

# The Death Penalty and Bernard Diamond's Approach to Forensic Psychiatry

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**Bernard Diamond would testify only for the defense in criminal cases, but only if the whole psychiatric truth would be introduced during a trial and the facts of the case supported the defense position. Otherwise, he would refuse to participate. Although few other forensic psychiatrists have personal or professional ethical concerns regarding ever participating for the prosecution, many more have such problems in capital cases. Bernard Diamond's approach to forensic psychiatry should be considered at least as an option by those opposed to the death penalty. Bias in capital cases is not a persuasive reason to withdraw from involvement if the forensic psychiatrist remains honest.**

Bernard Diamond was unquestionably an honest and scrupulous physician who insisted always on following the highest of ethical standards in his practice as a forensic psychiatrist. He would participate in criminal cases only for the defense because of his belief that facilitating punishment was not a proper role for a physician. Although few other forensic psychiatrists would likely agree with him to the extent that they also would consider it inappropriate ever to participate for the prosecution in any

type of case, many more forensic psychiatrists oppose the death penalty on either a personal or professional basis and have ethical problems participating for the prosecution in such cases.

The general assumption in most discussions of death penalty problems has been that the only ethical alternatives are limited to being equally prepared to testify for either the defense or prosecution depending on the facts of a case or not to participate at all. Testifying for only one side has not even been mentioned as a serious option and is considered tantamount to a confession to being a "hired gun" or at least giving the veneer of dishonesty and lack of credibility.

For some reason, Diamond's approach to psychiatric participation in all criminal cases has generally not been considered even as a viable option for

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capital cases. His approach is either unfamiliar to most forensic psychiatrists or misunderstood. Diamond had a strong concern with how his testimony would be used. He believed in participating honestly but only in ways consistent with his personal and professional values and ethics. He would work only with the defense and was very concerned with the outcome of a case. He made no pretense of impartiality or objectivity, both of which he considered impossible.

The intent of this paper is to review Bernard Diamond's approach to forensic psychiatry, clear up possible misconceptions, contrast his approach with others, and explore its possible application in death penalty cases. The paper also highlights Bernard Diamond's thinking as culled from some unpublished correspondence on relevant ethical issues.

### **Precursors to Diamond and Modern Forensic Psychiatry**

Concern in the United States about the role of psychiatry in capital cases has a long history. Benjamin Rush advocated "substituting expiatory confinement and labor, and the power of medicine, according to circumstances, for capital punishment" as well as "rendering all other punishments less severe, and more certain." He advocated efforts "to abolish the punishment of death."<sup>1</sup>

William Alanson White in 1923 anticipated Bernard Diamond in his appreciation that the presence of bias itself did not necessarily invalidate testimony. White wrote, "It would dignify the whole procedure enormously if the cross-examinations were conducted for the pur-

pose of disclosing the degree to which an acknowledged prejudice affected the judgment of the witness, rather than as now, along the sinister lines of a tentative search for a bias which if found discredits the witness." In contrast to Diamond, White would work with prosecutors, but like Diamond only in ways to reach a humane outcome. White was interested in protecting society as well as the individual. In one case he worked with the district attorney in a capital murder case not to achieve a death penalty verdict but a prison sentence by which the defendant, a "mental defective with psychotic features," could be potentially incarcerated for life but also given treatment in a state hospital. White stated he was "enabled to present in a connected story, without interruption," including "a full description of the personality makeup of the defendant, the way in which the crime grew out of and related itself to this makeup and an explanation of his subsequent conduct." According to White, the district attorney was pleased with a conviction and the family of the boy pleased he was spared the death penalty, though such collaboration required a district attorney "who is more than a prosecuting officer."<sup>2</sup>

White wrote that district attorneys often took his opinion and had a prisoner committed as "insane" instead of sending him to trial. In capital cases, this procedure generally benefitted the defendant and did avoid the death penalty. White's approach shows that concern about outcome and opposition to facilitating a death penalty could also allow participation for the prosecution, in con-

## Diamond's Approach to the Death Penalty

trast to Diamond, but only in ways that avoid a death penalty.

### Personal and Professional Ethics

Traditional Hippocratic ethics can be seen as an ideal for medicine and even relevant for the forensic psychiatrist despite the absence of a classical doctor-patient treatment relationship. Such ethics were relevant for Diamond but he had doubts about imposing it on others. Diamond distinguished between personal ethics, organizational ethics, and a subset of organizational ethics not fully accepted but practiced by the most competent leaders in the field.<sup>3</sup> In Diamond's opinion, the subset of organizational ethics not fully accepted should not be enforced or imposed on others. It should be seen as representing solely guidelines for good practice. Only the generally accepted ethical guidelines represent minimum standards for practice and should be enforced. According to Diamond, ethical guidelines often did not distinguish between the two types. Personal ethics could be shared by groups of practitioners, but in his opinion should not be imposed on others, despite a strong wish often to do so. He accepted the legitimacy of those with opposing points of view who were honest in their testimony. The presence of other forensic psychiatrists ready to work for the prosecution would provide them with no shortage of experts. However, he did not believe the profession necessarily had any obligation to provide prosecutors with such experts. Regarding participation in a legally authorized execution, Diamond wrote:

Many years ago I did serve as an official New York State witness for the execution of two hired gangster killers by electrocution at Sing Sing Prison. Was I a participant? I think so, and I would not do it again. But might this be an example of an ethical standard limited to a special group of physicians, namely anticapital punishment believers? I daresay that conscientious well-meaning physicians participated in the Inquisition, cheerfully engaging in the burning of their victims believing wholeheartedly that they were saving souls from damnation (personal communication, April 28, 1988).

### The Development of Diminished Capacity as an Effort to Avoid the Death Penalty

Although the negation of specific intent in a crime had precedent in Scotland and in California in cases of intoxication,<sup>4</sup> the development of diminished capacity in California, one of Diamond's major contributions, began with *People v. Wells* in 1949.<sup>5</sup> Wells, a California prison inmate, threw a cuspidor at a prison guard fracturing his cheek bone after the guard shined a flashlight in his face. California at that time had a mandatory death penalty for a prisoner serving a life sentence who assaulted a prison guard with malice aforethought. Diamond became involved in the appeals process of the death penalty verdict. The *Wells* case established that despite a bifurcated trial in California, psychiatric evidence other than that involving legal insanity but relevant to the mental state at the time of the crime nevertheless could be introduced in the trial-in-chief (guilt phase). It was not necessary to wait until the sanity phase when only restrictive M'Naghten insanity criteria would apply. However, Wells' life was not

spared by the ruling since the court did not find the error prejudicial.

After resolution of the legal issue, Diamond did not lose interest in Wells but continued to try to help. Then Governor Earl Warren refused to commute the sentence. Paradoxically, Warren's elevation to the United States Supreme Court allowed his successor at Governor, conservative Goodwin Knight, to commute the sentence to life imprisonment.<sup>4</sup> This case illustrates what Diamond saw as an important role of a forensic psychiatrist, namely becoming involved in appellate cases as an honest advocate. He also would work to change the law in his work on forensic cases in ways consistent with his personal and professional ethics, utilizing the approach and values employed by psychiatrists in treating patients or consulting to other disciplines.

Diamond was very concerned about and opposed to the death penalty and was sometimes asked to find factors to prevent an execution.<sup>6</sup> Diminished capacity originated from Diamond's attempt to assist the defense in death penalty cases. The diminished capacity defense was further clarified in *People v. Gorshen* in which Diamond testified during the trial itself.<sup>7</sup> The defense permitted the psychiatrist to express an opinion as to whether the defendant lacked the capacity to form the intent necessary to be found guilty of specific intent crimes. If the defendant could not form the requisite specific intent, he or she could at most be found guilty of the lesser included crime (e.g., trespass instead of burglary or manslaughter in-

stead of murder). However, diminished capacity was inapplicable in general intent crimes.

Limitations on diminished capacity followed public reaction to a finding of manslaughter in the Dan White case, in which White had killed the mayor and a supervisor in San Francisco. White utilized a diminished capacity defense. Even though the prosecution had no psychiatrists testify for their position regarding criminal intent, the media and prosecutors blamed this psychiatric-legal defense rather than the lack of effective prosecution for Dan White not being convicted of murder. Diamond himself did not participate in the case because of a disagreement regarding strategy (Diamond, personal communication, 1979).

Despite abolition of diminished capacity in California in 1982, psychiatric testimony remains permissible during the trial-in-chief. Psychiatric evidence can still be used to establish whether a defendant actually had formed the requisite intent—i.e., “diminished actuality.” However, the psychiatrist now is not permitted to express directly an opinion on whether the defendant actually formed the requisite intent, although in California an ultimate opinion regarding legal sanity can still be offered. The ultimate issue of intent is relegated for decision solely by the trier of fact. Psychiatric evidence, though, is now relevant for determining criminal intent as well as specific-intent crimes. However, premeditation and malice have been redefined, overturning years of California Supreme Court precedent,

### **Diamond's Approach to the Death Penalty**

so as to sharply limit the relevance of psychiatric data and testimony to the *mens rea* required for murder. Triers of fact are thereby limited now in their ability to utilize an understanding as to why a defendant committed a homicide, for the purpose of exercising mercy by finding guilt for a lesser included crime. The law in California essentially has been returned to that existing in 1949 immediately after the *Wells* decision.<sup>5</sup> Unlike insanity, diminished capacity permitted gradations in punishment.

Despite its recent limitations in California, some other states have now begun to permit psychiatric testimony relevant to the presence or absence of an intent required for conviction or even to permit a diminished capacity defense itself.<sup>8-11</sup> Diamond's contribution is now having an impact outside of California.

### **Honest Advocacy**

As a defense-oriented psychiatrist, Diamond would testify only for the defense, but only if total honesty would be permissible and legal technicalities would not be used to hide or distort the psychiatric facts. It was crucial that the facts support the defense position and that facts not be manipulated or partially concealed to leave a false impression. He would insist that the defense attorney allow him to present the whole psychiatric truth. Otherwise he would refuse to participate. He believed in honesty as not only most ethical, but also as the best tactical approach to persuade the jury not solely by the strength of credentials or expertise but by demonstrating the argument and evidence to the jury.

Such a demonstration was necessary to prove credibility since he openly and honestly admitted to bias. He would enable the trier of fact to see all the evidence and to know that nothing was being withheld. He wanted the defense attorney to allow him to explain why a defendant was the way he was and why a crime occurred and not hide any of the psychiatric truth. He considered his primary role one of explaining to the trier of fact why the defendant did the crime, and he insisted that the attorney give him an opportunity to do so. Because of various problems with a case, he would participate in only approximately 10% of the legal cases in which he was asked to provide psychiatric consultation (Diamond, personal communication, 1979).

Diamond distinguished between a "hired gun" and an honest advocate.<sup>12</sup> He believed in the legitimacy of participating in difficult financially unrewarding trials in which the psychiatrist's sole interests are the broader social implications such as wishing to enlighten, educate, or contribute to social or legal reform. He considered it equally legitimate for a forensic psychiatrist to want to help the underdog, the have-nots, or on the other side, for others to be advocates of law and order or to try to be a protector of society. At the very least he thought the forensic psychiatrist should advocate principles of mental health, the scientific status of psychiatry, and fight against the misuse of psychiatric evidence. The forensic psychiatrist in his opinion is not a hired gun if he or she does not give false evidence. In testi-

mony and reports, honesty also required stating the limits of psychiatric knowledge.

One objection often raised to testifying solely for the defense in death penalty cases, is that it would negate what often is considered a demonstration of impartiality, namely for the forensic psychiatrist to show that he testifies in different cases for either the defense or the prosecution and is equally willing to testify for either side. However, that really does not prevent a true "hired gun" who will testify for whatever side will pay him and will make a case for either side regardless of the case or the truth. Some forensic psychiatrists may forget that they in contrast to attorneys take an oath to tell the whole truth. Although some have asserted that court-appointed experts are impartial and are a solution to the problems of bias, Diamond believed that most court-appointed forensic psychiatrists actually are prosecution oriented or they otherwise would not be continually appointed. He wrote his famous paper on the fallacy of the impartial expert to combat proposals for such an arrangement.<sup>13</sup> Although Diamond wished to help the defense, truth and honesty in court were even higher values for him in order not to undermine respect for psychiatry and to retain his own principles and ethics.

Diamond classified as a hired gun,

...both those who knowingly give false testimony and those who give erroneous testimony which they could have easily determined to be false or misleading if they made the slightest effort. Example: "Dr. Death" testified that he was 100 percent certain that the defendant would commit a serious assault or murder

again. If he does not already know that no such prediction can be 100 percent certain, he could have easily discovered that fact by the most cursory review of the literature. A "hired gun" will sometimes give testimony that he knows is misleading because his conclusions are contraindicated by other facts which are excluded from the trial because of evidential technicalities (personal communication, July 26, 1988).

Diamond believed that personal crusades or beliefs could result in becoming a "hired gun" only if the psychiatrist is not honest. Examples according to Diamond are:

a psychiatrist who testifies that a defendant is legally sane when he knows that the defendant actually meets all the criteria for legal insanity because he fears the defendant will be released and will be dangerous (an actual case) or the expert who falsifies his evidence because he does not believe in the legal concept of exculpation for reason of mental illness. Or the "Dr. Death" who gives false testimony because he is an ardent believer in capital punishment. Or the defense psychiatrist who falsely testifies because he is an ardent opponent of the death penalty (Diamond, personal communication, July 26, 1988).

Diamond further wrote:

Thus I do not think I am a "hired gun" because if I cannot testify to the whole *psychiatric* truth, even though legal technicalities may permit an omission, I will not testify at all. Thus, though I believe I retain my honesty as an expert witness, the kinds of cases for which I can be truly helpful are somewhat limited. With most cases I tell the defense attorney that I cannot help his case and that he should forget I ever saw his client. I often do not get paid for giving such advice.

Where my lack of impartiality shows though is in my predilection for the defense, my interpretation for the defense, my interpretation of psychiatric theory and clinical knowledge in ways which obviously favor the defense, and my definition of the role of the physician which does not permit him to employ his skills

## **Diamond's Approach to the Death Penalty**

on behalf of prosecution and punishment. Further, I am willing to apply my abilities in developing psychiatric theories of value to the defense (such as diminished capacity), but I have no interests in applying my talents to the development of strategies for the prosecution (personal communication, March 6, 1988).

### **Diamond-Pollack Comparison**

Bernard Diamond and one of his contemporaries, Seymour Pollack (who like Diamond was an influential and scholarly California forensic psychiatrist), oftentimes found themselves supporting diametrically opposed positions on forensic psychiatry's major issues. Seymour Pollack was a primary proponent of the probably dominant approach to forensic psychiatry. Although both Diamond and Pollack wanted to raise the caliber of forensic psychiatric testimony and favored higher standards, there were important differences. Diamond favored honest advocacy; Pollack promoted "impartiality"—deemed impossible by Diamond.<sup>13</sup> Pollack believed the forensic psychiatrist should become aware of social policy considerations.<sup>14</sup> Diamond agreed insofar as these referred to legal statutes and relevant court decisions. Where they differed was that Pollack would attempt to ascertain what courts and legislators really wanted when the legal criteria were unspecified, unclear, or ambiguous. He would then present his reasoning so that a trier of fact could understand the basis for his opinion and disagree if necessary. In his forensic evaluation, Pollack would not try to expand or modify a legal concept. Diamond on the other hand would interpret ambiguities in a manner to encourage the law to operate more humanistically and

would see himself in a fiducial capacity to the law.<sup>15</sup> He would try to influence the law in ways consistent with his own values and those of the medical profession. He was unashamedly biased but honest.

Diamond and Pollack also differed insofar as Pollack would permit the law to set a threshold for mental illness, thereby changing medical diagnosis into a legal term with a legal threshold. Where not specifically defined, rather than use medical thresholds, Pollack would try to determine what threshold he believed the legal system intended. Diamond's opinion, in contrast, was that psychiatry should not permit the law to encroach on the psychiatric territory of diagnosis or change the threshold for mental illness. He believed the law could decide what illnesses or criteria were exculpatory but could not decide what was mental illness.<sup>16</sup>

Another example of their differences was in their interpretation of the M'Naghten insanity rule—which has been California's insanity standard except for 1978 to 1982 when the ALI rule was in effect. Pollack believed social policy considerations required that to "know" the nature and quality of the act in the defense is broader than a simplistic, atomistic, childish level of comprehension, but did not encompass the maximum breadth, scope, and maturity of fullest comprehension.<sup>17</sup> Diamond, in contrast, interpreted "know" to mean "appreciate," "comprehend," or "realize its full meaning" following Professor Jerome Hall and Dr. Gregory Zilboorg. Diamond's interpretation favors the de-

fense; Pollack's interpretation favors the prosecution. In testifying for a woman who murdered her child Diamond stated "her act was so deviant from any normal maternal behavior and the evidence of mental disease so conclusive, that she just couldn't have known the nature and quality of the act." However, because he did not like to resort to semantics and an arbitrary "all or none" defense, he preferred to focus on the inability to form necessary included aspects of intent or *mens rea* (diminished capacity) as a more reasonable approach. He preferred this approach because it favored an understanding of a defendant's motivation and permitted sentencing gradations. He thought that a literal interpretation of M'Naghten would either encourage perjury or force the psychiatrist to "become a puppet doctor, used by the law to further the primitive and vengeful goals demanded by our society." He believed if a literal sense of the phrase "know" is employed, "Just about almost every defendant, no matter how mentally ill, no matter how far advanced his psychosis, knows the difference between right and wrong in the literal sense," and the psychiatrist "becomes an expeditor to the gallows or gas chamber."<sup>18</sup>

### **Psychiatric Ethical Perspectives on the Death Penalty**

According to the Los Angeles Times, the United States is alone among the Western democracies in maintaining active capital punishment.<sup>19</sup> Amnesty International is of the opinion that two innocent black men were recently sent

to their deaths in Florida and Mississippi and that 23 innocent Americans were executed since 1900. In addition, 349 such individuals were unjustly convicted of capital crimes during this period. The fallibility of the process, expense of appeals as well as recent endeavors to limit the appeals process and the lack of any demonstrated deterrent value or effect on homicides are reasons for opposition.<sup>19</sup> It also is striking that despite invariably opposed public opinion, every Western industrial nation except the United States has stopped executing criminals, sometimes followed some years later by formal abolition.<sup>20</sup>

Diamond wrote:

On the death penalty issue: I think a psychiatrist should never testify as an expert without a thorough knowledge of the use to which his testimony is to be put in the legal system. If the eventual use of the testimony is something which is morally wrong, contrary to the expert's own sense of values, or in any way contrary to medical principles ("first do no harm"), the psychiatrist should refrain from offering such testimony and refrain from making his services available. As an analogy, I like to shoot and I own several guns. Yet I would not allow one of my guns to be used by another to kill a man. So I believe my expert knowledge is an instrument that belongs to me and which I will not lend to others to put to immoral purposes.

Judge David Bazelon once wrote that it is no business of the psychiatrist how and to what end his testimony is put. The psychiatrist's job is to provide the expert knowledge and the law will put it to its own use for its own ends. I think Bazelon is dead wrong. The use that society puts my expert knowledge is very much my business and I intend to scrutinize carefully what the law does with it.

I believe capital punishment is wrong and that the psychiatrist who gives testimony (such as potential dangerousness) which is used in a



## Diamond's Approach to the Death Penalty

criminal trial to justify the sentence of death is an equal participant with the judge and executioner in the prisoner's death (personal communication, December 30, 1985).

Many forensic psychiatrists oppose capital punishment either for personal ethical reasons, their view of its ineffectiveness and cruelty, or because of their views that professional ethics should prohibit facilitating such actions even though it presently does not clearly do so. They may also feel that it goes against traditional medical Hippocratic values (*primum non nocere*).<sup>3</sup> Distinction between morals and ethics does not necessarily help since the terms are often used interchangeably.<sup>21</sup> It often is stated that personal morals or ethics is the only legitimate basis for a forensic psychiatrist's opposition to the death penalty. However, some forensic psychiatrists could favor the death penalty as citizens or for someone who has killed the psychiatrist's friend or relative yet believe it is not appropriate for a physician to in any way facilitate death. A recent survey of forensic psychiatrists showed divided opinion regarding the ethics of contributing in any way to a death penalty verdict.<sup>22</sup> A substantial number of forensic psychiatrists thus see facilitating a death penalty as unethical, thus this issue remains unresolved.

Most discussions on death penalty participation solely consider how such participation is consistent with Pollack's concept of the role of the forensic psychiatrist as a "impartial" consultant to the legal system.<sup>23</sup> Diamond's approach of honest advocacy solely for the defense is not even considered. Many forensic

psychiatrists have no objection to participating for the prosecution in early phases of death penalty cases but refuse to participate for either side during some later phase. Some will not participate at all in capital cases. The New York State Medical Society ethical guidelines forbid participating in the later phases of death penalty cases for either side.<sup>24</sup> Pollack himself apparently refused to participate at all in death penalty cases after the Sirhan case<sup>25</sup> in which Diamond and he were on opposing sides.

Moral philosopher Philippa Foot<sup>21</sup> has commented on the need for psychiatrists opposed to capital punishment to participate honestly in the process. She states that although a psychiatrist must testify in light of criteria laid down by the court, there is latitude in deciding how to apply them or how much to emphasize merciful mitigating factors. She further states that the worst thing that could happen would be an exodus of all forensic psychiatrists opposed to capital punishment since that would relegate evaluations to death penalty proponents, with a bias in favor of death. Those opposed to capital punishment according to her can do so honestly from the inside. One possible approach according to Foot is to work only for defense attorneys in capital cases—a position similar to Diamond's. However, in contrast to Diamond who would participate only in confidential defense evaluations, Foot believes that in circumstances where confidentiality to the defense attorney cannot be assured participation still can be ethical. Even if a forensic psychiatrist opposed to the death penalty can be

“subpoenaed by the prosecution when he will have to give his honest opinion in court,” she considers it is a good course of action for a psychiatrist opposed to the death penalty to participate in such forensic evaluations and to try to do what he believes is right. He can work to oppose the death penalty in any honest way possible. Ambiguities can be interpreted in ways to favor the defendant. Although the psychiatrist “cannot be sure that he will not have the opposite effect from the one he believes himself to have a duty to bring about,” Foot believes that “this may happen to anyone whatever good cause he is working for.”<sup>21</sup>

Some commentators have stated that refusing to participate in death penalty cases may be an adequate solution for individual forensic psychiatrists but not the profession.<sup>26</sup> Others believe that it would be unfair to bar the prosecution from also making use of a psychiatrist’s skills if they were made available only to the defense.<sup>27</sup> However, although such arguments may be true in most other circumstances, it is not clear that the psychiatric profession has an obligation to be available to those seeking a death penalty. Such availability would not be necessary if the psychiatric profession agreed with Diamond’s personal ethical view. The profession could determine that facilitating a death penalty would be professionally unethical and consequently that working for the prosecution is unethical at certain phases of the death penalty process. Such a determination would not preclude testifying honestly for the defense. It would be possible for

the profession to permit only honest opposition to capital punishment. It would be possible for the law to utilize other mental health professionals or follow Diamond’s 1973 proposal that psychiatric testimony be reserved for the defense in criminal trials. He suggested that the prosecution could “prove sanity or other elements of the requisite mental state required by the definition of the crime by the use of nonexpert witnesses or by the circumstances of the crime.”<sup>28</sup> Such a role in his opinion would be “more compatible with the psychiatrist’s role as healer.”<sup>28</sup> It also would preclude the “battle of experts.” However, he doubted his proposal would be adopted. Testifying solely for the defense in death penalty cases would be consistent with a recent resolution, currently under consideration by the American Medical Association (AMA), which would prohibit physicians from providing information to certify competence to be executed or treating people to make them competent to be executed. This resolution would expand the meaning of participation in a legally authorized execution, presently forbidden by both the AMA and APA.<sup>29</sup>

Foot believes that the ethics of the death penalty is relevant for psychiatry since it is a profession regularly asked to participate in aspects of the process.<sup>21</sup> Therefore, it would be ethically appropriate to take such a position, and in Foot’s opinion, such a position should be taken if considered ethically “right” even if it led to no immediate changes in the death penalty process. Ethical issues need not be decided by majority vote. However, Diamond thought gen-

### Diamond's Approach to the Death Penalty

eral acceptance was necessary before ethical guidelines should be enforced.<sup>3</sup> Without general acceptance, he believed some guidelines should be considered solely guidelines for good practice. With the current difference of opinion on this issue in the profession, including the current difference of opinion regarding whether medical tradition<sup>3</sup> should preclude participation for the prosecution to facilitate a death penalty,<sup>22</sup> any such decision by the profession may be unlikely unless the AMA resolution expanding the prohibition against participating in a legally authorized execution is passed. However, even this resolution would permit participation for the prosecution in the early phases of a death penalty case, which Diamond would have opposed. Regardless of the final decision by the AMA, some psychiatrists for their own ethical reasons could still decide not to participate for the prosecution in capital cases at any phase. At least, they would endeavor not to participate unless the prosecution agreed to seek a lesser penalty. Although another expert will often be obtained, occasionally, such refusal might even lead to agreement to seek a lesser punishment. Despite disagreement on many death penalty facets, surveys of forensic psychiatrists<sup>29</sup> do show that most consider it unethical to give an opinion in a death penalty case without a personal examination despite the legality of doing so as stated by the United States Supreme Court in *Barefoot v. Estelle*.<sup>30</sup> Because of its special significance, the death penalty also should be treated differently from other cases—a statement agreed to

by forensic psychiatrists in recent surveys.<sup>31</sup>

There also is no reason that agency and duty for a forensic psychiatrist should be considered as single and absolute and solely against a defendant if hired by the prosecution since even treating psychiatrists have multiple duties to society as well as to patients. Forensic psychiatrists can be seen as having duties to both an evaluatee and society regardless of who retains them.<sup>29,31</sup> The difference can be which duties are given relative priority. If a harm were sufficiently great, the priority could be overruled. Multiple agency and balancing of values<sup>32,33</sup> would seem more appropriate models, consistent with the findings of recent surveys of forensic psychiatrists.<sup>29,31</sup>

Showalter<sup>34,35</sup> calls attention to the importance of psychiatric testimony at the sentencing phase since psychiatric evidence that does not qualify for an insanity defense oftentimes can be admissible as a mitigating factor in a trial's sentencing phase. Similar to Diamond, Showalter advocates a comprehensive psychiatric evaluation encompassing a thorough assessment of the defendant's developmental history and possible mitigating factors as well as a detailed psychological explanation of the defendant's behavior near and at the time of the offense. Showalter states, "It is widely believed that the most useful clinical input in mitigation at sentencing in a capital case is a presentation of a psychological explanation of the offense." Diamond also believed that careful detailed evaluations were necessary in

these cases, and that court-appointed psychiatrists (psychologists) often missed substantial psychopathology because of the superficiality of their evaluations often encouraged by the system which hires them. Virginia law does not allow information obtained by the psychiatrist for the prosecution to be used for aggravation. Information obtained by a psychiatrist can be utilized at the penalty phase of a capital trial solely for mitigation or to refute mitigating psychiatric arguments but not to prove aggravation itself.<sup>34,35</sup> The ethics of actively cooperating with the prosecution for the development of aggravating factors by psychiatrists in states without this limitation is especially questionable.

Another new problem area for psychiatrists in death penalty cases could arise as a result of the recent United States Supreme Court case, *Payne v. Tennessee*,<sup>36</sup> which allows prosecutors to use Victim Impact Statements during a criminal trial's sentencing phase. According to psychiatrist Alan Stone,<sup>37</sup> these statements of the victim's character and psychological impact of the crime on the victim's family could involve a key question of the presence or absence of post-traumatic stress disorder (PTSD) in a murder victim's family leading to a battle of experts on the PTSD issue. There also could be racial bias if the victim was white and the defendant nonwhite. This potential problem area is another in which those who oppose the death penalty or even solely oppose racial injustice could elect to follow Diamond's precedent of testifying honestly solely for the defense.

However, the victim's family's treating psychiatrist could be forced to testify for the prosecution with disregard for the treating psychiatrist's views about facilitating a death penalty either personally or professionally. The only alternative in some circumstances may be contempt of court.

### Recapitulation

The intent of this paper has been to call attention to Bernard Diamond's approach to forensic psychiatry as a possible model for those opposed to the death penalty. As stated by Diamond, impartiality is not necessary for participation in the process and probably is impossible anyway. Interest and concern about making money do not necessarily lead to dishonesty; and similarly, concern about outcome can exist yet not affect honesty. In fact, concern about outcome or about nonmaleficence is more likely to be correlated with concern about ethical principles and is probably more likely to be consistent with honesty. Although Diamond worked only for the defense, concern about outcome can even be appropriate for a prosecution psychiatrist opposed to the death penalty who follows the tradition of William Alanson White by endeavoring to work only with prosecutors open to solutions short of capital punishment. However, present public clamor for the death penalty may make such prosecutors a rarity. It may therefore be necessary to work for the defense if a forensic psychiatrist opposes the death penalty or possibly be court-appointed if he or she can continue to get such appointments. Since

## Diamond's Approach to the Death Penalty

completely unbiased psychiatrists probably are not possible, there is no persuasive reason why forensic psychiatrists opposed to the death penalty should abandon the field to those with a bias favoring death. Diamond's approach clearly should be permitted by the profession's ethical guidelines. It also should be considered at least as an honest and ethical option by those forensic psychiatrists opposed to facilitating the death penalty, yet who do not wish to abandon involvement in these cases.

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### References

1. Rush B: Sixteen Introductory Lectures to Courses of Lectures upon the Institutes and Practice of Medicine. Philadelphia, Bradford and Innskeep, 1811
2. White WA: Insanity and the Criminal Law. New York, MacMillan, 1923
3. Weinstock R, Leong GB, Silva JA: The role of traditional medical ethics in forensic psychiatry, in Ethical Practice in Psychiatry and the Law. Edited by Rosner R, Weinstock R. New York, Plenum Press, 1990
4. Diamond BL: Lecture, Boalt Hall, University of California, Berkeley, 1978
5. People v. Wells. 33 Cal 2d 330, 220 P2d 53 (1949)
6. Diamond BL: Murder and the death penalty: a case report. Am J Orthopsychiatry 45:712-722, 1975
7. People v. Gorshen. 51 Cal 2d 716, 336 P2d 492 (1959)
8. Commonwealth v. Grey, 399 Mass 469, 505 N.E. 2d 171 (1987)
9. State v. Shank, 367 S.E. 2d 639 (N. C. 1988)
10. State v. Rose, 398 S.E. 2d 314 (N. C. 1990)
11. Colorado v. Sandoval, 805 P. 2d 1126 (1990)
12. Diamond BL: 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
13. Diamond BL: The fallacy of the impartial expert. Arch Crim Psychodynamics 3:221-6, 1959
14. Pollack S: Principals of forensic psychiatry for psychiatric-legal opinion-making, in Legal Medicine Annual 1971. Edited by Wecht C. New York, Appleton-Century-Crofts, 1971
15. Diamond BL: The forensic psychiatrist: consultant vs. activist in legal doctrine. Bull Am Acad Psychiatry Law 20:119-132, 1992
16. Diamond BL: Reasonable medical certainty, diagnostic thresholds, and definitions of mental illness in the legal context. Bull Am Acad Psychiatry Law 13:121-8, 1985
17. Pollack S: Forensic Psychiatry in Criminal Law. Los Angeles, University of Southern California, 1974
18. Diamond BL: Criminal responsibility of the mentally ill. Stan L Rev 14:59-86, 1961
19. Los Angeles Times: Editorial. page B6, January 22, 1990
20. Zimring F, Hawkins G: Capital Punishment and the American Agenda. Cambridge, Cambridge University Press, 1986
21. Foot P: Ethics and the death penalty: participation by forensic psychiatrists in capital trials, in Ethical Practice in Psychiatry and the Law. Edited by Rosner R, Weinstock R. New York, Plenum Press, 1990
22. Weinstock R: Ethical concerns expressed by forensic psychiatrists. J Forensic Sci 31:596-602, 1986
23. Pollack S: Psychiatric consultation for the court, in Psychiatric Consultation. Edited by Mendel W, Solomon P. New York, Grune and Stratton, 1967
24. Rosner F, Halpern AL, Kark PF: Physician involvement in capital punishment. NY St J Med 19:15-8, 1991
25. Curren WJ, Pollack S: Mental health and justice: ethical issues of interdisciplinary cooperation, in Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice. Edited by Curren WJ, McGarry AL, Shah SA. Philadelphia, F. A. Davis, 1986
26. Zonana H: *Ford v. Wainwright*: competency to be executed. AAPL Newsletter 11:8-10, 1986
27. Appelbaum PS: Psychiatrists' role in the death penalty. Hosp Community Psychiatry 32:761-2, 1981
28. Diamond BL: From *Durham* to *Browner*: a futile journey. Wash U L Q 1973:109-25, 1973
29. Weinstock R, Leong GB, Silva JA: Opinions by AAPL forensic psychiatrist on controver-

- sial ethical guidelines: a survey. *Bull Am Acad Psychiatry Law* 19:237-48, 1991; erratum 19:393, 1991
30. *Barefoot v. Estelle*, 463 U.S. 880 (1983)
  31. Weinstock R: Perceptions of ethical problems by forensic psychiatrists. *Bull Am Acad Psychiatry Law* 17:189-202, 1989
  32. Hundert EM: A model for ethical problem solving in medicine with practical applications. *Am J Psychiatry* 144:839-46, 1987
  33. Hundert EM: Competing medical and legal ethical values: balancing problems of the forensic psychiatrist, in *Ethical Practice in Psychiatry and the Law*. Edited by Rosner R, Weinstock R. New York, Plenum Press, 1990
  34. Showalter CR: Psychiatric participation in capital sentencing procedures: ethical considerations. *Int J Law Psychiatry* 13:261-80, 1990
  35. Showalter CR: Broad based psychiatric formulation in capital cases. *Psychiatric Times* 7(11):1,28-31, 1990
  36. *Payne v. Tennessee*, 111 S. Ct. 2597 (1991)
  37. Stone AA: Report on the Supreme Court Decision in *Payne v. Tennessee*. Newsletter of the American Academy of Psychiatry and the Law 16:79-81, 1991