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FITNESS TO PROCEED: A BRIEF LOOK AT SOME ASPECTS OF THE MEDICO-LEGAL PROBLEM UNDER THE NEW YORK CRIMINAL PROCEDURE LAW

H. H. A. Cooper*

INTRODUCTION

"Would you tell me, please which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the Cat.

"I don't much care where—" said Alice.

"Then it doesn't matter which way you go," said the Cat.¹

The issue to be addressed in the present article is a very limited one. Nevertheless, while it seems to have considerable importance of its own, it is in danger of being overlooked or disregarded by reason of its connection with a much larger and, in many ways, more perplexing problem. The New York Criminal Procedure Law, which came into force on September 1, 1971, introduced two concepts which it proceeded to define successively: the "incapacitated person"² and the "dangerous incapacitated person."³ The medico-legal problems, of which some aspects are to be considered here, reside in the identification of those persons and the application to them of the procedural steps, which the legislation prescribes in their case. It is proposed here to examine some of the problems facing the lawyer and the psychiatric examiner in relation to the "incapacitated person" as defined by the Criminal Procedure Law. It is necessary to state at the outset, that it is not proposed to deal

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1. C. Dodgson, "Alice in Wonderland," The Annotated Alice 88 (1971). No apology need be tendered for citing the works of Lewis Carroll, so often quoted in modern legal literature. It is worth observing, however, that they seem to be quoted with uncommon frequency in recent writings on the present subject; see, e.g., Dershowitz, The Law of Dangerousness: Some Fictions About Predictions, 23 J. Legal Ed. 24, 25 (1971); Morris, Psychiatry and the Dangerous Criminal, 41 S. Cal. L. Rev. 514 (1968).

2. N.Y. CODE CRIM. PRO. § 730.10(1) (McKinney 1971).

3. Id. § 730.10(2) (McKinney 1971).
with the extremely complex and near-inexhaustible subject of "dangerousness." It must, however, be adverted that the pressing problem of the medico-legal standard of dangerousness, the legislative association of the adjective "dangerous" with the term "incapacitated person" so as to mean something quite different, and the legislative proximity of these quite distinct topics are what tend to divert attention from some of the more interesting problems inherent in the basic, statutory definition. The intention here is to focus attention upon these problems, to explain what they seem to be and to show their relation to the practical application of these standards. In order to do this, something of an "unravelling" must be attempted, for some issues, relatively simple in themselves, have become complicated by reason of their entanglement with others.

To essay even this modest undertaking within the limits set for this article involves a number of presumptions. It would be tempt-


6. N.Y. CODE CRIM. PRO. § 730.10(2) (McKinney 1971) provides that: "Dangerous incapacitated person" means an incapacitated person who is so mentally ill or mentally defective that his presence in an institution operated by the department of mental hygiene is dangerous to the safety of other patients therein, the staff of the institution or the community.

7. E.g., Id. § 730.10(9) (McKinney 1971) which provides: "Where an order of examination has been issued by a superior court, the psychiatric examiner must also set forth his opinion as to whether the defendant is or is not a dangerous incapacitated person."
ing to commence such an exercise with a jus-philosophical discussion of interpretative criteria generally. It might be attractive to set the consideration of the problems to be posed in their appropriate historical setting, both to increase understanding and for reasons of polish, as fine platinum enhances the qualities of a rare jewel. It might be thought even more urgently pressing to examine these questions by reference to the implications of the underlying criminal policy. All these delights must be firmly eschewed. The possibilities of usefully discussing the same problems at length from each of these different perspectives is not discounted; it is simply a luxury which cannot be afforded in the present context. Some things must be taken for granted and the reasoned basis for their assertion looked for elsewhere. While this limitation might be thought to reduce the appeal and authority of the present endeavor, it does at least have the merit of permitting concentration upon the real problem herein isolated for examination, rather than dispersing the energies of the discussant over a field too wide for comfort. Attention thus will be focused upon a very small segment of this legislation, a few words at most, in the knowledge that they are but a part of a wider scheme of regulatory material whose associations and effects must be presumed and accepted rather than ignored; likewise, a surgeon, concentrating his skills upon the extirpation of some small organ, is professionally cognizant of anatomy in general, ethical standards and responsibilities, and a host of other associated matters on different planes, without these interfering with his primary activity. He who sets out to specialize is naturally in self-imposed blinkers, but he is not blind.

The recognition of an individual in a criminal proceeding as an incapacitated person carries with it consequences of considerable moment to that individual and to society as a whole. The task of making the appropriate identification so as to set off the train of events posited by the law is divided rather unevenly between the lawyer and the psychiatric examiner, with the court playing a somewhat detached, supervisory role. Each of the professionals involved in this decision-making process is faced with a difficult set of choices as a result of the possibilities open to him in such a situation. It is important to emphasize at this point that the choice made is not necessarily a scientific one based simply upon the selection of the proper principles deriving from the respective disciplines, but rather, a question of policy reflecting certain ethical predispositions. The entry into a profession means the broad acceptance of that profession's major postulates and goals. Thus, the psychiatrist is concerned primarily with the mental health and in-

8. See Id. § 730.10 (McKinney 1971).
tegrity of the individual who is seen as a patient to whom the medical profession is ministering in this hour of need. This perspective determines the medical approach to the question of the subject's capacity in this legal situation as decidedly as does that of the lawyer. Perhaps it should be admitted that the lawyer is somewhat less certain of the bases of his ministry than is the physician, but he is no less sure of his primary purpose, which is to assist the subject, his client, by the proper use of his professional skills in the predicament which the individual faces at law. Both the lawyer and the psychiatrist are thus endowed with the skills to assist the individual, be he patient or client, but their respective disciplines provide no reliable guide in the situation to be considered here as to how that assistance should be rendered. In short, the psychiatrist, by reference to his professional goals, has the urge to treat; the defense lawyer, by reference to his objectives, is motivated by the desire to recover his client's freedom at the earliest possible moment that the law allows. While these aims may not necessarily be incompatible, neither in general nor in any particular case, the pursuit of either is potentially capable of warping the law to accord with one or other of these professional predispositions.

The main danger in all this is that the policy of the statute tends to be formed or reformed in action, as it were, by those entrusted with its administration. The provisions relating to the determination of capacity are devoid of an essential element until it is supplied by the psychiatrist and the lawyer. Where the court is fully cognizant of this possibility, it can act positively to adjudicate the issue, taking into account the effect of these predispositions. Not all courts are, however, so conscientious nor apprised of the perils of somnolence in the face of medico-legal activism. It is all too easy for courts to rule upon motions of this sort in a routine fashion so that a pattern of facile acceptance of the expert's viewpoint becomes established. The expert all too easily becomes mesmerized by the symmetry of his own diagnosis and prognosis, unaware that these are based to a large extent upon rules of con-

10. See, e.g., Lawton, Psychiatry, Criminology and the Law, 5 MED. SCR. & L. 132, 132 (1965): "Psychiatrists see patients; criminologists see tabulated results of social inquiries; judges see murderers, ravishers, burglars, swindlers and cheats—and between the Bench and the dock stand the victims of crime."
venience dictated by his own professional attitudes. It behooves
the court, which has most ample powers and the gravest of re-
sponsibilities under New York law, to be ever alert against such
possibilities, and it is salutary to recall the words of a harsh critic
of psychiatry in the courts:

It is astounding that judges and correctional officials continue to
view psychiatrists as experts on human behavior when there is
considerable experimental and other research which shows laymen
to be superior to psychiatrists and associated personnel in the judg-
ment of people's motives, emotions, abilities, personality traits, and
action tendencies.\textsuperscript{13}

It is easy to overlook the fact that the determination of incapacity
under New York law is neither exclusively a medical nor a legal
question; it is, in large measure, one relating to the proper exercise
of the Art of Judgment.\textsuperscript{14} The courts ought to have a very clear idea
where the lawyers and psychiatrists are capable of leading them. As
the Cheshire Cat told Alice, you are sure to get somewhere if you
only go on long enough. But the court, unlike Alice, is duty bound
to care where it is going, and to that end, it must pay careful atten-
tion to the words of the law as well as those duly appointed to guide
it.

WHAT THE LAW SAYS ABOUT
THE INCAPACITATED PERSON

"It's too late to correct it," said the Red Queen: "when you've
once said a thing that fixes it, and you must take the conse-
quences."\textsuperscript{15}

The New York Criminal Procedure Law provides that: "'Inca-
pacitated person' means a defendant who as a result of mental dis-
 ease or defect lacks capacity to understand the proceedings against
him or to assist in his own defense."\textsuperscript{16} The issue of capacity is, in
the first instance, one for the competent court. The law provides
that:

At any time after a defendant is arraigned upon an accusatory in-
strument other than a felony complaint and before the imposition
of sentence, or at any time after a defendant is arraigned upon a
felony complaint and before he is held for the action of the grand

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13. Hakeem, \textit{A Critique of the Psychiatric Approach to Crime and Cor-
Denning gives as the cardinal virtues: "Patience to hear what each
side has to say; ability to understand the real worth of the argument;
wisdom to discern where truth and justice lie; decision to pronounce
the result."
15. C. DODGSON, \textit{supra} note 1, at 323.
\end{footnotesize}
\end{flushleft}
FITNESS TO PROCEED

jury, the court wherein the criminal action is pending must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person.\textsuperscript{17}

The result of such a determination by the court is the referral of the defendant for examination in accordance with the terms and conditions of the preceding sub-section of the enactment.\textsuperscript{18} The prime product of such a court order is the "examination report" defined by the statute as:

a report made by a psychiatric examiner wherein he sets forth his opinion as to whether the defendant is or is not an incapacitated person, the nature and extent of his examination and, if he finds that the defendant is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the defendant lacks capacity to understand or to assist in his own defense.\textsuperscript{19}

The receipt by the court of the examination reports it has required gives rise to a number of possibilities. Where these reports:

show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person, the court may on its own motion, conduct a hearing to determine the issue of capacity, and it must conduct a hearing upon motion therefor by the defendant or by the district attorney. If no motion for a hearing is made, the criminal action against the defendant must proceed. If, following a hearing, the court is satisfied that the defendant is not an incapacitated person, the criminal action against him must proceed; if the court is not so satisfied, it must issue a further order of examination directing that the defendant be examined by different psychiatric examiners designated by the director.\textsuperscript{20}

When, on the other hand, the reports show:

that each psychiatric examiner is of the opinion that the defendant is an incapacitated person, or when the examination reports submitted to the superior court show that each psychiatric examiner is of the opinion that the defendant is a dangerous incapacitated person, the court may, on its own motion, conduct a hearing to determine the issue of capacity or dangerousness and it must conduct such hearing upon motion therefor by the defendant or by the district attorney.\textsuperscript{21}

There remains the possibility that:

When the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, or

\begin{itemize}
\item \textsuperscript{17} Id. § 730.30(1) (McKinney 1971).
\item \textsuperscript{18} Id. § 730.20 passim (McKinney 1971).
\item \textsuperscript{19} Id. § 730.10(9) (McKinney 1971).
\item \textsuperscript{20} Id. § 730.30(2) (McKinney 1971). The term "director" as used in this section is defined by § 730.10(5) (McKinney 1971).
\item \textsuperscript{21} Id. § 730.30(3) (McKinney 1971).
\end{itemize}
when the examination reports submitted to the superior court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not a dangerous incapacitated person, the court must conduct a hearing to determine the issue of capacity or dangerousness.22

Enough has been cited to be able to comment usefully upon the respective roles assigned by the law to each of those entrusted with the administration of these provisions. It should be noted that there is no presumption of capacity favoring the defendant;23 it is precisely because the court considers he may be an incapacitated person that the machinery for deciding the matter is set in motion. The law is silent as to how this opinion of the court might be engendered. It is possible to conceive of the matter arising spontaneously as a consequence of the defendant's appearance upon arraignment. It is more logical to presume that the matter will be drawn to the court's attention by the district attorney or the defense attorney, although the law makes no express provision for this to be done. It must, therefore, be noted that while neither the district attorney nor the defense can prevent the court from making an order for examination—indeed, if the conditions required for the operation of the law are present, the court cannot prevent itself from ordering such a referral—either one can be instrumental in causing the court to make such an order where it might otherwise have proceeded differently. Thus, the lawyer is not confined to debating the question of the defendant's capacity; he can raise it as well.

Some observations must be made with reference to the definition of "incapacitated person." It contains, patently, two exclusively medical questions, namely whether the defendant is suffering from a mental disease or a (mental) defect. These purely medical findings are not debatable as such; the hearing is on the question of capacity, not on whether the defendant has or has not a mental disease or defect, and this latter is relevant only to the wider context. It is here that the psychiatrist is seen to step boldly—or be made, legislatively, so to act—out of the realms of psychiatric medicine into the unfamiliar province of law. He is not allowed to confine himself to the simple determination of the patient's condi-

22. Id. § 730.30(4) (McKinney 1971).
23. There seems always to have been a distinction at common law between the issue of capacity and the general issue of responsibility in that there existed a presumption of sanity which formerly placed the onus of raising the issue of insanity upon the defendant. See, e.g., Bratty v. Atty. Gen. No. Ireland, [1963] A.C. 386 (N. Ire. 1961). On the other hand, capacity or fitness to plead could have been raised by any party or by the court itself.
tion, leaving the lawyers to argue about what that means; instead, he must state in detail "wherein the defendant lacks capacity to understand or to assist in his own defense." This latter is manifestly not an exclusively psychiatric question. Yet the psychiatrist may be the determining authority in this matter under certain circumstances. If both examining psychiatrists agree that the defendant is not incapacitated and the court, following a hearing, is not so satisfied, it must return the defendant for further psychiatric examination—notwithstanding that the point upon which it is dissatisfied is not an exclusively medical one, but rather, the question of whether the defendant understands the proceeding. This is a sobering thought for any lawyer. It should be an equally sobering thought for the psychiatrist.

To be able to detail his reasons why the defendant lacks the capacity to understand the proceeding against him or to assist in his own defense involves the psychiatrist in a process fraught with professional peril. He must himself "understand" the proceeding to be able to gauge the lack of understanding of the defendant. The fact that many psychotics are manifestly incapable of understanding matters of far less complexity does not logically qualify the psychiatrist to undertake the task. Many who are referred for his examination will not be psychotics; it is equally true that many may fail to understand the proceedings on grounds quite irrelevant to the state of their mental health. What is involved in the notion of "assisting in his own defense"? A defendant may have suffered from a temporary amnesia, destroying his recollection of the matter with which he is charged, as a result of which he may be literally quite unable to assist in his own defense. Yet, with perfect truth, the psychiatric examiners might report in such a case that the defendant did not lack capacity, which is the issue to be tried, to assist in his own defense as a result of a mental disease or defect.

26. The defect might be a defect of speech or hearing. See, e.g., Regina v. Roberts, [1954] 2 Q.B. 329, 331-32 (1953) (Devlin J.). "It is clear from the authorities that it is not merely defects of the mind which may bring about the result. Defects of the senses, whether or not combined with some defect of the mind, may bring about that result, and the authorities are clear that, if there be no certain means of communication with the accused so that there is no means of making sure that he will follow as much of the proceedings at his trial as it is necessary that he should follow, then he should be found unfit to plead."
court might well be of a contrary view; yet it cannot settle the question of capacity on its own motion, but must refer the issue back for further examination. And what of the case where the next two examiners render the same answer? And the succeeding examiners? Who shall bow before the storm of professional opinion?

Then again, there are some mental diseases and defects which do not impair understanding of the legal proceedings, for they do not affect that area of the defendant's functioning nor do they prevent him from effectively assisting in his own defense. Perhaps the most controversial among such conditions is psychopathy. There is much disagreement among psychiatrists as to what this condition is and about what can be done concerning it; but there are few psychiatrists who would not claim to recognize the condition when they see it, or be able, with a fair degree of confidence, to interpret it for the benefit of the courts. Yet much of such interpretation depends upon what the psychiatrist himself believes about psychopaths. And it is undoubtedly true that some psychopaths at any rate are capable of arousing very strong emotions in some psychiatrists. The psychiatrist may well consider the psychopath to be grossly abnormal and to be suffering from a defect of the mind, if not a mental illness, such as to bring him within the scope of these provisions of the Criminal Procedure Law on that account; whether, as a result, he is lacking in understanding of the proceedings against him or unable to assist in his own defense is quite another matter. It may be briefly remarked that psychopaths can be notoriously uncooperative when they so choose, and

27. The literature upon psychopathy is very extensive. Hakeem, supra note 13, at 672, observes that, "Psychiatrists do not disagree only with each other. Some disagree with themselves."


29. "The difficulty is that assessment of, say, impulsiveness, remorse, insight or capacity to form a relationship depends very much upon how well the psychiatrist knows the patient and what he feels about psychopaths." Fox, supra note 28, at 194-95. See, also, Meyers, Psychiatric Examination of the Sexual Psychopath, 56 J. Crim. L.C. & P.S. 27, 28 (1965).

30. See, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967) and the very full discussion thereon in Beaver, The "Mentally Ill and the Law: Sisyphus and Zeus, 1968 Utah L. Rev. 1, 23-24. This patient certainly seems to have aroused very strong feelings in Dr. Economon of St. Elizabeth's Hospital.

31. See e.g., Sharkey, Four Stages in the Treatment of the Psychopathic Delinquent, 5 J. Of Offender Therapy 7, 8 (Sept. 1961): "Motivating a psychopath is an extremely difficult job, since he invariably feels there is nothing wrong with him."
this lack of empathy often finds a distorted echo in the psychiatrist's report. Does, then, the psychopath lack the understanding envisaged by the legislator, or does he just set himself against understanding the psychiatrist? It is clearly wrong to equate an impairment in judgment, such as might be characteristic of psychopathy and some other conditions, with an inability or lack of capacity for understanding.

Finally, a legislative peculiarity should be noted. While seemingly the court cannot override the medical opinions where both examiners are in agreement that the defendant is not an incapacitated person as defined by the law, the case is different where they are in agreement that the defendant is an incapacitated person. There, the court is directed to hold a hearing upon the issue of capacity where this is moved for by the district attorney or the defense, or it may do so of its own motion. As a consequence, it may be satisfied that the defendant is not an incapacitated person, notwithstanding the medical evidence to the contrary, and without further referral to other examiners, it must order the criminal action to proceed. Thus, while the psychiatric profession does have the last word where it insists that the defendant is not an incapacitated person, this is not the case where it argues, however, vehemently and uniformly, that he is. It is difficult to see why this should be so, for if the profession cannot be trusted absolutely in its pronouncements about one category, it ought not to be trusted absolutely with respect to its logical opposite. This odd distinction can only be explained in terms of legal deference, in this one respect, to medical knowledge upon the question, in itself a curiosity reminiscent of compurgation at early common law. It quite overlooks the fact that the question of capacity, as it is posed by the Criminal Procedure Law, is not an exclusively medical one, neither in the one case nor in the other, but one upon which the court ought, in every case, to be free to make the appropriate finding after giving proper weight to the expert and other evidence.32

32. It has been well said that: "If there is an absence of detail in the statutory law regarding competency and a confusion in the common law on that same issue, one might well anticipate a confusion and lack of understanding of the issue by psychiatrists whose responsibility it is to render an opinion on the matter. Such a lack of understanding and confusion about the legal criteria and other medical findings is, indeed, the reality in this area." Rosenberg, Competency for Trial—Who Knows Best, 6 Crim. L. Bull. 577, 581-82 (1970). In the wrangle between psychiatrists and lawyers for the distinction of pronouncing definitively upon this question, it is sometimes lost sight of that important considerations of penal policy are involved even in its being posed. John Magnus has said: "While the determination of competency to stand trial represents an important legal
THE DOCTORS' DILEMMA

"How do you know I'm mad?" said Alice.
"You must be", said the Cat, "or you wouldn't have come here."33

No legal decision is made in a social vacuum. Every determination is made upon the unspoken premise that it is part of a multiphased, social continuum and that it will give rise to the next appointed step in a sequence of juridically predestined events leading to the theoretical reestablishment of the societal equilibrium.34 Each participant who is invested with decision-making capacity must be aware, if he is to act responsibly, that his own determination is likely to give rise to a number of consequences directly related to the person affected by his decision, and moreover, that most of those consequences, so far as the execution of that particular decision is concerned, will be mainly out of his control. It behooves him, therefore, to choose wisely and well, for it is very often his only chance to play an influential role in the situation in which he is appointed to act. This is as true for the lawyer as it is for the psychiatrist, but the former, because he is acting in a more familiar milieu, is perhaps less susceptible to the pressures and more able to maintain the momentum of his impact through successive professional interventions. All this must be set against the dramatic backdrop of the adversary character of our procedures and the grave responsibilities of making a determination vitally affecting the liberty of the subject. It is clear how professional attitudes come to play an important part in the discharge of these weighty obligations.

In the judging of attitudes it is important to remember that law question, it also symbolizes a vital social principle. It represents mankind's painstaking efforts to deal with the problem of simultaneously safeguarding the rights of both the individual and society." Magnus, Mental Incompetency, 18 Baylor L. Rev. 22, 23 (1966). It is sometimes overlooked that the most important evidence of the mental capacity of the defendant may be obtained from that person himself in open court. "The determination concerning an accused's fitness to stand trial must be based on the aggregate of all the relevant evidence presented and not on any one isolated factor." Id. at 73. David Bennett comes to the heart of the matter with the observation: "The defendant should be found unfit to proceed not simply because he has some type of mental illness, but because he cannot properly perform his role at the trial." Bennett, Competency to Stand Trial: A Call for Reform, 59 J. Crim. L.C. & P.S. 569, 574 (1968).

33. C. Dowson, supra note 1 at 89 (1971).
34. In the present connection, the court on making its determination under either N.Y. Code Crim. Pro. § 730.40 or § 730.50 (McKinney 1971) must have in mind what is provided by the next two sections.
and medicine do not always speak the same language. There is nowadays a much closer understanding between lawyers and psychiatrists of each other’s professional roles, procedures and predispositions. The essential differences, however, remain and their importance should not be minimized. In this connection, it is worth citing in extenso a distinguished forensic psychiatrist, Benjamin Karpman:

It must be first clearly understood that insanity is entirely a legal term comprising behavior that is grossly and obviously abnormal; hence, a mental defective without any evidence of psychotic manifestations is legally insane, since he cannot choose, because he does not understand the difference between right and wrong; while a very intelligent and clever paranoiac, obviously psychotic from a psychiatric point of view, is often freed by the judge and jury as not insane. In contradistinction, most psychiatrists emphasize the term psychosis and view that every individual suffering from a psychosis cannot be held accountable for any crime committed, it being presumed that such a crime is the result of an existing mental disorder. They will, however, wash their hands of the psychopathic individual and thus accord with the legal profession that he is legally responsible though they will, unlike the lawyer, concede that he is mentally abnormal even if not suffering from a psychosis.

While it is not here asserted that Dr. Karpman’s views are shared unreservedly by all psychiatrists, they are sufficiently representative of those held by the profession to warrant a consideration of their effects. The question arises as to what these attitudes mean in practical terms in relation to the type of determination the psychiatrist is called upon to make under the New York Criminal Procedure Law.

First and foremost, the psychiatrist knows that his decision means, quite simply, the difference between treatment and punishment. Incapacity on mental health grounds means that the criminal proceeding is truncated and the defendant ceases to be regarded as a potential criminal, but rather as a sick person. The psychiatrist has, quite properly, the strongest urge to treat such persons. As another psychiatrist has said,

Indeed, it is only humane not to subject these people to the experience of an open trial and to let them hear themselves being dis-

35. “Part of the problem lies in the vagueness of terms such as ability to understand charges, ability to understand legal proceedings, or ability to assist counsel. Obviously, these terms can only be defined quantitatively.” Halleck, A Critique of Current Psychiatric Roles in the Legal Process, 1966 Wis. L. Rev. 379, 400.
36. Polier, supra note 9, at 12.
cussed as of unsound mind and be confronted with the proposition that their ideas are all bosh. Such an experience is definitely the reverse of therapeutic. If we are to expect these people to get well after they have been sent to a mental hospital perhaps we should do something to prevent their having this experience.\textsuperscript{38}

This last sentence shows very clearly how a professional perspective might color an examiner's actions under the statute and it is most important to bear in mind its effect in "tipping the scales" in borderline cases. The structure of the law and its operative procedures raise a presumption of mental illness in the mind of the psychiatric examiner. The metaphorical ball has been placed firmly in his court by this referral. He reacts to this presumption as a being conditioned by professional thinking on this subject and by reason of his own conception of his role in this decision-making process. This is obviously a very subjective matter in many instances.

Were the psychiatrist confined to the question of whether the defendant is or is not suffering from a mental illness or defect and to an explanation of the probable effects of that condition upon the defendant's behavior, some of the suggested difficulties might disappear. The psychiatrist is, however, specifically charged under New York law with another function, involving the use of other judgment criteria, to interpret his findings in a non-medical way so as to produce a non-medical value-judgment upon the defendant's condition. Let us consider, practically, the implications of this. Dr. Gaylord Coon tells us that, "The brilliance and alertness of the manic is such that he is quick to see the many relationships and associations in conjunction with words and objects."\textsuperscript{39} A manic, who qualified for such a description of his capabilities while passing through this phase of his psychosis, could hardly be said to "lack the capacity to understand the proceedings against him." Indeed, the heightened perceptions of his diseased condition might even startlingly elucidate for him the elements of his legal situation so that he is able to appreciate them much more realistically than a person whose senses and affect are unimpaired by mental illness. Yet, as the same writer goes on to show us, the manic is, nevertheless, abnormally imprudent and his judgment is impaired by his psychosis.\textsuperscript{40} Even so, it is doubtful if this can be said to affect his understanding; he will know that he is in a court of law, and that he is facing a criminal proceeding, and he may well know the sections of the law under which he is charged and the alternatives open to the court in his case. It might be argued that this impru-

\textsuperscript{38.} Selling, Forensic Psychiatry, 39 J. CRIM. L. & C. 603, 613 (1949).
\textsuperscript{39.} Coon, Psychiatry for the Lawyer: The Principal Psychoses, 31 CORNELL L. Q. 327, 331 (1946).
\textsuperscript{40.} Id.
dence, this lack of judgment, might hinder the defendant from assisting in his own defense. Certainly, he might make a bad impression upon the court and his attitude towards his lawyer might be distinctly unhelpful. Yet it is difficult to see that this is what the legislators had in mind. It is not hard to imagine how a psychiatrist might report in such a case, harmonizing his professional criteria with the words of the law so as to find the defendant an incapacitated person. It is questionable, however, that the words of the law have the elasticity to meet such a case. Certainly Dr. Coon entertained no doubts concerning what ought to be the disposal of such a person. He said, "The manic patient must be kept in a mental hospital in order to protect him from his own folly and aggressive impulses."41

Then again, in making his value judgment, the psychiatrist is acutely conscious of his own lack of facilities to treat or even contain some types of mentally ill offenders. Dr. Abraham Goldstein has said, "The mental hospitals do not want to receive 'criminal' types, principally because psychiatry is usually unable to treat them; the few successful methods of treatment are so expensive as to make them a practical impossibility."42 As many studies have shown,43 the psychiatrist tends to err on the side of caution in relation to the assessment of dangerousness. In a statute like the one presently under consideration, where the issues of capacity and dangerousness lie side by side,44 often to be determined by the same participants using the same procedures in the same proceedings, it is inevitable that the one should become tainted by the other. The medical profession is very conscious of its responsibilities in these matters, and particularly of the public rather than the private consequences of an error of judgment.45 As a practical matter, this translates into caution and overprediction:46 it is better to hospitalize than to turn a potentially dangerous defendant back to the criminal justice administration, whence he might, all too rapidly, find himself out on the streets once more. Thus the issue of capacity is not dealt with by reference to the narrow limits prescribed

41. Id. at 334.
44. N.Y. Code Crim. Pro., §§ 730.30-730.50 (McKinney 1971).
45. See, Livermore, supra note 43, at 84.
46. See, Schreiber, Indeterminate Therapeutic Incarceration of Dangerous Criminals, 56 Va. L. Rev. 602, 619 (1970): "Institutional psychiatrists tend to protect themselves against censure for the release of inmates who later commit crimes by overestimating the dangerousness of their patients and retaining them until there appears to be virtually no risk of recidivism."
for it by the statute, but according to considerations which, strictly speaking, have nothing whatsoever to do with it. This point is strikingly made in the Michigan study on the competency of insane persons to stand trial, where it is stated:

The records also indicate that some of the examining physicians assumed the role of moral experts. In one case the doctor recommended commitment because of the patient's "hostile and aggressive tendencies." . . . In another instance the examining physicians said: "We actually feel the patient could co-operate with counsel but that it would be better if he were to be hospitalized in Ionia [state hospital]." This departure from the physician's proper role as expert medical witness seems to be based on two factors. [One of which is that] the physician does not understand that the legal objective is the narrow one of determining whether the defendant is competent to proceed with trial but rather tends to think of his function as a broader one of protecting society, the defendant, or both. Implicit in many of the physician's recommendations is the feeling that the individual defendant is such a pathetic figure and so clearly not responsible for his crime that he should not be consigned to prison.47

The authors conclude: "It is our judgment that as a result of this loose application of the competency tests, persons are being committed to Ionia who are not in fact legally incompetent."48 However well-meaning this officious policy-making, it results distressingly often in the sacrifice of the private interest to the supposed public good.

The real issue here is the injection by the psychiatrist of his own ethical standards into this value-judgment so as to usurp a function which is not a medical but a legal one. As Melvin Belli neatly poses the question, "Does the medical expert have the right (or the duty) to infuse his ethics into the factual court investigation. . . ."49 The point has been well made that: "It should be noted that the concept of incompetency as it exists in the law does not exist in medicine. No physician within the framework of his science or his experience alone can sensibly state that a given individual is incompetent. Incompetency is a legal definition, not amenable to precise medical standards of mental health."50 The psychiatrist might properly respond that under New York law he has been invited to perform this evaluative function. The replication, then, would be that the legislature can certainly impose the duty, but it cannot thereby endow the psychiatrist with the profes-

48. Id. at 1083.
50. Comment, supra note 47, at 1100 n.65.
sional capacity to undertake it. The psychiatrist would be less than human had he no opinions upon some of the evaluations made by lawyers and judges resulting from the materials that his own professional competence allows him to present. What is here suggested is that those opinions have no more legal relevance in the present context than those of any other non-qualified person in treating a legal question. It has been correctly observed that:

The greatest danger of permitting a psychiatrist to testify in conclusory fashion about legal criteria is that the doctor may have his own notion of the substantive legal standards required for commitment. And that notion may differ markedly from that of the court, but the difference may easily go unnoticed and unexplored at the hearing—particularly if neither the court nor the patient's lawyer vigorously questions the doctor.

Psychiatric evidence as to the state of the defendant's mind at the time when fitness to proceed is in issue is indispensable. It should, however, be limited to the medical as distinct from the legal question. This is a matter where, "The medical profession must give proper deference to the ultimate responsibility of the judiciary for the determination of legal questions."

It has been most elegantly suggested that this latest flirtation of law with medicine is but one in a long line of similar, promiscuous indiscretions stretching back to a less mature age. The same writer has remarked that: "On the one hand, law has permitted medicine to go too far too early, and on the other, law has not responded soon enough." The present case seems to be one in which "fickle law" has responded over-generously and perhaps a little unwisely to a not over-enthusiastic suitor. At common law the issue of fitness to stand trial was a matter for non-medical men, a judge and jury, who would receive, not always enthusiastically even in

51. See, e.g., Gibbens, The Task of Forensic Psychiatry, 8 MEd. ScI. & L. 3, 4 (1968): "In murder trials especially, it is very doubtful if diminished responsibility is really a defence in the sense of counsel doing his best for his client. I have often suggested to them that a mandatory life sentence for murder is a more charitable decision and provides better chances for rehabilitation than a sentence for example of twenty years for manslaughter which might otherwise be the prisoner's lot. But the defence has to do its rather routine job of differing from the prosecution."

52. Scoville, supra note 12, at 64.


55. Id. at 286.
recent times, medical evidence upon the question which they would then determine after their own fashion. This, in the State of New York, became transformed into determinations by the Lunacy Commission, a body peculiarly prone to improper extraneous influences, and one which cannot be said to have decided these matters satisfactorily. Very properly, medicine was then invited, subject to certain safeguards, to resolve the question pertaining to its own discipline and a notable improvement resulted. It cannot properly be argued that the entire question of competence was thereby handed over to the psychiatrists as a medical question, for that most certainly it is not. At the bottom of this lies a significant policy question which perturbs lawyers deeply. As Henry Weihofen has said,

If the legal criteria for commitment are not made clear in the question, the doctor may be asked to apply his own political philosophy, determine the fundamental policy issue by his own lights

56. See, e.g., R. v. Rivett, 34 Crim. App. 87 (1950). In this case, three medical men testified that the defendant was suffering from mental illness. Goddard, L.C.J. remarked: "The first observation that this court would make is that three juries have refused to find the prisoner insane." Id. at 91.


58. This has been so stated by Thomas Maroney in Note, Mental Condition of an Accused: Pre-Trial, Trial and Post-Trial, 13 Syracuse L. Rev. 287, 290 (1961): "It should be remembered that the function of the examiners is to decide the defendant's competency to stand trial, a purely medical question, and not his criminal responsibility." The authority cited for this is the Desmond article. Desmond states, however, "In its place the new Desmond law establishes a scientifically sound procedure whereby the medical question of the sanity of a defendant at time of trial is determined solely by qualified psychiatrists." Desmond, supra note 57, at 656. This comment of Maroney referred, of course, to the now superseded New York Code of Criminal Procedure, Sec. 870, but the point is the same under the new law. That Maroney himself entertained some doubt as to the validity of his assertion is seen from Note, supra note 58, at 291: "Quaere, if mental competency to stand trial is in fact a medical question should the court be forced to reject the finding of the experts, particularly a finding of competency?" This is particularly interesting in light of the terms of N.Y. Code Crim. Pro. § 730.30 (2) (McKinney 1971). It is worth recalling an observation of Slovenko, Psychiatry, Criminal Law, and the Role of the Psychiatrist, Duke L.J. 395, 415 (1983): "A psychiatrist is acknowledged in effect as a high priest to decide whether a person will go on trial." Magnus, supra note 32, at 25: "It must be remembered that the term 'insanity' as the term 'incompetency' is a legal term, and not a medical one." He cites, appropriately, as authority, United States v. Sermon, 228 F. Supp. 972 (W.D. Mo. 1964).
and give us his policy decision. None of us truly believe that this is purely a medical question to be decided by medical experts.\textsuperscript{59}

**LIKEWISE THE LAWYERS’**

“There’s the King’s Messenger. He’s in prison now, being punished: and the trial doesn’t even begin till next Wednesday: and of course the crime comes last of all.”\textsuperscript{60}

Were the psychiatrist asked to make a quick response as to what he conceived to be his main professional responsibility, it would be reasonable to suppose that he might aver: the mental health of the patient. The lawyer to whom a similar question were addressed would have no hesitation in replying: the rights of the subject. Guilt and innocence are not mental health concepts,\textsuperscript{61} and can be largely disregarded by the psychiatrist, but they are basic and indispensable to the life of the Law. The criminal lawyer, whatever his assigned role in the legal drama, is constantly aware that the exercise of his profession involves the liberty of the subject, and often his life, property and reputation as well. The lawyer’s thinking is molded by these realities; he necessarily thinks in terms of capacity or competence,\textsuperscript{62} pleading and trial, guilt or innocence, sentence and sanction. And these concepts follow each other in logical sequence, so that the Rule of Law be established and observed. When these concepts become disordered, or if the individual processed is somehow diverted or recycled, the lawyer tends to become indignant on the subject’s behalf. There are no areas where his susceptibilities are so sensitive as those touching upon the relinquishment of these grave responsibilities to those professing other disciplines, however well-qualified or well-intentioned.

\textsuperscript{59} Weihofen, The Definition of Mental Illness, 21 Ohio St. L.J. 1, 10 (1960).

\textsuperscript{60} C. Dodgson, supra, note 1 at 248 (1971). Lawrence, The Psychiatriso-Legal Communicative Gap, 27 Ohio St. L.J. 219, 231 (1966): “A psychiatrist of long and fruitful experience once remarked that the difference between the normal man and the one who is mentally sick, was that the latter was inside the wall of a hospital and the former was not.”

\textsuperscript{61} Polier, supra note 9, at 16.

\textsuperscript{62} There appears to be no forensic difference between these terms and they are used quite frequently in an interchangeable fashion in the same literature indicating that they have the same sense to the writer. Funk & Wagnalls New Standard Dictionary of the English Language treats the terms as synonymous. In Hale, 1 Pleas of the Crown 34, it is stated that: “If a man in his sound memory commits a capital offense and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. The reason is that he cannot advisedly plead to the indictment.”
such persons might be.63 Such thinking dominates the lawyer's consideration of questions such as those which arise under the statutory provisions which are presently being examined. These attitudes tend to be sharpened or exaggerated according to the circumstances of the case, the precise matters in issue and whether the lawyer's role is that of judge, prosecutor or defense attorney—it will not be overlooked that the judges of the criminal courts, upon whom falls the burden of deciding these questions, are cut from the same professional cloth and receive the same, distinctive intellectual impress. If there is one overriding belief that all good lawyers share, whatever other components of their respective creeds might differ, it is that rule of objective justice which decrees that the innocent ought not to be punished. Whoever might or might not fall within that elastic category of "innocent" depends largely upon the lawyer's standpoint, but it is a cardinal rule of the common law that a man is innocent until he shall be proven guilty before a competent court by due process of law.

Now, unquestionably, the loss of liberty for however short a time constitutes a punishment. The thought of an innocent man being so punished is revolting to all right-thinking lawyers, but it is recognized that, on occasion, the wider interest of the public at large must prevail. The lawyer bows, albeit ungraciously, before what has been called "administrative convenience."64 Hence, the "good" lawyer resigns himself to there being a modicum of pre-trial detention in the interests of society, though the militant libertarian might shy even at that. It is realistically, if reluctantly, admitted that, "No legal system could function without often disregarding individual distinctions. . . ."65 The notion of committing the client to an indefinite deprivation of his liberty, without the issue for which he has been inducted into the criminal justice system ever having been resolved, is one at which most lawyers would balk—unless there were some corresponding advantage to be gained from accepting such a disagreeable imposition. This latter

63. See, Ennis, Civil Liberties and Mental Illness, 7 CRIM. L. BULL. 101, 102 (1971).
64. Prevezer, Fitness to Plead and the Criminal Lunatics Act, 1300, 1558 CRIM. L. REV. 144, 153.
66. "Pre-trial commitment has never been and should not be permitted to become a devious means of assuring criminal custody over persons on the alternative ground that, although they can demonstrate that they are not guilty, psychiatric opinion finds them dangerous to the interests of the United States." Foote, A comment on Pre-Trial Commitment of Criminal Defendants, 108 U. PA. L. REV. 832, 844-45 (1960).
FITNESS TO PROCEED

is very close to the heart of the matter for the lawyer and conditions all his thinking about competency and responsibility.

As a practical matter, the issue of fitness to proceed raises serious ethical problems for the lawyer. He is primarily aware that the determination that his client is an incapacitated person means that the substantive issue at law is subordinated to considerations which have nothing to do with the disposal of the criminal charge, but instead, address themselves to the state of the mental health of the defendant and the procedural issue of his ability to meet and answer the accusations against him. One aspect of the lawyer's dilemma is well illustrated by the English case of Regina v. Roberts,\textsuperscript{67} where the defendant, charged with murder, stood mute on arraignment. The defense called evidence (which was not contradicted) to show that the accused was deaf and dumb from birth, but the court was not invited to draw any conclusions from that fact with regard to fitness to proceed. Counsel for the Crown, on the other hand, submitted that these facts raised a presumption of idiotism and a presumption that the accused was unfit to plead. The defense argued strenuously that this would put the accused to an unfortunate election, prejudicial to his position, and moreover, one unsupported by authority. Mr. Justice Devlin upheld that contention, saying:

[T]o insist on the issue of fitness to plead being tried might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and the authorities, to have been the person responsible for the crime—whether he was or was not—and investigations which might have led to the apprehension of the true criminal would not take place.\textsuperscript{68}

Three years later, Mr. Justice Byrne, in another case similar on the facts, felt constrained to differ from this determination, taking the view, strongly supported by authority "that the law has always been that an insane person cannot be tried . . . ."\textsuperscript{69}

This is substantially the position as it has been legislated in New York, but this learned difference of opinion points up the fact that it is based firmly upon a policy consideration of "convenience," which might not be acceptable to all legal thinkers.

It has been well said that, "To be charged with both crime and

\textsuperscript{67} [1954] 2 Q.B. 329 (1953). This case is not, incidentally, authority for the proposition for which Bruce Ennis has cited it. Ennis, \textit{supra} note 63, at 120 n.58.


incompetence is to be twice-cursed.\textsuperscript{70} This gives rise to a “double-stigmatization”\textsuperscript{71} that can follow the unfortunate defendant for the rest of his days. It is clearly “acceptable” to the lawyer only where it is inevitable, where, in other words, something worse might be the defendant’s lot were the effects of this double-stigmatization successfully resisted. Too often the lot of the defendant can be little more than one of hopeless resignation. In assessing the merit of the available alternatives, the lawyer must alter, most unfortunately and often unconsciously, the theoretical bases of the exercise of his profession. The lawyer must make, in effect, a judgment upon the guilt or innocence of his client in relation to the matter with which he stands charged. This is a distortion of his function and it matters little that some lawyers habitually form such opinions in relation to their clients’ guilt or innocence. It may usefully be observed here that if the psychiatrist is confused and confounded by the legislative association of the strictly unrelated issues of capacity and dangerousness, the lawyer is likewise bemused by the issues of mental health in relation to competency and in relation to criminal responsibility. As a result, both the issue of competency and that of responsibility generally become defense bargaining counters, with the fate of the defendant decided not by reference to what he is accused of having done in breach of the criminal law, but rather with one eye upon what would be likely to happen to him were the case allowed to proceed and the other upon the duration of the possible deprivation of liberty were the defendant committed as unfit. Committal becomes infected with deterrence thinking,\textsuperscript{72} and the defense lawyer is turned into the accomplice of the court in making a determination which might be far from beneficial to the interests of the client. Thomas Szasz has pointed out that: “There is evidence that, from the subject’s point of view, confinement in a mental hospital is more unpleasant than imprisonment in jail.”\textsuperscript{73} The lawyer is ever conscious that it is much easier to enter a medical hospital than to secure one’s release.\textsuperscript{74}

It was earlier observed that the New York Criminal Procedure Law does not specify how and by whom the issue of the defendant’s incapacity might be brought to the attention of the court. In this connection, an English case, \textit{Rex v. Dashwood},\textsuperscript{75} may usefully be

\begin{itemize}
\item \textsuperscript{70} Ennis, \textit{supra} note 63, at 117.
\item \textsuperscript{71} Morris, \textit{supra} note 1, at 524.
\item \textsuperscript{72} 79 \textit{Harv. L. Rev.} 1288, 1290 (1966).
\item \textsuperscript{73} Szasz, \textit{The Insanity Plea and the Insanity Verdict}, 40 \textit{Temp. L.Q.} 271, 277 (1967).
\item \textsuperscript{74} Ennis, \textit{supra} note 63, at 113.
\item \textsuperscript{75} [1943] 1 K.B. 1 (C.C.A. 1942).
\end{itemize}
cited, for the Court of Criminal Appeal was there at pains to state, "[T]he should be known, if there is any person who is not aware of it, that the court acts in such a case on information conveyed to it from any quarter." It is thus open to the defense attorney to raise with the court, on the arraignment of his client, the question of fitness to proceed, so as to cause the court to issue the appropriate order of examination. The defense attorney has, therefore, to give most careful thought to what is at stake for his client. Crowded dockets, "slim" evidence, the plea-bargaining syndrome from which the American criminal justice administration so acutely suffers, all make for the strong possibility of a light sentence after a finding of guilt, against which the uncertainties of hospitalization, on a finding of incapacity, must be weighed.

The lawyer might suspect, or even be professionally advised, that his client would benefit from treatment. Is he, nevertheless, entitled to press this view upon the client in the knowledge that there is the possibility of acquittal on the criminal charge? Many lawyers would unhesitatingly thrust aside all other considerations and take the view that they owed a paramount duty to the client to restore him to freedom as swiftly and expeditiously as possible on the basis that, "[T]here are strong arguments for permitting individuals to make "wrong" decisions that are, on some objective scale, against their best interests." Some might well take a more paternalistic view. On the other extreme, there are lawyers who conceive that they owe a more comprehensive duty embracing the wider interests of society to which the client must subordinate his own, more immediate, selfish desires. It is important to see that in taking such a view, the lawyer is acting upon the assumption that the early release of the defendant, as opposed to his hospitalization on the grounds of his unfitness to proceed, is likely to harm the wider interests of society in general.

There is no practical difference between such a position and that of the psychiatrist who acts upon his opinion as to the defendant's dangerousness in determining his findings on the matter of capacity. The psychiatrist justifies, to himself, his finding on the grounds that the defendant needs treatment and that it is in

76. Id. at 4.
77. An article which vividly establishes the present point is Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chr. L. Rev. 50 (1968).
78. Ennis, supra note 63, at 106.
79. This is borne out by the facts. Foster, supra note 55, at 287: "I am informed that within recent memory there has not been a successful 'not guilty by reason of insanity' plea resulting in an acquittal in Manhattan. Dozens if not hundreds of cases have been disposed of on the competency issue."
his own and society's interests that he receive it; the lawyer's self-justification for his "recommendation" rests on the ground that he owes it to society and his client to prevent further possible harm to both. Yet is the responsible lawyer properly entitled to ignore the probable consequences of his professional activity in cases where such intervention can only result in the early release of a person likely to cause substantial harm?80 This is the true nature of the lawyer's dilemma and it is identical with that of the psychiatrist: both are endowed with special skills, the use of which gives meaning and direction to the dry words of the statute. The lawyer has no more right to read his personal or professional ethic into the words of the law than has the psychiatrist. If one accepts that this unaccustomed excursion, whatever its direction, is predicated upon some apprehension of future harm, it must be remembered that, "[I]n order to understand the concept of danger one must determine what acts are dangerous and how likely it is that they will occur."81 It must be admitted that a criminal trial lawyer is generally far less qualified than is the forensic psychiatrist to make such a prediction and that any which he might make is even more likely to be colored by professional self-interest than the corresponding prognostication of his psychiatric counterpart. But in arguing about capacity as it is defined in the New York Criminal Procedure Law, the lawyer stands firmly upon his own ground, for this is a legal concept, whoever might be the authority prescribed for its determination.82

HEAH COME DE JUDGE

"Consider your verdict," the King said to the jury.
"Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!"83

No study devoted to this subject can properly be concluded without a few words dedicated to the judge. The judge is in many ways but an extension of the lawyer into another realm. Although he carries over into this new role the thought patterns and assimilations of his early, partisan formation, elevation to the Bench carries with it new and wholly different responsibilities, which in turn contribute to the formation of attitudes and projections. Upon the judge is placed, first and foremost, the responsi-

80. See, e.g., the case cited by Karpman, supra note 37, at 596-97.
81. Livermore, supra note 43, at 84.
82. It should be noted that at common law, this question was always regarded as one of fact for the jury. See, Rex v. Governor of His Majesty's Prison at Stafford, [1909] 2 K.B. 81, and the review of the authorities therein; Slovenko, supra note 59, at 410 n.36.
83. C. Dodgson, supra note 1 at 146 (1971).
bility of decision. The psychiatrists may advise, the lawyers may urge and argue, the defendant may disguise his feelings, act out his emotions or stand mute, but it is the word of the judge that must ultimately prevail in deciding whether the defendant is fit to proceed in the matter before him. A "wrong decision" as to whether a defendant is an incapacitated person may be based upon a grossly distorted examination report, it may be induced by the policy of a forceful district attorney, or it may be the result of an unscrupulous argument by a clever, dedicated, narrowly-blinkered defense lawyer. Yet the responsibility is that of the court, to which the statute entrusts the matter of deciding. It is, therefore, well for the court to take note of the perils and to decide according to the evidence, rather than by reference to any built-in theories of routine disposal. The court should be above bias and beyond prejudice. Only thus can the issue of capacity be given a fair trial.

The twin enemies of the judge in this, as in other fields, are haste and professional pressure. He must be constantly on guard against the insidious influences of both. Above all, he must understand the influences which are at work upon both the lawyer and the psychiatrist, for it is only in this way that he can understand the working of these self-same influences upon his own thought processes and determinations. Justice is not done when the court pays scant attention to these policy-making aspects and, instead, leaves the decision as to capacity to the psychiatrist or to the lawyer. The court under New York law is assigned an activist role, and accordingly it must develop a thorough-going and wholesome policy towards this question of capacity so that these provisions are neither converted into an escape hatch for those who merit punishment nor into a disposal bin for those assumed to be socially dangerous but whose imagined proclivities cannot be proved in a criminal proceeding nor even directly associated with the criminality with which they are charged. The issue of capacity is a narrow one and the words of the law are abundantly clear. It is the prime

84. Ennis, supra note 63, at 120-21.
85. Slovenko, supra note 58, at 412.
86. See Slough & Wilson, Mental Capacity to Stand Trial, 21 U. Prrt. L. Rsv. 593, 598 (1960): "We are compelled to recognize here, as elsewhere in the law, that the standard established by the law is not inevitably the standard employed in practice. The fact of mental illness and the need for hospitalization is, in practice, often the paramount criterion of unfitness to proceed, notwithstanding the statutes or precedents suggesting other standards. Psychiatrists, whose aid is usually sought in determining capacity to stand trial, may be unsympathetic to subtle legal distinctions. And while the determination may ultimately be one for the court, the probability of the court's disregarding the psychiatrists finding is not great."
duty of the court to see that neither the psychiatrist nor the lawyer stray as policy-makers into other fields.

The statute has all the poise and delicacy of a surgeon's knife in the right hands. It has equally the potentiality of becoming as oppressive and unselective as a bludgeon if it is wielded incorrectly. The judge must strive to keep the issues apart, for if capacity and dangerousness become inextricably linked in the judicial consciousness, the liberty of the subject is gravely in peril. It may be salutary to end on a note of warning. It has been said that: "Throughout history, governments have been tempted to establish order by identifying and imprisoning in advance all likely troublemakers." The judge is often the last bulwark against the tide of tyranny. Any judge who feels that declaring a defendant to be an incapacitated person is the "soft-option" is doing himself, his office and society as grave an injustice as he is doing to the subject of his determination.

37. Tribe, supra note 65, at 376.
38. Liversidge v. Anderson, [1941] 3 All E.R. 338, 361: "In England amidst the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I."