

# In Memoriam: Bernard L. Diamond December 8, 1912–November 18, 1990

**Joseph Satten, MD**

On November 18, 1990, Bernard L. Diamond, our friend and colleague, died. He was just short of his 78th birthday. He had been suffering from emphysema for some time, but death came following by-pass surgery for a coronary occlusion. As we all know, he had become almost a legendary figure in forensic psychiatry. For those of us who knew him personally, and I feel privileged to have been one of those, his passing leaves a great gap. I am honored to present this eulogy.

Bernard Diamond, or Bernie, as many of us knew him, was one of the most well known and respected forensic psychiatrists in the United States. He was recognized nationally for his efforts in introducing psychiatric principles into the law and for his concern about the management of offenders. He did not see himself, however, as a traditional forensic psychiatrist, but as a scholar interested in the interface of the disciplines of law and psychiatry. He was concerned with the role of the legal proc-

ess in human affairs and wanted it, as much as possible, to reflect an accurate knowledge of human psychology. Apart from his scholarship, however, we knew him as an able clinician, a respected teacher, and a warm-hearted, modest colleague.

His professional career was spent almost entirely in the San Francisco Bay Area. He received his A.B. degree from the University of California at Berkeley and his M.D. from University of California, San Francisco. After completing his internship and psychiatric residency at the University of Michigan, Ann Arbor, he served in the Army Medical Corps in World War II and was discharged as a Lt. Colonel. He returned to San Francisco in 1946, where he started a private practice. He also enrolled at the San Francisco Psychoanalytic Institute and was one of its first graduates in 1952.

As part of his practice, he became interested and involved in criminal cases. He began to think about the issues

involved and his role in them. He was especially interested in the way the past influenced the present, and this scholarship was reflected in some of the early papers he wrote, e.g., "Isaac Ray and the Trial of Daniel M'Naghten."

He was a steadfast believer in the sophisticated and knowledgeable participation of psychiatrists in the legal process. He felt that psychiatrists needed to communicate with lawyers and legal scholars and that, in addition to testifying in trials and appearing before legislative committees, psychiatrists needed to write for legal journals whenever possible.

He did exactly that, and in so doing, his thinking developed. The papers he wrote about the origins of the right and wrong test of criminal responsibility, and about the concept of malice aforethought led him to realize that, in many cases, the law really did allow for the introduction of psychiatric testimony beyond the narrow question of insanity.

He was interested in the use of the specific legal case as a device for legal reform. In one such case, he made use of the legal principle that a crime, basically speaking, consists of two elements—an illegal act and an evil or criminal intent, called *mens rea*. For example, depending on the intent or *mens rea*, the act of homicide could be considered first degree murder, second degree murder, manslaughter, or accidental. He felt further that the use of the concept of *mens rea* could be a vehicle to bring more useful psychiatric testimony into the court, better assess the degree of blame, and thus ultimately

influence the handling of mentally disordered offenders. On that basis, he testified in what became a landmark case, *People v. Gorshen*. The decision in 1959 was seen as a major breakthrough in California, and the concept of diminished capacity or diminished responsibility was accepted in a number of other states.

In addition to his practice, he was active in local and national psychiatric associations. He served as president of Northern California Psychiatric Society in 1954. He also participated in and chaired various committees of the American Psychiatric Association dealing with forensic psychiatry issues. In 1964, he was honored by University of California at San Francisco and received the J. Elliot Royer Award for outstanding contributions to the fields of psychiatry and neurology.

By that time, however, he had become increasingly interested in teaching and writing. In 1964, he also began full time teaching at Boalt Hall, the University of California Law School, and he began to phase out his private practice. He was appointed Professor of Law and Criminology, and he taught in both the law school and the School of Criminology.

By 1968, his scholarly contributions were recognized nationally, and he was awarded the prestigious Isaac Ray Lectureship by the American Psychiatric Association. In 1975, AAPL awarded him the Golden Apple Award for his forensic psychiatry contributions. In 1978, together with a group of other psychiatrists interested in raising the standards of forensic psychiatry, he

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helped found the American Board of Forensic Psychiatry. Most recently, the Northern California Psychiatric Society in its April 1990 meeting at Yosemite honored him with a Meritorious Service Award.

His university career was equally distinguished. He was a highly respected law professor. He was also acting dean of the School of Criminology at University of California, Berkeley from 1969 through 1970 and from 1974 to 1976 when that school was being phased out. He formally "retired" as a law professor in 1980 but then was asked to be director of a controversial and experimental Doctor of Mental Health program established jointly between University of California at Berkeley and University of California, San Francisco. He remained in that post until the program's demise in 1986. Throughout most of his career, from 1968 until his death, he was also a clinical professor of psychiatry at University of California, San Francisco.

At the time of his death, he had completed 40 papers, 12 book chapters, and 6 book reviews. The range of his scholarship was extreme. He started out by analyzing and writing about what he was doing, with the goal of bringing psychiatric understanding into the courtroom. The philosophy he developed is perhaps best reflected in a quote from "Criminal Responsibility of the Mentally Ill":

I concede that this whole business of lack of mental capacity to premeditate, to have malice or to entertain intent, is a kind of sophistry which must not be allowed to remain an end in itself. Right now we must utilize these legal techniques to gain entrance into the trial court and to allow the judge and jury to give full

consideration to the deeper and more complex mental and emotional factors of the defendant. . . . The psychiatric expert should not give a . . . limited response to the legal questions of intent, premeditation, and malice. Instead he should use this opportunity to tell everything he knows about the defendant . . . in meaningful psychodynamic terms . . . that . . . contribute to the understanding of the particular criminal act.

His early and long time interest was in history and his early papers reflected that interest, as follows:

1956—Isaac Ray and the Trial of Daniel M'Naghten

1964—On the Spelling of Daniel M'Naghten's Name

1965—The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relationship to Theories of Criminal Responsibility

1966—Origins of the "Right and Wrong" Test of Criminal Responsibility

He also wrote on "Criminal Responsibility" as such. From 1957 to 1977, he wrote six important papers in this area, in which he worked out his theoretical ideas and practical suggestions. I have quoted a section from the Stanford Law Review paper on Criminal Responsibility above. There also were two papers on "Diminished Capacity", one in 1962 and one in 1978.

Linked to the question of philosophy was the question of testimony and how to bring the philosophy into action. From 1959 through 1973, there were six papers about this. The 1959 paper on the "Fallacy of the Impartial Expert" was seminal, and is reviewed specifically by Jay Katz elsewhere in this issue.

Diamond also wrote about specific questions of diagnosis and evaluation of mental illness in the legal context, as

well as on the relationship between criminal behavior and psychopathy. Six papers are found in this subject area.

From 1967 through 1975, he wrote about the general relationship between psychiatry and law including questions of violence, the death penalty, and the prediction of dangerousness. During this period, also, he wrote about the effects of stress on law students. Earlier, in 1966, there was a provocative paper on welfare law and punitive sanctions.

His last "crusade" was linked to his opposition to the use of hypnosis for the "memory enhancement" of witnesses. He strongly believed that hypnosis contaminated the identification process and made witnesses artificially appear more sure than they really were. He wrote two strong papers on the subject, one in 1980 and one in 1986, and he testified before legislative committees, as well.

The last paper I want to note was written in 1985 but appeared in 1991 after his death. He wrote a chapter about the experimental Doctorate of Mental Health program he had headed describing the problems of developing such a program in a University setting.

Bernie loved to teach and to help those interested in criminology and in forensic psychiatry. He was very generous of his time and often met with individuals and small groups to encourage research and offer support.

In addition to a scholarly interest in reform in the handling of offenders, he was also interested in practical help. Early in his career, he was a member of the Board of Directors of the Northern California Service League, a voluntary

organization offering counseling and other services to county jail prisoners. More recently, he was an advisor, supporter, and sort of godfather to Delancey Street, an organization in San Francisco working directly to rehabilitate drug and other offenders. This organization was established by one of the graduates of the School of Criminology with ideals and concepts she attributes directly to him.

But Bernard had his professional disappointments too. The most intense disappointment, I believe, came as a result of the recent conservative drift in public attitudes toward offenders. This manifested itself in a state initiative to "tighten" the criminal law and eliminate the diminished capacity defense, an action that was later sustained by the California Supreme Court. A second disappointment was the gradual elimination of almost all programs of rehabilitation in the California state penal system.

He was philosophical about these regressions, however, and he insisted that it was important to continue to write about the relation of psychiatry to law. Eventually, he felt, the ideas he stood for would be recognized, but they must continue to be written about, especially in a time of more punitive attitudes to offenders.

One of my last recollections of Bernard is his appearance at a dinner meeting of the Northern California Chapter of AAPL in the summer of 1990. He walked up the stairs to our second floor meeting room and took some time to recover his breath. After he settled down,

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he told us informally of his work as a consultant to the American Bar Association Criminal Justice Mental Health Standards Project and his disappointment with organized psychiatry in “backing down” on the definition of insanity after the Hinckley case. He also told of his work with the state legislature with regard to the use of hypnosis by police for “memory enhancement” in witnesses. Though we noticed his breathing difficulty, we did not realize then that we were seeing him perhaps for the last time.

Throughout his career he had a loving and constructive interaction with his wife, Ann Landy Diamond, a prominent attorney in her own right who specialized in family law problems. We send our condolences to her, and to their six children.

We personally have lost a friend, a colleague, and a great teacher. Our field has lost a scholar and critical thinker with broad interests. He will be in our hearts as long as we practice, but I am sure that his thinking will influence psychiatry and law long after we leave the scene. He was a strong believer in the importance of history as a factor in improving the present. Now that he is becoming history, it would be appropriate that his work influence the future when the regressive cycle shifts, as he was certain it eventually would.

### Publications

#### Articles and Chapters in Books

1. *Isaac Ray and the trial of Daniel M'Naghten.* *Am J Psychiatry* 112:651–6, 1956

2. *With malice aforethought.* *Arch Crim Psychodynamics* 1:2–45, 1957
3. *The fallacy of the impartial expert.* *Arch Crim Psychodynamics* 3:222–6, 1959
4. *Criminal responsibility of the mentally ill.* *Stanford Law Review* 14:59–86, 1961
5. *From M'Naghten to Currens and Beyond.* *Cal L Rev* 50:189–205, 1962
6. *Some observations about the genesis of the Gorshen case, in Criminal Law: Problems for Decision in the Promulgation, Invocation, and Administration of a Law of Crimes.* Edited by Donnelly RC, Goldstein J, and Schwartz RD. New York, Free Press of Glencoe, 1962
7. *Law and psychiatry, in The Encyclopedia of Mental Health.* Albert Deutsch, editor in chief. New York, F. Watts, 1963
8. *Psychiatry and the criminal. Part I: Rules of criminal responsibility of the mentally ill.* *Postgrad Med* 36:48–52, 1964
9. *Preparing psychiatric testimony, in California Criminal Law Practice.* Berkeley: California Continuing Education of the Bar, 1964
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11. *Law and psychiatry: Detente, entente, or concomitance? (with D.W. Louisell).* *Cornell L Q* 50:217–34, 1965
12. *The origins and development of the “wild beast” concept of mental illness and its relation to theories of criminal responsibility (with A.M. Platt).* *J Hist Behav Sci* 1:355–67, 1965
13. *Clues to spotting mental illness in misdemeanants no. 2.* *Municipal Court Review* 5:1, 1965
14. *The psychiatrist as an expert witness: Some ruminations and speculations (with D.W. Louisell).* *Mich L Rev* 63:1335–54, 1965
15. *The psychiatrist as a medical witness, in Proceedings—National Medicolegal Symposium.* American Bar Association and American Medical Association, sponsors. Chicago, American Bar Association, 1965
16. *The children of Leviathan: Psychoanalytic speculations concerning welfare law and punitive sanctions.* *Cal L Rev* 54:357–69, 1966
17. *The origins of the “right and wrong” test of criminal responsibility and its subsequent development in the United States: An historical survey (with A.M. Platt).* *Cal L Rev* 54:1227–60, 1966
18. *The scientific method and the law.* *Hastings L J* 19:179–99, 1967
19. *The psychiatric view, in Psychiatric Aspects of Criminology.* Edited by Halleck SL, Bromberg W. Springfield IL, Thomas, 1968

20. The biblical conception of psychopathy: The law of the stubborn and rebellious son (with M. Rotenberg). *J Hist Behav Sci* 7:29-38, 1971
21. Failures of identification and sociopathic behavior, in *Sanctions for Evil*. Edited by Sanford N, Comstock C. San Francisco, Jossey-Bass, 1971
22. From Durham to Brawner: A futile journey. *Wash U L Q* 1973:109-25, 1973
23. The psychiatrist as advocate. *J Psychiatry Law* 1:5-21, 1973
24. The psychiatric prediction of dangerousness. *U Pa L Rev* 123:439-52, 1974
25. Murder and the death penalty: A case report. *Am J Orthopsychiatry* 45:712-22, 1975
26. Violence. *Mills Q* 57:15, 1975
27. Psychological problems of law students, in *Looking at Law School: A Student Guide from the Society of American Law Teachers*. Edited by Gillers S. New York, Taplinger Publ Co., 1977; published, in part, as: *Psychic pressure: What happens to your head*. *Juris Doctor* 6:40, 1976
28. Criminal responsibility of the mentally ill, in *International Encyclopedia of Psychiatry, Psychology, Psychoanalysis, and Neurology*. Edited by Wolman BB. New York, Produced for Aesculapius Publishers by Van Nostrand Reinhold Co., 1977
29. Social and cultural factors as a diminished capacity defense in criminal law. *Bull Am Acad Psychiatry Law* 6:195-208, 1978
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31. The relevance of voice in forensic psychiatric evaluations, in *Speech Evaluation in Psychiatry*. Edited by Darby JK. New York, Grune & Stratton, 1981
32. The psychiatrist as expert witness. *Psychiatric Clin North Am* 6:597-609, 1983
33. Forensic psychiatry, in *Review of General Psychiatry*. Edited by Goldman HH. Los Altos, CA, Lange Medical Publications, 1984
34. Reasonable medical certainty, diagnostic thresholds, and definitions of mental illness in the legal context. *Bull Am Acad Psychiatry Law* 13:121-8, 1985
35. The contamination of evidence by hypnotic enhancement of memory of witnesses, in *Evidence: Cases, Materials, and Problems*. Edited by Rothstein PF. New York, Matthew Bender, 1986
36. The psychiatric expert witness: Honest advocate or "hired gun"? in *Ethical Practice in Psychiatry and the Law*. Edited by Rosner R, Weinstock R. New York, Plenum Press, 1990
37. The DMH Program in its university context, in *The Doctorate Program in Mental Health: An Experiment in Mental Health Professional Education*. Edited by Wallerstein RS. Lanham, MD, University Press, 1991

#### Book Reviews

1. Louisell and Williams: Trial of Medical Malpractice Cases. *Cal L Rev* 49:410-4, 1961
2. Yarmey: The Psychology of Eyewitness Testimony. *J Psychiatry Law* 8:341-5, 1980
3. Van Dine, Conrad, and Dinitz: Restraining the Wicked. *Crime and Delinquency* 26:402-5, 1980
4. Burt: Taking Care of Strangers. *Mich L Rev* 26:743-9, 1980
5. Fingarette and Fingarette Hasse: Mental Disabilities and Criminal Responsibility. *Stan L Rev* 33:567-73, 1981
6. Nissman, Barnes, and Alpert: Beating the Insanity Defense: Denying the License to Kill. *J Psychiatry Law* 10:245-6, 1982
7. Salmony: Benefic Autonomy: A Formulative Study. *Dynamic Psychotherapy* 4:77-9, 1986