
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	10
Packer, The Courts, the Police, and the Rest of Us	10
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	15
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	22
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	25
Langbein, Torture and Plea Bargaining	25
Alschuler, Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System	26
Wright & Miller, The Screening/Bargaining Tradeoff	29
Bibas, The Myth of the Fully Informed Rational Actor	30
4. Some Distributional Consequences of the Criminal Justice System	32
U.S. Department of Justice, Civil Rights Division, The Ferguson Report	32

Fagan & Geller, Following the Script: Narratives of Suspicion in <i>Terry</i> Stops and Street Policing	33
Chacon, Overcriminalizing Immigration	34
5. The Police	36
Packer, The Limits of the Criminal Sanction	36
Harmon, The Problem of Policing	36
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	40
6. The Lawyers and the Trial Courts	42
Wice, Chaos in the Courthouse: The Inner Workings of the Urban Criminal Courts	42
Blumberg, The Practice of Law as Confidence Game: Organizational Co-Optation of a Profession	44
Natapoff, <i>Gideon</i> Skepticism	48
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 57

A Brief History	58
A. Defining Due Process	60
<i>Hurtado v. California</i>	60
Notes on the Meaning of “Due Process of Law” in Criminal Cases	63
B. Incorporation	73
<i>Duncan v. Louisiana</i>	73
Notes on <i>Duncan</i> and the Incorporation of the Bill of Rights	77
C. The Residual Due Process Clause	80
<i>Medina v. California</i>	81
Notes About Due Process and a Defendant’s Competence to Stand Trial	86
Note About Due Process in Civil and Criminal Cases	89
<i>Hamdi v. Rumsfeld</i>	90
Notes About the Meaning of Due Process in “Quasi- Criminal” Cases	101

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 on the <i>Gideon</i> Right to Counsel	115
	Notes on the <i>Gideon</i> Right to Counsel as Applied to Misdemeanors	116
	<i>Alabama v. Shelton</i>	122
	Notes and Questions on <i>Shelton</i> and Its Impact	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 About <i>Rothgery</i> and “Critical Stage” Analysis	130
	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	146
	1. The Meaning of Effective Assistance	147
	<i>Strickland v. Washington</i>	148
	Notes and Questions About <i>Strickland</i> and the Effective Assistance of Counsel	159
	Notes and Questions on Further Implications of <i>Strickland</i> Applying <i>Strickland</i> : The “Performance” and “Prejudice” Prongs	166
	Ineffective Assistance, Habeas Corpus, and the Death Penalty	172
	<i>Rompilla v. Beard</i>	174
	Notes and Questions About the Significance of <i>Rompilla</i>	177
	Concluding Thoughts About the Effective Assistance of Counsel	181
	2. Multiple Representation	182
	<i>Cuyler v. Sullivan</i>	184
	Notes and Questions About Conflicts of Interest	189
	<i>Mickens v. Taylor</i>	190
	Notes and Questions About Waiving Conflict-Free Counsel	193
	3. Effective Assistance of Counsel and Plea Bargaining	198
	<i>Missouri v. Frye</i>	200
	<i>Lafler v. Cooper</i>	208
	Notes and Questions About the Implications of <i>Lafler</i> and <i>Frye</i>	219

C. Autonomy, Choice, and the Right to Counsel	221
1. The Right to Proceed Pro Se	221
Notes on Competence and Waiver	227
<i>Indiana v. Edwards</i>	228
Notes and Questions About the Implication of <i>Edwards</i>	230
2. The Right to Counsel of One's Choice	231
<i>United States v. Gonzalez-Lopez</i>	232
Notes and Questions About the Right to Counsel of Choice	238

PART FOUR
THE ADJUDICATION PROCESS 983

Chapter 8
The Charging Decision 985

A. Prosecutorial Discretion	985
1. The Decision to Charge	987
<i>Inmates of Attica Correctional Facility v. Rockefeller</i>	987
Notes on the Scope of Charging Discretion	990
2. Selecting the Charge	994
<i>United States v. Batchelder</i>	994
Notes on Legislatures, Prosecutors, and Charge Selection	998
B. Limits on the Charging Power	999
<i>United States v. Armstrong</i>	1000
Challenging the Charging Decision	1007

Chapter 9
Bail and Pretrial Detention 1015

A. Bail Amounts	1016
<i>Stack v. Boyle</i>	1016
Notes on Money, Poverty, and Pretrial Release	1018
B. The Bail Reform Act and Preventive Detention	1022
<i>United States v. Salerno</i>	1024
Notes on Predicting Dangerousness and Pretrial Release	1034

Chapter 10
Pretrial Screening and the Grand Jury 1039

A. Preliminary Hearings	1039
B. Grand Juries; The Screening Function	1044
1. Background and Current Practice	1044

2. Grand Jury Review	1048
<i>Costello v. United States</i>	1048
Notes on the Scope of the <i>Costello</i> Rule	1051
<i>United States v. Williams</i>	1053
Additional Limits on Indictment Challenges	1062
C. Grand Jury Investigations	1064
1. Grand Jury Secrecy	1064
a. Scope of the Rule	1064
<i>In re Sealed Case No. 99-3091</i>	1066
Notes on the Secrecy Rule	1071
b. Exceptions to the Secrecy Rule	1073
2. The Subpoena Power	1075
<i>United States v. Dionisio</i>	1076
Grand Jury Subpoenas and the Fourth Amendment	1081
<i>United States v. R. Enterprises, Inc.</i>	1083
Notes on the Scope of the Subpoena Power	1087
3. Limits on the Investigative Powers	1089
a. Immunizing Testimony	1090
Notes Immunizing Witnesses	1092
b. Documents and the Act of Production	1095
<i>United States v. Hubbell</i>	1097
Notes on the Act of Production and Immunity	1104

Chapter 11

The Scope of the Prosecution 1107

A. The Right to a Speedy Trial	1108
<i>Barker v. Wingo</i>	1108
Notes on the Constitutional and Statutory Right to a Speedy Trial	1116
<i>Doggett v. United States</i>	1121
Notes on <i>Doggett</i> and Prejudice Under the Speedy Trial Clause	1129
B. Venue	1129
1. Location of the Crime	1129
<i>United States v. Rodriguez-Moreno</i>	1131
Notes on Venue and the “Crime Committed” Test	1135
2. Changes of Venue	1139
<i>Skilling v. United States</i>	1140
Notes on Pretrial Publicity and Changes of Venue	1157
C. Joinder and Severance	1158
<i>United States v. Hawkins</i>	1160
Notes on Joinder, Misjoinder, and Severance	1167
<i>Zafiro v. United States</i>	1169
Notes on <i>Zafiro</i> and the Grounds for Severance	1172

Chapter 12		
Discovery and Disclosure		1175
<hr/>		
A. Disclosure by the Government		1176
1. The Prosecutor's Discovery Obligations		1176
Federal Rules of Criminal Procedure: Rule 16		1176
Notes on the Scope of Discovery		1177
2. The Prosecutor's Constitutional Disclosure Obligations		1182
<i>Kyles v. Whitley</i>		1182
Notes on the Scope of the <i>Brady</i> Doctrine		1195
<i>United States v. Ruiz</i>		1199
Notes on the <i>Brady</i> Doctrine and Guilty Pleas		1203
B. Disclosure by the Defense		1204
<i>Williams v. Florida</i>		1204
Notes on the Defendant's Obligation to Disclose		1208
C. Sanctions for Nondisclosure		1210
<i>Taylor v. Illinois</i>		1211
Notes on the Remedies for Discovery Violations		1218

Chapter 13		
Guilty Pleas and Plea Bargaining		1221
<hr/>		
A. The Guilty Plea		1222
1. Rule 11 and the Plea Process		1222
a. Knowing		1223
Notes on the "Knowing" Requirement		1224
b. Voluntary		1226
c. Factual Basis		1227
<i>North Carolina v. Alford</i>		1228
Notes on <i>Alford</i> Pleas, Accuracy, and Innocence		1233
2. The Effect of a Guilty Plea		1237
<i>Class v. United States</i>		1237
Notes on <i>Class</i> and Unpreserved Claims		1245
B. Plea Bargaining		1245
1. History and Practice		1247
Langbein, Understanding the Short History of Plea Bargaining		1247
Notes on Langbein's History		1250
Fisher, Plea Bargaining's Triumph		1250
Notes on the Rise of Plea Bargaining		1253
Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys		1254
Notes on Plea Bargaining Practice		1258
2. Inducements to Plead		1260
<i>Bordenkircher v. Hayes</i>		1261
Notes on <i>Bordenkircher</i> and Government Inducements		1265
3. The Subject Matter of Plea Bargaining		1268

<i>United States v. Hodge</i>	1269
Notes on “Tied” Plea Deals and Other Inducements	1274
<i>Newton v. Rumery</i>	1276
Notes on Release-Dismissal Agreements	1284
4. Interpreting and Enforcing Guilty Pleas and Plea Bargains	1284
a. Plea Withdrawal	1286
b. Breach of the Plea Deal	1289
<i>Santobello v. New York</i>	1289
Notes on Prosecutorial Breach of a Plea Deal	1292
<i>Ricketts v. Adamson</i>	1293
Notes on Construing Plea Bargains and Remedies for a Defendant’s Breach	1298
C. The Role of Defense Counsel	1298

Chapter 14

The Jury and the Criminal Trial

1301

A. The Right to a Trial by Jury	1301
<i>Ballew v. Georgia</i>	1304
Notes on Jury Size and Unanimity Requirements	1311
B. Jury Composition	1313
Notes on the Impartiality Requirement	1315
1. The Fair Cross Section Requirement	1319
<i>Duren v. Missouri</i>	1319
Notes on the Fair Cross Section Requirement	1325
2. Equal Protection and the Peremptory Challenge	1326
<i>Batson v. Kentucky</i>	1327
Notes on the Rationale and Scope of <i>Batson</i>	1335
<i>Flowers v. Mississippi</i>	1341
Notes on <i>Flowers</i> and <i>Batson</i> Violations	1352
C. The Defendant’s Trial Rights	1353
1. The Right to Be Present, to Testify, to Obtain Evidence, and to Present a Defense	1353
2. The Confrontation Clause	1359
a. The <i>Crawford</i> Revolution	1359
<i>Crawford v. Washington</i>	1360
<i>Davis v. Washington</i>	1367
Notes on the <i>Crawford</i> Doctrine After <i>Davis</i> and <i>Hammon</i>	1380
<i>Michigan v. Bryant</i>	1382
Notes on the Continuing Confusion over <i>Crawford</i>	1397
The (Mis?)Application of <i>Crawford</i> to Expert Testimony	1402
b. The <i>Bruton</i> Rule	1409
<i>Gray v. Maryland</i>	1409
Notes on the <i>Bruton</i> Rule	1416

D. Influences upon the Jury	1417
<i>Darden v. Wainwright</i>	1418
Notes on Prosecutorial Closing Arguments	1427
E. Proof and Verdict Issues	1429
1. The Burden of Proof	1429
2. Encouraging a Verdict	1431
3. Unanimity of the Verdict	1432
4. Consistency of the Verdict; General Verdicts	1433
5. Impeachment of the Verdict	1434
<i>Peña-Rodriguez v. Colorado</i>	1436
Notes on <i>Peña-Rodriguez</i> and the No-Impeachment Rule	1445
6. Post-Verdict Motions	1446

PART FIVE
POST-TRIAL PROCEEDINGS 1449

Chapter 15
Sentencing 1451

A. Introduction to Sentencing	1451
1. Sentencing Options	1451
2. Sentencing Considerations	1454
3. Substantive Limits on Sentencing—Eighth Amendment	
Proportionality	1456
<i>Ewing v. California</i>	1457
Notes on Proportionality and Prison Sentences	1467
<i>Roper v. Simmons</i>	1469
Notes on Proportionality and Capital Punishment	1481
B. Discretion and Rules in Sentencing	1483
Frankel, Lawlessness in Sentencing	1483
U.S. Department of Justice, Bureau of Justice Statistics, Special Report: “Truth in Sentencing in State Prisons”	1484
Tacha, Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience	1486
C. Do the Rules of Constitutional Criminal Procedure Apply to Sentencing?	1487
<i>Williams v. New York</i>	1488
Notes on the Scope of <i>Williams</i>	1492
Notes on Determinate Sentencing and the Constitution	1494
<i>Blakely v. Washington</i>	1497
<i>United States v. Booker</i>	1501
Notes on the Impacts of <i>Blakely</i> and <i>Booker</i>	1509
<i>Gall v. United States</i>	1512
Notes on <i>Gall</i> and the “Reasonableness” Standard	1521
Further Implications of the <i>Apprendi</i> Doctrine	1522

D. Forfeitures and the Eighth Amendment	1524
<i>Austin v. United States</i>	1526
Notes on <i>Austin</i> and the Constitutional Limits on Forfeitures	1534

Chapter 16
Double Jeopardy

1537

A. “Twice Put in Jeopardy”	1538
1. Acquittals	1538
<i>Fong Foo v. United States</i>	1538
Notes on the Special Status of Acquittals	1540
<i>Ashe v. Swenson</i>	1548
Notes on the Implications of <i>Ashe</i>	1550
2. Mistrials	1551
<i>Oregon v. Kennedy</i>	1551
Notes on Mistrials and Double Jeopardy	1555
B. “For the Same Offence”	1556
Notes on the Rise, Fall, and Rise of the <i>Blockburger</i> Test	1558
<i>United States v. Dixon</i>	1567
Notes on the After-Effects of <i>Dixon</i>	1571
Notes on Sentencing and the Meaning of “the Same Offence”	1573
C. Double Jeopardy and the “Dual Sovereignty” Doctrine	1575
<i>Heath v. Alabama</i>	1575
Notes on the Dual Sovereignty Doctrine	1582
D. Double Jeopardy and the Criminal-Civil Divide	1585
<i>United States v. Ursery</i>	1588
Notes on the Criminal-Civil Divide	1597

Chapter 17
Appellate and Collateral Review

1601

A. Appellate Review	1601
1. The Defendant’s Right to Appeal	1601
2. The Prosecution’s Right to Appeal	1601
3. Interlocutory Appeals	1602
4. What Law Applies?	1603
5. Prejudice and Harmless Error	1604
<i>Chapman v. California</i>	1604
Notes on Harmless Error and “Structural Error”	1607
Notes on “Plain Error”	1613
Concluding Note on the Legal Standards for Harm and Prejudice	1616
B. Collateral Review	1617
1. The “Great Writ” of Habeas Corpus	1618
2. The Nature and Purposes of Federal Habeas	1619
<i>Terry Williams v. Taylor</i>	1624
Notes on AEDPA’s New Standard of Review	1637

3. Procedural Issues in Federal Habeas	1638
a. Timing	1638
b. Exhaustion	1639
c. Procedural Default	1640
<i>Wainwright v. Sykes</i>	1640
Notes on Procedural Default	1641
d. Successive Petitions and Abuse of the Writ	1644
e. The “Fundamental Miscarriage of Justice” Exception	1645
f. Evidentiary Hearings	1645
4. What Law Applies?	1646
<i>Stone v. Powell</i>	1646
Notes on the Scope of <i>Stone v. Powell</i>	1654
5. Prejudice and Harmless Error	1654
<i>Brecht v. Abrahamson</i>	1654
Notes on Harmless Error in Federal Habeas	1662
6. Innocence and the Future of Federal Habeas	1663
United States Constitution (Selected Provisions)	1669
Table of Cases	1673
Table of Authorities	1683
Table of Statutes and Rules	1695
Index	1703