

THE YALE LAW JOURNAL

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Befriended by Abe Goldstein

The friendship I formed with Abraham Goldstein is among the most valuable of all the many benefits my life as a legal academic has conferred upon me. My affectionate connection to Abe was cemented during the five years (a lamentably brief period) that I shared with him on the Yale Law School faculty. But my friendship with him actually commenced before I arrived in New Haven—indeed, well before I even *met* Abe in person. Had I never enjoyed the privilege of meeting him and the pleasure of becoming his colleague, I would certainly have been deprived of many benefits—the insights reflected in his questions at workshops and lectures; the sophistication imparted to my own work by his generous comments; the energy and optimism with which he infected all who worked alongside him. Yet I still could have counted myself *befriended* by Abe because he chose, for no reason other than love of intellectual exchange, to share with me and countless others his penetrating and wondrous ideas.

Abe was an accomplished and expansive scholar. But the profound impact he had on the formation of my own scholarly imagination was achieved primarily through two of his works: his classic book, *The Insanity Defense*,¹ and his masterful article, *Conspiracy To Defraud the United States*.²

Like nearly all conventionally trained lawyers (having attended Harvard Law School, I was denied the benefit of Abe's instruction as a student), and like most aspiring criminal law scholars, I in my scholarly adolescence held the naive belief that the proper handling of mentally impaired criminal offenders presented an essentially doctrinal puzzle. Which of the various competing tests—the traditional *M'Naghten* rule,³ the so-called irresistible impulse

1. ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

2. Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 *YALE L.J.* 405 (1959).

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

standard,⁴ the hybrid approach of the Model Penal Code,⁵ or the open-ended *Durham* formula⁶—worked best? Or should we (meaning *I*, as the aspiring legal expert, eager to write a tenure piece) formulate some superior alternative to all of these?

Then, in preparing to teach criminal law for the first time, I read Abe's book (scandalously, I had not read it before; but, as I said, I went to Harvard Law School), and learned that the doctrinal-puzzle-solving approach was but an academic conceit. Based on a painstaking examination of trial transcripts, jury instructions, case law, and judicial opinions, Abe concluded that "the words in which the defense should be cast are still receiving far more attention than they deserve. . . . The various tests do not seem very different [I]dentical evidence may be admitted under each of them and juries tend to assign much the same meaning to them."⁷ The meaning of the insanity defense resides, he argued, not in abstract doctrinal formulations but in the concrete sensibilities of those who apply them. If the system was broken, the solution required either fixing those sensibilities or, more realistically, creating some procedural alternative to a system that makes pre-legal sensibilities operative for the fate of the mentally ill who are remitted to the criminal justice system.

This was, of course, a majestic display of both the working premises and the rigorous methods of Yale legal realism.⁸ I had never been exposed to it, however, in a form so compellingly applied, particularly to a subject that mattered to me. The impact it had on my perception of how the law works—in the adjudication of the insanity defense but essentially, I came to see, everywhere within criminal law—was immense. I was, in effect, a different type of scholar after reading the book, and I blanch at the thought that I might have remained the type I was had I not read Abe's work.

Of course, I am not alone in having been affected so profoundly; Abe's brand of realism has inspired (and been fully vindicated by) a wide-ranging program of social science research on the insanity defense and other doctrines.⁹

4. See *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844).

5. See MODEL PENAL CODE § 4.01(1) (1962).

6. See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

7. GOLDSTEIN, *supra* note 1, at 213.

8. Having graduated from the Law School in 1949, and having been appointed in 1956, Goldstein came of age as a legal thinker when realism still reigned supreme at Yale. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986).

9. See, e.g., Norman J. Finkel, *De Facto Departures from Insanity Instructions: Toward the Remaking of Common Law*, 14 *LAW & HUM. BEHAV.* 105, 112-13 (1990); Norman J. Finkel et al., *Insanity Defenses: From the Jurors' Perspective*, 9 *LAW & PSYCHOL. REV.* 77, 83-84 (1985);

Yet had I not had the good fortune to read Abe's book for myself, I'm not at all confident that the wisdom it embodied would have found its way to me, for as my own naiveté as a young scholar attests, and as my review of the stream of scholarship that continues to pour out on the insanity defense confirms, "the words in which the defense should be cast are still receiving far more attention than they deserve"¹⁰ in law schools and law journals.¹¹ I'm pleased that this bit of Abe's wisdom, at least, is never lost on any student who learns criminal law from me at Yale.

Nor does any student of mine escape without learning the fundamental lesson of Abe's *Conspiracy To Defraud the United States*. Easily the most important article ever written on conspiracy, *Conspiracy To Defraud*, like *Insanity Defense*, dashes a formalist conceit—namely "the old saws that federal crime is closely defined by the legislature and that there are no judge-made common law offenses against the United States."¹² Carefully charting its origins and historical function, Abe shows that the federal conspiracy statute, because of its generative incompleteness, effectively licensed the "retroactive creation of crime by the judiciary to meet the needs of a society in transition, by expanding old categories and creating new ones."¹³

Again, Abe's analysis transformed me. Not only did he puncture a dogma that I had never been taught to recognize as such; he also cured me of the reflexive instinct to lament in pious and trite terms supposed judicial and legislative derogations of the legality principle. Abe wasn't sanguine about the function of the conspiracy and other vague criminal statutes in creating a de facto common law of crimes; rather he was *realistic* about it, recognizing its inevitability, and also noting its potential for both ill and good. The lesson for me (and for others¹⁴) is that the formation of criminal law is a dynamic and

James R. P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 LAW & HUM. BEHAV. 509, 521, 524 (1991).

10. GOLDSTEIN, *supra* note 1, at 213.
11. Many judges, I'm happy to note, have been deeply influenced. See, e.g., *United States v. Lyons*, 739 F.2d 994, 995 n.7, 996 nn.8-9, 998 & nn.17-18 & 21 (5th Cir. 1984) (Rubin, J., dissenting).
12. Goldstein, *supra* note 2, at 424 (internal quotation marks omitted).
13. *Id.* at 442.
14. Abe's conception of the federal criminal law as a common law system, and his limited defense of it as such, have also clearly had an impact on judges, who, ironically, frequently display a more keenly realist sensibility than do academics. See, e.g., *McNally v. United States*, 483 U.S. 350, 372-73 (1987) (Stevens, J., dissenting) (recognizing federal antifraud provisions as "implicit delegations of authority to courts to fill in the gaps in the common-law tradition of case-by-case adjudication"); *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting) (describing criminal mail fraud provisions as "a stopgap

shared one for courts and legislatures (and for juries and prosecutors, too, for that matter, as Abe also noted¹⁵), and that rather than alternately ignore or decry this reality we should dedicate ourselves to perfecting it, so that it serves our ends rather than undermines them. I don't think I would have pieced this together without Abe; and I know if I hadn't, my scholarly engagement with the field of criminal law would have been severely stunted.

It is a theme of the literary study of the classics that the great epic poets, in the guise of immortalizing the heroes whose actions they chronicled, were actually motivated to immortalize themselves through the creation of lasting and celebrated works. This ambition to live forever through the influence of one's ideas is sometimes offered as an explanation for the heroic labors of scholars.

Yet this account clearly doesn't explain Abe. I have seen plenty of academic glory seekers. Abe wasn't one. He was as modest as he was brilliant. Although he ended up achieving a fair measure of it, the idea of acquiring fame—much less immortal fame—I'm sure never occurred to him as he wrote *The Insanity Defense, Conspiracy To Defraud the United States*, and other works.

There's another species of motivation, also featured in the classics, that I think comes much closer to explaining Abe as a scholar. This is the form of friendship enjoyed by those who mutually and reciprocally dedicate themselves to one another's realization of the good life. Abe committed himself to scholarship in the spirit of this type of friendship with other scholars. He was motivated to form and share insight not for the sake of distinguishing himself (much less for the sake of enriching himself!) but sheerly for the sake of enlightening others whom he recognized were similarly committed to a life of gaining insight and sharing it.

I was privileged to enjoy this scholarly friendship with Abe, wholly apart from the rewarding personal friendship I formed with him during our years together on the Yale Law School faculty. And it pleases me to know that, because of Abe's selfless dedication to gaining and sharing insight with other scholars, the ranks of those who can enjoy this scholarly friendship with him will indeed continue to grow well into the future.

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device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil").

15. See Goldstein, *supra* note 2, at 436, 440.