

---

---

# Contents

---

Preface	xxi
Acknowledgments	xxiii

## PART ONE THE CRIMINAL PROCESS

---

Chapter 1	
Introduction to the Criminal Justice “System”	3
A. Introduction	3
B. Readings on the Criminal Justice Process	9
1. Perspectives on the System as a Whole	9
Packer, The Courts, the Police, and the Rest of Us	9
Whitman, Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice	10
Grano, Ascertaining the Truth	12
Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice	12
Garland, The Culture of Control	14
Muhammad, Condemnation of Blackness: Race, Crime and the Making of Modern Urban America	16
Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers	17
Amar, The Future of Constitutional Criminal Procedure	19
Tyler, Why People Obey the Law	21
2. The Distinction Between Criminal Procedure, Civil Procedure, and Substantive Criminal Law	23
Stuntz, Substance, Process, and the Civil-Criminal Line	23
3. Plea Bargaining and Sentencing	24
Langbein, Torture and Plea Bargaining	24
Alschuler, Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System	26
Wright & Miller, The Screening/Bargaining Tradeoff	28
Bibas, The Myth of the Fully Informed Rational Actor	30
4. Some Distributional Consequences of the Criminal Justice System	31
U.S. Department of Justice, Civil Rights Division, The Ferguson Report	31

Fagan & Geller, Following the Script: Narratives of Suspicion in <i>Terry</i> Stops and Street Policing	32
Chacon, Overcriminalizing Immigration	34
5. The Police	35
Packer, The Limits of the Criminal Sanction	35
Harmon, The Problem of Policing	35
Skolnick & Bayley, Community Policing: Issues and Practices Around the World	37
Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing	39
6. The Lawyers and the Trial Courts	41
Wice, Chaos in the Courthouse: The Inner Workings of the Urban Criminal Courts	41
Blumberg, The Practice of Law as Confidence Game: Organizational Co-optation of a Profession	43
Natapoff, <i>Gideon</i> Skepticism	47
7. The Supreme Court	49
Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases	49

## Chapter 2

### The Idea of Due Process 55

---

A Brief History	56
A. Defining Due Process	58
<i>Hurtado v. California</i>	58
Notes on the Meaning of “Due Process of Law” in Criminal Cases	61
B. Incorporation	71
<i>Duncan v. Louisiana</i>	71
Notes on <i>Duncan</i> and the Incorporation of the Bill of Rights	75
C. The Residual Due Process Clause	79
<i>Medina v. California</i>	79
Notes and Questions	84
<i>Hamdi v. Rumsfeld</i>	88
Notes and Questions	100

## PART TWO

### THE RIGHT TO COUNSEL—THE LINCHPIN OF CONSTITUTIONAL PROTECTION 105

---

## Chapter 3

### The Right to Counsel and Other Assistance 107

---

A. The Constitutional Requirements	107
1. The Right to the Assistance of Counsel at Trial	107

<i>Gideon v. Wainwright</i>	109
Notes and Questions	115
Notes on the <i>Gideon</i> Right to Counsel as Applied to Misdemeanors	116
<i>Alabama v. Shelton</i>	122
Notes and Questions	127
2. The Right to the Assistance of Counsel Before and After Trial	128
a. When Does the Right to Counsel Begin?	128
<i>Rothgery v. Gillespie County, Texas</i>	129
Notes and Questions	131
Notes on the Right to Counsel at Lineups, Show-Ups, and Photo Arrays	131
b. When Does the Right to Counsel End?	142
B. Effective Assistance of Counsel	145
1. The Meaning of Effective Assistance	147
<i>Strickland v. Washington</i>	148
Notes and Questions	159
Notes and Questions on the Application of <i>Strickland</i>	168
Notes on Ineffective Assistance, Habeas Corpus, and the Death Penalty	172
<i>Rompilla v. Beard</i>	174
Notes and Questions	176
2. Multiple Representation	181
<i>Cuyler v. Sullivan</i>	182
Notes and Questions	187
<i>Mickens v. Taylor</i>	189
Notes and Questions	192
3. Effective Assistance of Counsel and Plea Bargaining	196
<i>Missouri v. Frye</i>	198
<i>Lafler v. Cooper</i>	207
Notes and Questions	218
4. The Right to Effective Counsel as a Basis for Systemic Reform Litigation	220
<i>Hurrell-Harring v. State of New York</i>	222
Notes and Questions	234
Notes on Fairness, Equality, and the Right to Effective Counsel	237
Westen, The Empty Idea of Equality	237
Burton, Comment on “Empty Ideas”: Logical Positivist Analyses of Equality and Rules	239
C. Autonomy, Choice, and the Right to Counsel	243
1. The Right to Proceed Pro Se	243
Notes on Competency and Waiver	249
<i>Indiana v. Edwards</i>	251
Notes and Questions	253
2. The Right to Counsel of One’s Choice	254
<i>United States v. Gonzalez-Lopez</i>	254
Notes and Questions	261
Notes on Forfeiture Statutes and the Right to Counsel	262

PART FOUR  
THE ADJUDICATION PROCESS 1019

---

Chapter 8  
The Charging Decision 1021

---

A. Prosecutorial Discretion		1021
1. The Decision to Charge		1023
<i>Inmates of Attica Correctional Facility v. Rockefeller</i>		1023
Notes and Questions		1027
2. Selecting the Charge		1029
<i>United States v. Batchelder</i>		1030
Notes and Questions		1033
B. Limits on the Charging Power		1034
<i>United States v. Armstrong</i>		1036
Notes and Questions		1043

Chapter 9  
Bail and Pretrial Detention 1049

---

A. Bail Amounts		1050
<i>Stack v. Boyle</i>		1050
Notes and Questions		1052
B. The Bail Reform Act and Preventive Detention		1056
<i>United States v. Salerno</i>		1058
Notes and Questions		1068

Chapter 10  
Pretrial Screening and the Grand Jury 1073

---

A. Preliminary Hearings		1073
B. Grand Juries		1078
1. Background and Current Practice		1078
2. Grand Jury Review		1082
<i>Costello v. United States</i>		1082
Notes and Questions		1085
<i>United States v. Williams</i>		1087
Notes and Questions		1095
C. Grand Jury Investigations		1097
1. Grand Jury Secrecy		1098
a. Scope of the Rule		1098
<i>In re Sealed Case No. 99-3091</i>		1100
Notes and Questions		1105
b. Exceptions to the Secrecy Rule		1107
2. The Subpoena Power		1109
<i>United States v. Dionisio</i>		1110
Notes and Questions		1115

	<i>United States v. R. Enterprises, Inc.</i>	1116
	Notes and Questions	1121
3.	Limits on the Investigative Powers	1123
a.	Immunizing Testimony	1124
	Notes and Questions	1126
b.	Documents and the Act of Production	1129
	<i>United States v. Hubbell</i>	1131
	Notes and Questions	1138

## Chapter 11

### The Scope of the Prosecution 1141

---

A.	The Right to a Speedy Trial	1142
	<i>Barker v. Wingo</i>	1142
	Notes and Questions	1150
	<i>Doggett v. United States</i>	1154
	Notes and Questions	1162
B.	Venue	1163
1.	Location of the Crime	1163
	<i>United States v. Rodriguez-Moreno</i>	1164
	Notes and Questions	1168
2.	Changes of Venue	1172
	<i>Skilling v. United States</i>	1173
	Notes and Questions	1190
C.	Joinder and Severance	1192
	<i>United States v. Hawkins</i>	1194
	Notes and Questions	1200
	<i>Zafiro v. United States</i>	1202
	Notes and Questions	1205

## Chapter 12

### Discovery and Disclosure 1209

---

A.	Disclosure by the Government	1210
1.	The Prosecutor's Discovery Obligations	1210
	Federal Rules of Criminal Procedure: Rule 16	1211
	Notes and Questions	1212
2.	The Prosecutor's Constitutional Disclosure Obligations	1216
	<i>Kyles v. Whitley</i>	1216
	Notes and Questions	1229
	<i>United States v. Ruiz</i>	1233
	Notes and Questions	1237
B.	Disclosure by the Defense	1238
	<i>Williams v. Florida</i>	1238
	Notes and Questions	1242
C.	Sanctions for Nondisclosure	1244
	<i>Taylor v. Illinois</i>	1245
	Notes and Questions	1252

Chapter 13		
Guilty Pleas and Plea Bargaining		1255
<hr/>		
A. The Guilty Plea		1256
1. Rule 11 and the Plea Process		1256
a. Knowing		1257
Notes and Questions		1258
b. Voluntary		1260
c. Factual Basis		1261
<i>North Carolina v. Alford</i>		1262
Notes and Questions		1267
2. The Effect of a Guilty Plea		1271
<i>Class v. United States</i>		1271
Notes and Questions		1279
B. Plea Bargaining		1279
1. History and Practice		1281
Langbein, Understanding the Short History of Plea Bargaining		1281
Notes and Questions		1284
Fisher, Plea Bargaining's Triumph		1284
Notes and Questions		1287
Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys		1288
Notes and Questions		1292
2. Inducements to Plead		1294
<i>Bordenkircher v. Hayes</i>		1295
Notes and Questions		1299
3. The Subject Matter of Plea Bargaining		1302
<i>United States v. Hodge</i>		1303
Notes and Questions		1308
<i>Newton v. Rumery</i>		1310
Notes and Questions		1317
4. Interpreting and Enforcing Guilty Pleas and Plea Bargains		1318
a. Plea Withdrawal		1320
b. Breach of the Plea Deal		1323
<i>Santobello v. New York</i>		1323
Notes and Questions		1326
<i>Ricketts v. Adamson</i>		1327
Notes and Questions		1332
C. The Role of Defense Counsel		1333

Chapter 14		
The Jury and the Criminal Trial		1335
<hr/>		
A. The Right to a Trial by Jury		1335
<i>Ballew v. Georgia</i>		1338
Notes and Questions		1345

B. Jury Composition	1347
Notes and Questions on the Impartiality Requirement	1349
1. The Fair Cross Section Requirement	1353
<i>Duren v. Missouri</i>	1353
Notes and Questions	1359
2. Equal Protection and the Peremptory Challenge	1360
<i>Batson v. Kentucky</i>	1360
Notes and Questions	1369
<i>Flowers v. Mississippi</i>	1376
Notes and Questions	1386
C. The Defendant’s Trial Rights	1387
1. The Right to Be Present, to Testify, to Obtain Evidence, and to Present a Defense	1387
2. The Confrontation Clause	1393
a. The <i>Crawford</i> Revolution	1393
<i>Crawford v. Washington</i>	1394
<i>Davis v. Washington</i>	1402
Notes and Questions	1414
<i>Michigan v. Bryant</i>	1422
Notes and Questions	1436
b. The <i>Bruton</i> Rule	1441
<i>Gray v. Maryland</i>	1442
Notes and Questions	1449
D. Influences upon the Jury	1450
<i>Darden v. Wainwright</i>	1450
Notes and Questions	1460
E. Proof and Verdict Issues	1462
1. The Burden of Proof	1462
2. Unanimity of the Verdict	1464
3. Consistency of the Verdict; General Verdicts	1465
4. Impeachment of the Verdict	1466
<i>Peña-Rodriguez v. Colorado</i>	1468
Notes and Questions	1477
5. Post-Verdict Motions	1477

PART FIVE  
POST-TRIAL PROCEEDINGS 1479

---

Chapter 15  
Sentencing 1481

---

A. Introduction to Sentencing	1481
1. Sentencing Options	1481
2. Sentencing Considerations	1485

3. Substantive Limits on Sentencing — Eighth Amendment	
Proportionality	1487
<i>Ewing v. California</i>	1488
Notes and Questions	1499
<i>Roper v. Simmons</i>	1500
Notes and Questions	1513
B. Discretion and Rules in Sentencing	1515
Frankel, Lawlessness in Sentencing	1515
U.S. Department of Justice, Bureau of Justice Statistics, Special Report: “Truth in Sentencing in State Prisons”	1516
Tacha, Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience	1517
C. Do the Rules of Constitutional Criminal Procedure Apply to Sentencing?	1519
<i>Williams v. New York</i>	1519
Notes and Questions	1523
Notes on Determinate Sentencing and the Constitution	1526
<i>Blakely v. Washington</i>	1529
<i>United States v. Booker</i>	1532
Notes and Questions	1541
<i>Gall v. United States</i>	1544
Notes and Questions	1553
D. Forfeitures and the Eighth Amendment	1556
<i>Austin v. United States</i>	1558
Notes and Questions	1566

## Chapter 16

### Double Jeopardy 1569

---

A. “Twice Put in Jeopardy”	1570
1. Acquittals	1570
<i>Fong Foo v. United States</i>	1570
Notes on the Special Status of Acquittals	1572
<i>Ashe v. Swenson</i>	1580
Notes and Questions	1581
2. Mistrials	1583
<i>Oregon v. Kennedy</i>	1583
Notes and Questions	1587
B. “For the Same Offence”	1588
Notes on the Rise, Fall, and Rise of the <i>Blockburger</i> Test	1590
<i>United States v. Dixon</i>	1599
Notes and Questions	1603
Notes on Sentencing and the Meaning of “the Same Offence”	1605
C. Double Jeopardy and the “Dual Sovereignty” Doctrine	1608
<i>Heath v. Alabama</i>	1608
Notes and Questions	1614

D. Double Jeopardy and the Criminal-Civil Divide	1617
<i>United States v. Ursery</i>	1620
Notes and Questions	1630

Chapter 17  
Appellate and Collateral Review 1635

---

A. Appellate Review	1635
1. The Defendant’s Right to Appeal	1635
2. The Prosecution’s Right to Appeal	1635
3. Interlocutory Appeals	1636
4. What Law Applies?	1637
5. Prejudice and Harmless Error	1638
<i>Chapman v. California</i>	1638
Notes and Questions	1641
B. Collateral Review	1651
1. The “Great Writ” of Habeas Corpus	1652
2. The Nature and Purposes of Federal Habeas	1653
<i>Terry Williams v. Taylor</i>	1658
Notes and Questions	1673
3. Procedural Issues in Federal Habeas	1674
a. Timing	1674
b. Exhaustion	1675
c. Procedural Default	1675
<i>Wainwright v. Sykes</i>	1676
Notes and Questions	1677
d. Successive Petitions and Abuse of the Writ	1679
e. The “Fundamental Miscarriage of Justice” Exception	1680
f. Evidentiary Hearings	1680
4. What Law Applies?	1681
<i>Stone v. Powell</i>	1681
Notes and Questions	1689
5. Prejudice and Harmless Error	1690
<i>Brecht v. Abrahamson</i>	1690
Notes and Questions	1698
6. Innocence and the Future of Federal Habeas	1698
United States Constitution (Selected Provisions)	1705
Table of Cases	1709
Table of Authorities	1719
Table of Statutes and Rules	1731
Index	1739