

# THE YALE LAW JOURNAL

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## My Friend Abe Goldstein

Abe Goldstein and I were friends for more than half a century. I first met him in Washington in 1950, and during the years that followed our lives and careers intersected at a number of points. I came to have great regard for him.

I should preface the account of our initial meeting with some brief background. In May 1950, shortly before I left Yale, where I was a Graduate Fellow, to seek a job in Washington, Professor Boris Bittker suggested that I contact Raoul Berger, a solo practitioner in Washington. When I called on Berger, he told me that an associate in his office, Abe Goldstein, had departed some months earlier to become the law clerk to Judge David L. Bazelon on the U.S. Court of Appeals for the District of Columbia Circuit. Bazelon had recently been appointed to the bench, and he had appealed to Berger for assistance in finding a law clerk. Berger had volunteered, with great reluctance, to allow Abe to accept the clerkship. Accordingly, there was an opening in Berger's office, and the next day he phoned to offer me the job that Abe had vacated. Thus, I became a successor to Abe in my first job as a lawyer. I could not possibly have replaced him.

As I recall, I was introduced to Abe by Berger several months later. Berger was an able man, and he was also an exacting taskmaster. Years later, Abe and I would recall, amidst much laughter, our common experience in "Berger's boot camp."

Following his clerkship, Abe joined Donohue & Kaufman, a small Washington law firm where he remained until 1956. The senior partner—"Jiggs" Donohue—was a well known figure in Washington; he had been one of three commissioners who ran the government of the District of Columbia. Donohue was the "rainmaker," and Abe was the legal craftsman. The firm enjoyed a substantial civil and criminal practice. Abe had the opportunity to function in a first chair capacity in a number of complex litigation matters and to experience the rough and tumble of a courtroom. He liked private practice, and he had considerable doubt about his decision to leave Washington in 1956

to accept Dean Eugene Rostow's offer to join the Yale faculty. In any event, his experience in practice greatly influenced his views as a teacher and scholar.

In the many conversations we had during the early 1950s—usually at lunch or at dinner—I was impressed by his tough-minded, common sense approach to legal matters. Abe possessed in abundance the virtue prized most highly by first-rate lawyers: excellent judgment.

In 1953, I became involved in a case that later became a centerpiece in Abe's first book, *The Insanity Defense*.<sup>1</sup> After Berger closed his office in late 1952,<sup>2</sup> I became an associate at Arnold, Fortas & Porter. In the summer of 1953, Abe Fortas was appointed by the D.C. Court of Appeals to represent an indigent petitioner, Monte Durham, in the reargument of an appeal from a criminal conviction following rejection by the trial court of Durham's plea of not guilty by reason of insanity. Judge Bazelon was intensely interested in the relationship between law and psychiatry; he felt that psychiatry could make an important contribution to the administration of criminal justice.<sup>3</sup> Bazelon perceived the *Durham*<sup>4</sup> case as a vehicle for making a significant change in the standard governing the insanity defense. Fortas asked me to assist him in writing the brief on behalf of Durham. The existing standard of criminal responsibility in the District, and in most jurisdictions, was the *M'Naghten* rule, formulated in England in 1843.<sup>5</sup> Under that rule, as expressed by the English court, "to establish a defence 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 defeat of reason, from disease of the mind, as not to know the nature and quality of the act he was doing."<sup>6</sup> In the brief we submitted, we contended that the *M'Naghten* test was "an inappropriate, inadequate, and unjust criterion for determining criminal responsibility" and should be abandoned, because by focusing on the accused's cognitive function—his ability to distinguish right from wrong—the test did not cover individuals who could not control their behavior notwithstanding such

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

2. Berger withdrew from practice, and he was subsequently the Charles Warren Senior Fellow in American Legal History at the Harvard Law School. He wrote a number of books about constitutional law and constitutional history. See, e.g., RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

3. See DAVID L. BAZELON, *QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW* 39 (1988).

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

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

6. *Id.* at 722.

knowledge.<sup>7</sup> Our point was that *M’Naghten* was too narrow and obsolete in light of contemporaneous psychiatric knowledge. We also argued that, under the *M’Naghten* test, psychiatrists were prevented by courts from presenting to the jury all of their information and findings concerning the accused’s mental condition.<sup>8</sup> We urged that a new test be adopted. Judge Bazelon wrote the opinion for the Court of Appeals announcing a new standard of criminal responsibility: “An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”<sup>9</sup> The *Durham* decision was a bombshell. The decision was acclaimed by psychiatrists, but it was not followed by other courts, and in the legal community it was sharply criticized. The opinion inspired tremendous debate throughout the country concerning the issue of criminal responsibility and the role of psychiatrists in the administration of criminal justice.

Judge Bazelon urged Abe to make a comprehensive study of the insanity defense. Abe was attracted by “the challenge, and the difficulty, of setting limits on man’s responsibility to his fellow man.”<sup>10</sup> He disagreed with Judge Bazelon’s view that the *M’Naghten* test should be jettisoned—Abe felt that test could be interpreted to cover the defendant’s inability to control his conduct—and he was skeptical of the views of reformers that defendants would be better off in a mental hospital than in prison. He undertook extensive research and during a sabbatical year, 1964-1965, as a Visiting Fellow at Cambridge University, wrote most of *The Insanity Defense*, published in 1967. Much of the excitement that had greeted the *Durham* decision had vanished by that time. It had become apparent that there were major gaps in psychiatric knowledge of criminal behavior and that there were extremely limited resources—doctors and mental hospitals—available to deal with persons acquitted on grounds of insanity. Considerable skepticism had surfaced concerning psychiatrists and their role in criminal cases. Abe found that the existing literature on the insanity defense “has been so polemical that it has not provided the raw materials for appraisal of claim and counterclaim.”<sup>11</sup> He expressed his objective in writing the book in these words: “I shall try to rescue the insanity defense from the acrimony and the abstraction which have too long surrounded it.”<sup>12</sup> He succeeded admirably. His book rigorously and thoroughly addressed every

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7. Supplemental Brief for Appellant on Reargument at 20-30, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (No. 11,859).

8. *Id.* at 24-25, 29.

9. *Durham*, 214 F.2d at 874-75.

10. GOLDSTEIN, *supra* note 1, at 3.

11. *Id.* at 4-5.

12. *Id.* at 5.

aspect of the defense: the philosophical underpinnings of the idea of criminal responsibility, the different tests of insanity that had been applied or proposed, the evidentiary and procedural framework of a trial where the defendant's mental condition is an issue, the myriad post-trial problems relating to the disposition of a person acquitted by reason of insanity, and various alternatives for dealing with the issue of a defendant's mental disorder. He wrote, with clarity and precision, an uncommonly sensible book about the insanity defense. I thought at the time that his book was one of the best—probably the very best book—on the subject.<sup>13</sup>

I recently re-read the book. The landscape relating to the insanity defense has been transformed in the nearly forty years since Abe wrote his book, but many of his insights remain fresh and relevant. Let me mention one example. An enormous quantity of intellectual energy has been expended over the years in debating and formulating the precise phrasing of the test of responsibility. But, as Abe correctly recognized, the exact language of the test, embodied in a jury instruction, is far less consequential to the outcome than competent defense counsel, knowledgeable about the intricacies of the defense, and the assistance of a psychiatric expert who can clearly and effectively describe the defendant's mental condition to the jury.

As I noted, there have been fundamental changes, both in the law and in psychiatry, in the past four decades. The public outcry over the acquittal on grounds of insanity of John Hinckley, who attempted to assassinate President Reagan, provoked the enactment by Congress of the Insanity Reform Act of 1984.<sup>14</sup> Under that statute, an accused person pleading insanity in a criminal prosecution in the federal courts must prove that “as a result of a severe mental disease or defect [the accused] was unable to appreciate the nature and quality or the wrongfulness of his acts.”<sup>15</sup> In addition, a majority of the state courts now adhere to the *M’Naghten* rule. There have also been noteworthy developments in psychiatry. Considerably more is now known about severe mental disorders, and an array of drugs have been developed that relieve symptoms and enable many mentally ill persons to function reasonably well in a social setting. These drugs can be administered in a prison setting probably as effectively as in a mental hospital. As a net result, the insanity defense is now limited to a relatively small number of extreme cases. Defense counsel must weigh foregoing the defense and running the risk of a guilty verdict with a

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13. See Abe Krash, Book Review, 82 HARV. L. REV. 504 (1968) (reviewing ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967)).

14. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified as amended in scattered sections of 18 and 28 U.S.C.).

15. 18 U.S.C. § 17 (2000).

relatively fixed prison sentence, against interposing the defense and running the risk of an acquittal on insanity grounds perhaps with a period of indeterminate commitment to a mental hospital.<sup>16</sup>

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I had an opportunity to see Abe quite frequently in the late 1970s and early 1980s. I was invited to Yale as a Visiting Lecturer, and I would meet with him in his office or at his home. In recent years, we saw one another while vacationing on Cape Cod. Our conversations ranged over many topics: legal education, the administration of criminal justice, politics, books and articles we were reading, changes in the legal profession and practice, and the triumphs and disappointments of mutual friends. Abe's remarks were, as always, thoughtful, salty, penetrating, and funny.

On the last occasion that I saw him—in June on Cape Cod—he mentioned that he hoped to continue teaching a seminar, and he discussed his supervision of papers by a number of students. In listening to him, I appreciated anew how serious and conscientious a teacher he was. He cared deeply about his students. As I sat in the funeral home in August at the services for him, I reflected on the deep loss incurred by the death of such a dedicated teacher. I was reminded of Plato's account of the death of Socrates in his profoundly moving dialogue, *Phaedo*.<sup>17</sup> In describing the scene afterwards to one of his friends, Phaedo remarks: "Such was the end . . . [of] the wisest, and justest, and best of all the men whom I have ever known."<sup>18</sup> Abe was a person of great moral and intellectual integrity, and with his death we have lost one of the best of our generation.

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16. As a general rule, a person acquitted on grounds of insanity is committed to a mental institution until he has recovered his sanity or is no longer dangerous. In *Jones v. United States*, 463 U.S. 354 (1983), the Supreme Court rejected the contention that an individual may not be hospitalized for a period longer than he would have been imprisoned if convicted, and sustained the constitutionality of a statute providing for indeterminate commitment.

17. PLATO, *Phaedo*, in 1 THE DIALOGUES OF PLATO 383 (B. Jowett trans. & ed., New York, Scribner, Armstrong & Co. 1873).

18. *Id.* at 447.