

THE YALE LAW JOURNAL

KATE STITH

Abraham S. Goldstein's Contributions to Criminal Law Scholarship

Abraham S. Goldstein was an extraordinary legal scholar. His law review articles and books are now “classics” in a broad array of criminal law fields: (1) conspiracy law, (2) trial procedures, (3) the insanity defense, (4) comparative criminal procedure, (5) prosecutorial discretion and plea bargaining, (6) victims’ rights, and (7) the criminal jury. While now classics, each of his writings was path-breaking when published. Moreover, each soon became the seminal work in the area – by which I mean that each Goldstein contribution spawned an immense amount of further research and scholarship, including many subsequent books and articles by his former students here at Yale Law School.

Goldstein wrote with elegance and intellectual power. His scholarship sought to understand the impact of criminal law doctrines in real courtrooms and in the real world. His analytical approach was rigorous and balanced, devoid of rhetorical or ideological excess. And he had a writing style unusual in the legal academy: He strove to be at once thorough but concise, each page chock full of powerful insights.

Goldstein was one of the early scholars to document the dangers and ambiguities of the law of conspiracy. In his powerful 1958 article, *Conspiracy To Defraud the United States*,¹ he wrote about the lack of boundaries imposed by the vague terms “conspiracy” and “defraud.” Like all of his articles, this one could not have been written had he spent his entire life in the academy. It was the first law review article he wrote after serving for five years as a criminal defense and civil rights trial lawyer in Washington, D.C. His cases included the defense of a businessman accused of “conspiracy to defraud the United States,”

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

rather than the more usual charge of conspiracy to commit a particular offense.²

In the classroom as in his scholarly articles, Goldstein tackled issues that for most in the academy were barely on the horizon. In 1959, he and Joseph Goldstein³ produced, but never published, a textbook-length set of mimeographed materials that essentially constitutes the first criminal procedure casebook⁴—predating Yale Kamisar’s path-breaking and celebrated casebook by four years.⁵ The Goldstein & Goldstein “book” organized what was then a barely existing field of study, excerpting not only leading Supreme Court and other appellate cases, but offering rich textual notes and questions. While the text was never published, some of its insights were pursued in the criminal procedure textbook that Goldstein and Leonard Orland published more than a decade later.⁶ Like the unpublished Goldstein & Goldstein text, Goldstein & Orland was full of annotations and questions that were unusually challenging and original.

Goldstein’s interest in practical applications and real-world consequences made him at home in a legal academy that embraced legal realism. In a 1966 article,⁷ he commented on the increasingly interdisciplinary nature of legal scholarship, in particular the incorporation of criminology and other behavioral sciences into legal research. The next year he addressed the relationship

-
2. See 18 U.S.C. § 371 (2000) (“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”)
 3. Abraham Goldstein wrote of Joseph Goldstein, “[We] had so many convergences besides bearing the same last name. We were both articles editors of the *Yale Law Journal*, both law clerks to Judge Bazelon on the D.C. Circuit, both members of a cohort of 12 who came to the faculty of Yale Law School in 1956. We both taught Criminal Law For almost 45 years, we participated together in the life of Yale Law School.” Abraham S. Goldstein, *Tribute to Joseph Goldstein*, 19 *YALE L. & POL’Y REV.* 31, 31 (2000).
 4. Abraham S. Goldstein & Joseph Goldstein, *Criminal Procedure* (1959) (unpublished manuscript, on file with Professor Leonard Orland). An updated mimeographed manuscript is on file in the Yale Law School Library, Faculty Collection.
 5. See *LIVINGSTON HALL & YALE KASIMAR, MODERN CRIMINAL PROCEDURE* (1965).
 6. *ABRAHAM S. GOLDSTEIN & LEONARD ORLAND, CRIMINAL PROCEDURE: CASES AND MATERIALS ON THE ADMINISTRATION OF CRIMINAL LAW* (1974); see also Abraham S. Goldstein, *Introduction to LEONARD ORLAND, JUSTICE, PUNISHMENT, TREATMENT: THE CORRECTIONAL PROCESS* xxv (1973).
 7. Abraham S. Goldstein, *Research into the Administration of Criminal Law: A Report from the United States*, 6 *BRIT. J. CRIMINOLOGY* 27 (1966).

between legal scholarship and education.⁸ He called for reform in legal education, urging schools to move beyond the case method into “rich interdepartmental resources,” and theoretical and practical application.⁹ In 1971, he and Joseph Goldstein published a collection of articles designed to help bridge this gap between casebooks and legal scholarship.¹⁰

It was in 1962 that Goldstein first turned his sharp attention to the insanity defense.¹¹ He was urged to tackle this controversial and difficult subject by Judge David L. Bazelon,¹² who had appointed Goldstein as his first law clerk in 1949, and who was a strong proponent of a broad insanity defense. Goldstein’s 1967 book on the subject, read and reviewed both in this country and around the world,¹³ was a meticulous examination of the history and development of this legal defense to crime. He argued forcefully for a robust but limited insanity defense for mentally ill offenders. Such an approach, he observed, would not weaken the deterrence value of the criminal law and was far preferable in a free society to indefinite civil commitment of potentially dangerous mentally ill persons.

8. Abraham S. Goldstein, *The Unfulfilled Promise of Legal Education*, in *LAW IN A CHANGING AMERICA* 157 (Geoffrey C. Hazard, Jr. ed., 1968).

9. *Id.* at 165.

10. *CRIME, LAW AND SOCIETY* (Abraham S. Goldstein & Joseph Goldstein eds., 1971). In their preface to the book, the editors express regret at “the extent to which law students have come to rely entirely on casebooks,” and conclude that their reader will “be a useful addition to the literature.” *Id.* at vii. The two Goldsteins also noted that “[t]he pleasure of collaboration was enhanced by the thought that we might further confound the confusion that has sometimes led readers in criminal law to attribute the work of each of us to the other.” *Id.*

11. One of Goldstein’s earliest articles on the subject, published with Edith W. Fine, was *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061 (1962). Goldstein was troubled by the “fragmentary” procedural devices accorded indigent defendants with potential psychiatric defenses. *Id.* at 1091. The same year, Goldstein and Jay Katz of the Yale Law School published *Psychiatrist-Patient Privilege: The Gap Proposal and the Connecticut Statute*, 118 AM. J. PSYCHIATRY 733 (1962). Goldstein’s masterwork on the subject, *The Insanity Defense*, was published five years later in 1967.

12. See Leon Radzinowicz, *Mental Illness & the Law*, COMMENTARY, May 1969, at 100, 100 (reviewing ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967)) (noting that Goldstein’s study “was undertaken at the suggestion of Judge Bazelon”). Radzinowicz, a professor at Cambridge University, recommended the book to “advanced students, both in law and in psychiatry.” *Id.* at 103.

13. For example, in 1983 one of Goldstein’s lectures on the insanity defense was translated into Japanese by the Research and Training Institute at the Japanese Ministry of Justice. Copies of this Japanese manuscript are on file in the Yale Law School Library, Faculty Collection, in Goldstein’s Pamphlets and Papers.

We may note that Goldstein's efforts to reform the criminal law were not limited to the legal academy. Before he became Dean of Yale Law School in 1970, he served on Connecticut's Board of Parole, on the Commission to Revise Criminal Statutes, and on the Governor's Planning Commission on Criminal Administration.

Goldstein also made valuable contributions to the field of comparative criminal procedure. He was among the first scholars to examine the sometimes subtle differences and similarities among adversarial and inquisitorial systems of criminal procedure around the world.¹⁴ He had an ongoing dialogue and friendship with leading criminal law scholars in England, France, Germany, Japan, and Israel. He began writing about criminal procedure systems in Europe and elsewhere in the early 1970s, decades before the wave of "globalization" studies would popularize such studies. He counseled against confusing the philosophy of continental systems with the actual practices of those systems;¹⁵ he was also among the first to recognize and analyze the presence of significant inquisitorial themes in our own criminal procedure.¹⁶ In a later article, he warned of the incongruities, if not calamities, that can result if nations casually "borrow" practices of other nations with different histories and cultures.¹⁷

Themes of balance in the criminal justice system are to be found in all of Goldstein's works. Throughout his career, Goldstein expressed concern about the rights of criminal defendants and the abuse of state power. In 1960, he challenged conventional notions about the United States criminal justice system and documented the imbalance between governmental power and defendants' rights in the criminal process in the pre-Warren Court era.¹⁸ This article may fairly be said to have presaged, in a general way, the changes in criminal procedure subsequently devised by that Court over the next decade. Goldstein's concern with fair process resurfaced decades later in his book *The Passive Judiciary*, in which he wrote critically of the central role of prosecutorial

14. Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) [hereinafter *Three "Inquisitorial" Systems*]; see also Abraham S. Goldstein & Martin Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978).

15. See *Three "Inquisitorial" Systems*, *supra* note 14, at 245-46.

16. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974).

17. Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567 (1996), reprinted in 31 ISRAEL L. REV. 169 (1997).

18. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149 (1960).

discretion in the United States and what he viewed as judicial abdication of oversight.¹⁹ While appreciating the inevitability and importance of prosecutorial discretion, Goldstein was critical of the failure of magistrates and judges to review and check prosecutorial power – referring to the posture of the judiciary “as less one of judicial restraint than of judicial withdrawal.”²⁰ In particular, he urged that judges review the merits and fairness of plea bargains, and refuse to accept those without a clear factual basis. He pursued these themes in subsequent articles, urging judicial checks on prosecutorial power and closer review of search warrant applications.²¹ He later expressed concern about the use of the civil legal system to punish white-collar defendants without the procedural protections of a criminal trial.²²

Goldstein also recognized the need for a respectful role for victims in criminal prosecution.²³ His pioneering 1982 article urged that victims be brought into the processes of charging, plea bargaining, and sentencing. It was written at the dawn of the “victims’ rights” movement, and in many ways charted the course of subsequent efforts to make that slogan a reality. The article was especially influential because, like all of Goldstein’s writings, it was balanced and sober, with due regard for competing considerations and the interests of both the prosecutor and the defendant.²⁴

Goldstein’s deep commitment to fair criminal procedure led him to advocate strongly for the secrecy of criminal jury deliberations.²⁵ As jurors increasingly appeared on television programs and gave interviews to the press, or even wrote books about their experiences, Goldstein sounded a strong note of caution. Examining the special role of the jury in criminal cases, he echoed Justice Cardozo in urging that “jurors must deliberate in secret so that they

19. ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* (1981).

20. *Id.* at 5.

21. See, e.g., Abraham S. Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173 (1987).

22. Abraham S. Goldstein, *White Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895 (1992); see also the article in the same issue by Goldstein’s former student, Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992).

23. Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515 (1982).

24. In a later article, Goldstein analyzed the role of judicial and prosecutorial discretion under the Federal Victim and Witness Protection Act of 1982. Abraham S. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 LAW & CONTEMP. PROBS. 225 (1984).

25. Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Post-Verdict Interviews*, 1993 U. ILL. L. REV. 295.

may communicate freely with one another, secure in the knowledge that what they say will not be passed along to others.”²⁶

Abraham S. Goldstein—lawyer, scholar, teacher, and Dean of the law school he cherished and nourished—was a man devoted to justice and academic integrity. In each of his influential works he attempted to bridge the gap between theory and The Real World. His vision of a fair, balanced, and effective criminal justice system will continue to inspire and guide all who examine the criminal law.

Kate Stith is the Lafayette S. Foster Professor of Law, Yale Law School. She thanks Jessica Stebbins '06, a grateful Goldstein student, for her research assistance, and Mirjan Damaška, Steven Duke, Leonard Orland, and Stanton Wheeler for their insights about a colleague so greatly admired and appreciated.

26. *Id.* at 295 (referencing Justice Cardozo’s statement in *Clark v. United States*, 289 U.S. 1, 13 (1933) that: “Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”).