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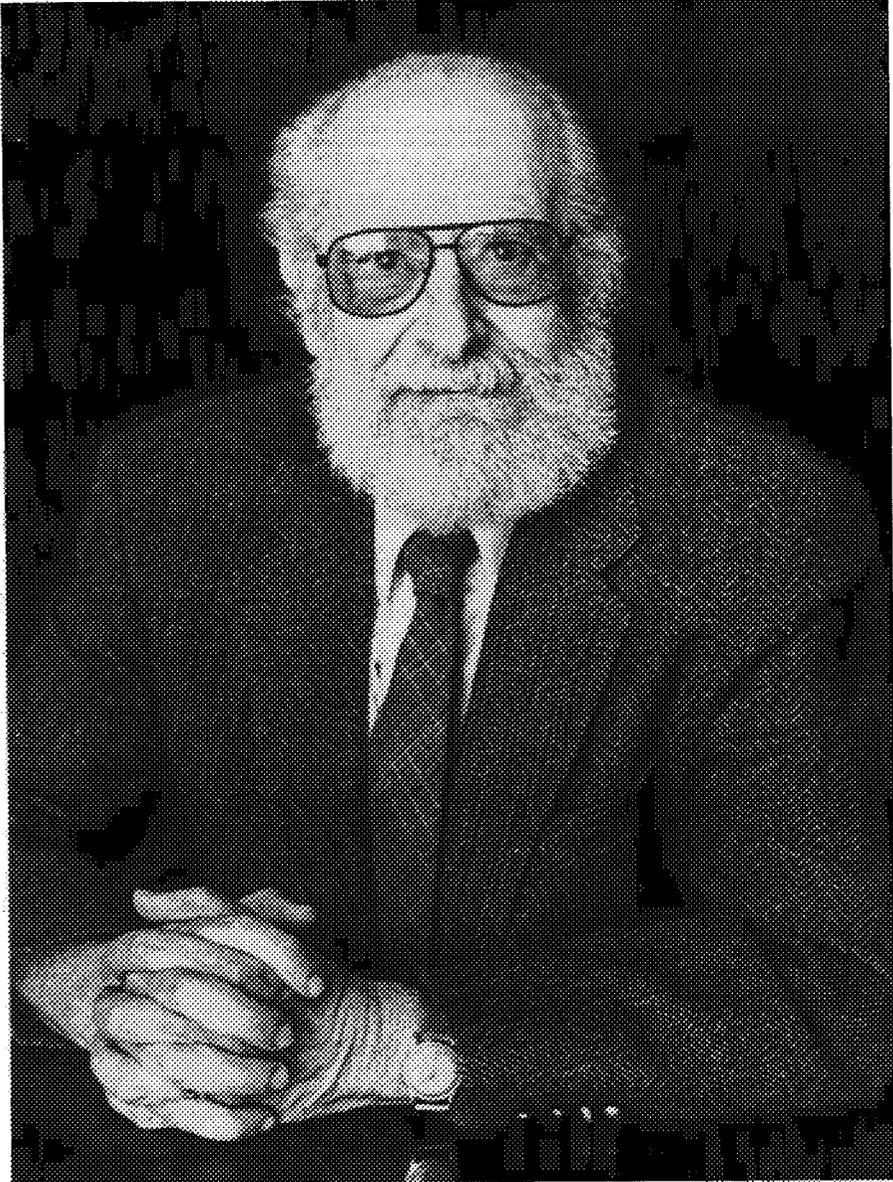
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DR. BERNARD L. DIAMOND

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In Memoriam: Dr. Bernard L. Diamond

Jesse H. Choper†

Pioneer is the term that best captures Bernard Diamond's career in the law. When Bernard joined the Boalt Hall faculty in 1963, he was one of the very first psychiatrists appointed as a Professor of Law at an American law school. His interdisciplinary work was a harbinger of the larger movement to integrate legal academia with other disciplines. Economists, philosophers, historians, political scientists, and sociologists—in addition to psychiatrists and psychologists—are now often found on law school faculties. Bernard's work demonstrated the value of this intellectual blending.

Bernard Diamond's varied professional experience brought vibrance and perspective to his work as a legal academic. He led not one but two experimental programs, first as the acting dean of Berkeley's then-noted School of Criminology, and later as founding director of the Berkeley-U.C.-San Francisco Doctor of Mental Health Program.

More than any of his many distinguished professional accomplishments, Bernard particularly relished his role in the classroom. He continued to teach courses in Law & Psychiatry for many years after his formal retirement, and he was regularly invited by first-year criminal law teachers to lecture to their students on the diminished capacity defense. He always enjoyed attending student events. I particularly remember him at our law school graduations. His green doctoral robe, signifying medicine, stood out in the sea of normal black and purple (and the occasional red of Oxbridge).

Although Bernard was a man of the academy in every sense of the word, his impact stretched far beyond lecture halls and libraries. His

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work on diminished capacity doctrine placed him squarely in the forefront of a furious public debate on crime and punishment. As our colleague Jerome Skolnick describes more fully, Bernard was a prime force in the movement to reevaluate the law's approach to criminal responsibility. His deep concern for justice and his commitment to reform fortified him for that role, and sustained him despite the electorate's growing frustration with the diminished capacity defense. After becoming professor emeritus, Bernard continued to teach and work in yet another pioneering area: the use of hypnotic suggestion to refresh the memory of witnesses.

Bernard Diamond will be missed by students and faculty alike at Boalt Hall and the larger University. His many friends share his loss with the wonderful family he left behind. His wife Ann Landy Diamond is a legal pioneer in her own right. Practicing matrimonial law in Marin County, she led the way in emphasizing conciliation and accommodation over vitriol and revenge. Bernard leaves an enduring personal and professional legacy of compassion and conviction. He also leaves behind a path of interdisciplinary work in the law that will continue to guide and inspire young scholars for decades to come.

A Giant in the Field

Stanley Mosk†

I do not believe I ever met Dr. Bernard Diamond. Nevertheless, over the past fifteen or more years, I have learned to respect his expertise in a remarkable number of areas.

A casual glance in periodical indices reveals Dr. Diamond writing more articles than Roger Traynor, giving more lectures than Harold Lasswell, and participating in more seminars than Geoffrey Hazard. His subjects have ranged from psychiatry to social welfare to such criminal law topics as expert witnesses and criminal responsibility.

My first contact with the works of Dr. Diamond came in 1975 when our court considered *People v. Burnick*,¹ a case involving the proper standard of proof in mentally disordered sex offender proceedings. We were particularly concerned with the predictability of dangerousness. This is a subject of grave importance to an alleged MDSO, for he must defend not for what he is purported to have done but for what he is predicted to do in the future.

We referred to Dr. Diamond as “a nationally known specialist in this field”² and cited his article on *The Psychiatric Prediction of Dangerousness*.³ He pointed out in that article that “Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness.”⁴

For that, among other reasons, we held in *Burnick* that the standard of proof beyond a reasonable doubt is required in mentally disordered sex offender proceedings under the due process clause of the California Constitution.⁵

Perhaps the most significant case in which Dr. Diamond’s expertise proved helpful was *People v. Shirley*.⁶ This was a classic tale of conflicting stories, one by a Marine, the other by a woman he picked up in a bar. She claimed rape; he asserted consent. The prosecution had the woman hypnotized in order to bolster her story with details.

† Associate Justice, California Supreme Court.

1. 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975).

2. *Id.* at 328 n.19, 535 P.2d at 366 n.19, 121 Cal. Rptr. at 502 n.19.

3. 123 U. PA. L. REV. 439 (1974).

4. *Id.* at 452.

5. *Burnick*, 14 Cal. 3d at 332, 535 P.2d at 369, 121 Cal. Rptr. at 505.

6. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

Fortunately for our court, Dr. Diamond had written a definitive article on pretrial hypnosis and its inherent problems.⁷

To readers whose sole experience with hypnosis may have been a rehearsed performance on a theatrical stage, he discussed at length the nature and history of hypnosis, the legal literature on the subject, and the manipulative possibilities for those of dubious qualifications who may undertake to hypnotize a person. He did not equivocate in reaching a conclusion: "The plain fact is that such [pretrial hypnotic] testimony is not and cannot be reliable. The only sensible approach is to exclude testimony from the previously hypnotized witnesses as a matter of law, on the ground that the witness has been rendered incompetent to testify."⁸

Our court reached substantially the same conclusion, making an exception only for a defendant himself, for we could not deny the right of a criminally accused person to testify in his own behalf.⁹

The *Shirley* opinion has been the subject of widespread discussion in courtrooms and legislative halls. Much of the comment has revolved around Dr. Diamond's *California Law Review* article on the subject as well as the case analysis.

Dr. Diamond's views were also considered by our court in the celebrated *Tarasoff v. Regents of the University of California*.¹⁰ Once again, the psychiatrist's inability to predict future violence was the principal issue. In my concurring opinion, I relied on Dr. Diamond's articles, though he was not cited, and I reiterated my *Burnick* concept: "In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession."¹¹

I regret that Dr. Diamond's voice has been stilled, his pen silenced. For he was a giant in the field of psychiatry and will be sorely missed.

7. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980).

8. *Id.* at 349.

9. *Shirley*, 31 Cal. 3d at 67-68, 641 P.2d at 805, 181 Cal. Rptr. at 273-74.

10. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

11. *Id.* at 451, 551 P.2d at 354, 131 Cal. Rptr. at 34.

Dr. Bernard L. Diamond

Jerome H. Skolnick†

It is my recollection that during the 1950s and early sixties, psychoanalytic theory set the trend for the world of intellectuals. To be defined as an educated person meant that one could converse about its concepts. To be highly educated meant that one had undergone a personal psychoanalysis.

The Yale Law School's Law and Behavioral Sciences Program, where I began in 1956 to paddle in interdisciplinary—some would say “polluted”—waters, focused largely on issues of law and psychiatry. All around the nation, law professors, psychiatrists, and judges spent countless hours discussing and writing about the proper formulation of the insanity defense.

In this forum, Dr. Bernard Diamond emerged as one of the truly major players, a scholar-practitioner who could persuasively apply psychiatric knowledge and clinical experience to the arcane recesses of the law of criminal responsibility—particularly, but not exclusively, to the law of homicide.

Bernard advocated an important and influential theoretical position. He perceived the “all-or-none” conceptualization of the insanity defense as central to the difficulties of introducing psychiatric knowledge into the law. At the same time, he perceived a key to resolving these difficulties in the ancient doctrine of *mens rea*. “The historical background of *mens rea*,” he wrote, “as the requisite mental element without which there can be no crime, condenses within itself the entire history of civilized morality, ethics, philosophy and religion.”¹

Bernard forged the idea of diminished responsibility of the mentally ill—which came in law to be called the doctrine of diminished capacity—out of the implications of a criminal law system that embraces the notion of moral blameworthiness in its determination of guilt. The idea of diminished responsibility can perhaps best be stated as a question: If it is proper to find a psychotic murderer not guilty by reason of insanity, that is, to excuse him entirely from moral blameworthiness because of his mental disorder, isn't it equally appropriate to diminish his criminal

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1. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 67 (1961).

liability if he is not psychotic but nevertheless suffers from a lesser mental disease or defect?

Bernard Diamond would have answered that question with a ringing affirmative. He argued that there were innumerable degrees of mens rea. And if there were, an "infinitely graduated" spectrum of legal responsibility was implied—corresponding to our contemporary understanding of the psychological reality of human beings.²

Bernard had been before retirement a legendary teacher at the School of Criminology, the Law School, and the Jurisprudence and Social Policy Program. Students have told me that his courses—and his presence—genuinely moved them to change the course of their lives.

In June of 1988, I was teaching a Criminology and Criminal Law course to judges in Reno's Master's of Judicial Studies program. I invited Bernard to be a guest lecturer on the topic of insanity and diminished capacity. Bernard accepted the invitation, but declined to fly to Reno. Then 75 years old, Bernard chose instead to drive his camper van up by himself. (His wife, Ann, was visiting her native Hungary at the time.) He told me that he and Ann had enjoyed a marvelous camping trip the previous summer. And exactly like a kid showing off his new toy to another kid on the block, Bernard reviewed for me the customized features of the van, including its cellular phone.

With his gray beard, thoughtful demeanor, and international reputation, Bernard was an imposing eminence, a distinguished professor of law and psychiatry. But to his friends there was a boyish side that he never outgrew—a kid who loved his adult toys, from the latest in computer equipment to the best in wine and hi-fi electronics. Since we were both skiers, the toy I most admired was the red Jeep he purchased with the substantial proceeds from the Isaac Ray Award of the American Psychiatric Association, one of the many awards he would receive for outstanding scholarship and service.

For the lecture, Bernard brought a huge, heavy briefcase full of materials. Already suffering from emphysema, Bernard was puffing heavily in Reno's 4,000-foot altitude. But he insisted on carrying his briefcase. He then proceeded to lecture, never once using the materials in the briefcase. Bernard delivered an eloquent and passionate lecture on criminal responsibility from antiquity to the present. He developed three topics: the idea of criminal responsibility; the substance, meanings, and implications of the rules; and the political and social circumstances leading to the rules governing the insanity and diminished capacity defenses.

Bernard proved to be a deep well of knowledge. He had studied the briefs, the psychiatric testimony, and the newspapers surrounding the

2. *Id.* at 73.

classic and fascinating *M'Naghten* case.³ He told riveting war stories about his testimony in the *Sirhan* case⁴ and his reasons for declining to testify at Dan White's trial.⁵ This was the longest, most coherent, and most interesting lecture I have ever listened to. The judges were simply stunned.

Bernard enjoyed the give-and-take of teaching and the obvious gratitude of the students. Still, he seemed tired. He told me that this would be his last professional engagement. He had formally retired nearly a decade earlier, but his post-retirement life seemed busier than ever. He continued to teach in the Jurisprudence and Social Policy program. He wrote, lectured, and testified in a new area, the contamination of evidence by hypnotic suggestion.⁶ He was also heavily involved in developing a joint Berkeley-UCSF Doctor of Mental Health program.

Still, for all his accomplishments, he will best be remembered for his work in psychiatry and the law, particularly for his development of the diminished capacity defense. Not only was Bernard the principal architect of the diminished capacity defense, but he was also its chief exponent in the courtroom. He was mainly responsible for the strategy employed in *People v. Gorshen*,⁷ a defense carefully planned from the beginning to utilize psychiatric evidence to disprove premeditation and malice aforethought.

Largely because of Bernard's courtroom victories and scholarly writings, there was a sharp increase in the use of psychiatric testimony in murder trials in California during the 1960s. Eventually, however, such defenses began to fall out of favor. In part, one can point to a rise in crime from the mid-sixties which led to increasing punitiveness on the part of the sentencing system. It moved from indeterminate sentencing stressing rehabilitation to a determinate system emphasizing punishment as its goal. Since the practical result of diminished capacity was to reduce the penalty for murder, the public began to look askance at that defense.

In particular, the Dan White case generated a public uproar against the defense. White had deliberately shot and killed Mayor George Moscone of San Francisco and Harvey Milk, a gay city supervisor, both political opponents. His psychiatrist—not Dr. Diamond, who refused to participate in the defense—testified that White was suffering from a severe clinical depression exacerbated by eating junk food. The jury

3. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

4. *United States v. Sirhan*, 504 F.2d 818 (9th Cir. 1974).

5. *People v. White*, 117 Cal. App. 3d 270, 172 Cal. Rptr. 612 (1981).

6. See, e.g., Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980).

7. 51 Cal. 2d 716, 336 P.2d 492 (1959).

found that because of White's state of mind he was not guilty of first-degree murder but of a lesser degree of homicide. White was released from prison after serving a determinate sentence of five years.⁸ The public was outraged by the verdict and diminished capacity was excoriated by the press as the "Twinkie" defense.

The California Legislature abolished the diminished capacity defense in 1981. In effect, the legislature returned to an earlier *mens rea* model where evidence of mental abnormality was admitted for the sole purpose of establishing whether the defendant intended to commit the crime, rather than for the purpose of understanding the defendant's underlying mental condition.

Bernard Diamond's conception of moral responsibility was broader, deeper, and more compassionate than the traditional one. He brought to the criminal responsibility debate powerful personal qualities—wisdom and erudition, as well as compassion—which succeeded in a less punitive era. All of us can admire these qualities, but few will embody them as well as he did. His ideas will remain although times may change.

8. Dan White later committed suicide in San Francisco, after his release from prison. *L.A. Times*, Oct. 22, 1985, at 1, col. 1.

Memorial Service for Dr. Bernard Diamond

Robert S. Wallerstein†

We are gathered today to join in memorializing a many-dimensional loss. First, of course, Bernard Diamond was a loyal friend and an esteemed colleague whom we come together today, sorrowfully, to remember and to honor. Second, to those in our intersecting professional communities, Bernie was a man of many parts and many accomplishments. A graduate of UC Berkeley and the UCSF School of Medicine, Bernie became very rapidly, and long remained, a central figure and leader, as clinician and teacher, in the post-World War II coming of age of psychiatry and its allied mental health disciplines here in the Bay Area. This was so much so that when the annual J. Elliott Royer Award was established in the early sixties at UCSF, designated for the outstanding contribution to the fields of psychiatry and neurology, Bernie was properly one of the very first recipients, in fact the very second one, immediately after then-Chairman of the Department of Psychiatry, Karl Bowman.

Parenthetically, I should state here, because it is so descriptive of the man, Bernie was at the same time utterly unpretentious about his achievements and honors, and with the wry and benevolently ironic streak that was so characteristic of him, when I won the same award a decade later, he extended his sober congratulations and then, for both our benefits, indicated that this was one award that we should agree was certainly more honorarium than honor.

Bernie was also one of the earliest graduates of our San Francisco Psychoanalytic Institute, and most significantly our Bay Area psychoanalytic pioneer—and, in this, one of a small handful of such pioneers nationally—in extending the understandings of psychoanalysis into vital arenas of societal distress and dysfunction, in his instance into the understanding of the law, of the adversarial legal process, and of those hapless individuals caught up in criminal behaviors as the expression of the social and psychological pressures that unhappily shaped and deformed their lives.

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These remarks were delivered at a memorial service at Temple Rodef Sholom in San Rafael, California, on October 23, 1990.

It is in this context that Bernie moved into his academic career at Boalt Hall Law School at Berkeley, as psychiatrist-psychoanalyst Professor of Law and Psychiatry, over the many years there truly illuminating this vital interface in both directions, out of his scholarly immersion in both these disciplines. And it is here that he has been most widely—and most controversially—known, through his involvement with such well-known murder cases as the trials of Sirhan Sirhan and of Dan White, through his role in the shaping of the easily misunderstood doctrine of “diminished capacity” in assessing the culpability of criminals suffering varying degrees of mental and emotional impairment, and through his tireless advocacy on behalf of the most enlightened penal policies, with his concerns for remediation, rehabilitation, and mitigation always uppermost.

Many of Bernie’s stands in these arenas went counter to the prevailing public passions or to conventional professional expertise, but Bernie always stubbornly stuck to his guns, and again characteristically modestly, never conceived of this as being particularly heroic: he could admit though that it was at times somewhat lonely to see all the public pressures, and often the professional-scientific pressures, running in the other direction than his.

These, in briefest capsule, were some of the established dimensions of this distinguished man when he and I came to work closely together, in our shared interest in an innovative training program in health and medical sciences being created on the Berkeley campus in the early seventies. With his involvements with psychiatry, psychoanalysis, the law, and criminology (he had served a stint as acting Dean of the UC Berkeley School of Criminology), Bernie was inevitably drawn to a new interdisciplinary matrix, with its somewhat utopian vision of what health care could ideally be. I came with a program, one that a number of us had been fashioning at Mt. Zion Hospital, for a new kind of professional mental health training seeking uniquely to qualify one to treat mental and emotional disorder, amalgamating the most relevant knowledge areas and clinical training experiences of the standard mental health professional disciplines. That program became, of course, the Doctor of Mental Health program based at the three collaborating sites: Mt. Zion, UC Berkeley, and UCSF. This took its place first as the so-called Mental Health Option within the Berkeley Health and Medical Sciences program in that exciting gestational period in the early seventies.

Bernie, with his insatiable curiosity and his restless intelligence, occupied a number of key niches in this overall program edifice over its years until he settled down. When I became Chairman of Psychiatry at UCSF, and he was officially retired from his professorship at the Law School and UC Berkeley, he at that point settled into his new job and

post-retirement new career as Director of the UCSF Doctor of Mental Health Program. This he worked at with indefatigable enthusiasm and devotion, and of course with strong ideas, with which I and the others involved in the program at times clearly disagreed. It was a recap, I suppose, of the same way in which he had never in his life shirked the excitement of intellectual challenge and concomitant controversy.

But out of these occasional disagreements and our much more usual full and enthusiastic agreements about what we wanted to do, we all learned and our mutual respect always grew. Overall, I as department chairman and as one of the program originators felt that the program was always the better and the stronger because Bernie was its director and was devoting himself to guiding its destiny.

And when the program fell on difficult days because of financial and professional academic pressures that led ultimately to its being phased out of existence, Bernie could make the same kind of wry, ironic, and wistful comments about somehow always being selected by the university to preside over the closing of programs (as had happened earlier with his period as Dean of the School of Criminology). But he could at the same time continue to manage the whole program—including its phasing out—with dignity and spirit and in a way that ensured that the students and their training would be as fully protected as human effort could make possible.

The cadre of gifted students that emerged from that program into productive and fulfilling careers in our midst, and some of them around the country, is but one of Bernie's shining legacies. It happens to be one that I know most intimately and has meant so much to me personally.

So I, like all of us gathered here, will miss Bernie deeply. His physical energy and mental acuity seemed boundless until just now halted so abruptly. It is hard to realize that he is no longer helping lead the way among us. I do feel honored to have been asked to be one of those to express something of what we all feel on this occasion today.

