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Continental Criminal Procedure: "Myth" and Reality

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In a recent issue of this *Journal*, Professor Abraham Goldstein and Research Fellow Martin Marcus discussed their observations about the criminal procedures of three European countries, France, Germany, and Italy, as representative of the "Continental" or "inquisitorial" model of investigation and prosecution.[1] Their inquiry was prompted, they said, by a desire to probe claims that in those countries the extreme form of prosecutorial discretion that produces plea bargaining and pervasive reliance on guilty pleas in the United States is avoided by greater judicial control and supervision of the process. They were concerned also to find out to what extent judicial supervision of the investigation of crime obviates our after-the-fact efforts to deter official abuses by the exclusion of evidence unlawfully obtained.[2] Their conclusions are summarized in the title of their article: "Judicial supervision" is a "myth." The claim that Continental systems of criminal procedure adhere to a rule of law more strictly than ours is based not on fact but on "ideology" and "the assumption that officials adhere to the ideology."[3] The prosecutor and, in their sphere, the police are dominant in Europe as they are here; judicial responsibility is mostly "reactive" to the primary roles played by other officials.[4] The authors advise that we Americans be skeptical and cautious about borrowing from the models they describe.

We believe that Goldstein and Marcus have misinterpreted the most

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1. Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) [hereinafter cited without cross-reference as *Myth of Judicial Supervision*].

2. *Id.* at 245-46.

3. *Id.* at 283.

4. *Id.* at 282.

important characteristics of the procedures they intended to describe and that their descriptions are substantially misleading. As they rightly point out, persistent, deep dissatisfaction with criminal justice in this country has led many people to wonder whether we might not learn a good deal from practices elsewhere. We agree with them that the issue should not be posed as "this model or that," as if criminal procedure came complete in indivisible packages; nor should we ask ourselves whether to adopt "the French system" or "the German system." At the same time, we think that there is much to be learned from Continental procedures, which, adapted to our circumstances, might be marked improvements over what we have now. While Goldstein and Marcus counsel caution and careful examination of the experience and results elsewhere, their own approach is neither cautious nor careful and belies their counsel. Believing, as do the authors, that the matter is important, we are impelled to write this brief statement of our disagreement.

We make below some observations about French and German procedure; we do not comment specifically about Italian procedure, with which neither of us is closely familiar. Our major disagreements are general. Although the authors note that the offices of policeman, prosecutor, and magistrate in the Continental systems are not defined along the same lines as they are in the United States, they perceive the comparable officials elsewhere as largely indistinguishable from their American counterparts. They ignore or dismiss as insignificant all the differences in the selection, training, and professional codes of the foreign officials as well as the institutional structure within which they work. That, of course, makes the conclusion that practices everywhere are more or less alike almost inevitable. But it is not, as the authors seem to assume, self-evident that the French *procureur* and German *Staatsanwalt* are simply district attorneys who speak a foreign language; that the French *police judiciaire* and the German *Polizei* are just the homicide squad of an American city dressed in different uniforms; that the *juge d'instruction*, the *Richter*, and the American trial judge are, beneath the robe, one and the same. Apparent differences may, no doubt, mask an underlying similarity of function and performance; but that is something to be shown concretely in each case, rather than by a presupposition that makes such differences irrelevant from the start.

Goldstein and Marcus proceed by setting up a model of Continental criminal procedure to contrast with American "accusatorial" process; in their model, prosecutorial discretion is either eliminated entirely or "carefully controlled," and "full judicial inquiry . . . [is] made into

every offense formally charged."[5] Most of their article describes findings in the countries they studied that conflict with the model. The model, however, portrays inaccurately both the theory and the practice in those countries. Indeed, there is not, as the authors suppose, a single "model" to which the procedures of the three countries conform; the differences among them are in many respects as important as the similarities.[6] Having found that their model is false, they conclude that the reality must resemble practices in this country. Their conclusions, however, based mostly on conjecture about what "must be" the underlying reality, are as far afield as the model they replace.

France

Taking the investigation of a case and the preparation of formal charges by a *juge d'instruction* (the investigating magistrate) as the prototype of French procedure, Goldstein and Marcus found that in the majority of cases the reality is different. An *instruction* (magisterial investigation) is required only for the most serious category of offenses, *crimes*, and not for the much larger category of *délits*, which includes not only our misdemeanors but also most of the less serious felonies.[7] Often the *procureur*, who is responsible for the decision to send a case to a *juge d'instruction*, ignores evidence that an offense should be prosecuted as a *crime* and qualifies it as a *délit*, which is then sent directly to the court (*tribunal correctionnel*) for trial and judgment.[8]

5. *Id.* at 244.

6. The theory of judicial investigation, for example, which looms so large in the model that Goldstein and Marcus attack, is characteristic of the procedure in France and Italy but not Germany, where judges do not have responsibility for pretrial investigation. Goldstein and Marcus describe the elimination of the institution of the *Untersuchungsrichter* from the Code of Criminal Procedure in 1975 as "the abolition of the examining magistrate in Germany." *Id.* at 249. The implication is that the Germans were previously operating a system of judicially conducted pretrial examination like the French. In fact, examination by *Untersuchungsrichter* was not a regular phase of German procedure, but only an option available on motion of the prosecution or defense in certain very serious or complex cases, primarily in order to preserve sworn evidence. *See* STRAFPROZESSORDNUNG (Code of Criminal Procedure) §§ 178-180, 188 (repealed 1975) [hereinafter cited as StPO]; *id.* § 251 (1977) (authorizing receipt of judicially conducted examinations). The procedure was seldom used. Its abolition did not, as a reader of Goldstein and Marcus might infer, "replace" (*Myth of Judicial Supervision* at 249) a magistrative pretrial system with a prosecutorial one.

7. *Crimes* are those offenses punishable by imprisonment for more than five years. C. PEN. arts. 1, 6-7, 18-19 (72e ed. Dalloz 1974-75). *Délits* generally are punishable by imprisonment for more than two months and not more than five years. C. PEN. arts. 1, 40 (72e ed. Dalloz 1974-75). There is also a category of petty offenses called *contraventions*, punishable by not more than two months' imprisonment. C. PEN. arts. 1, 465.

8. The *Cour d'assises* has jurisdiction over *crimes*. C. PR. PEN. arts. 214, 231 (16e ed. Dalloz 1974-75). The *tribunal correctionnel* has jurisdiction to judge *délits*. C. PR. PEN. art. 381 (16e ed. Dalloz 1974-75). The *tribunal de police* has jurisdiction over *contraventions*. C. PR. PEN. art. 521 (16e ed. Dalloz 1974-75).

This practice of "correctionalization" reduces still further the number of cases prepared by an investigating magistrate.

Goldstein and Marcus regard the small proportion of cases submitted to a *juge d'instruction*, and the practice of "correctionalization" in particular, as a departure from the "model" of French criminal procedure; they strongly intimate that, at least at a theoretical level, the failure to conduct a judicial investigation in most if not all cases is improper and to be regretted.[9] That view reflects their preoccupation with their own false model. An *instruction* is not prescribed even in theory if the charge is for one of the less serious offenses and further investigation does not appear to be necessary.[10] While it is undoubtedly true that the *procureur* "correctionalizes" offenses in order not to burden the process with an *instruction* in too many cases, his decision to do so does not evade a required procedure. One may believe that charges and convictions in France are too lenient; whether that is so or not, persons charged with *délits* are not denied an investigation they ought to have had.[11] Indeed, as Goldstein and Marcus note, when a case has been "correctionalized," the accused can challenge the jurisdiction of the *tribunal correctionnel* and urge that the case be examined by a *juge*, in which case it may be qualified as a *crime*.[12]

One might use the distinction between *crimes* and *délits* and the procedures required for each to make a point quite different from what the authors suggest: when the responsible state official believes that the

9. *See Myth of Judicial Supervision* at 250-51.

10. C. PR. PEN. art. 79 (16e ed. Dalloz 1974-75). The point is made plainly in the standard French treatises on criminal procedure. For example: "Les juridictions d'instruction ont un rôle très important, mais limité à certains types d'infractions: en droit français, en effet, l'instruction préparatoire n'est obligatoire que pour les crimes, qui sont tout de même une chose relativement rare; elle est facultative en matière de délits correctionnels et exceptionnelle pour les contraventions de police." 2 R. MERLE & A. VITU, TRAITE DE DROIT CRIMINEL 196 (2e ed. 1973); *see* G. STEFANI & G. LEVASSEUR, PROCEDURE PENALE 32 (9e ed. 1975).

11. Merle and Vitu, like other French commentators, observe that although the practice of "correctionalization" is accepted by everyone, it is beyond the legal competence of the *procureur*. They point to various harmful effects of the practice: *e.g.*, uneven sentencing, weakening of the deterrent effect of the criminal law, discouragement of the police, and distortion of the statutory definition of offenses. 2 R. MERLE & A. VITU, *supra* note 10, at 563-64. Such criticism of "correctionalization" is quite different from the claim that an offense qualified (rightly or wrongly) as a *délit* and not unusual or complex ought to be submitted to a *juge d'instruction*.

12. C. PR. PEN. art. 659 (16e ed. Dalloz 1974-75). The victim of a crime, who may appear in the case as *partie civile* can also challenge "correctionalization." Likewise, if the victim files a complaint as *partie civile* before the *juge d'instruction*, "correctionalization" is forestalled. C. PR. PEN. arts. 85, 86 (16e ed. Dalloz 1974-75). The *tribunal correctionnel* may reject the qualification of an offense as a *délit* if there appear to be facts that indicate commission of a *crime*. C. PR. PEN. art. 469 (16e ed. Dalloz 1974-75). As Goldstein and Marcus state, *Myth of Judicial Supervision* at 253, "correctionalization" is rarely disturbed. *See generally* 2 R. MERLE & A. VITU, *supra* note 10, at 563-64.

investigation of an offense is incomplete, and in all cases in which the state intends to prove a major offense, there *is* an investigation under the direction of a magistrate. The lesson that we might draw from the French experience is that we should be skeptical of any proposal for elaborate post-crime investigation in all cases, not that judicial investigation, limited to cases in which it is most likely to be valuable, is a myth. The false model of a judicial investigation in every case takes our attention away from the question we ought to ask: whether the procedure actually provided in France for the large number of *délits* is preferable to ours in comparable cases.

Most of the time, the authors observe, the *procureur* himself does little investigation even when a case is not submitted to a *juge d'instruction.* Like an American prosecutor, he usually relies on evidence gathered by the police and presented to him in the *dossier* of the case. So, they say, "the overwhelming proportion of *délits* is likely to proceed to trial with a dossier that is little more than a police report."[13] Similarly, the *juge* relies heavily on the work of the police for investigation of a *crime* that is not especially serious or complex. The authors conclude that whether one speaks of *délits* or *crimes*, "[b]ehind the veil of the formal requirements of the Code, the French *dossier*, the manner in which it is compiled, and even its contents may not be as different from an American prosecutor's file as is commonly supposed."[14]

In France, as in the United States, ordinary crimes are "solved" mostly on the basis of evidence that police gather routinely as part of their initial response at the scene of the crime. In such cases, it is a matter of course that investigation is largely completed before the case reaches the *procureur*; that he or the *juge d'instruction* ordinarily relies on the information provided by the police is likely to surprise only those who have taken judicial investigation as the invariable standard. French procedure prescribes nothing to the contrary. One who is familiar with American police work, however, will be misled by the statement that the French *dossier* is "little more than a police report." In this country, a "police report" is primarily an internal police document, the report of an incident that called for some response by the police and, if the incident was criminal and someone was arrested for the crime, a record of how it was cleared. The police are not expected to provide a legally competent basis for prosecution and conviction. The preparation of the report is subject to no prosecutorial

13. *Myth of Judicial Supervision* at 255.
14. *Id.* at 255-56.

requirements of form or content; it is used by the prosecutor, if at all, only as an unofficial document without evidentiary significance. The French *dossier,* on the other hand, is prepared and intended to be used as part of the evidentiary basis of the judgment. In their capacity as *police judiciaire*—which Goldstein and Marcus summarily dismiss as a fiction[15]—French police are expected to prepare an investigative record that is complete and formally correct, available to the defense as well as the prosecution, and able to withstand a searching examination.[16] If the *dossier* is inadequate to prove the commission of an offense, unless the case is dropped it must be turned over to a *juge d'instruction* for further investigation. Of course, a *dossier* is more easily compiled if the facts are uncomplicated and beyond dispute than if they are not. In the easy cases as well as the hard, the *dossier* of a French case, *crime* or *délit,* ordinarily provides a permanent record of both inculpatory and exculpatory evidence that is substantially superior to anything regularly available in this country short of a trial transcript.

Goldstein and Marcus' specific comments about the investigative responsibility of the French police do not concern the adequacy of the investigative record, but rather the lack of "judicial" oversight of police illegality. Again they observe that their model of judicial supervision of investigations has limited application—as it must unless police are to be accompanied by magistrates when they go to the scene of a crime. Beyond that, the authors are surprised by the lack of effective "review after the fact." The French *juge d'instruction* and the courts rarely inquire into the legality of police conduct; although they have authority to "nullify" an illegal act, they rarely do so in the manner of this country, by excluding illegally obtained evidence.[17]

To a considerable extent, this simply makes the point that the exclusion of evidence is not applied as a remedy for police misconduct in France as it is here. Whether or not the exclusion of illegally obtained evidence is desirable, the late and faltering resort to that remedy in this country[18] shows that it is not an essential characteristic of one process more than another. In England, where criminal procedure more

15. *Id.* at 249.

16. See, for example, C. PR. PEN. arts. 53-74 (16e ed. Dalloz 1974-75), which specifies the investigative responsibilities of the *police judiciaire* with respect to those *crimes* and *délits flagrants* that the police have authority to investigate without judicial direction. *See generally* 2 R. MERLE & A. VITU, *supra* note 10, at 249-50.

17. *Myth of Judicial Supervision* at 254-55.

18. The rule with respect to unlawful searches was not applied to the states as a constitutional matter until 1961, in Mapp v. Ohio, 367 U.S. 643 (1961). Since *Mapp,* both in principle and in practice, exclusionary rules have not been an unalloyed success. *See, e.g.,* United States v. Ceccolini, 98 S. Ct. 1054 (1978); Stone v. Powell, 428 U.S. 465 (1976) (limiting application of exclusionary rule in Fourth Amendment cases).

closely resembles ours, the automatic application of an exclusionary rule has consistently been rejected.[19] There are also differences between French and American law concerning what police practices are permissible, which have nothing to do one way or another with the choice of procedures for prosecution. A greater degree of force and, in our terms, abuse by the police is tolerated in France than is tolerated here, an aspect of the generally more authoritarian relationship between the state and the individual. The French code, for example, expressly authorizes under certain conditions the kind of custodial interrogation that, at least before *Miranda*,[20] was carried out by police in this country without any authorization at all.[21] We should not compare conduct that is lawful in France with conduct that is unlawful here and then conclude that, because it would be unlawful here, it is irregular and unsupervised in France.

For all their apparent disapproval of French police practices, Goldstein and Marcus say nothing to indicate whether or not French police are generally responsive to the rules circumscribing their authority. Unaccountably, the authors do not mention that in the performance of criminal investigations, the French police are subject to the supervision and control of the magistracy (the *procureur* in particular).[22] The *procureur* makes regular evaluations of the police officers subject to his supervision, which become part of the officers' official record. There is thus the framework for direct bureaucratic control of the police, for lack of which in this country we have had to depend on the dubious deterrent effect of exclusionary rules. That control is far from perfect and is much criticized by the French themselves;[23] it is evidently less successful than the German bureaucratic structure that

19. *See, e.g.*, Jeffrey v. Black, [1977] 3 W.L.R. 895 (Q.B.), [1978] All E.R. 555.

20. Miranda v. Arizona, 384 U.S. 436 (1966).

21. In certain circumstances, the French police are allowed to detain a person for interrogation for 24 and sometimes 48 hours, under prescribed conditions. The practice is called the *garde à vue*. C. PR. PEN. arts. 63, 77 (16e ed. Dalloz 1974-75); *see Myth of Judicial Supervision* at 253. In this country the *Miranda* rules may not have prevented police questioning so much as imposed some formal requirements on it. To the extent that this is so, our current practice has certain similarities to the *garde à vue*, although it is quite rare that detention for questioning is as prolonged here as it may be in France.

22. *E.g.*, C. PR. PEN. arts. 12, 13, 19, 54, 56, 63-64, 68, 75 (16e ed. Dalloz 1974-75); *see generally* 2 R. MERLE & A. VITU, *supra* note 10, at 253-54.

23. The same police who function in one capacity as *police judiciaire* commonly function in other capacities, such as peace-keeping, as well. When their investigative work is not pursuant to judicial authorization, as when they are responding directly to the scene of a crime, it is difficult to separate their responsibilities in their various capacities. The lines of bureaucratic control are badly defined, because supervision is shared among the governmental agencies concerned with the various policy functions. *See generally* 2 R. MERLE & A. VITU, *supra* note 10, at 222-43.

it somewhat resembles.[24] But to ignore it altogether makes comparison worthless.

The concept of "judicial police" that Goldstein and Marcus dismiss as a fiction is not intended to suggest that the police are magistrates but that, however imperfectly, the investigative functions of the police are integrated into the criminal process and responsive to its demands, rather than to an entirely separate definition of their role. There is far more to be learned from the strengths and weaknesses alike of the institutional structure of the French police and its relationship to criminal prosecution than we are told simply by a comparison of exclusionary rules there and here.

The absence of direct judicial supervision of criminal investigation in France is not repaired, Goldstein and Marcus believe, by the trial. Although in theory the trial is "an active inquiry by the court into the defendant's guilt,"[25] for the "simpler and more routine cases,"[26] which are the majority, the Continental trial is, they assert, scarcely distinguishable from the entry of a guilty plea before a judge who conscientiously inquires into the basis of the plea before accepting it. The authors, however, say scarcely anything about the conduct of a French trial except to note that proceedings in the *tribunal correctionnel* may be swift, even "perfunctory," if the accused does not contest his guilt; in such cases, "the key to the sufficiency of the evidence and accuracy of the charge lies more in the dossier than in the trial itself."[27]

Goldstein and Marcus do not suggest that a searching inquiry of contested facts is not available to an accused charged with a *crime* or a *délit*. Rather they claim that an accused is subject to pressure comparable to that of plea bargaining in this country not to contest the charges. Just as here, they say, dispositions are "plainly affected by what the prosecutor or judge may do for the accused, and what he may do for them."[28] Most of their concrete observations about French practices, however, point the other way. They note that *procureurs* consistently deny that they engage in practices comparable to plea bargaining.

> [*Procureurs*] insist that they do not reward confessions and cooperation with a favorable exercise of their discretion not to charge. They express suspicion of informers and hostility toward

24. *See* p. 1560 *infra*.
25. *Myth of Judicial Supervision* at 265.
26. *Id.* at 268.
27. *Id.* Goldstein and Marcus' references to the *dossier* in this part of the discussion considerably undercut their earlier suggestion that it is comparable to an American police report.
28. *Id.* at 270.

> bargaining and profess to leave considerations of mercy to the courts. The system gives them the authority but not the inclination to drop the cases of helpful offenders; historic deference to the judge predisposes prosecutors to send cases on for trial and whatever amelioration the court may provide.[29]

Nor does any of their information from other sources contradict the *procureurs'* description. The authors report that while there may be "conversations between prosecutor and defense counsel . . . there is little or no talk of 'trading' a confession for the reduction or 'correctionalization' of the charges."[30] In sharp contrast with this country, where prosecutors and defense counsel acknowledge that they bargain and defense counsel in particular often assert their special ability to obtain a favorable bargain, in France plea bargaining is contrary to practice and to professional ethics alike.

How then do Goldstein and Marcus conclude that plea bargaining, or a close analogue, is a part of the French process? Aside from some general observations that in Europe, as here, a prosecuting official may have the power to deal leniently with an accused who cooperates, they rely entirely, despite what they were told, on the practice of "correctionalization": when the *procureur* "correctionalizes," "he is, in effect, offering an accused a lesser sentence for a *délit* in exchange for a waiver by the accused of the full process that he would have if he were charged with a *crime*."[31]

This account of "correctionalization" as crypto-plea-bargaining would be unrecognizable to the persons who are supposed to engage in it. Starting once again from their own model, Goldstein and Marcus describe the situation of a French accused as if he were entitled to a judicial investigation, which he sacrifices in exchange for the certainty that his sentence will not exceed that prescribed for a *délit*. He is thus made to resemble the American defendant who gives up a trial for some benefit in sentencing. But it would startle all of those involved, the accused not least, to suggest that he has given up something when he does not insist on being prosecuted for a more serious offense. In France, unlike the United States, the seriousness of the accusation does have a bearing on the process of prosecution, and that has nothing to

29. *Id.* at 277 (footnote omitted).

30. *Id.* at 269.

31. *Id.* at 277. Perhaps not quite convinced themselves that "correctionalization" is as close an analogue of plea bargaining as they suggest, they add: "And the German experience suggests that if French prosecutors are as inflexible as they claim, the French police may be exercising more discretion in charging than officials there admit." *Id.* (footnote omitted). Even if we credit such evident conjecture, it has little to do with plea bargaining.

do with the accused's acceptance of a deal.[32] The *procureur* makes the decision to "correctionalize" without discussing it with the accused or his lawyer. The accused ordinarily has no reason to suppose that the more elaborate proceeding for a *crime* would give him an advantage, lost if he pleads guilty, comparable to the American defendant's chance for an acquittal.

Unlike the American defendant who pleads guilty, a French accused who accepts "correctionalization" of the offense is not bound to accept the prosecution's evidence against him. No doubt an accused sometimes cooperates, in a sense unwillingly, because he hopes to benefit in some way. But his cooperation is not a condition of "correctionalization" explicitly or implicitly. The accused can, and often does, put the prosecution to its proof. He can claim his complete innocence of the charges, question the evidence against him, and present his own, without risking the loss of his side of the supposed bargain. In sharp contrast, the American defendant risks rejection of his guilty plea unless he corroborates the charges.[33] Before the *tribunal correctionnel* as much as before the *Cour d'assises,* which judges *crimes,* conviction depends on the proof of guilt contained in the *dossier* and presented to the court.

Part of the explanation for Goldstein and Marcus' Americanized account of French criminal procedure is their overriding presupposition that investigative and prosecutorial functions are necessarily separate from judicial functions and cannot be performed with the attributes that we associate with the latter. So they assume that the "judicial responsibility" for which they were searching can only mean supervision by a judge of other officials, the police and prosecutors. The possibility that "judicial responsibility" might in some respects be provided by a redefinition of roles and integration of functions is ignored. Insistence that, in this context, a rose is a rose is a rose makes good sense if one has exclusively in mind the American criminal process. Not only are the prosecutorial and investigative functions separate from the judicial function in this country, but it is also a matter of

32. *See* p. 1551 *supra.*

33. Goldstein and Marcus state that an American judge who carefully makes the required inquiry into the "factual basis for the plea" before accepting it conducts "a brief 'inquisitorial' inquiry that bears striking similarities to the uncontested Continental trial." *Myth of Judicial Supervision* at 268-69. We question whether many judges do regularly review the prosecutor's files, question witnesses, or examine the defendant as thoroughly as Goldstein and Marcus suggest. Even if that is sometimes the case, many American observers wonder whether such inquiries do not simply oblige the defendant to lie so far as is necessary to induce the judge to accept the plea. Unlike the French accused, an American defendant who wants to plead guilty has everything to lose by asserting himself.

principle that they be kept so. It is just that principle of separation, however, that has been rejected in France by long tradition. There are substantial links between prosecutorial and judicial functions unlike the alignment here, where district attorney and defense counsel share a common function as lawyers that is distinguished sharply from the role of a judge. Both the *procureurs* and the *juges d'instruction* are part of the magistracy, the former called *magistrats du parquet* and the latter *magistrats du siège. Magistrats* receive professional training in common, which includes the work of both branches of the magistracy and is distinct from the training of private attorneys. *Magistrats* of both types belong to common professional associations. Over the course of their careers, it is not uncommon for *magistrats* to change office from *magistrat du parquet* to *magistrat du siège,* and the reverse.[34] Goldstein and Marcus disregard all of this, evidently because it is a "resort to fictions" to assert that the *procureur* is anything but an American prosecutor. We do not suggest that the combination of investigative or prosecutorial functions with judicial functions be approved or imitated uncritically.[35] It is one thing, however, to conclude on the basis of close observation that such combination has been, or is likely to be, unsuccessful, quite another to label it a "fiction" and let it go at that.

Germany

Goldstein and Marcus observe that in Germany the police perform most criminal investigation. Once again they note that the American remedy of excluding evidence illegally obtained by police is not followed. Therefore, they conclude, "pretrial investigation follows Code requirements only as much as the police choose to adhere to them."[36] While they add that the requirements "take their force through the degree of obligation felt by the police to follow legal rules,"[37] they say

34. 2 R. MERLE & A. VITU, *supra* note 10, at 202.

35. Some critics of Continental procedure believe that if the prosecutor acquires some judicial attributes, it is also likely that the judge will acquire some of the attributes of a prosecutor and lack the neutrality that a judge ought to have above all. That has been a serious concern in France and some other countries, a partial response to which has been an effort to increase the independent responsibilities of defense counsel along the lines of our accusatorial model. Undeniably, an effort to "judicialize" the prosecutor's function in this country without guarding carefully against an unintended reverse effect would be ill-advised. The judicial role need not be conceived as indivisible; combining prosecutorial and judicial attributes at some stages of the process for some purposes does not entail a similar combination at other stages involving different officials.

36. *Myth of Judicial Supervision* at 262.

37. *Id.*

nothing about the carefully developed institutional framework for ensuring that the obligation is not only felt but is honored.

German police forces are relatively large, they are organized or coordinated from the state level, and they have many grades of rank and compensation. Each force follows meritocratic promotion policies, for whose good order the parliamentary minister of the interior for that state is responsible. This system gives the policeman a direct incentive to avoid generating citizen complaints that will remain in his personnel file throughout his career. There is an extensive statutory procedure, including provisions for both administrative and judicial sanctions, for investigating complaints of misconduct. A designated departmental superior is obliged to investigate any citizen complaint and to state reasons for his conclusions. The complainant can secure review of this action by laying a fresh complaint with the next higher departmental superior, who must also justify his conclusions in writing. The requirement of a written statement of reasons at each level is meant to deter intradepartmental coverups. When a complaint is sustained, sanctions ranging from rebuke to dismissal with loss of pension rights may be imposed.[38]

When the policeman's conduct has violated the criminal law, the citizen makes his initial complaint to the public prosecutor,[39] and disciplinary proceedings usually take place after the criminal proceedings in the ordinary courts have been completed. Americans are accustomed to regard criminal proceedings as a virtually hopeless remedy for police misconduct. Consider, however, the stern German handling of the case of Otto N——, a policeman in the state of Baden-Württemberg, who was investigating a complaint against a teenage boy alleged to have shot a neighbor's cat with an airgun. There was considerable evidence against the boy but he resisted confession. In the course of interrogation at the police station the policeman first slapped the boy and then punched him a number of times. The boy's father instituted

38. In Baden-Württemberg, for example, the superior may in a less serious case impose (1) a warning, defined as an official disapproval accompanied by an instruction to the offending officer to avoid the disapproved conduct in the future; (2) official censure; or (3) a fine not to exceed one month's salary. These sanctions are entered on the personnel file of the policeman and will affect his prospects for promotion and job preferment. In more serious cases the departmental superior must take steps that will bring the matter before the disciplinary chamber at the administrative court. The available sanctions include (1) reduction of salary by as much as one-fifth for as long as five years; (2) denial of otherwise applicable salary increases; (3) demotion to a lower rank; (4) dismissal; and (5) reduction or denial of pension rights. LANDESDISZIPLINARORDNUNG §§ 4-13 (1962), *reprinted in* GESETZE DES LANDES BADEN-WÜRTTEMBERG Stat. No. 51, at 3-5 (G. Dürig ed. 1977).

39. Regarding the prosecutor's legally enforceable duty to prosecute, see p. 1563 and note 54 *infra*.

criminal proceedings, and the policeman was sentenced to a year's imprisonment for the offense.[40]

Goldstein and Marcus are misleading when they say that actions "to redress grievances against the police . . . are [seldom] brought, and they are not likely to be successful."[41] If a system meant to deter abuse has succeeded in its purpose, actions to remedy abuse ought to be relatively infrequent. If every complaint is investigated, a considerable proportion ought to be determined in favor of the policeman. Whether or not the Germans have been as successful in deterring and punishing police misconduct as most German legal academics and other law professionals believe is a question that would reward careful and extensive empirical study. The generalities on which Goldstein and Marcus rely do little to answer the question. Indeed, the only concrete examples they mention are cases of *successful* prosecutions of police officials in Augsburg.[42] It is significant that where there are a press and a parliamentary process as visible and outspoken as in modern Germany, political discussion knows no real counterpart to the bitter American debate about police abuse and exclusionary rules.

Goldstein and Marcus report, evidently on the basis of their interviews, that German prosecutors deny that they exercise the discretion in bringing charges that is characteristic of an American prosecutor. Nevertheless, they discount their own findings and conclude that in Germany as well as in the other systems they observed, prosecutorial "[d]iscretion is exercised . . . for reasons similar to those supporting it in the United States."[43] In truth, the Germans have been remarkably successful in eliminating discretion from the prosecution of serious crime.

The basic statutory design is straightforward.[44] Section 152(II) of the Code of Criminal Procedure requires the German prosecutor to

40. Judgment of Aug. 31, 1961, 2d Grosse Strafkammer des Landgerichts Tübingen, KLs 15/61, *aff'd*, Nov. 28, 1961, 1st Strafsenat des Bundesgerichthofs, 457/61. We are grateful to Professor Gunther Arzt, Erlangen University, who recollected the case from his clerkship (*Referendar*) days, for obtaining copies of the judgments for us. The policeman in this case was also convicted of two unrelated lesser counts of misconduct and sentenced to a combined term of one year and one month. Departmental proceedings were, of course, also taken.

41. *Myth of Judicial Supervision* at 261 (footnote omitted).

42. *Id.* at 261 n.55.

43. *Id.* at 280.

44. In the 1970s a substantial body of literature has been produced by or for Americans explaining the purpose, the origins, and the operation of this scheme. *See, e.g.*, Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468 (1974); Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970); Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

prosecute "all prosecutable offenses, to the extent that there is a sufficient factual basis."[45] This so-called *Legalitätsprinzip*, the rule of compulsory prosecution, denies the German prosecutor all power to decline to prosecute where criminal liability is provable. It is, however, limited by section 153(I), which permits nonprosecution for misdemeanors (*Vergehen*) if the culprit's guilt can "be regarded as minor" and "there is no public interest in prosecuting."[46] All felonies (*Verbrechen*) and all misdemeanors that cannot be excused under the two criteria of pettiness must be prosecuted.[47]

A crucial corollary of this system is that there can be no charge or plea bargaining in cases of serious crime. The prosecutor who is duty-bound to prosecute in every such case lacks authority, for example, to offer to reduce the charge in return for a concession of guilt. The rule of compulsory prosecution requires him to take the case to trial in its strongest and most inclusive form.[48] If he does not, the court is empowered to correct his error.[49] And even if the accused admits his guilt, a trial must be held at which proof will be taken to establish the material facts.

German trial procedure is relatively rapid,[50] so the prosecutor has no particular incentive to try to avoid trial even if he could. The prosecutor's pretrial dossier facilitates the trial, because the trial judge works from it when he interrogates witnesses and the accused. The prosecutor is under a duty to investigate thoroughly and impartially, and the dossier contains exculpatory as well as inculpatory evidence.[51]

45. StPO § 152(II) (1977).

46. *Id.* § 153(I).

47. There are a few exceptions provided by statute, of no quantitative importance, collected in Langbein, *supra* note 44, at 458 n.48.

48. There is one inconsequential exception permitting nonprosecution of unimportant collateral offenses "if the punishment . . . to which [such prosecution] can lead is negligible compared with a punishment . . . imposed or anticipated against the accused for another act." StPO § 154 (translated in J. Langbein, Comparative Criminal Procedure: Germany 159 (1977)).

49. *Id.* § 206, *discussed in* J. Langbein, *supra* note 48, at 9.

50. *See* J. Langbein, *supra* note 48, at 77 (summarizing data from Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. Leg. Stud. 135, 149-51 (1972)).

51. This nonadversarial prosecutorial practice also bears importantly on another mistake in the Goldstein and Marcus article. The authors say: "The German prosecutor . . . may take a case to trial without any prior formal proceedings; there is no analogue of a preliminary hearing or a grand jury." *Myth of Judicial Supervision* at 262. In fact, German procedure has rather a close analogue to the Anglo-American preliminary hearing, which is called the *Zwischenverfahren*, literally the in-between procedure, in the sense of being between pretrial investigation and trial. In this phase of the procedure, the trial judge reviews the prosecutor's motion to require the accused to stand trial, StPO §§ 199-210 (1977), according to a standard that amounts to probable cause, *id.* § 203.

The code makes provision for the accused to contest the prosecutor's motion, and for the court to investigate the submissions of the accused by a variety of means, including the taking of evidence. While contested preliminary proceedings may be quantitatively less

It is made available in advance of the trial to the accused and his defense counsel,[52] who can by motion require the prosecutor to investigate defensive claims and evidence that he has overlooked on his own.[53] Surprise and forensic strategy are largely eliminated from the trial, which is usually straightforward and speedy.

Like the police, German prosecutors are members of a career service with strictly meritocratic promotion standards. All decisions not to prosecute are reviewable on citizen complaint (*Dienstaufsichtsbeschwerde*), and every complaint and its resolution are entered in the relevant personnel files. Even in cases of a lesser misdemeanor where the rule of compulsory prosecution does not apply, the citizen complainant is entitled to review by the office of the state prosecutor-general, which must issue a statement of reasons if the decision not to prosecute is endorsed.[54]

Goldstein and Marcus present no evidence that the German rule of compulsory prosecution is anything less than completely effective. They point to no case in which a German prosecutor declined to prosecute a serious crime when the evidence known to him would have supported conviction, and mention no report of such a case from those whom they interviewed or from anyone else. Yet they assert:

> Though prosecutors deny that they use evidentiary grounds to conceal policy-motivated dismissals, the denials lose much of their force when we consider the large number of cases dropped for lack of evidence. In 1970, of 3.3 million reported cases, sixty-eight percent were terminated by the prosecutor on such grounds. Even

important in German than in American practice, Goldstein and Marcus do not address the main reason, which is well-known. German procedure aims to terminate unsupportable cases at the pretrial investigatory stage by imposing on the prosecutor the responsibility to investigate exculpatory as well as inculpatory circumstances. *Id.* § 160(II). The police have a similar responsibility. *See id.* § 136(II). Except in simple matters, the prosecutor is required to interview a suspect before bringing charges against him. *Id.* § 163a(I). The suspect who has an easy answer to the allegations against him will disclose it then.

German defense lawyers interviewed by one of the authors report that they do not have difficulty in getting prosecutors to investigate defensive contentions fully and that prosecutors generally do decline to prosecute when exculpatory evidence demonstrates that there is inadequate ground for making an accused stand trial. But when the prosecutor does err in exercising his charging function, the *Zwischenverfahren* is available to the accused to correct the error.

52. StPO § 147 (1977).

53. H. Schorn, Der Strafverteidiger: Ein Handbuch für die Praxis 116 (1966).

54. In cases of serious crime where the rule of compulsory prosecution does pertain, the prosecutor may still decline to prosecute for want of adequate factual or legal basis. However, in such cases the victim is entitled not only to departmental review but also to judicial review by the state supreme court. These judicial proceedings to compel prosecution (*Klageerzwingungsverfahren*) are rare, because the statute requires that departmental review precede judicial review, and most mistaken decisions not to prosecute are corrected at the departmental level. *See* Langbein, *supra* note 44, at 463-66.

> though these figures include crimes reported to the police but not solved, they point *plainly* to the exercise of some charging discretion by the prosecutor.[55]

These statistics, which Goldstein and Marcus attribute to an unpublished and unofficial source, are highly misleading. The official publication, *Polizeiliche Kriminalstatistik*, gives the figure of 2,413,586 reported crimes, including all felonies and all misdemeanors other than traffic violations, for the same year.[56] The vast majority of the cases not cleared were relatively less serious misdemeanors affecting unguarded property for which it is difficult to obtain evidence; for example, the police cleared less than twenty percent of the 133,459 cases of bicycle theft and 212,726 cases of theft of property from motor vehicles that were reported to them.[57] Goldstein and Marcus present no evidence at all that these statistics represent anything other than what they purport to be, unsolved and preponderantly petty crimes. Yet the authors rely on these figures for the proposition that German prosecutors are disobeying the rule requiring them to prosecute all *provable* cases of *serious* crime.

Goldstein and Marcus then shift the finger of suspicion back to the police.[58] Even if the prosecutor behaves, the police may dupe him, since he will seldom second-guess their determination that a case should be terminated for lack of evidence. But the authors do not mention any case in which the police have pretended that evidence was unobtainable when they in fact knew better. Of course, German police departments exercise managerial discretion in allocating manpower to the exigencies of the moment: murders receive more extensive investigation than minor crimes. But Goldstein and Marcus have adduced nothing to suggest that such discretion is exercised on any irrational, arbitrary, or improper basis.

Goldstein and Marcus misconceive the scope and the institutional context of the German rule of compulsory prosecution when they conclude that it "demands the impossible: full enforcement of the law in a time of rising crime and fierce competition for resources."[59] The rule

55. *Myth of Judicial Supervision* at 275 (emphasis added) (footnote omitted).

56. There were also just under 2000 state security crimes. BUNDESKRIMINALAMT WIESBADEN, POLIZEILICHE KRIMINALSTATISTIK 1970, at 1, 31 (R. Holle ed. 1971). The larger figure given by Goldstein and Marcus probably includes 900,000 traffic violations.

57. *Id.* at 14, 107.

58. *Myth of Judicial Supervision* at 275-76. Here, as they argue on another point about France, the authors shore up an unsupported conjecture about the prosecutor with an equally unsupported conjecture about the police. *See* note 31 *supra*.

59. *Myth of Judicial Supervision* at 280.

of compulsory prosecution is limited by statute to cases of serious crime precisely in order to take account of the factor of resource insufficiency and to make the necessary adjustments in the morally less troublesome sphere of lesser crime.[60] The rule of compulsory prosecution works as smoothly as it does because proper incentives are created for the professionals to obey it, and because prosecution is geared to an efficient nonadversarial trial procedure that does not create pressure to avoid ordinary trials in cases of serious crime.

Turning to lesser misdemeanors where the rule of compulsory prosecution does not apply, Goldstein and Marcus describe the disposition of minor cases under the nontrial "penal order" procedure[61] as a "direct analogue of the American guilty plea."[62] They do not, however, give adequate emphasis to the differences that weaken that analogy. The penal order lacks characteristics that most people, including so far as one can tell Goldstein and Marcus themselves, regard as central to the American plea bargaining procedure. First, a penal order is not available at all for a felony or serious misdemeanor—the important sphere of American plea bargaining.[63] Second, there is no bargaining; the accused is offered the disposition of a penal order on a take-it-or-leave-it basis. Third, if the accused rejects disposition by a penal order in favor of a trial, the prosecutor virtually never recommends, nor does the court impose, a penalty higher than that contained in the penal order. The accused is not pressured to waive his right to trial by the threat of an increased sanction if he demands trial and is convicted.[64] The likely analogue in this country is a ticket and fine for speeding, which the motorist can either accept as a disposition or con-

60. StPO § 153 (1977).

61. The prosecutor moves in the local criminal court for the issuance of the penal order. The prosecutor drafts the proposed order, and in theory the judge reviews the file and the order before propounding the order as his own. In practice this review is generally cursory, and the order customarily contains what the prosecutor has proposed. The order has the form of a provisional judgment issued by the court: "Unless you object by such-and-such date, you are hereby sentenced to such-and-such criminal sanction(s) on account of such-and-such conduct which offends such-and-such criminal proscription(s)." The document instructs the accused that if he makes timely objection (within one week) he is entitled to a criminal trial. If he objects, the penal order is nugatory and an ordinary criminal trial will take place as though the penal order had never been issued.
Langbein, *supra* note 44, at 456.

62. *Myth of Judicial Supervision* at 267. The mechanical resemblance to the Anglo-American guilty plea is noted in Jescheck, *supra* note 44, at 515, and Langbein, *supra* note 44, at 456.

63. *See* StPO § 407 (1977) (penal order procedure authorized only for offenses not punishable with imprisonment). Until 1975 a maximum of six months' imprisonment could be imposed under a penal order.

64. *See* Langbein, *supra* note 44, at 457.

test, in which case he will have a trial. While most of us accept the fine without contest, it would be odd indeed to regard the procedure as involving plea bargaining. Like the American who declines to contest a traffic ticket, the German who accepts a penal order may save himself the cost and nuisance of trial, but he cannot affect the charge or the sentence. Penal order procedure is a mode of prosecution, not a vehicle for selective prosecution.

Only in its arrangements for conditional nonprosecution of petty misdemeanors does German procedure admit any element of negotiation in disposing of criminal charges. It will be recalled that section 153 of the Code of Criminal Procedure permits the prosecutor to decline to prosecute in cases of provable criminal liability if the culprit's guilt can be regarded as minor and there is no public interest in prosecution. Section 153a allows the prosecutor to make such a disposition conditional on restitution to the victim or some other comparable act. Once again, however, the exercise of discretion is limited to minor cases,[65] and the extent and manner of bargaining bear scant resemblance to the negotiation of a plea of guilty to a felony in this country.

As for cases of serious crime, Goldstein and Marcus perceive "a more subtle analogue"[66] to our guilty plea in German trials in which the accused does not dispute the main charges against him. "The uncontested trial is brief; few witnesses are called; and the judge sees his task in calling witnesses less as developing the facts than as confirming the confession."[67] Of course a trial is likely to be shorter if the accused has confessed. As the authors themselves state: "If there is no apparent reason for the judge to question a witness closely and if there is no encouragement from counsel or the parties for him to do so, the result is a trial that is not especially probing and is unlikely to stray far from

65. Herrmann's study, on which Goldstein and Marcus rely, *see Myth of Judicial Supervision* at 243 n.8, indicates that section 153a has been used essentially for traffic and other trivial misdemeanors. Herrmann, *supra* note 44, at 489-93.

66. *Myth of Judicial Supervision* at 267.

67. *Id.* at 267-68. The reference to witnesses not being "called" is misleading. Unless there is a pretrial confession in the dossier, the trial court does not know in advance whether an accused will contest or not. The court will, therefore, summon all the relevant witnesses. At the trial the accused is always heard first. If he then confesses, the court will usually call only some of the potential witnesses, and if they confirm what the accused has confessed the court will not call the others.

Casper and Zeisel measured trial time and deliberation time in a sample of over 500 German trials. In the 41% of their sample cases in which the accused confessed, they found that less trial time was needed, but that "the differences are much smaller than one would expect on the basis of American experience. The deliberation time differs hardly at all, suggesting that the bulk of deliberation time [even in contested cases] is devoted to the sentencing issue." Casper & Zeisel, *supra* note 50, at 150.

the dossier."[68] Such trials are simply as probing as the circumstances require, bearing in mind the rule that all doubts are to be resolved in favor of the accused. Goldstein and Marcus have no basis for the conclusion that such trials depart from "the full and independent judicial inquiry promised by inquisitorial theory."[69] When they liken such trials to the rapid proceeding for "the taking of a guilty plea in an increasing number of American jurisdictions,"[70] they seem to treat a case in which guilt is clear as if it were, somehow by definition, a case in which guilt is not proved.

As we have indicated, to a considerable extent Goldstein and Marcus are themselves captives of the myths they seek to explode. No practitioner or scholar in the countries they visited would assert that the procedures followed in the large majority of routine cases include the elaborate and extended investigative and adjudicative processes that characterize the most difficult and serious cases. If such a misconception can indeed be derived from some of the writings in English that Goldstein and Marcus exclusively quote, there is all the more reason not to rely only on such sources for descriptions of what actually occurs. We confess that we are baffled by an article in which the authors purport to describe the criminal procedures of three foreign countries, but refer to none of the literature of those countries and acknowledge that they have not even "reviewed" the foreign literature.[71] They

68. *Myth of Judicial Supervision* at 266.
69. *Id.* at 266-67.
70. *Id.* at 268.
71. *Id.* at 245 n.16. The authors explain their disregard of French, German, and Italian literature with the observation that scholars in those countries confirmed "the view that there is little or no empirical description comparable to that available about the American system." *Id.* While full-dress empirical studies have not been made in those countries as often as they are here, the foreign literature is far from barren of material that describes actual practices, often critically.

For France, examples of readily available sources of such material are ASSOCIATION NATIONALE DES AVOCATS DE FRANCE ET DE LA COMMUNAUTE, LE BARREAU FACE AUX PROBLEMES ACTUELS DE LA JUSTICE PENALE (1969); A. MELLOR, LES GRANDS PROBLEMES CONTEMPORAINS DE L'INSTRUCTION CRIMINELLE (1952). There are many legal periodicals and publications of lawyers' and officials' professional associations that publish articles about criminal procedure, among which can regularly be found some that discuss concrete current problems. The *Revue de Science Criminelle et de Droit Pénal Comparé* publishes a bibliography of current writing. Several publications, including *Recueil Dalloz Sirey* and *La Semaine Juridique*, accompany the text of current legislation with a list of references to related legislative documents (*travaux préparatoires*), such as commission reports; those relating to criminal procedure are a source of considerable information. In addition, the standard general treatises, such as R. MERLE & A. VITU, *supra* note 10, and G. STEFANI & G. LEVASSEUR, *supra* note 10, as well as more specialized works, *e.g.*, P. CHAMBON, LE JUGE D'INSTRUCTION (1972), and the large number of practice manuals for lawyers and officials, are perhaps too

evidently made scant observations of their own in each of the countries and rely for their conclusions on interviews framed in advance on the basis of the literature in English, which they themselves say contains little except descriptions of the criminal codes.[72] We wonder how seriously they would receive an article about American criminal procedure written in French by a Frenchman who had read none of the literature available in this country and whose personal observations were similarly limited.

Because we agree with Goldstein and Marcus that the time may be propitious for a critical assessment of criminal procedure in this country, we believe that the matters they discuss in their article are of considerable importance. We agree emphatically that the issues ought not be framed as a choice between "the adversarial model" and "the inquisitorial model,"[73] especially if the two models are presented as theoretical abstractions unrelated to the conditions in which they are or might be realized. The point made at the conclusion of their article—that any procedures that we devise must allow the relatively swift, summary disposition of most cases and must reserve painstaking and costly procedures for the few that are unusual, because of their seriousness or complexity or the inconclusiveness of readily available evidence[74]—is correct, and it is fundamental to any effort to improve our criminal process. All of that is, indeed, borne out by the experience elsewhere.

On the other hand, we think there is far more to be learned from other countries' experience, particularly that of France and Germany

much oriented to the codes for common-law tastes, but there is much to be learned from them about the systems they describe.

The major German treatises on criminal procedure collect and organize citations to the case law and to a vast periodical, monographic, and *Festschrift* literature. LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ (22d ed. 1971-74) (3 vols.); E. SCHMIDT, LEHRKOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ (3 vols. & Supps. 1957-70). The one-volume work that professionals typically carry with them in court, T. KLEINKNECHT, STRAFPROZESSORDNUNG (33d ed. 1977), is a marvel of concision. Two leading journals specialize in criminal law and procedure, *Zeitschrift für die gesamte Strafrechtswissenschaft* and Goltdammer's *Archiv für Strafrecht*. Further, the leading general law journals such as *Juristenzeitung* and *Neue Juristische Wochenschrift* contain frequent reportage and criticism of developments in the field. For outstanding examples of German empirical work on aspects of criminal procedure, see E. KLAUSA, EHRENAMTLICHE RICHTER: IHRE AUSWAHL UND FUNKTION, EMPIRISCH UNTERSUCHT (1972) (concerning selection of lay judges in criminal and other courts) and K. PETERS, FEHLERQUELLEN IM STRAFPROZESS (1970-74) (3 vols.) (concerning cases reopened after judgment upon discovery of new evidence, etc.). A recent monograph on the rule of compulsory prosecution collects in its bibliography about 150 German titles that the book's author found worth consulting. T. WEIGEND, ANKLAGEPFLICHT UND ERMESSEN 193-99 (1978).

72. *Myth of Judicial Supervision* at 245.

73. *Id.* at 283.

74. *Id.*

which we know best, than Goldstein and Marcus allow. Summary procedures for determining guilt are not necessarily all alike just because they are the primary means of disposing of large numbers of cases. It is no less important to ask which system "more fairly and accurately searches out the truth"[75] when we are comparing modes of simple, swift process than when we are comparing more painstaking procedures. We do not suppose that Goldstein and Marcus believe otherwise. Yet along with their dismissal of a comparison of unreal prototypes, they seem very nearly to dismiss a comparison of what actually takes place.

Much as we are encouraged by the effort to learn about criminal process elsewhere, we are also dismayed by the assumption that observations can be made accurately and interpreted without laying aside preconceptions engendered by the procedures we want to improve. It is simply pointless to study practices different from our own if one is guided by an *a priori* assumption that after all they cannot be very different. We do not ask for uncritical acceptance of foreign judgments that other procedures are preferable to ours. We do not assume that the social values and objectives that determine the criminal process abroad are in all respects the same as ours or that even when they are, what works elsewhere must work for us as well. We do believe that it is significant that dissatisfaction with criminal justice is greater and deeper at all levels, professional and public, in this country than it is in Western Europe; we believe that it is foolish and dangerous to suppose that the whole explanation for our dissatisfaction can be found in a greater commitment to the ideal of justice or a more acute perception of reality. If we look elsewhere expecting to find only what is familiar, our expectations will easily be confirmed. We shall, then, all too comfortably confuse the familiar with the necessary.

75. *Id.*