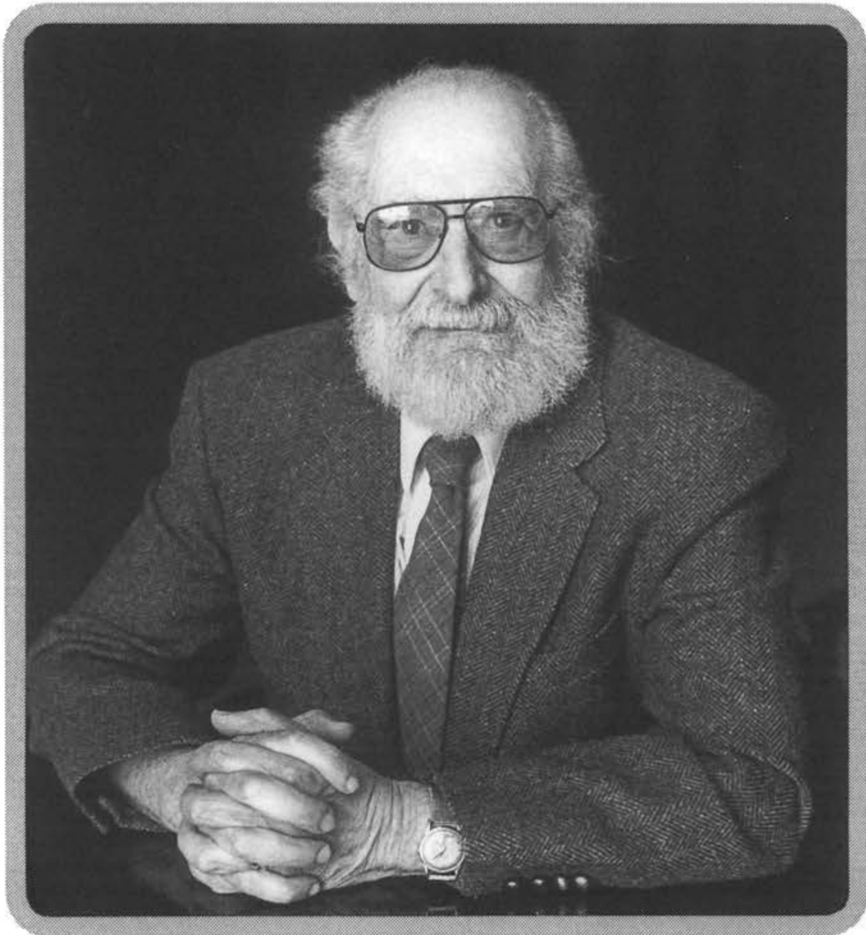
THE PSYCHIATRIST IN THE COURTROOM

Selected Papers of Bernard L. Diamond, M.D.

EDITED BY

Jacques M. Quen, M.D.

The Psychiatrist in the Courtroom



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Dedicated to the Memory of
Bernard Lee Diamond

For the last decade of his life, Bernard L. Diamond bestowed on me a warm friendship and was a mentor who tolerated with good humor and respect our numerous discussions and our several differences on professional issues. Like Isaac Ray, he was a giant who, through his writings, his example, and his students, gave far more than his colleagues appreciated and who continues to give to his profession.

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Editor's Introduction

BERNARD LEE DIAMOND
December 8, 1912 - November 18, 1990

Early Career

Bernard Lee Diamond was born on December 8, 1912, the third of the four children of Leon Isaac and Rose (Cohen) Diamond of Fresno, California.

When Bernard was 12, the notorious Leopold and Loeb Case filled the headlines of the newspapers throughout the country. He was intrigued by the case and by the idea of psychoanalysts who studied the workings of the mind and then testified in courtroom trials (see "Psychoanalysis in the Courtroom," this volume).

Bernard Diamond graduated from a vocational high school and entered the University of California (Berkeley) where, in 1934, he received his bachelor's degree with honors in medical sciences. He entered the University of California Medical School (San Francisco) and received his MD in 1939, after serving a year of internship at the Neuropsychiatric Institute at the University of Michigan. He was a psychiatric resident at the Institute during the years 1939–1940 and 1941–1942.

Dr. Diamond's first publication, written while he was a medical student, revealed some of his enduring personality traits. "Are Clinical Clerkships Abused?"[1] was introduced with a note from the editors. "*The contribution below is presented in no muckraking spirit. It is a clear, thoughtful analysis that* THE JOURNAL *highly recommends to all students concerned about the plan of the medical curriculum.*" The title suggested an affirmative answer, which it delivered. Diamond protested the exploitation of medical students (clinical clerks) by faculty for obtaining data for their personal research and for pointlessly "treating the chart." Diamond maintained that requiring medical students to do routine

laboratory tests, or to obtain clinically unnecessary, extended medical histories for purposes of faculty research, had little educational value and was actively destructive of the learning process. He protested that the very limited time of medical students was far too important to be exploited by others. His thinking was so far ahead of its time that 15 years later, during my own clinical clerkship, we heard, with envy, that there were some medical schools contemplating hiring laboratory technicians to do the routine laboratory work for patients. It was only some years later that this became a standard practice, and medical clerkships increased their emphasis on learning medicine as had been proposed by the student Bernard Diamond.

He won the surgical service's award for an essay by a medical student during the third year ("On the Surgical Importance of the Psychological Abdomen"). It was published as a two-part paper.[2]

In 1940, anticipating America's entry into World War II, he enlisted in the Army Medical Corps as a first lieutenant. He served on active duty in the New York City area for one year and then returned to complete his psychiatric residency. In 1988, in a letter discussing ethics, Bernard Diamond referred to this period in his life, saying, "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." [3] The executions he witnessed, on June 12, 1941, were those of Harry ("Pittsburgh Phil") Strauss, 31 years old, and Martin ("Buggsy") Goldstein, 36, members of the Brownsville murder syndicate of Brooklyn. They died in the electric chair for the murder of Irving ("Puggy") Feinstein, another member of the gang, on September 4, 1939.

He reenlisted in 1942 and remained on active duty through 1945, when he was discharged with the rank of lieutenant colonel. During his Army service, Diamond treated newly blinded soldiers returned to the United States. This deeply affecting experience gave rise to his first clinical publication, in which he wrote:

> In all too many instances, soldiers blinded beyond all hope of recovery had been told by doctors and nurses and other medical personnel during their initial hospitalization overseas or during their evacuation to the United States, that there was a possibility of their eyesight being at least partially restored. Upon being informed subsequently that the prognosis was hopeless, they consistently responded by becoming bitter, resentful and depressed. Evidently the purpose in so misinforming these soldiers was to maintain their spirits and morale until they got home. It cannot be over-emphasized that giving such false hope and casual reassurance is crassly foolish and cruel. . . .

> The soldier wants the truth and he wants it immediately. A postponement of the explanation of his disability and its outcome until he "feels better" only perpetuates his doubt, his insecurity, and his anxiety, and may crystallize his thoughts, feelings and actions in such a way as to interfere with his social and economic rehabilitation.[4]

Here one sees not only the passion earlier implied in his paper on clinical clerkships, but also the unyielding commitment to honesty and candor. He is reminiscent, here, of the founder of American forensic psychiatry, Isaac Ray, who wrote, in his 1842 annual report as Superintendent of the Maine Insane Hospital:

> Above all things, in order to obtain the confidence of our patients, we find it necessary to abstain from every form of deception in our dealings with them. . . . The case, I think, could seldom happen, in which it would not be far better to encounter a little more resistance, or use a little more force, than to practice a deliberate, systematic deception. The former irritates, but it is soon over; the latter, remains and rankles. It is a cardinal principle in our moral treatment to deal with our patients fairly, honestly and candidly; for we believe that no temporary advantage can counterbalance the mischief that inevitably arises from deceit. . . . The moment a patient discovers we have been deceiving him, his respect for us is gone.[5]

The New Year's Eve following his discharge, Bernard L. Diamond met Ann Landy, a Hungarian-born lawyer friend of his sister. They married soon after and had six children. Bernard had already set up practice in San Francisco, at 291 Geary Street. He spent the rest of his life practicing and teaching in Northern California.

In 1953, Diamond collaborated with Henry Weihofen, Professor of Law at the University of New Mexico, on a paper on privileged communication and the clinical psychologist.[6] In it, the two authors counsel the clinical psychologist to abstain from keeping notes so that a court cannot subpoena them, in order to protect their client's confidentiality. Today, however, following such advice would put one in direct conflict with the law in many jurisdictions, where informative notes are required to be kept. New York State requires that patients' records be made available to them on demand, and such requests can be denied only with the concurrence of a state-appointed committee of physicians.

Bernard Diamond's next publication was a historical review of the trial of Daniel M'Naghten (1843). He wanted to call the attention of his colleagues to the remarkable role played in that trial by American Psychiatric Association founder Isaac Ray. Diamond observed, "It is safe to say that never since, in an English or an American courtroom, has a

scientific work by a psychiatrist been treated with such respect as was *A Treatise on the Medical Jurisprudence of Insanity*." This paper also marks an early expression of his lifelong appreciation of the importance of history in understanding current professional concepts. At the time of his death, Bernard Diamond possessed what was probably the most extensive private collection in America of rare books on the history of psychiatry.

That same year, Diamond published an article on "The Simulation of Sanity" (see this volume), in which he counseled against psychiatrists' excessive focus on unmasking malingerers who were trying to act insane and to focus instead on the much more common, but neglected, phenomenon of defendants' trying to hide their mental illness from the public and even from their own lawyers. This theme is one that was a significant concern during his career.

Later Career

In 1964, he left the private practice of psychiatry and psychoanalysis and became a Professor of Law and Psychiatry at Boalt Hall, the law school of the University of California (Berkeley). That same year, he received the Royer Award of the Regents of the University of California for the advancement of psychiatry. In 1968 he received the Isaac Ray Award of the American Psychiatric Association for the advancement of psychiatry and the law. In 1972 he received the Gold Medal Award of the Mt. Airy Foundation for distinction in psychiatry (see "The Psychiatrist as Advocate," this volume). In 1975 he received the "Golden Apple [AAPL] Award" of the American Academy of Psychiatry and the Law, and in 1980 he was the Yochelson Memorial Lecturer (in Criminology) at the Yale University School of Medicine.

During the course of his career, Diamond served as a consultant in forensic psychiatry to the Veterans Administration Hospital in San Francisco, the U. S. Army Medical Department at Letterman and Tripler Medical Centers, the U. S. Navy Medical Center at Oakland and the California State Department of Mental Health. He was a member of the Advisory Committee of the American Bar Association's Criminal Justice Mental Health Standards Project, the American Medical Association's Diagnostic and Therapeutic Technology Assessment Panel as well as its Committee on the Scientific Status of Refreshing Recollection by the Use of Hypnosis. He was a founding member of the Board of Directors of the American Board of Forensic Psychiatry and the author of more than 50 articles and book chapters on forensic psychiatry, criminal behavior, evidence, and related issues of psychiatry and the law.

In a case heard before the California Supreme Court, in which Bernard Diamond had no role, the quality of his psychiatric testimony in the courts was referred to, in a footnote, as representing the judicially desired standard of testimony by forensic psychiatrists. It was a professional endorsement that ranked high among the ones he treasured.[7]

Perhaps the professional experience that troubled Bernard Diamond the most was the position statement of the American Psychiatric Association on the Insanity Defense of 1983. In a letter to a non-psychiatrist faculty colleague, Diamond wrote:

> I am not as enthusiastic as you seem to be about the American Psychiatric Association position paper. It by no means represents a consensus of psychiatric opinion. . . . Organized psychiatry has never been happy with the role of psychiatrists in the legal system and this position paper represents simply one more effort to eliminate, as much as possible, the role of psychiatry in law. It is an elitist position reflecting the views of a group who are more worried about their public relations than they are about either their patients or their justice system. The APA statement does not reflect a "change of the climate of opinion". . . . Rather, it is the attempt of an organization to climb on the media bandwagon of the Hinckley case, and secure a profit for its own public relations.[8]

While I have spoken at some length about what he has done, I have said relatively little about the nature of the person, the private individual that Bernard L. Diamond was. He was a man of great dedication and concentration, concerned that the reliability of his facts and his reasoning be the best he could produce. During a chance meeting in an airport, we had a half-hour lively discussion about whether or not a comma was intentionally absent in a passage by sixteenth-century jurist William Lambard in his book *Eirenarcha*, or was it a terribly important typographic error? The passage was visible in his mind's eye, as we talked and tried to solve the important question he'd raised.[9]

He had a warmth that played a role in his developing a rich personal network of colleagues, acquaintances, and students. Few knew that he maintained a correspondence for over 30 years with Nathan Leopold (of the Leopold-Loeb case). In fact, a little more than a year after Leopold's release, Ann and Bernard Diamond had dinner with him and his wife.

Diamond was a personal friend of Judge David Bazelon, who formulated the well-intentioned but doomed *Durham* rule. Their mutual friend was Albert Deutsch, the journalist/social reformer who in the 1940s and 50s was one of the leaders of the psychiatric hospital reform movement and for whom Diamond had a remarkable admiration. In fact, Bernard Diamond believed that it was Deutsch who had suggested to Bazelon that he attempt to broaden the insanity test beyond M'Naghten via the Durham rule.[10]

From One Generation to the Next

Perhaps a better way to appreciate Diamond's personal style is through his closing words in an address he delivered when he was honored by American Academy of Psychiatry and the Law at its annual meeting in October 1989.

The title of his talk was "The Forensic Psychiatrist: Consultant versus Activist in Legal Doctrine."[11] Diamond spoke about his experiences in the world of law and forensic psychiatry. The following words were addressed to his younger colleagues:

> I particularly urge that psychiatrists publish articles in law reviews and law journals for that greatly increases the likelihood that your ideas will be considered by legal authorities.
>
> Sometimes there is a substantial delay before the appellate courts pick up on one's recommendations, so one must have patience. In a 1962 law review article [see "From *M'Naghten* to *Currens* and Beyond," this volume], I criticized the restrictive clause of the American Law Institute (ALI) Model Penal Code rule of criminal responsibility, which prohibits a condition manifested only by criminal or antisocial behavior from being considered a mental disease or defect for purposes of the insanity defense. I asserted that this clause was discriminatory against poor defendants in that wealthy defendants could hire experts who by spending a great deal of time on examinations in depth could always legitimately find evidence of psychopathology that would be more than criminal or antisocial behavior. But poor defendants, subject to cursory, superficial psychiatric examinations would be dismissed as not mentally ill. No one paid any attention to this until eight years later when the Ninth Circuit Court of Appeals adopted the ALI rule of insanity. It specifically rejected the restrictive clause because of its discriminatory nature and cited my article as authority for that.[12] So you have to be really patient, indeed!
>
> I am convinced that it is possible to practice good psychiatry in relation to the law, and to be a significant influence on the development of the law in line with the humanitarian and ethical values of traditional medicine. The legal system can be influenced by expert testimony, by scholarly writings on research and policy, by teaching in the classroom, and most importantly by example.
>
> Psychiatry has had less control over its own practice than any other medical specialty. Of psychiatric subspecialties, forensic psychiatry has permitted itself to be misused, abused, and perverted to a disgraceful degree, and its low public image is well deserved. I am suggesting how that image might be improved within the humanitarian tradition of medical responsibility. It just may turn out to be good for the law as well.

> In closing, one must ask does all this make economic sense for the forensic psychiatrist? Probably not. It probably means that forensic work should not be the sole source of income for a psychiatrist. To refuse to be manipulated by the attorneys who are paying your bill, and to reject cases because their potential does not meet one's ethical standards is not conducive to a successful forensic practice. It is only too easy to slip into the "hired gun" role when your family's economic welfare is at stake. The honest and responsible forensic psychiatrist requires some type of subsidy, so that he is always able to pick and choose his cases independently of his financial needs. In the current American world of law and psychiatry I do not believe it is possible to be incorruptible and also earn a decent living from forensic psychiatry. A combination of a more general psychiatric practice with part-time forensic work seems to work out if one can manage the difficult problems of scheduling. Employment in a clinic, mental health facility, or government agency may be satisfactory if one is not restricted by bureaucratic policies. Academia, preferably with tenure, provides the ideal subsidy. But if feeding your children is contingent upon the goodwill of trial lawyers, you are in deep trouble.

* * *

Bernard Lee Diamond died on November 18, 1990. In a brief memorial note, Justice Stanley Mosk of the California Supreme Court wrote, "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. . . . 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."[13]

Forensic Psychiatry

The involvement of physicians in the civil and criminal courts has a long tradition in medicine. When Bernard Diamond learned of it, American psychiatry was in a period of enthusiastic optimism about the potential for treatment and prevention of mental illness. Psychoanalysis and the unconscious (that newly discovered dark continent of the mind) fascinated Americans. And the role of the psychiatrists in the Leopold-Loeb presentencing hearing captured the imagination of the American public and its newspaper moguls.

In the course of American medical history, the role of the forensic psychiatrist has attracted praise and opprobrium. Early in that history, there was a professional confidence that one of the areas, above and beyond

patient care where a physician could make substantial and desirable contributions to the community was in the courtroom, where he could help to resolve disputes that had crucial effects on the individual and the community. In the first recorded medical school lecture on medical jurisprudence in the United States, Benjamin Rush propounded that

> [t]hey entertain very limited views of medicine, who suppose its objects and duties are confined exclusively to the knowledge and cure of diseases. Our science was intended to render other services to society. It was designed to extend its benefits to the protection of property and life, and to detect fraud and guilt in many of their forms. This honor has been conferred upon it by the bench and the bar, in all civilized countries both in ancient and modern times.[14]

In his lecture, Rush focused first and foremost on psychiatric issues: "The subjects of medical jurisprudence are, first, all those different diseases of the mind which incapacitate persons from exercising certain civil rights, such as disposing of property and bearing witness in courts, and which exempt them from punishment for the commission of crimes." He went on to enumerate six other areas of general medical jurisprudence: criminal trauma and wounds; toxicology; causes of death, for example, poisons, hanging, drowning, starving, etc.; presence or absence of virginity, impotence, sterility, false pregnancy, natural and induced abortions, stage of gestation, and infanticide; determining medical exemption from civil and military duties, including simulated or feigned diseases; and public health issues such as potability of water, putrid food, unhealthy air, and epidemic diseases.[15]

Rush was one of the earliest physicians to consider chronic drunkenness as a disease beyond the control of the drunkard. Long before abulia was a common psychiatric term, he recognized that men could be controlled not by reason, but by diseased volition. He referred to these conditions under the label "moral derangement," which he saw primarily as a disease of affect and volition. Along with his interest in forensic medical and psychiatric issues, Rush was also greatly interested in criminal justice and in the treatment and rehabilitation of convicts and prisoners. He was a founder of the Philadelphia Prison Society, an organization dedicated to improving conditions in the prisons. A relationship between criminality and the mental states of the mentally ill prisoners was apparent to the members of the Society. This relationship, however, was seen in wider psychiatric circles as one that threatened the public support of the proper medical care of the insane. The recurrent concern about a connection between insanity and criminality troubled even our earliest psychiatrists.

Forensic medicine, as it related to the mentally ill, was significant in American life and courts in the early nineteenth century, as a quick reading of McDade's *Annals of Murder* will show.[16] For example, in a two-year period (1829–1830), Daniel Drake, a prominent physician/educator in the history of American medicine, published three separate articles on a single murder case involving chronic alcoholism and the insanity defense.[17] The first textbook on forensic medicine written by an American was published by Theodric Romeyn Beck in 1823. This two-volume work went through 10 editions. Then, in 1838, a 31-year-old general practitioner with no formal education or experience with the law or the insane, wrote *A Treatise on the Medical Jurisprudence of Insanity*.[18] It was organized so that, in most instances, a chapter describing a clinical condition was followed by a chapter describing that condition's legal significance and consequences. It was both a textbook of psychiatry and a textbook of forensic psychiatry. It is remembered as the outstanding classic of forensic psychiatry and its author, Isaac Ray, is generally considered to be the founder of American forensic psychiatry as a separate discipline with its own body of knowledge, goals, and principles.

In his book, Ray considers so many court cases of a civil nature that the modern reader can readily draw the inference that we were a litigious society even then. Certainly from the beginning, forensic psychiatrists were called into civil cases, especially involving wills, as often as they were asked to participate in criminal cases. Isaac Ray never became interested in the psychiatric aspects of convicted prisoners, although he protested that many insane people who should have been recognized as such were being found guilty and sentenced to prison. Ray's seeming indifference appears to have been related to the same factors that led to the antipathy between organized psychiatry and the Philadelphia Prison Society. On the other hand, Ray was intensely concerned with improving the quality of medical testimony in the courts.

Amariah Brigham, one of the "original 13" founders of the American Psychiatric Association and the first Superintendent of the State Lunatic Hospital in Utica, NY, was also the founding editor of the *American Journal of Insanity* in 1844. It was the first medical specialty journal, as well as the first psychiatric one, in this country. In the following year, the Philadelphia Prison Society published the first issue of *The Pennsylvania Journal of Prison Discipline and Philanthropy*. A significant portion of it was devoted to insane asylums and to insane convicts.

In a brief review in his journal, Brigham attacked the new prison journal, as well as the annual reports of the Boston Prison Discipline Society, for the space and prominence they gave to insanity. The linking of

the insane with the criminal was considered invidious. There was a restrained but strong response in the next issue of the prison journal and an editorial of some length in a later issue of the *American Journal of Insanity* (AJI). Brigham overlooked the fact that two of the committees formed at the first meeting of the Association of Medical Superintendents of American Institutions for the Insane (AMSAII) were devoted to prisons and insane prisoners. Tension persisted between the two groups, although they clearly had overlapping interests. In fact, Dorothea L. Dix and Samuel Gridley Howe, both prominent in the asylum movement, were also prominent in prison reform.

Today, forensic psychiatrists as a group are viewed with suspicion and cynicism, not only by many of their psychiatric colleagues but by the lay public as well. How have we come from a position where the physician in the courtroom could take pride in the humanitarian value of his work, to one in which both the populace and our own colleagues look on us with mistrust? Part of the complicated answer to this question lies in the actions of some few psychiatrists of questionable ethics. Another part of the answer lies in the bizarre situation in which psychiatry's leaders and teachers have so many misconceptions about the realities of forensic psychiatry that they shun it in their residency education programs, thus initiating a self-perpetuating ignorance and creating generations of psychiatrists whose only knowledge of the functions and goals of forensic psychiatry come from supermarket tabloids. Beyond this, the complexities of the blend of law and psychiatry are such that they necessarily leave much room for misunderstanding. With educational neglect the problems for psychiatry, society, and the law are compounded.

It may be helpful here to remind ourselves how the psychiatrist becomes involved in court cases, both criminal and civil. The psychiatrist enters into legal proceedings as an expert witness; in this respect, she or he does not differ from pathologists, ballistics experts, and similar specialists. Expert witnesses are called by the court, or by either party to the dispute, to assist the jurors or, in some cases, the judge, in evaluating evidence that is beyond the average person's education or experience. Expert witnesses are, in a sense, the representatives of their particular science or skill, called upon to teach basic and advanced scientific knowledge, to help the "trier of fact" (i.e., jury or judge) to evaluate the evidence.

In America, expert witnesses are distinguished from the usual witnesses of fact in that their opinion not only is allowed to be entered into the record, but is particularly solicited. In contrast to the factual knowledge possessed by an ordinary fact witness (to which the witness *can* be required to testify), the opinions of any individual, whether expert or inexpert, on any given matter are his or her private property and cannot be required by

the court. For this reason, unlike witnesses of fact, expert witnesses are paid for their time, knowledge, opinions, and their reasoning.

The basic underpinning of our Anglo-American legal system is a belief in the superiority of the adversarial method for determining truth. Consequently, the first necessary condition for the courts to determine is that the adversaries are competent to play the roles required by our system. They must be able to participate in the trial physically and mentally. For competence to participate mentally, we evaluate whether the parties in question, be the dispute civil or criminal, are adequately able to understand the meaning and significance of the elements of their case, to comprehend the role of the various participants in the trial, and to assist their attorneys in the conduct of that case. If they are not able to do these things, then the legal process must wait. Although this is, in the final analysis, a judicial decision, there is little controversy about the role of the psychiatrist, and the weight given to her or his opinion, in that particular determination.

Accordingly, the psychiatrist expert witness in a competency hearing is called upon, generally, to present to the court her or his evaluation of some aspect of mental or psychiatric adequacy or competence, whether it be competence to make a contract, a will, to exercise various rights (for example, the right to refuse treatment, the right to informed consent, the right to manage property and finances, the right to be at liberty, the right to confidentiality, etc.), as well as to assess the relative desirability of particular persons to serve as parent or guardian in custody cases involving children or disabled adults. The emphasis on the term "competency" is derived from the legal Latin "non compos mentis," or not mentally competent (i.e., to exercise a particular legal right or privilege). The term should be used in conjunction with specific acts or functions, since one may be competent for some actions, and at the same moment be incompetent for others.

In criminal cases, however, the role of the forensic psychiatrist often goes beyond the issue of competency to stand trial, and the expert is asked to address questions of a defendant's legal responsibility for his or her behavior at the time of the alleged crime. In the past several decades, to a remarkable extent because of the work of Bernard L. Diamond, this role in criminal cases has expanded. Diamond based much of his position on the early history of English criminal law, specifically on the two basic requirements for a crime to have occurred: there must be (1) a guilty mind (*mens rea*) coupled with (2) a guilty act (*actus reus*). The guilty mind refers to a criminal or wrongful intent on the part of the actor. The antiquity of this principle in British law can be traced back at least to the thirteenth century, when Henri de Bracton wrote:

> We must consider with what mind or with what intent a thing is done . . . in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure intervene, nor is a theft committed except with the intent to steal. . . . And this is in accordance with what might be said of the infant or madman, since the innocence of design protects the one and the lack of reason in committing the act excuses the other.[19]

For Bernard Diamond, the historical-developmental importance of the concept of the *mens rea* in the law was paramount. Indeed, the basic concept that the nature of the intention was intrinsic to the nature and meaning of the act, and thus set a limit to culpability and punishment, could be traced back to the premises underlying ancient Mosaic law. In an early paper, he wrote,

> I am astonished that this early concept of *mens rea* has been overlooked by most writers on the subject. Particularly, it is of great significance, for it establishes as clearly as could possibly be that the Mosaic *Lex Talionis*—an eye for an eye, a tooth for a tooth—was a maximum, not a mandatory punishment. The *Lex Talionis*, in its historical context, was a most humane concept which restricted the maximum punishment that could be inflicted, under any circumstances of evilness of a crime, to an amount proportional to the injury done [see "Criminal Responsibility of the Mentally Ill," this volume].

He was pointing out that, historically, the *Lex Talionis* did not countenance a punishment of *two* eyes for *one* eye, but *only* one eye for one eye.

To return to the courtroom roles of the forensic psychiatrist, in criminal proceedings one determines whether mental illness was present at the time of the alleged crime, and if it was, whether it was of such nature as to prevent the defendant from having the necessary criminal intent. Too many people assume that this is the only psychological element in a crime. In law, an act is not the act of the actor unless it is a *voluntary* act. That is, the mere mechanical movement does not constitute the legal act of the individual. It must be an act that the person wanted to do. This fine distinction grew out of the concern for justice, in early English history, when the Norsemen overran England and forced the captured villagers to work against the British, and thus appear to be traitors. The captives were not held responsible for acts they were forced to do. There are some qualifiers here, as there almost always are in the law, but this is a general principle, and one that, to the great credit of the English of that time, provided a defense even against the crimes of murder and treason. The

principle also extends to infants and children who may do things, not volitionally, nor as a matter of choice, but because they are obeying an adult. In such a case, the child may be the instrument of another, rather than the true actor in law. Similarly, a testator making bequests in a will in response to undue influences, threats, or coercion is not performing a valid legal act, nor do those bequests express the will of the testator but, rather, the will or wills of others.

Both elements, the *mens rea* and the *actus reus*, are necessary for a common-law crime to have occurred. The mechanical act, without the volition of the person, is not, in law, *her or his* act and therefore cannot be her or his *actus reus*. Neither is the act, without the necessary defined intent, a crime. It was this principle in the law on which Diamond based much of his reasoning and many of his interpretations.

Sir Matthew Hale, the seventeenth-century jurist, was one of England's outstanding juridical minds. It was Hale who said:

> Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law. . . . The consent of the will is that which renders human actions either commendable or culpable; as where there is no law there is no transgression, so regularly, where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law . . . . And because the liberty of the will presupposeth an act of the understanding to know the thing or action chosen . . . it follows that where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions.[20]

Underscoring the difficulty of weighing the role of psychiatric factors in determining guilt, Hale said:

> It is very difficult to divide the indivisible line that divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.[21]

Diminished Capacity and Diamond's Role in the *Wells-Gorshen* Rule

One of the outstanding contributions of Bernard L. Diamond was his crucial role in the development of the diminished capacity defense in California. At the time Diamond proposed his revision of criminal

procedure, California had a two-part trial system for defendants who pleaded an insanity defense. The first part, often referred to as the guilt phase, determined whether or not the defendant had performed the criminal act alleged. This part of the trial excluded any psychiatric testimony. Once the defendant had been found guilty, the second phase of the trial was restricted to the issue of legal insanity, which was a total defense to the crime; that is, depending on the finding of sanity or insanity, the person was either guilty or innocent, with no intermediate options. In Diamond's view, this yes-or-no, black-or-white reasoning employed in the courtroom forced too many injustices. His first opportunity to influence this occurred with his late entry into the *Wells* case.

Wesley Robert Wells was a convict who had received an indeterminate sentence and awaited the California Adult Authority's recommendation as to its maximum length.[22] On a technicality, this delay in setting such a maximum made Wells a prisoner with a life sentence. Prisoners serving life sentences were mandated to be executed if found guilty of aggravated assault while in prison.

Wells was a political activist and charismatic leader among the prisoners. He would often leak information to the public media about problems within the corrections system. He had been in solitary confinement and was taken to the prison doctor who determined that Wells was in a "tension state" and should have a tranquilizer and some relief from the psychological stress of solitary confinement. Wells received neither. A prison guard provoked Wells, who threw a cuspidor at him, fracturing one of the guard's facial bones. Wells was tried on aggravated assault charges (which was, for him, a technical life-sentence prisoner, a capital offense). The judge did not allow medical testimony as to Wells's "tension state" because he assumed that *all* psychiatric testimony was prohibited in the first, or guilt, phase of California's bifurcated trial.

The judge's disallowance posed a life-or-death problem for the defense as they had wanted to introduce psychiatric testimony to show that Wells did not possess the requisite *mens rea* for aggravated assault. The appellate court agreed that the judge should have allowed the testimony; but it felt that this was so minor a factor that it would not have affected the conviction, and the court let it stand.

Wells's situation aroused public sympathy, and funds were raised to hire the law firm of Garry, Dreyfus, and McTernan. They retained Bernard L. Diamond as an expert witness and consultant. They asked him to find forensic psychiatry articles they could cite to show that, because of psychopathology, one might not have the mental ability to form the specific intent required for some crimes. Diamond found nothing suitable in the

literature and decided to write such a paper himself. He turned to early English law for the principles that would apply to the *Wells* case.

Although Bernard Diamond was not sympathetic to Matthew Hale or to Hale's general legal philosophy as he saw it, it was in Hale's writing that he found what was needed: a clear statement of the concept of partial insanity.[23] Where Diamond wished to go beyond Hale was in linking partial insanity to partial responsibility. For justification of this idea, he went to the law of Scotland, which, in 1867, originated the concept of diminished responsibility. In this way he found an avenue to correct the binary thinking, black or white, sane or insane, of the law, which was well illustrated in his account of the M'Naghten trial.[24]

In 1843, Daniel M'Naghten, in response to a psychotic idea of reference, fatally shot Edward Drummond, private secretary to the Prime Minister, Sir Robert Peel. M'Naghten was acquitted on the ground of insanity, which resulted in a public and political furor. The House of Lords summoned the fifteen judges of the Queen's Bench (equivalent to our Supreme Court justices) and asked them to clarify the relevant law of England by answering five questions. Fourteen of the fifteen judges combined two questions (the second and third) and their answer to that is called the *M'Naghten* rule. It states that the

> jurors ought to be told that . . . to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.[25]

The judges worried that, between their aggregate judicial weight and the absence of a particular case with its own specific details taken into account, their response would stifle the flexibility necessary to allow the common law to evolve and develop gradually, as it should. And that is what happened. Frequently, the rule was interpreted by the judiciary, American and British, to prevent the kind of fuller clinical inquiry that Diamond and others felt was necessary for the court to understand genuinely a defendant's state of mind. Indeed, it was partly in order to find precedential material older than the *M'Naghten* rule that Diamond went to Matthew Hale's writings.

Arguably, one might see Hale as more liberal than Diamond gave him credit for being, when one considers Hale's suggested standard for the distinction between partial and total insanity: "such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as