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REASSESSING THE ROLE OF THE TRIAL JUDGE IN VERDICTLESS DISPOSITIONS OF CRIMINAL CASES

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THE PASSIVE JUDICIARY. By *Abraham S. Goldstein*. Baton Rouge: Louisiana State University Press, 1981. Pp. 104. $17.95.

Selection is the watchword of criminal prosecution in this country: not everyone is prosecuted for all he might be. Some, though chargeable, are not charged at all. Others — and a substantial proportion — are prosecuted and/or punished less than fully.[1] Selection, moreover, is neither entirely fortuitous nor predominantly private (as in the litigation of civil actions).[2] Rather, government choice, principled in a sense, governs the selective process. Whether to investigate, whether, whom, and of what offense to accuse are decisions of the first level. Next come a group of choices concerning the resolution of a lodged charge: principally, discontinuation of the case, disposition by a less onerous conviction than the crime(s) charged or chargeable, and the appropriate severity of punishment.

By law, rule or custom, these various choices are assigned to police or to prosecutors (not always a unitary agency) or to judges. It would be simplistic, however, to view the office *ultimately* responsible for any of these decisions to be *solely* responsible. Obviously, the three organs interact and vitally influence each other. External agencies too have an influential part: newspeople, the defense bar, perhaps others.[3] So also conditions of the sys-

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1. The figures are familiar. Eighty to ninety percent of criminal convictions are by guilty plea. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL, 3 & n.1 (1966) (around 90 percent); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 197 (1980) (83 percent in federal courts in 1979). While we have no compilation of the reduction of charges or sentence exchanged for these guilty pleas, it is safe to surmise that some consideration was acquired by those who "pleaded out." I do not venture whether such consideration, in a significant proportion of the cases, results in less punishment than "deserved." I suggest only that the result in many cases is probably some degree below what the legislature or "public" had in mind for the crime in question.

2. Professor Abraham Goldstein has noted that the origins of the adversary mode of prosecution run back to an age when state participation was rudimentary and responsibility to bring on a case was predominantly private. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1017 (1974). Yet in today's world, discussion of prosecutorial choice must be an analysis of state action, and of course, it is thus that Professor Goldstein treats it.

3. Even a legislature, by enacting discretion-inhibiting sentencing laws, may exert an influence on prosecutorial decisions in charging and in seeking pleas to lesser crimes. *See, e.g.*, Alshuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for*

tem itself exert pressure: budget, congestion of the docket, multiplication of ancillary proceedings, population of the prison system, etc. As the process lumbers toward the conclusion of a case, it is often difficult to detect the agency of real responsibility. The discretionary choices of the formal decisionmaker are usually unarticulated,[4] and the influences of the other strands in the network are frequently inchoate.

Identifying the decisionmaker is normally the post-facto delight of newspeople, picking at the rubble of a visible case gone awry to discover some supposed error of judgment in the debris. Scholars too have enjoyed the play of discretion in the process, and sometimes seek to isolate the authorities, the better to rationalize or criticize their exercises of power.[5]

One such is Professor Abraham Goldstein.[6]

As his title suggests, Professor Goldstein is troubled by the perceived fact that trial judges in many jurisdictions do not take an active role in the decision to reduce charges and dispose of criminal cases by less than a full verdict of guilty. His thesis: a more "aggressive" judicial "inquiry" into the factors inducing prosecutorial decisions on dismissals and charge reductions would improve the process and enhance development of a "common law of prosecutorial discretion" (pp. 7-8).

In leafing through a work of scholarly comment — particularly a contribution by so thoughtful and studious an author as Professor Goldstein — I am often bemused by the question: how did he choose the subject of the work (here, originally, the Edward Douglass White lecture delivered at

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"Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550 (1978); Pugh & Radamaker, *A Plea for Greater Judicial Control Over Sentencing and Abolition of the Present Plea Bargaining System*, 42 L.W.U. L. REV. 79 (1981).

4. When there is a requirement of articulation it is often so broad that the required statement gives no clearer voice to the underlying rationales than the silence it displaces. Consider the Federal Immunity Act of 1954, 18 U.S.C. § 3486(c), which requires that the prosecutor deem the grant of immunity to be in "the public interest." The United States Supreme Court held that a judge has no discretion to review a grant of immunity under the Act. While the statute requires the court's approval, the Supreme Court held that the judge may only inquire into whether procedure was followed and may not question the prosecutor's judgment that immunity is in "the public interest." Ullman v. United States, 350 U.S. 422, 432-33 (1956).

5. Professor Albert W. Alshuler is an important contributor to this field: *See* Alshuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV., 50 (1968); Alshuler, *The Defense Attorney's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV., 1059 (1976). Another basic reference for any undertaking in this area is D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966). On the role of the police and prosecutions, *see, e.g.*, Arnold, *Law Enforcement — An Attempt at Social Dissection*, 42 YALE L.J. 1 (1932); Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1969); Thomas & Fitch, *Prosecutorial Decision Making*, 12 AM. CRIM. L. REV. 507 (1976). On the role of the defense counsel *see, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973). On the role of the judge, *see, e.g.*, Gallagher, *Judicial Participation in Plea Bargains: A Search for New Standards*, 9 HARV. C.R.-C.L. L. REV. 29 (1974); Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1972); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).

6. In addition to the book under review, Professor Goldstein has contributed a number of thoughtful pieces bearing on the topic. *See* Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978); Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240 (1977); Goldstein, *supra* note 2; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

Louisiana State University in 1977)? Particularly when the author's apparent mission is critical or corrective, what moved him to shine the light of analysis on this, of all topics? Professor Goldstein gives no hint of the origin of his concern with judicial passivity.[7] He reports no injustices resulting from executive dominance of the choice to prosecute or not to prosecute. He suggests no general or growing uneasiness with arrogance, carelessness, or social dullness among unbridled prosecutors. Where is the evil that drew Professor Goldstein's attention, where is the harm to which he addresses his remedy?[8]

In good academic fashion, Professor Goldstein has constructed a "conflict" in the role of the prosecutor and claims that the Supreme Court has "recognized" that "it might not be possible to reconcile the conflicting roles" (p. 7). The possible impossibility of reconciliation hardly seems the sort of fact that can be "recognized" and thereby established. But, passing the weakness of rhetorical proof, let us examine the nature of the purported infirmity which, according to the author, is now opening hitherto blind judicial eyes and awakening a need for more active judicial participation.

Behind the "quasi-judicial" mask by which prosecutors kept courts docile for so long, the prosecutor is now revealed to be torn between the expectations to "display partisan zeal" and to "practice vigorous advocacy" while at the same time to "conform to constitutional standards" and to "protect the public interest" (pp. 6-7).

It is hard to believe that this is a genuine, much less serious and irreconcilable, conflict. Zeal and vigorous advocacy can be, and normally are displayed and practiced within the strictures of constitutional standards. With rare exceptions, the strain experienced by the zealous prosecutor by the necessity of, let us say, avoiding all reference to excluded evidence is minimal. And even the most vigorous prosecutor, directing an investigation for ex-

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7. At about the same time as he spoke the thoughts in the pages under review, Professor Goldstein with Martin Marcus published *The Myth of Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, *supra* note 6. In it, Goldstein gently suggests that American observers of the continental mechanism of criminal justice may have been too easily captivated by the apparent control of the *juge d'instruction*. *Id.* at 282-83. In setting the stage for his thesis, Goldstein offers a clue as to the germination of the ideas under review. He reports "an emerging concern that American law has been too casual in addressing [charging policies, dismissals, and plea arrangements] — that disposition by agreement of the parties may intrude upon legislative and judicial functions and that the concept of 'inherent' prosecutorial discretion may be inconsistent with the rule of law." *Id.* at 242.

8. Three years before he delivered the lecture on which the book is based, Professor Goldstein published a piece in which he expressed views that are not entirely congruent with his present concern with excessive judicial detachment from the exercises of prosecutorial discretion. In the matter of guilty pleas, Professor Goldstein wrote then:

> Judges have intervened to assure that the defendant has not been coerced or overborne and that the public interest has not been casually bargained away by prosecutors. Inquiries are now made into the factual basis for the plea, the extent to which the defendant understands his legal position and his defenses, and the adequacy of the advice he has received from his counsel. Plea bargaining has been accepted as legitimate, albeit subject to judicial regulation. And such regulation has led to greater judicial involvement with the facts underlying guilty pleas and with the appropriateness of the charges brought and the sentences proposed. In short, American judges have assumed supervisory roles strikingly similar to those of "inquisitorial" judges, while lacking the machinery to implement the roles.

Goldstein, *supra* note 2, at 1023 (footnote omitted).

ample, comfortably types out his probable cause and submits it for a warrant when he decides to conduct a telephone surveillance or other search and seizure. Moreover, the obligation to serve the "public interest," far from presenting an obstacle, defines the work of the most zealous prosecutor. To be sure, the term "the prosecutor" employed freely by Professor Goldstein covers a fairly broad range of individuals, for which a paradigm is difficult to construct. So too, the "public interest" can be variously defined from various perspectives. But surely, one fair definition of public interest which prosecutors would accept is the twin imperative to convict the guilty and to free the innocent. Vigorous persecution of a conscientiously selected target would then appear to be wholly consistent with the "public interest," and is the ordinary business of "the prosecutor."

If Professor Goldstein means to say only that sometimes zeal conflicts with some aspects of the public interest, none would say nay. The "public interest," for example requires individual protection from dubious, politically or egotistically motivated pursuit of the popular villain. Or, the "public interest" calls for a fair trial in which the prosecutor takes no improper advantage of his office to persuade the jury. In such instances of baseless prosecution or overreaching advocacy, however, corrective devices are — and have long been — at hand. Such comparatively infrequent lapses of judgment may indeed be the unfortunate product of partisan enthusiasm overcoming professional restraint, but can hardly be regarded as the inevitable outcome of the complex role of the public prosecutor.

More importantly, errors of this sort do not call for the particular remedy Professor Goldstein prescribes. More active judicial supervision of prosecutors' motions to dismiss and recommendations for disposition is not likely to have much impact on the prosecutor who exceeds the bounds of propriety in his summation nor is it likely to affect the misguided decision of the prosecutor to pursue a flimsy case for the applause of his constituency.

Finally, I do not think Professor Goldstein fairly calls upon the Supreme Court to attest to the existence of the problem he perceives. He cites two decisions. The first is *Coolidge v. New Hampshire*.[9] What may not be immediately recalled about that famous fourth amendment case is that it began as a search by warrant. After some investigation of the murder of a babysitter, the Attorney General decided to search Coolidge's automobile. By formal application, he issued a search warrant sitting in his capacity as justice of the peace. Employment of peace officers and public officials as justices of the peace (not so distant from the ancient origins of the office) was apparently common and unchallenged practice in New Hampshire at the time. Understandably, however, the Supreme Court found the concurrence of roles inconsistent with the "neutral and detached" magistrate contemplated by the framers of the fourth amendment.[10] Invalidation of the formal exercise of judicial authority by the chief prosecutor, however, hardly amounts to "recognition" of the general, inherent conflict of obligation claimed by Professor Goldstein. Similarly, Professor Goldstein

9. 403 U.S. 443 (1971).

10. 403 U.S. at 453.

stretches *Gerstein v. Pugh*[11] somewhat. That case held, basically, that the determination of probable cause to support an accusation should be made or verified by a court, in some fashion. The Court therefore struck down the prosecutor's accusatory information for lack of objective verification of probable cause sufficient to restrain the liberty of the defendant pending trial. Again, to hold inappropriate the prosecutor's performance of a peculiarly judicial function is a far cry from "recognizing" inherent conflicts in the exercise of ordinary prosecutorial decisions relating to charging and discharging.

It is indisputably true that some judges maintain a balanced outlook and sense of proportion. It is equally true that some prosecutors lose theirs. It follows that in some instances, justice is served by judicial assertion at a crucial moment where a prosecutorial position may seriously affect the outcome of a case. From this rather elementary syllogism, however, one must hesitate to derive a theory concerning the operation of discretion or the virtue of regular judicial intervention. Yet, this is the conclusion Professor Goldstein drives toward. He proceeds from principle, as I read him. The principle is that challenge is healthy where discretion rules. Challenge produces articulation, articulation produces standards, and standards mean law (which is good, of course). As he states it, Professor Goldstein's objective is the creation of a "common law of prosecutorial discretion." By this "law" he means to "tame" the prosecutor's discretion by "sharing responsibility for the public interest" with the court (p. 75).

Felix Frankfurter used to write of the "felt need" as the basis for reform. With his scholarly background, I take it the Justice meant to distinguish the felt from the perceived need. Professor Goldstein, I fear, has built his thesis about the scholar's perception, the principle unleavened by experience. Of course, "experience" provides some highly uncertain data. Particularly on the subject of the just distribution of discretion, or the efficacy of challenge and self-justification, reports from the field are rarely detached and often conflicting.

My own testimony, whatever it may be worth, does not confirm Professor Goldstein's perception, either of the problem or of the remedy. In the fourteen years I spent in a prosecutor's office and the occasional visits to courtrooms in the equal number of years since, I have not found judicial interest in the prosecutor's decisions regarding extra-verdict dispositions to be sluggish. While some judges are more passive than others, and some more intuitive, the assertion of a prosecutorial position — particularly in a serious case — that deviated from the norm of expected and customary discretion on bail, disposition, or other subtrial matters, generally faced judicial inquiry and required carefully and persuasively articulated reasons. If a common law of prosecutorial discretion was silently growing out of these events, it was not noticed as such. Whether Professor Goldstein would be satisfied that the practice with which I am familiar follows his prescribed pattern, I cannot be sure. But at least the need for the reform he proposes has not been apparent to me.

More importantly, I am not convinced of the value of the judicial "ini-

11. 420 U.S. 103 (1975).

tiatives" Professor Goldstein recommends, even if the general mood of trial judges were felt to be unduly submissive. At one point, in a slightly different context, Professor Goldstein gives a passing nod to reality when he acknowledges "[t]he criminal justice system is already so burdened that it may not be able to stand any change that might require more time and more money" (p. 71). Against this evident and, to my mind, highly important truth, the author's proposed "initiatives" must be measured. He knows that a simple, routine call from the bench to explain the prosecution's discretionary choice will, sooner or later, be answered by a ritualized rejoinder: "We believe this disposition accords with the interests of justice, your honor, and affords the court adequate scope for punishment" — or some such. Professor Goldstein is obviously not seeking to embellish the formalities. Rather, as Professor Goldstein conceives him, the more active judge "would determine whether dismissals and guilty pleas are based on *accurate* facts, whether they reflect *rational* enforcement policies and *reasonable* interpretations of competing statutory and constitutional provisions, whether the sentences recommended are *sensibly* related to the underlying facts and charges" (p. 68 (emphasis added)).

It's a tall order. A trial judge would have to reach an independent judgment, in as many as nine out of ten cases on his felony docket, usually starting from scratch, on virtually every ingredient of fact, law, and policy behind the proposed disposition. Neither general confidence in the prosecutor's office nor in the process of negotiated settlement relieves the court of the responsibility of full inquiry. Of course, under Professor Goldstein's rather sketchy procedure, the judge may call on the prosecutor for oral justification or dig into the prosecutor's files for verification of the factual basis for a guilty plea. But the judge should exhibit, if only occasionally, his recourse to independent sources by calling witnesses or the victim to challenge the "consensus all too likely to be presented to him by prosecution and defense" (p. 69).

Clearly, it is one thing for the court, called upon to accept a disposition settlement, to view it with care, to elicit from the parties ingredient factors of their mutual choice, to distend the judicial nostrils and follow the scent of abuse, torpor, or poor judgment by deeper inquiry and perhaps rejection of the unjust deal. As I have indicated, I take this to be common and long-standing practice, at least in the better-run courtrooms. It is quite another matter to expect the judge to sign off on every plea or dismissal. No one, presumably, would advocate that such an inordinate burden be laid upon a system — already grievously overloaded with non-adjudicatory determinations — except at the demand of dire necessity. Gross and regular injustice in the prosecutor-dominated, adversary process of negotiation would be the least one would expect the proponent to show. I see no such showing (nor any attempt to do so) in Professor Goldstein's piece, nor am I aware of the prevalence of such a condition. It is difficult, therefore, to take the thesis as a serious proposal for the restructure of the prevalent process and for the redefinition of relationships and responsibilities in it.

It is interesting to have Professor Goldstein's conclusion that prosecutorial prerogative to dismiss a case traces, through the writ of *nolle prosequi*, to the Crown's benevolent check on vindictive private prosecution (p. 12). But, though the demise of private prosecution may remove history

as support for current practice, it hardly undermines contemporary justifications. Professor Goldstein also touches on the history and limits upon the charging discretion of the prosecutor. This aspect of the process is not so easily brought within his prescription for judicial self-assertion as the disposition of lodged charges.

The power to charge is probably the most diffused of those considered by Professor Goldstein. Very few prosecutors' offices in very few cases consider themselves preeminently responsible for the initiation of criminal charges. The largest portion of cases are "brought" by victim complaints or police intervention *in flagrante delicto*. There is no "investigation" to speak of, and certainly no prosecutorial decision to initiate the prosecution. While there may be some exercise of discretionary judgment when the case enters the judicial process, most prosecutors probably would report fairly that in most cases the assessment the prosecutor makes has more to do with the offense, if any, that available evidence will prove than with any other factor. In addition, the prosecutor will remind the scholar that other individuals and agencies frequently contribute importantly to his decision to go with a case: the attitude of the complainant, the assessment of the police officer, the input of the defense lawyer, the grand jury, and often the judge himself at the preliminary hearing or bail fixing. Moreover, he may insist that, at least in his jurisdiction, these other voices are truly independent of his own policies. Even the customary uses, which also play a large part in the ordinary charging decision, are not exclusively of the prosecutor's devising.

All of which leaves what Professor Goldstein may be talking about: the relatively rare cases in control of the relatively few prosecutors who do make the decisions to initiate, and to choose whom to charge and whom, of those chargeable, to convert into a government witness — with the usual compensation. As Professor Goldstein notes, we have had only rare judicial intervention in the decision to charge. Only where facts demonstrate intentional and discriminatory nonfeasance have courts spoken to the question, and even then, it is extremely difficult to order a reluctant prosecutor to undertake an investigation or pursue a prosecution.[12] Unfortunately, Professor Goldstein has not looked deeply into the question whether the systemic insulation of the prosecution's position (in all but the gross instances of indefensible neglect) is or is not functionally advantageous. He has, for example, said little of the possible effects on judicial impartiality from more regular assertion by judges on the question of whom to prosecute and for what. Supervision begets participation, and the judge who participated in the initial decision to prosecute, or to grant immunity, is in an awkward position to hear adverse motions relating to that decision. Nor are other judges as free to pass upon contentions when a colleague had an active role in the challenged choice.

Professor Goldstein has taken note of the Weinfeld-Wright position that a court has little power to compel a prosecution.[13] But he prefers to assert

12. *Cf.* United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

13. United States v. Greater Blouse, Skirt & Neckware Contractors Assn., 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964) (Weinfeld, J.); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 812, at 305 (1969).

the ultimate judicial authority to reject the prosecutor's move to dismiss (and thereby to order the case pursued). Indeed, he would have the trial judge review the original prosecutorial decision not to charge. However, the author does not trouble to explain how, in real courtrooms, the judge could effectively discharge the supervening authority assigned him. Would Professor Goldstein recommend, as a regular feature of the criminal justice system, judicial use of contempt power to compel submission of the executive branch to superior judicial wisdom in the choice to prosecute? Does he rely on a sort of avuncular amity to enforce judicial wishes? Can the prosecutor be brought to serve judicial judgment in this matter, even if Professor Goldstein convinces us that the prosecutorial role should be subservient in these matters? Unfortunately very little professorial attention is accorded such serious questions.

Many Americans have been favorably impressed with the continental system of quasi-judicial control of the investigatory and charging process. Some have recommended engrafting the idea onto our domestic structure.[14] I had not counted Professor Goldstein among that company, however much he may like the way the *juge d'instruction* and dossier system works abroad.[15] If his thesis here is intended to recommend a first step toward the construction of an American analogue, the idea deserves much more thorough exploration than this thin volume provides. Grafts are tricky operations. A device which works well within the entire system in which it developed may prove sour, and perhaps pernicious, in alien soil.

While Professor Goldstein does not offer a principled or reasoned separation among the several discretionary options he treats, he does separately discuss such items as immunity. He acknowledges that prosecuting officers do not enjoy exclusive authority to confer formal immunity, so he focuses on the informal arrangements by which prosecutors sometimes contract to abstain. For reasons not given, Professor Goldstein states that the informal device has relegated formal immunity to the status of "limited adjunct" (p. 27). Looking back a century or so, Professor Goldstein discovers a Supreme Court decision[16] involving rejection of a prosecutor's agreement to dismiss an indictment against a cooperative defendant; the district attorney having exceeded his authority, the defendant may claim only "equitable title to be recommended to mercy."[17] Informal immunity, he tells us, has in the years since lived in this equitable "twilight zone" by the good faith of the parties and on the "bogus rationalization" that cooperation evinced contrition or rehabilitation meriting alleviation of judgment (pp.

14. *E.g.*, Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System*, 36 LA. L. REV. 947 (1976); Pugh & Radamaker, *supra* note 3, at 84.

15. Goldstein & Marcus, *supra* note 6; Goldstein, *supra* note 6; Goldstein, *supra* note 2. The *"Reflections"* piece does suggest an explicit combination of inquisitorial and adversarial elements. But, interestingly, in Professor Goldstein's *"Comment"* piece, he notes that there is very little quotidian difference in the level of judicial control here and abroad. "From our interviews, we concluded that judges in 'inquisitorial' systems do not control or supervise the investigation, prosecution, or trial of most criminal cases much more closely than do judges in our own 'adversarial' systems." Goldstein & Marcus, *supra* note 6, at 1571.

16. United States v. Ford, 99 U.S. 594 (1878).

17. P. 27 (quoting United States v. Ford, 99 U.S. at 606).

27-28). Occasionally, as in a case involving a Manson witness in California, a court has taken a more pragmatic approach and viewed the method in contractual terms.[18] The contractual approach carried the day in *Santobello*,[19] and Professor Goldstein cites it for the "estoppel approach" which could easily be transferred to the informal immunity promise to settle the enforceability question (p. 36).

More important: should a judge get involved in counselling, directing prosecutorial choices at this stage? To this major question, Professor Goldstein offers a simple line by way of reply. Classical rhetoric must have a name for it. It is, in effect, the flip "why not?" answer to the question, "why?" It will not do for argument, even when coupled with a not-altogether-analogous parallel. "When judges issue arrest and search warrants, they are routinely involved in *ex parte* and secret relations with the police and prosecutors, appraising their justifications for actions that are concededly executive and investigative in nature,"[20] Professor Goldstein informs us. "It is not at all apparent why they should not play a similar role when immunity is conferred" (p. 32). I can not believe that this line passes for analysis of so large and sensitive a question of judicial involvement in prosecutorial choices with so astute and thorough a critic as Professor Goldstein. Yet it is all he offers here.

I share what I take to be Professor Goldstein's underlying sense that our judges have, to some extent, abdicated to the adversary control of litigation. I would like to encourage the more reticent of them to reassert themselves to rein in the American spectacle of rampant contention. But I think I would respond to a rather different consequence of passivity on the bench. I would try to address what I believe to be a deeply felt need for benchmarks, curbs on costly and worthless zeal for zeal's sake. State judges can (in New York at least) and should limit the senseless and extensive voir dire of counsel on jury selection. Routine and obviously baseless pre-trial motions should be given short shrift and no evidentiary hearing by the assertive judge. Prosecutorial delay, poor judgment, and arrogance should meet with severe judicial reprimand and effective rebuff. Endless cross-examination, jury seduction or issue obfuscation by either counsel should be peremptorily snuffed out by an alert judge. With such words of encouragement to the reticent judge in the obvious and disgraceful sorts of adversarial abuse, I might turn a perplexed frown on the area I consider the major problem today in bench-bar interaction: the on-trial responsibility of the sitting judge to compensate for, to correct, to relieve the incompetent counsel.[21] Though prosecutorial discretion has long exerted a greater pull on the attention of scholars, adjudicatory abuses requiring judicial intervention more frequently come from the other side of the aisle. Perhaps if we

18. *See* People v. Brunner, 32 Cal. App. 3d 908, 108 Cal. Rptr. 501 (1973).

19. Santobello v. New York, 404 U.S. 257 (1971).

20. Professor Goldstein's example of judicial involvement has a somewhat hollow ring. Are judges normally "active" in the warrant process? In his earlier Article, Professor Goldstein wrote in apparent agreement: "It is a commonplace conclusion that judges 'rubber stamp' warrant applications and rarely supervise the process." Goldstein, *supra* note 2, at 1024.

21. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973).

called these frivolous, prolonged, or misguided defense choices "abuses of discretion," or if we focused on the judicial obligation to protect the defendant from his own counsel we might stand a better chance of inducing such scholars as Professor Goldstein to apply their efforts to where the real problems ache.

Of course, I can not fairly fault Professor Goldstein for composing a different theme than I might have sounded in his place. But I must note with regret my opinion that he has constructed a thesis on imaginary ills, expounded it on undeveloped principles or architectural assumptions, and submitted a prescription of illusory if not baleful remedies.