

A Personal View of the Ethics and Values of Bernard L. Diamond

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I met Bernard L. Diamond when he served as one of my examiners for the American Board of Forensic Psychiatry in February 1979. Following that, we became good friends although we lived on opposite coasts.

Soon after, we happened to meet in an airport. He said he was trying to determine the significance of a particular comma in a 16th century law book. It turned out to be in the paragraph in Lambarde's *Eirenarcha*,¹ referring to criminal exculpability, which is one of the more historically significant statements in the evolution of the Anglo-American legal concept of criminal insanity. We had an animated discussion about it, partly because we had differing interpretations, although we agreed on its importance. Later I had to smile as I considered the picture we must have presented: two grown men arguing in an airport lounge about the placement and meaning of a comma in a book more than 300 years old.

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Bernard Diamond decided to become a physician at the age of 12, when he read about the Leopold and Loeb hearing in which Clarence Darrow introduced psychoanalytic expert testimony to the American courts. It was at about the same time that Bernard's school advised his parents that he should go to a vocational high school, since his teachers did not think he was college material. He attended vocational high school and, even with that academic obstacle, he eventually graduated from medical school, later from the San Francisco Psychoanalytic Institute, still later he was invited to become a Professor of Law and Psychiatry at the University of California (Berkeley) and, later yet, Dean of its School of Criminology. During World War II he served in the Army Medical Corps, rising from first lieutenant to lieutenant colonel.

I have yet to meet a colleague more dedicated to forensic psychiatry, and by that, I mean emotionally dedicated to the discipline and its improvement. It pained him that forensic psychiatrists provided so much justification for the bad press we tend to get with the public

at large and with our medical and general psychiatry colleagues. Although he was angry and anguished about this, somehow he also was sympathetic to the pressures that drive some forensic psychiatrists to behave that way, particularly the younger ones. However, although he appreciated the strength and nature of those pressures, he was firm in his insistence that they should not be allowed to justify unethical, exploitative, or dishonest behavior.

Bernard Diamond had a strong conviction that the sorry state of the discipline would be improved substantially if the AAPL membership would promulgate a more specific and effective code of ethical behavior than we had in 1988, when he last spoke to AAPL.² He felt that this should include some minimum qualifications to ensure that the psychiatrist in a forensic situation would appreciate how the *context* of legal issues and questions requires a change from the purely clinical to the distinctly different clinical/legal values and mode of reasoning.

He felt that the forensic psychiatrist owed it to the individual and his/her lawyer to anticipate problems, to be candid and timely about the expert's principles, requirements, and behavioral standards. For example, if Bernard Diamond was going to be an expert witness in an insanity defense case, he required the defendant to testify. He wanted the jury to be able to see and hear the relevant evidence for themselves so that he could interpret its meaning to them, rather than have them concerned about the accuracy and inferred nuances of his description of the interview.

He recognized that the lawyer might believe that putting the defendant on the stand was too dangerous. However, while Diamond acknowledged the right of the defendant and his counsel to determine the nature and conduct of their defense, "that doesn't give them the right to tell me how I should practice or in what circumstances I may refuse to participate." In keeping with that, he would neither manipulate nor edit his testimony for the convenience of the trial strategy.

Bernard Diamond would not omit anything from his testimony that he thought was relevant to the formation or understanding of his expert opinion. One might say that was his overarching principle. In one case, the defendant told him something criminally damaging which he thought was necessary to the formation and understanding of his opinion, but which he knew the defense lawyer might see as endangering his client. After discussing it, they decided they would retain another psychiatrist. Eventually, the lawyer and the prosecutor agreed to a lifetime sentence without parole, although if he had prevailed on a diminished capacity defense it would have been a significantly less severe sentence for the defendant.³ Incidentally, it was partly because of this requirement of Bernard Diamond's that Sirhan Sirhan testified in his trial.

The point I want to make here is that Bernard Diamond felt that his primary responsibility had to be to maintaining his clinical integrity and, in a sense, the integrity of his profession. The second priority, following closely upon the heels of the first, was to do no harm to any-

body. This meant respect for the rights of the defendant *while respecting his own rights and responsibilities as a forensic psychiatrist*. In Bernard's view, such priorities guaranteed the defendant the best possible expert assistance.

Bernard Diamond was a criminal defense forensic psychiatrist. He would not serve as a witness for the prosecution. I had and have a difference with him on this point. When we discussed it, he explained that although he could see the merit in my concerns, he was so critical of the flaws and abuses of our penal system, that as a physician, he did not feel that he could play a role in consigning anybody to it. He saw it as destructive to human beings and destructive to the goal intended for it, that is, it increased rather than decreased the danger specific people posed to society. To Bernard Diamond, our penal system was the antithesis of what his commitment to medicine was about.

Bernard Diamond's reasoning convinced me to modify my position, somewhat. I now believe there is enough room for both ideologies, as long as the profession can provide equally competent experts to the defense and to the people, to the plaintiff and to the defendant.*

* In 1973, Bernard Diamond wrote, "I have suggested the principle (which I know to be legally unsound, but which I believe to be medically correct) that psychiatric expert testimony should be reserved exclusively for the defense in criminal trials. Let the prosecutor prove sanity or other elements of the requisite mental state required by the definition of the crime by use of non-expert witnesses or by the circumstances of the crime. Such a procedure would eliminate the troublesome battle of the experts as well as being more compatible with the psychiatrist's role as healer. I have no expectation that this suggestion will be adopted by any court." "From Durham to Brawner: a futile journey," *Wash U L Q*, 1973 pp. 109-125, p. 116.

It is important to appreciate that he subscribed to the view that there were two categories of ethics. He referred to them as organizational ethics and personal ethics. As I understood his position, organizational ethics called for a conclusion of ethical or unethical, while personal ethics was a matter of right or wrong. The lying or dishonest witness was absolutely unethical, while the psychiatrist testifying for the prosecution was wrong but not necessarily unethical.

On April 25th, 1988, Bernard Diamond wrote to Robert Weinstock, Chair of the AAPL Ethics Committee,

To me the difficult problem is how does one decide which ethical responsibilities belong in the organizational category, and which are unique to some individual or group of practitioners, but not applicable to all. We know that such individuals tend to believe that they hold the key to ethical truths and what they believe to be true should be believed by everyone. Hence [n] . . . opponent of abortion may believe that abortion should be opposed by all. I, as a criminal defense psychiatrist, may think that it is unethical to work for prosecutors, and that all my colleagues should share my scruples. [This is a significant moderation of his 1973 view. (see footnote above.)—jmqq.]

He continued,

It has been stated that any activity which is not directed at healing and preserving life is unethical for a physician. Hence, euthanasia is unethical. So is participation in an execution. I am not so certain that the claimed basis for this is valid. Doctors have numerous roles other than healing the sick. What about public health doctors who are concerned only with

That his position evolved further is demonstrated by his later statements (see letter to Robert Weinstock, M.D., quoted in text below.) That same letter makes it clear that he was sensitive to the possibility that he might be wrong, or in a special interest group, in this regard, who might mistakenly think they were correct and unwisely impose their beliefs upon the entire profession.

epidemiology? What about forensic pathologists who are concerned only with the cause of death? [Here I would add, what about the forensic pathologist who is concerned with helping the police to identify and apprehend the criminal? Or what about the physician who finds that s/he can only comfort or palliate the symptoms of the incurable and the unhealable?—jmq.]

Bernard Diamond went on to say

As much as I would like it to be otherwise, I do not think one can make out a case, based on historical tradition alone, that a physician should not participate in executions. I, personally, would not be willing to do so . . . But might this be an example of an ethical standard limited to a special group of physicians, namely anti-capital punishment believers? [Here, emphasized by the phrase "I, personally," is a reiteration of the modifying of his 1973 position.—jmq.] I daresay that conscientious well-meaning [i.e., ethical—jmq.] physicians participated in the Inquisition, cheerfully engaging in the burning of their victims, believing wholeheartedly that they were saving souls from damnation. . . . †

I think sooner or later psychiatrists are going to be involved in euthanasia cases. Inevitably, some type of euthanasia is going to become legal, and then they will need to have a psychiatrist vouch for competency of the patient to make the decision to die. Should we do this? This is the kind of tough decision ethics committees are going to have to deal with in the near future.

When Bernard Diamond said, "should we do this," he was saying, "should we as a profession." When he said "tough decision," I think he was expressing his view that there was merit on both sides of the argument. He and I never discussed euthanasia but I can tell you that even if he was opposed to participating

† It is useful to realize that in 1492, even the nonbelievers and the sinners were terrified of dying without the church's absolution. The reality of eternity in Hell was too palpably terrifying to be risked by the peasant, the noble, or the scholar.

in it, he most likely would have believed that it would be proper for the profession to consider it within the range of ethical behavior. It is not unlike the position of the American Psychiatric Association that we, as physicians, support the right of an individual to determine what is to be done with their body, including removing an unwelcome fetus. But, equally, there is nothing unethical in a physician *refusing* to participate in providing an elective abortion because of personal values or ethics. The ethical question would arise if such a physician withheld information about the availability of competent medical care of that type from the patient, preventing her from knowing that it is an option she *could* choose or have with another physician or another clinic. Despite the opinion of the Rehnquist Court, I think Bernard Diamond would have agreed with me that although legal, *that* is professionally unethical. ‡

Bernard Diamond was a psychiatrist who objected vehemently to dishonesty in colleagues. He was strongly opposed to the substance of the American Psychiatric Association Position Statement

‡ I think Bernard probably supported the position taken by Howard Zonana in his discussion of *Ford v. Wainwright* in the September 1986 issue of the AAPL Newsletter. Zonana wrote "Many psychiatrists will not participate in death penalty cases in either a forensic or treatment role. This attempt to cut the Gordian knot of ethical dilemmas with a single stroke is successful for the individual psychiatrist, *but fails the profession as a whole*. The future task is to develop guidelines that will *maintain the integrity of the profession* while providing appropriate expert forensic evaluations and treatment for the seriously mentally ill on death row. Such double agent conflicts cannot be resolved by such superficially appealing axioms as 'first of all, do no harm'" [emphasis added]. Here Zonana asserted the necessity to respect the distinction between professional [organizational] ethics and personal ethics.

on the Insanity Defense, as well as the questionable and disrespectful manner in which it was drafted and adopted. He and Lawrence Z. Freedman, of the University of Chicago, were the two psychiatrists in the American Psychiatric Association most identified with psychiatry's fight for justice for the mentally ill and for a medically valid criminal court process. Both were consultants to the American Bar Association Criminal Justice Mental Health Standards Project, and their expertise was well known to the leadership of the American Psychiatric Association and the American Bar Association. (Lawrence Z. Freedman was one of the three psychiatrists involved in the creation of the American Law Institute (ALI) Rule and was a member of the American Bar Association Task Force on Criminal Non-Responsibility.)⁴ The American Psychiatric Association and the American Bar Association appear to have managed, by a literally incredible coincidence of chance, luck, and brilliant ineptitude, to have neither Diamond nor Freedman nor the members of the American Bar Association Task Force on Criminal Non-Responsibility learn of the organizations' coordinated repudiation of the ALI Rule until after it was too late for them to be heard or to influence either the negotiations or the decision.[§] Nor did a significant number of the reported 75 forensic psychiatry experts who were loudly advertised to be enthusiastic about the Position Statement, appear to

[§] There is a very disturbing possibility that there may have been one exception to this, a member of the Task Force who for private reasons may have refused to circulate the information.

be aware even of its existence until after it was too late to register their objections, and objections there were. ||

Two components of the American Psychiatric Association (an Assembly Task Force and a subcommittee of the Council on Law and Psychiatry) together, ended up disapproving of the Position Statement almost in its entirety. One of the many statements it contained that particularly offended Bernard was "Most psychotic persons who fail a volitional test for insanity will also fail a cognitive-type test when such a test is applied to their behavior, thus rendering the volitional test superfluous in judging them."[¶] It was a cavalier statement designed to justify the unconscionable intended sacrifice of some of the mentally ill at the altar of political expediency. It brings to mind Isaac Ray's comment, aimed at an earlier proposed professional abandonment of some of the mentally ill, that "It is never expedient to do the wrong thing." I should add that at least one recently published study suggests that about 25 percent of persons who fail a volitional test will *not* fail a cognitive-type test, thus rendering the volitional test a *necessity* for justice for those mentally-ill individuals⁵—a necessity that the American Psychiatric As-

|| It is my understanding from several lawyers in the area of medical law that they, as well as other members of the ABA, were equally offended and alienated by the questionable and disrespectful way their leadership manipulated the issue and their colleagues.

[¶] Note the nonmedical thinking exemplified in the refusal to allow for a confirmatory test when the one being relied upon is known to be insensitive to some of the true-positives. No other medical specialty, nor most psychiatrists, would countenance such a slipshod approach to a physician's responsibility.

sociation continues to maintain should be denied to them.#

I've talked about what Bernard approved of, what he disapproved of, and what he hoped for. I would like to tell you about something he prized. The event in his career that I believe he was proudest of, was a footnote in a California Supreme Court decision, in a case with which he had no direct connection. In that note, the court made an explicit and specific reference to their need for expert testimony that met the qualitative criteria exemplified by that "of Dr. Diamond in *People v. Gorshen*."⁶ When you read his testimonies or his papers, you will find them clear and candid, detailing the basis for his conclusions, and defining the limits of his confidence and the areas of his uncertainties, doubts, or unavailable but important data. I think Bernard also would have been proud of the fact that California Supreme Court Justice Mosk, who had never met him, was moved to write a tribute to him in the *California Law Review*.⁷

The reader might find it illuminating to review Diamond's paper, written 30 years ago, "From *M'Naghten* to *Currens* and beyond," (*Cal L Rev* 50: 189-205, 1962) wherein he says "For the truth is that the principle behind *M'Naghten*, namely, that defect of cognition as a consequence of mental disease is the primary exculpating factor in the determination of legal insanity, has probably never been other than a legal fiction. I assert, without attempting to prove it here, that all psychiatrists of high caliber and experience invariably utilize, as the basis of formulating their own expert opinion about the mental responsibility of a given defendant, some other criteria than defects of cognition. They may or may not give lip-service to *M'Naghten* and may or may not advocate its change. But in their own reasoning about the defendant's mental condition, in their own appraisal of the mentally ill defendant's criminal responsibility, they give cognitive defects small measure compared to other psychopathological manifestations. If it were otherwise, extremely few defendants would ever be found legally insane" (pp. 189-90).

While I was a house guest of Ann and Bernard Diamond, I read, for the first time, the words of Lord Francis Bacon (1561-1626), from his book *Elements of the Common Lawes of England*. They were quoted by Thomas Percival in the preface to his book *Medical Ethics* (1803).⁸

I hold every man a debtor to his profession, from . . . which as men . . . do seek to receive countenance and profit, so ought they of duty to endeavour themselves, by way of amends, to be a help and ornament thereunto. This is performed, in some degree, by the honest and liberal practice of a profession: when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof: and preserve themselves free from the abuses where-with the same profession is noted to be infected. But much more is this performed, if a man be able to visit and strengthen the roots and foundation of the science itself, thereby not only gracing it in reputation and dignity but also amplifying it in profession and substance.

Bernard Lee Diamond was a forensic psychiatrist who visited and strengthened the roots and foundation of the science itself. He graced it in reputation and dignity. He amplified it in profession and substance. And in the process, he enriched all of us.

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