# Contents

Preface xxvii  
Acknowledgments xxix

## PART ONE  
THE CRIMINAL PROCESS 1

### Chapter 1  
Introduction to the Criminal Justice “System” 3

<table>
<thead>
<tr>
<th>A. Introduction</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Readings on the Criminal Justice Process</td>
<td>9</td>
</tr>
<tr>
<td>1. Perspectives on the System as a Whole</td>
<td>9</td>
</tr>
<tr>
<td>Packer, The Courts, the Police, and the Rest of Us</td>
<td>9</td>
</tr>
<tr>
<td>Whitman, Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice</td>
<td>10</td>
</tr>
<tr>
<td>Garland, The Culture of Control</td>
<td>12</td>
</tr>
<tr>
<td>Muhammad, Condemnation of Blackness: Race, Crime and the Making of Modern Urban America</td>
<td>13</td>
</tr>
<tr>
<td>Grano, Ascertaining the Truth</td>
<td>14</td>
</tr>
<tr>
<td>Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers</td>
<td>15</td>
</tr>
<tr>
<td>Amar, The Future of Constitutional Criminal Procedure</td>
<td>17</td>
</tr>
<tr>
<td>Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice</td>
<td>20</td>
</tr>
<tr>
<td>Tyler, Why People Obey the Law</td>
<td>22</td>
</tr>
<tr>
<td>2. The Distinction Between Criminal Procedure, Civil Procedure, and Substantive Criminal Law</td>
<td>23</td>
</tr>
<tr>
<td>Stuntz, Substance, Process, and the Civil-Criminal Line</td>
<td>23</td>
</tr>
<tr>
<td>3. Plea Bargaining and Sentencing</td>
<td>25</td>
</tr>
<tr>
<td>Langbein, Torture and Plea Bargaining</td>
<td>25</td>
</tr>
<tr>
<td>Alschuler, Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System</td>
<td>26</td>
</tr>
<tr>
<td>Wright &amp; Miller, The Screening/Bargaining Tradeoff</td>
<td>29</td>
</tr>
<tr>
<td>Bibas, The Myth of the Fully Informed Rational Actor</td>
<td>30</td>
</tr>
<tr>
<td>4. Some Distributional Consequences of the Criminal Justice System</td>
<td>32</td>
</tr>
<tr>
<td>U.S. Department of Justice, Civil Rights Division, The Ferguson Report</td>
<td>32</td>
</tr>
</tbody>
</table>
Fagan & Geller, Following the Script: Narratives of Suspicion in *Terry* Stops and Street Policing 33
Chacon, Overcriminalizing Immigration 34
5. The Police
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
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
Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach 48
Natapoff, *Gideon* Skepticism 52
7. The Supreme Court
Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases 53
8. The Role of State Constitutions and State Constitutional Law
Brennan, State Constitutions and the Protection of Individual Rights 59
Latzer, Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Incorporation 61

Chapter 2
The Idea of Due Process 63

A Brief History 64
A. Defining Due Process 66
  *Hurtado v. California* 66
  Notes on the Meaning of “Due Process of Law” in Criminal Cases 69
B. Incorporation 79
  *Duncan v. Louisiana* 79
  Notes on *Duncan* and the Incorporation of the Bill of Rights 83
C. The Residual Due Process Clause 86
  *Medina v. California* 86
  Notes and Questions 92
  *Hamdi v. Rumsfeld* 95
  Notes and Questions 109
PART TWO
THE RIGHT TO COUNSEL—THE LINCHPIN OF
CONSTITUTIONAL PROTECTION

Chapter 3
The Right to Counsel and Other Assistance

A. The Constitutional Requirements
1. The Right to the Assistance of Counsel at Trial
   *Gideon v. Wainwright*
   Notes and Questions
   Notes on the *Gideon* Right to Counsel as Applied to
   Misdemeanors
   *Alabama v. Shelton*
   Notes and Questions
2. The Right to the Assistance of Counsel Before and After Trial
   a. When Does the Right to Counsel Begin?
      *Rothgery v. Gillespie County, Texas*
      Notes and Questions
      Notes on the Right to Counsel at Lineups, Show-Ups,
      and Photo Arrays
   b. When Does the Right to Counsel End?

B. Effective Assistance of Counsel
1. The Meaning of Effective Assistance
   *Strickland v. Washington*
   Notes and Questions
   Notes and Questions on the Application of *Strickland*
   Notes on Ineffective Assistance, Habeas Corpus, and the
   Death Penalty
   *Rompilla v. Beard*
   Notes and Questions
2. Multiple Representation
   *Cuyler v. Sullivan*
   Notes and Questions
   *Mickens v. Taylor*
   Notes and Questions
3. Effective Assistance of Counsel and Plea Bargaining
   *Missouri v. Frye*
   *Lafler v. Cooper*
   Notes and Questions
4. The Right to Effective Counsel as a Basis for Systemic Reform
   Litigation
   *Hurrell-Harring v. State of New York*
   Notes and Questions
   Notes on Fairness, Equality, and the Right to Effective
   Counsel
   Westen, The Empty Idea of Equality
Burton, Comment on “Empty Ideas”: Logical Positivist Analysis of Equality and Rules 246

C. Autonomy, Choice, and the Right to Counsel 250
   1. The Right to Proceed Pro Se 250
      Notes on Competency and Waiver 255
      *Indiana v. Edwards* 257
      Notes and Questions 259
   2. The Right to Counsel of One’s Choice 260
      *United States v. Gonzalez-Lopez* 260
      Notes and Questions 267
      Notes on Forfeiture Statutes and the Right to Counsel 268

PART THREE
THE RIGHT TO BE LET ALONE—AN EXAMINATION OF THE FOURTH AND FIFTH AMENDMENTS AND RELATED AREAS 271

Chapter 4
The Rise, Fall, and Return of Boyd v. United States 273

*Boyd v. United States* 274
Notes and Questions 283
*Schmerber v. California* 287
*Warden, Maryland Penitentiary v. Hayden* 294
*Berger v. New York* 300
Notes and Questions 303
Notes and Questions on *Doe, Braswell, and Hubbell* 313
Conclusion: Notes on the Future of *Boyd* 319

Chapter 5
The Fourth Amendment 321

Text and History 322
Remedy and Right 323
A. Remedies 324
   1. The Exclusionary Rule 324
      *Mapp v. Ohio* 324
      Notes and Questions 331
   2. Other Remedies 336
      a. Damages 337
      b. Injunctions 339
      c. Criminal Prosecution 341
      d. Administrative and Political Remedies 344
B. The Scope of the Fourth Amendment 346
   1. The Meaning of “Searches” 346
Contents

a. The Relationship Between Privacy and Property 346
   Katz v. United States 346
   Notes and Questions 352
   Florida v. Riley 357
   Notes and Questions 361
   Florida v. Jardines 364
   Notes and Questions 369
b. “Knowingly Expose[d] to the Public” 370
   United States v. White 371
   Notes and Questions 375
   California v. Greenwood 377
   Notes and Questions 381
c. Information, Privacy, and the Fourth Amendment 382
   Kyllo v. United States 383
   Notes and Questions 387
   United States v. Jones 390
   Notes and Questions 401
2. The Meaning of “Seizures” 404
   United States v. Drayton 404
   Notes and Questions 409
   California v. Hodari D. 412
   Notes and Questions 414
C. Justifying Searches and Seizures 417
   The Text (Again) 418
1. Investigative Warrants 420
   The Oath or Affirmation Requirement 422
   The Magistrate 423
   The Particularity Requirement 424
   The Execution of Warrants 425
   Notes on Warrant Execution 426
2. The Probable Cause Standard 432
   Illinois v. Gates 435
   Notes and Questions 442
3. Justifying Searches and Seizures Without Warrants 449
   a. Exigent Circumstances 449
      Mincey v. Arizona 449
      Notes on Exigent Circumstances 452
      Kentucky v. King 454
      Notes and Questions 461
      Brigham City v. Stuart 462
      Notes on Exigency and Community Caretaking 465
   b. Plain View 472
      Arizona v. Hicks 473
      Notes on “Plain View” Doctrine 477
   c. Automobiles 479
      California v. Acevedo 482
      Notes and Questions 490
      Wyoming v. Houghton 492
      Notes and Questions 497
Contents

4. Justifying Searches and Seizures Without Probable Cause or a Warrant: “Consent”
   
   Schneckloth v. Bustamonte 507
   
   Notes and Questions 512
   
   Georgia v. Randolph 516
   
   Notes and Questions 522

5. Reasonableness and Its Relationship with the Probable Cause and Warrant Clause
   
   a. Administrative Warrants: A Case Study on the Meaning of “Reasonableness”
      
      Camara v. Municipal Court of the City & County of San Francisco 526
      
      Notes and Questions 530
   
   b. Stops and Frisks
      
      Terry v. Ohio 531
      
      Notes and Questions 541
      
      Notes on the Refinement of “Stop and Frisk” 546
      
      Notes on the Meaning of Reasonable Suspicion 551
      
      Florida v. J.L. 551
      
      Notes and Questions 553
      
      Navarette v. California 554
      
      Notes and Questions 558
      
      Illinois v. Wardlow 558
      
      Notes and Questions 564
   
   c. Police Discretion and Street Policing
      
      Kennedy, Race, Crime and the Law 567
      
      Tyler & Wakslak, Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and the Acceptance of Social Authority 568
      
      U.S. Department of Justice, Civil Rights Division, Guidance For Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation or Gender Identity 570
      
      Whren v. United States 571
      
      Notes and Questions 575
      
      Atwater v. Lago Vista 579
      
      Notes and Questions 589
      
      Notes on Police Discretion and Substantive Criminal Law 590
      
      Chicago v. Morales 593
      
      Notes and Questions 602

6. Evaluating Individualized Suspicion
   
   a. Searches Incident to Arrest
      
      Chimel v. California 607
      
      Notes and Questions 612
      
      Arizona v. Gant 616
      
      Notes and Questions 624
      
      Riley v. California 626
A. Electronic Surveillance and the Search of Digital Information 754
   1. Wiretapping and Related Electronic Surveillance 756
      Title III Notes and Questions 758
   2. The Search of Stored Electronic Communications and Other Digital Information 761
      United States v. Warshak 763
Notes and Questions 772
United States v. Graham 775
Notes and Questions 786
B. Undercover Agents and Entrapment 789
Jacobson v. United States 791
Notes and Questions 800

Chapter 7
The Fifth Amendment 805

Text and History 806
A. The Fifth Amendment Privilege Against Self-Incrimination and Its Justifications 808
Counselman v. Hitchcock 809
Kastigar v. United States 817
Notes and Questions 821
B. The Contours of the Privilege Against Self-Incrimination 825
1. “No Person . . . Shall Be Compelled”: The Meaning of Compulsion 825
2. “In Any Criminal Case”: The Meaning of Incrimination 826
United States v. Ward 826
Notes on the Meaning of Incrimination 829
3. “To Be a Witness Against Himself”: The Meaning of Testimony 831
4. The Rule that the Fifth Amendment Privilege Must Be Asserted 837
Salinas v. Texas 839
Notes and Questions 843
C. Limiting, or Expanding, the Fifth Amendment Privilege? 848
Baltimore City Department of Social Services v. Bouknight 851
Notes and Questions 857
D. Police Interrogation 861
1. The Miranda Revolution 861
Notes on the Due Process Voluntariness Test 863
Watts v. Indiana 865
Massiah v. United States 870
Escobedo v. Illinois 873
Miranda v. Arizona 875
Notes and Questions 887
2. The Scope of Miranda 891
a. “Custody” 892
J. D. B. v. North Carolina 896
Notes and Questions 900
b. “Interrogation” 901
Rhode Island v. Innis 901
Notes and Questions 906
Illinois v. Perkins 907
Notes and Questions 911
c. Warnings 912
d. Invocations 915
PART FOUR
THE ADJUDICATION PROCESS

Chapter 8
Bail and Pretrial Detention

A. Bail Amounts

Stack v. Boyle

Notes and Questions

B. Preventive Detention

United States v. Salerno

Notes and Questions

Chapter 9
The Charging Decision

A. Prosecutorial Discretion

1. The Decision to Charge

Inmates of Attica Correctional Facility v. Rockefeller

Notes and Questions

2. Selecting the Charge

United States v. Batchelder

Notes and Questions

B. Limits on the Charging Power

United States v. Armstrong

Notes and Questions
# Chapter 10
## Pretrial Screening and the Grand Jury

### A. Background and Current Practice

- [1049]

### B. Grand Jury Secrecy

1. **The Scope of the Secrecy Rule**
   - *In Re Sealed Case No. 99-3091* [1054]
   - Notes and Questions [1060]
2. **Exceptions to the Secrecy Rule** [1062]

### C. Investigative Power

1. **The Subpoena Power** [1066]
   - *United States v. Dionisio* [1066]
   - Notes and Questions [1071]
   - *United States v. R. Enterprises, Inc.* [1072]
   - Notes and Questions [1077]
2. **Limits on the Investigative Powers** [1078]
   a. **Immunizing Testimony** [1080]
      - Notes and Questions [1082]
   b. **Documents and the Act of Production** [1084]
      - *United States v. Hubbell* [1086]
      - Notes and Questions [1093]

### D. The Screening Function

1. **Preliminary Hearings** [1095]
2. **Grand Jury Review** [1100]
   - *Costello v. United States* [1100]
   - Notes and Questions [1103]
   - *United States v. Williams* [1105]
   - Notes and Questions [1113]

# Chapter 11
## The Scope of the Prosecution

### A. The Right to a Speedy Trial

- *Barker v. Wingo* [1118]
- Notes and Questions [1126]
- *Doggett v. United States* [1130]
- Notes and Questions [1138]

### B. Venue

1. **Location of the Crime** [1139]
   - *United States v. Rodriguez-Moreno* [1140]
   - Notes and Questions [1144]
2. **Changes of Venue** [1148]
   - *Skilling v. United States* [1149]
   - Notes and Questions [1166]

### C. Joinder and Severance

- *United States v. Hawkins* [1170]
- Notes and Questions [1177]
Chapter 12
Discovery and Disclosure 1185

A. Disclosure by the Government 1187
   1. The Prosecutor’s General Discovery Obligations 1187
      Federal Rules of Criminal Procedure: Rule 16 1187
      Notes and Questions 1189
   2. The Prosecutor’s Constitutional Disclosure Obligations 1193
      Kyles v. Whitley 1193
      Notes and Questions 1206
      United States v. Ruiz 1210
      Notes and Questions 1213

B. Disclosure by the Defense 1215
   1. Defense Disclosure and the Constitution 1215
      Williams v. Florida 1215
      Notes and Questions 1219
   2. Sanctions for Nondisclosure 1221
      Taylor v. Illinois 1221
      Notes and Questions 1229

Chapter 13
Guilty Pleas and Plea Bargaining 1231

A. The Guilty Plea 1232
   1. Rule 11 and the Plea Process 1232
      a. Knowing 1233
         Notes and Questions 1234
      b. Voluntary 1236
      c. Factual Basis 1237
         North Carolina v. Alford 1238
         Notes and Questions 1243
   2. The Effect of a Guilty Plea 1247
      United State v. Broce 1247
      Notes and Questions 1250

B. Plea Bargaining 1251
   1. History and Practice 1251
      Langbein, Understanding the Short History of Plea Bargaining 1251
      Notes and Questions 1254
      Fisher, Plea Bargaining’s Triumph 1254
      Notes and Questions 1257
      Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys 1258
      Notes and Questions 1263
   2. Inducements to Plead 1263
      Brady v. United States 1264
Notes and Questions 1268
*Bordenkircher v. Hayes* 1271
Notes and Questions 1275

3. The Subject Matter of Plea Bargaining 1278
*United States v. Hodge* 1279
Notes and Questions 1284
*Newton v. Rumery* 1287
Notes and Questions 1294

4. Plea Bargains as Contracts 1295
a. Contract Formation 1295
*Mabry v. Johnson* 1295
Notes and Questions 1297
b. Contract Interpretation 1299
*Ricketts v. Adamson* 1299
Notes and Questions 1305
c. Remedies for Breach of Contract 1308
*Santobello v. New York* 1308
Notes and Questions 1311

C. The Role of Defense Counsel 1313

Chapter 14
The Jury and the Criminal Trial 1315

A. The Right to a Trial by Jury 1315
*Ballew v. Georgia* 1318
Notes and Questions 1324

B. Jury Composition 1327
Notes and Questions on the Impartiality Requirement 1330
1. The Requirement of a Fair Cross Section 1334
*Duren v. Missouri* 1334
Notes and Questions 1340
2. Equal Protection and the Peremptory Challenge 1341
*Batson v. Kentucky* 1341
Notes and Questions 1349
*Miller-El v. Dretke* 1356

C. The Defendant’s Trial Rights 1375
1. The Right to Be Present, to Testify, to Obtain Evidence, to Confront His Accusers, and to Present a Defense 1375
2. The Confrontation Clause 1381
a. The *Crawford* Revolution 1381
*Crawford v. Washington* 1382
*Davis v. Washington* 1390
Notes and Questions 1402
*Michigan v. Bryant* 1410
Notes and Questions 1425
b. The *Bruton* Rule 1430
PART FIVE
POSTTRIAL PROCEEDINGS

Chapter 15
Sentencing

A. Introduction to Sentencing
1. Sentencing Options
2. Sentencing Considerations
3. Substantive Limits on Sentencing—Eighth Amendment Proportionality
   Ewing v. California
   Notes and Questions
   Roper v. Simmons
   Notes and Questions

B. Discretion and Rules in Sentencing
   Frankel, Lawlessness in Sentencing
   Tacha, Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience

C. Do the Rules of Constitutional Criminal Procedure Apply to Sentencing?
   Williams v. New York
   Notes and Questions
   Notes on Determinate Sentencing and the Constitution
   Blakely v. Washington
   United States v. Booker
   Notes and Questions
   Gall v. United States
   Notes and Questions
Chapter 16
Double Jeopardy

A. “Twice Put in Jeopardy”  1550
   1. Acquittals  1550
      Fong Foo v. United States  1550
      Notes on the Special Status of Acquittals  1552
      Ashe v. Swenson  1560
      Notes and Questions  1561
   2. Mistrials  1563
      Oregon v. Kennedy  1563
      Notes and Questions  1566
B. “For the Same Offence”  1568
   Notes on the Rise, Fall, and Rise of the Blockburger Test  1569
   United States v. Dixon  1579
   Notes and Questions  1584
   Notes on Sentencing and the Meaning of “the Same Offence”  1586
C. Double Jeopardy and the “Dual Sovereignty” Doctrine  1588
   Heath v. Alabama  1588
   Notes and Questions  1595
D. Double Jeopardy and the Criminal-Civil Divide  1597
   United States v. Ursery  1600
   Notes and Questions  1610

Chapter 17
Appellate and Collateral Review  1615

A. Appellate Review  1615
   1. The Defendant’s Right to Appeal  1615
   2. The Prosecution’s Right to Appeal  1615
   3. Interlocutory Appeals  1616
   5. Prejudice and Harmless Error  1618
      Chapman v. California  1618
      Notes and Questions  1621
B. Collateral Review  1630
   1. The “Great Writ” of Habeas Corpus  1631
   2. The Nature and Purposes of Federal Habeas
      Terry Williams v. Taylor  1637
      Notes and Questions  1652
   3. Procedural Issues in Federal Habeas  1653
      a. Timing  1653
      b. Exhaustion  1654
      c. Procedural Default
         Wainwright v. Sykes  1655
         Notes and Questions  1656
      d. Successive Petitions and Abuse of the Writ  1658
Contents

   e. The “Fundamental Miscarriage of Justice” Exception 1658
       Notes and Questions 1656
   f. Evidentiary Hearings 1659
       Stone v. Powell 1660
       Notes and Questions 1667
5. Prejudice and Harmless Error 1668
       Brecht v. Abrahamson 1668
       Notes and Questions 1676
6. Innocence and the Future of Federal Habeas 1676

United States Constitution (Selected Provisions) 1683
Table of Cases 1687
Table of Authorities 1701
Table of Statutes and Rules 1719
Index 1729