways,” 51 JUDICATURE 370 (1968).
Professor Kittrie touches on most of these questions at one point or another in his massive book. He has undertaken to provide a grand synthesis: a survey of existing law and practice, and a thorough critique. But he does not pursue this initial strategy to any advantage. The core of the book consists of five chapters which discuss in turn the compulsory treatment laws applicable to the mentally ill, delinquent youths, psychopaths, narcotics addicts, and alcoholics. He traces no connections among the statutes he surveys, and the utterly unsystematic analysis actually obscures comparisons. Having followed no particular thread through this maze, Kittrie comes out, unsurprisingly, in no particular place.

Each of the statutory schemes analyzed by Kittrie is vulnerable to criticism on the ground that it defines the criteria for commitment in broad and imprecise terms. But Kittrie discusses this problem of vagueness only with respect to laws dealing with juveniles. He would apparently eliminate criteria such as “incorrigibility” designed to identify future criminals among juveniles, and authorize compulsory treatment only for conduct that would be criminal if committed by an adult. This reform would simply abandon a primary goal of most

8. There is also a chapter devoted to forms of compulsory treatment which are widely regarded as particularly extreme or controversial, including sterilization, lobotomy, and electric shock therapy. Kittrie concludes that some treatments are so severe that they should be prohibited, or severely limited, although he does not offer a principle for ranking treatments in order of severity. Kittrie, supra note 1, at 297-339.

9. A mentally ill person may be subject to commitment if he is “a fit subject for treatment in a hospital,” Conn. Gen. Stat. Ann. § 17-178 (Supp. 1973), or if he is “by reason of that illness likely to injure himself or other persons,” D.C. Code Ann. § 21-545(b) (1967). There is an initial ambiguity, of course, in the use of the term “mentally ill” as a criterion for commitment, see, e.g., T. Scheff, Being Mentally Ill (1968).


A person may be committed as a narcotics addict if he is “addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted,” Cal. Welf. & Insts. Code § 3030 (West 1972), or as an alcoholic if his “condition, resulting from the excessive or addictive use of alcohol, is such that, for his own protection or the protection of others, he requires compulsory hospitalization and treatment,” Conn. Gen. Stat. Ann. § 17-155(e)(b) (Supp. 1973).

A person may be committed as a sexual psychopath if he has a “lack of customary standards of good judgment” rendering him “irresponsible for his conduct with respect to sexual matters, and thereby dangerous to other persons,” Minn. Stat. Ann. § 525.09 (1969). This statute served as the prototype for statutes in many other states after it was upheld by the Supreme Court against an attack on the ground of vagueness, Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).

10. Kittrie, supra note 1, at 117-25. Actually Kittrie seems to waver on this point, suggesting that it might be appropriate after all to specify certain kinds of noncriminal conduct as additional grounds for commitment. Id. at 123. This approach sounds rather like a call for a legislative determination of the kind of conduct that would support a prediction of harm, see p. 1573 infra.
compulsory treatment statutes: to identify and treat persons who are likely to harm others, although they have not done so yet. Other critics have urged that this goal be abandoned, either because it is impossible to identify such persons accurately with existing techniques of prediction, or because it is impossible to prevent such persons from causing harm with existing techniques of treatment.¹¹ Perhaps, in the case of juveniles, Professor Kittrie accepts one or both of these arguments. He does not say so explicitly, however; nor does he discuss the possibility of extending his proposed reform to the other compulsory treatment statutes.

If he rejects as a general matter the effort to predict harm and to intervene to prevent it, then Kittrie's proposed reform of the juvenile statutes would seem appropriate for each of the other statutory schemes discussed in this book. Accordingly, compulsory treatment would be provided only to convicted criminals during the period of confinement authorized by their conviction. This reform would by no means eliminate all the problems raised by the practice of compulsory treatment,¹² but it at least would apply a standard of precision comparable to that applied to criminal law in general.¹³

The reason for Kittrie's failure thus to extend this prescription is obscure. Perhaps in his view techniques of prediction and intervention are more reliable for the mentally ill, addicts, alcoholics, and psychopaths than for juveniles. Or perhaps he considers these other statutes less vague than the juvenile statutes, and hence the need for this reform less acute. But he never treats this question, or any other, from the broad perspective promised by this book, the perspective of the general practice of compulsory treatment.

If one accepts the idea of prediction as a basis for compulsory treatment (and Kittrie apparently does, juveniles excepted), then it is neces-

¹². There remains, for example, the large problem of deciding which treatments, if any, should be prohibited or subjected to more stringent regulation than others. See note 8 supra; Note, Conditioning and Other Technologies, 45 S. Cal. L. Rev. 616 (1972).
¹³. It is perhaps worth noting that, notwithstanding the constitutional requirement of precision in criminal statutes, Papachristou v. Jacksonville, 405 U.S. 156 (1972); Lanzetta v. New Jersey, 306 U.S. 451 (1939), many such statutes are not in fact precise in any generally-understood sense of the term. If the compulsory treatment statutes were drawn to conform to the specificity requirements of the criminal law, they would perhaps be somewhat less ambiguous than they now are, but they would hardly be free from ambiguity. See generally Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

Some constitutional requirement of precision applies to compulsory treatment statutes even if they are characterized as civil rather than criminal, Giaccio v. Pennsylvania, 382 U.S. 399 (1966); A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925). But in practice civil statutes have seldom been struck down on the ground of unconstitutional vagueness. See Note, supra, at 69-70 n.16.
sary to consider the special problems of formulating a precise definition based on predicted harm. In drafting such a statute the legislature could state precisely the future harmful acts which, if predicted, would justify compulsory treatment. Or it could state precisely the past acts that would support a prediction of harmful behavior in the future.

The first approach would limit the discretion of administrators and courts, and thereby make it more difficult to confine people for arbitrary, or constitutionally impermissible, reasons. In particular, it would force a legislature to decide just what future harms are sufficient for compulsory treatment, and how likely those harms must be. A standard which has been made explicit is perhaps more likely to be applied evenhandedly.

But even a very precise statement of anticipated harms would not serve one purpose of the requirement of precision: It would not operate to give fair warning of the conduct that will result in confinement. A statute authorizing compulsory treatment of a person predicted to do a certain act (X) does not tell anyone how he must behave in order to avoid compulsory treatment. One thing is clear: It is not sufficient simply to avoid doing X.

The second approach would require the legislature to give fair warning by specifying those acts which it finds to be reliable indicators for predicting harmful conduct, and authorizing compulsory treatment of persons who have committed those acts. This is essentially what a legislature does when it authorizes imprisonment for attempt crimes, or for crimes of possession, e.g., possession of burglar's tools. Presumably the legislature does not believe that harm is inflicted on anyone by bare possession, or by an unsuccessful attempt; it authorizes imprisonment largely because acts of attempt, and possession of certain items, are thought to be good predictors of future harm.14

To use this approach a legislature would have to develop its own theory of prediction: It would enact into law predictive inferences it finds reliable, and forego reliance on the clinical judgment of a psychiatrist or other expert in an individual case.15 This approach is therefore appropriate if one doubts the reliability of psychiatric predictions; it is needlessly restrictive if one believes (a) that psychiatrists often make reliable predictions, and (b) that they cannot translate their predictive methods into simple behavioral criteria for legislative use.

Kittrie appears to take contradictory positions on the problem of

15. This appears to be the approach favored by Professor Alan Dershowitz, supra note 7 and by Dr. Thomas Szasz, supra note 11.
defining the harms that justify compulsory treatment, and also on the problem of identifying persons who are likely to inflict those harms. In the concluding chapter he sets forth a ten-point proposal for the reform of all compulsory treatment statutes as a Therapeutic Bill of Rights. On the subject of criteria for compulsory treatment, the document states:

No person shall be compelled to undergo treatment except for the defense of society.\(^{16}\)

He appears to mean that the risk of harm to self is not sufficient to warrant commitment. But a few sentences later he states that compulsory treatment should be “limited to those who have committed crimes or who pose a clear and present danger to themselves or others.”\(^{17}\) He says, further, that such “clear and present danger” must be demonstrated through “truly harmful behavior which is immediately forthcoming or has already occurred. Generally an overt act should be required.”\(^{18}\) He thus fails to specify whether compulsory treatment is to be imposed only on a person who has committed a criminal attempt as defined by the law of crimes, or whether there is room for predictive judgments in individual cases by psychiatrists and others. Nor does he specify (assuming the latter) who is the proper decision-maker—judge or jury, panel of experts, or some other tribunal—saying only that there should be a “judicial or other independent hearing.”\(^{19}\)

His treatment of the other major questions is equally unsatisfying. It would serve no purpose to multiply examples of the opportunities for analysis that Professor Kittrie has missed.\(^{20}\) It should be sufficient

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17. Id. It is of course possible to argue that there is no such thing as pure “harm to self,” that all such harm indirectly harms others, e.g., dependents or employers. But Kittrie nowhere suggests that he is relying on that kind of argument. For the patient who seems likely to harm himself, Kittrie urges “greater emphasis upon voluntary welfare services,” but he implicitly falls back on compulsory treatment for those who do not accept such services. Id. See also Szasz, supra note 11, at 226.
18. Kittrie, supra note 1, at 402.
19. Kittrie, supra note 1, at 403. There has been a longstanding controversy between those who urge that the decision should be made by a jury because of its capacity to inject community values into the determination of whether compulsory treatment is justified in a particular case, and those who would reserve the decision to psychiatric experts, because of their greater technical competence in fact-finding, and because this method would avoid the trauma of formal judicial proceedings. See, e.g., Humphrey v. Cady, 405 U.S. 504, 508-09 n.5 (1972); R. Rock, M. Jacobson & R. Janopaul, Hospitalization and Discharge of the Mentally Ill 256-61 (1968).
20. It would have been interesting to pursue not only structural relationships but also historical connections among these several statutory schemes. Did any of these compulsory treatment schemes serve as the model for any others? Or did they all emerge simultaneously, as part of a more general trend toward reliance on scientific experts to cure society’s ills?
to say that despite its air of comprehensiveness and its promise of synthesis, this book offers no new insights to anyone who is at all familiar with the subjects under discussion. Moreover, because it does not survey the subject in a systematic way, it is not especially useful as a starting point for further investigation. Its chief value, perhaps, is for the reader who is not a lawyer, who seeks an introduction both to the range of existing compulsory treatment statutes and to the lawyer's arsenal of attacks on such statutes.21

III

While Kittrie's treatment of the fundamental questions in this area is unsystematic and incomplete, Ennis never confronts most of these questions at all. In the tradition of books by lawyers about their lives in court, Prisoners of Psychiatry contains an assortment of moderately interesting stories. Unfortunately, the stories do not appear to have been selected according to any organizing principle. Indeed, the author is quite candid about his criteria of selection: "I include these four stories [in the first section of the book] rather than others, only because they were the first to reach my attention."22 As illustrations of legal problems and principles, they are redundant; all four of the first stories, for example, show that it is both pointless and unjust to charge a person with a crime, and then hospitalize him indefinitely.

David Rothman has recently suggested that a "cult of asylum" swept America in the early nineteenth century. D. Rothman, The Discovery of the Asylum (1971). He argues that a single complex of reasons led to the nationwide construction of mental hospitals, penitentiaries, almshouses, and juvenile shelters. If his interpretation is correct, one might expect that the same factors led to the enactment or expansion of laws compelling commitment. Professor Kittrie does not, however, address the question of historical relationships among the several statutory schemes, nor does he provide sufficient background information to serve as a starting point for such an inquiry.

21. There are many misleading, if not inaccurate, statements in the discussions of legal principles, due perhaps to an effort to simplify for the general reader. For example, the distinction between criminal and civil processes is a technical distinction with a long history. Throughout most of the book Kittrie argues that the civil processes under discussion are tantamount to criminal processes, and hence criminal procedural safeguards should apply. But near the end of the book he discovers a significant difference between these civil processes and the ordinary criminal law:

Unlike the criminal process, which must insist upon punishment once guilt is determined, the parens patriae power would not have to be invoked after a harmful act had been committed if the therapists could satisfy themselves that the individual posed no further threat to society.

Kittrie, supra note 1, at 382. In fact, of course, except for the unusual case of a mandatory minimum sentence, even the ordinary criminal justice system allows its judges to suspend sentences, and often there are procedures for eradicating those legal disabilities which attach upon conviction. Pardons and paroles also provide mechanisms for suspending punishment for an individual who poses no further threat to society.

22. Ennis, supra note 2, at 4.
on the ground that he is incompetent to stand trial.\textsuperscript{23} One of them would surely have been sufficient.

The twelve tales provide a moderately lively introduction to the compulsory treatment system, but they also inflict on the reader in excruciating detail an account of the author's trials and tribulations in the courts of New York. Ennis tells more than anyone could possibly want to know about his oral arguments, his briefs, and his work load. These details do not improve the flow of the narrative, nor do they offer any insights into those aspects of the lawyering process which are far more worthy of attention. Strewn through the book are descriptions of the classic conflict of the public interest lawyer—the conflict between the demands of the test case and those of the individual client. At no point, however, does Ennis reflect on this dilemma. His book provides no more than a record of experiences that might generate some concern about the legal problems of people caught in the system of compulsory treatment.

In his final chapter Ennis reviews various reform proposals and concludes by calling for "nothing less than the abolition of involuntary hospitalization. That will not come soon, but it will come."\textsuperscript{24} But what does he mean by "abolition"? Does he mean an end to all forms of compulsory treatment, or an end to long-term compulsory confinement in large public hospitals? If Ennis really means to end all compulsory treatment, what would he do with the predicted murderer, or the predicted suicide, or the alcoholic found lying in the gutter on a freezing day?\textsuperscript{25} Should society learn to tolerate such people without intervening at all?

IV

Neither \textit{The Right to be Different} nor \textit{Prisoners of Psychiatry} contributes very much to the understanding of its subject. In fact, by obscuring the fundamental questions involved in compulsory treatment, they may retard that understanding. These books may succeed in calling greater public attention to a troublesome set of problems. But the tasks of analysis and reform still await execution.

\textsuperscript{23} The Supreme Court found this an easy case when they decided it last year in \textit{Jackson v. Indiana}, 406 U.S. 715 (1972). The Court is apparently reluctant to decide some of the more difficult issues in this area, see \textit{Murel v. Baltimore City Criminal Court}, 407 U.S. 355 (1972) (dismissing certiorari as improvidently granted).

\textsuperscript{24} \textit{Ennis, supra} note 2, at 232.

\textsuperscript{25} If the alcoholic says "Leave me alone," then bringing him indoors and pouring coffee into him is compulsory treatment. If he does not regard this as "involuntary hospitalization," it would be interesting to see just how Ennis would define that term.