Saint Louis University Law Journal

Volume 60
Number 3 *Teaching Criminal Procedure (Spring 2016)*

Article 6

2016

A Thematic Approach to Teaching Criminal Adjudication

Adriaan Lanni
Harvard Law School, adlanni@law.harvard.edu

Carol Steiker
Harvard Law School, steiker@law.harvard.edu

A THEMATIC APPROACH TO TEACHING CRIMINAL ADJUDICATION

ADRIAAN LANNI* AND CAROL STEIKER**

A few years ago, I (Adriaan Lanni) decided to teach Criminal Adjudication for the first time and approached my colleague Carol Steiker, who had taught the course several times, for advice. It turned out that Carol had never been entirely satisfied with the conventional criminal adjudication course, which emphasizes federal constitutional doctrine and a chronological organization (from "bail to jail"). We decided to collaborate on putting together a new course, one that takes a more selective, thematic approach that uses a broader range of materials to examine the operation of the criminal justice system. In Part I, Carol Steiker describes and critiques the conventional approach to teaching Criminal Adjudication. In Part II, we discuss our thematic and problem-centered approach to the course. In Part III, Adriaan Lanni discusses her experience teaching the new course. We include a sample syllabus as an appendix.

I. THE CONVENTIONAL APPROACH AND ITS DISCONTENTS

Although there is surely variation in the teaching of Criminal Adjudication, there appears to be a conventional approach that is marked by two commitments: (1) a dominant focus on federal constitutional law and (2) a chronological organization (from "bail to jail"). These conventions are visible in the organization of most of the casebooks, treatises, and study aids on the topic. Moreover, discussions with colleagues at other institutions suggest that these conventions are widely followed in the classroom. I (Carol Steiker) have used the conventional approach in teaching Criminal Adjudication every time I have taught it since I joined the academy in 1992, including while teaching the course jointly with my late colleague Bill Stuntz, whose own casebook largely follows the conventional approach.[1]

The conventional approach is a product of both history and logic. The constitutional focus of the conventional approach is a product of the "big

* Professor of Law, Harvard Law School.

** Henry J. Friendly Professor of Law, Harvard Law School.

1. *See* RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON & ANDREW D. LEIPOLD, COMPREHENSIVE CRIMINAL PROCEDURE (3d ed. 2011).

bang" birth of criminal procedure courses in the 1960s and 1970s. The Warren Court's revolution in criminal procedure, when the Court incorporated virtually all of the provisions of the Bill of Rights to apply to the states through the Due Process Clause of the Fourteenth Amendment, created a large quantity of new constitutional law regulating state criminal processes. This new body of controversial, ever-changing constitutional doctrine soon grew too large and complex to fit into traditional courses on constitutional law. Hence, new courses were born to address this burgeoning area of constitutional regulation. As intuited by the directors of the hit television series *Law & Order*, it makes sense to divide the world of criminal justice into the separate jurisdictions of police investigations and criminal prosecutions. Consequently, most schools eventually adopted two separate courses, one on the constitutional constraints on police practices and the other on the constitutional doctrines that structure the adjudicative process. The adjudication course deals with a hodgepodge of issues that do not have the same degree of thematic unity as police practices do. Moreover, many teachers of the adjudication course come to the academy after having worked as prosecutors or defense lawyers in the litigation trenches. Hence, logic seems to compel a chronological approach to the adjudicative process, organizing the constitutional issues in the order in which they are confronted over the course of litigating a criminal case.

There is much to be said for a chronological, largely constitutional course on the adjudicative process. A constitutional focus can be defended because the federal Constitution governs all across the country and marks the floor above which state legislation (and state constitutional law) must operate. And chronological organization simply makes intuitive sense; it feels familiar to litigators and is easy for students to follow. In my years of teaching Criminal Adjudication along these lines, I felt that I was offering students a valuable educational experience. And yet, I also always felt vaguely dissatisfied with the course. When a younger colleague (Adriaan Lanni) approached me to talk about teaching the course for the first time, I finally systematically reflected on my experience with the course, and came to see and articulate some of the pitfalls of the conventional approach.

First, a constitutional focus inevitably leads to too much emphasis on constitutional doctrine to the detriment of systemic understanding. I found myself spending too much time, for example, teaching about the scope of the constitutional right to counsel (*Gideon v. Wainwright*[2] and its progeny) and the doctrine of ineffective assistance of counsel (*Strickland v. Washington*[3] and its progeny) instead of the structural impediments to providing adequate indigent defense services. Although the Supreme Court cases contain soaring language about the importance of the right to counsel as the vehicle through which all

2. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
3. Strickland v. Washington, 466 U.S. 668, 686 (1984).

other rights are asserted,[4] constitutional law does not provide enough of a window to understand the problems plaguing indigent defense in the United States. Inadequate funding, docket pressures, lack of independence from the judiciary, and other structural issues are at the root of the perennial crisis in indigent defense. Understanding the variety of state and local funding mechanisms, as well as the variety of structures for the appointment, supervision, and training of defense counsel, is at least as crucial to understanding "the right to counsel" as, say, *Strickland*'s two-part test. However, a constitutional focus can create pressure to overemphasize doctrine and underemphasize context; one can feel the students' restlessness at the shift from black letter law to descriptive social science, which feels "soft" and unlikely to be tested on a traditional law school final exam.

Second, the traditional approach—the combination of a constitutional focus and a chronological organization—produces a course that overemphasizes the trial as the central feature of the American criminal justice system. There is a lot of constitutional law about trials—about jury selection, speedy trials, confrontation, cross-examination, and the like—that creates a misleading sense of the significance of the jury trial as a mechanism of case disposition. Once one commits to a chronological survey of constitutional law, one feels pressure to provide "coverage" of the issues commensurate to their constitutional significance, which is generally measured by the play that the issues get in the Supreme Court. However, constitutional significance is not a good proxy for systemic significance. For example, the Supreme Court has given a great deal of attention to race discrimination in jury selection (in *Batson v. Kentucky*[5] and its progeny) and to the constitutional right to confront witnesses at trial (in *Crawford v. Washington*[6] and its progeny). However, in an era in which fewer than five percent of cases are resolved by trial, it simply does not make sense to emphasize trial rights at the expense of understanding the system of plea bargaining, which is the dominant mode of adjudication. Yet I would wager that trial rights take up a much greater share of most criminal adjudication courses than does plea bargaining—and the responsibility for this state of affairs lies largely with the conventional approach to the course.

Third, the pressure for "coverage" of the most important constitutional issues from "bail to jail" not only over-emphasizes the trial but also creates pressure to include doctrinally complex issues that simply are not that important relative to other things that might be studied. For example, most criminal adjudication casebooks include significant coverage of the law of

4. *E.g.*, *Gideon*, 372 U.S. at 344–45 (concluding the right to counsel is so "fundamental" that it is "essential to fair trials").

5. Batson v. Kentucky, 476 U.S. 79, 84–87 (1986).

6. Crawford v. Washington, 541 U.S. 36, 42 (2004).

double jeopardy, which has been reconsidered by the Supreme Court multiple times, and, as a consequence, is highly complex and doctrinally difficult. The Court's interest notwithstanding, double jeopardy is an issue whose systemic importance does not match the time necessary to master it. In contrast, the problem of innocence in the criminal justice system—the conditions that produce wrongful convictions and possible remedies for them—does not have an obvious constitutional doctrinal "hook" and thus can end up getting short shrift in a conventional criminal adjudication course. Here, too, I would wager that most criminal adjudication courses spend more time on double jeopardy than on the causes of wrongful convictions.

Finally, a chronological constitutional survey from "bail to jail" lacks thematic coherence. It is hard to come up with themes that link such disparate topics as preventive detention, jury selection, double jeopardy, and standards for appellate review. Of course, not everyone who teaches Criminal Adjudication includes exactly the same mix of topics. For example, I included in my syllabus the topics of fair trial/free press and defendant competency, which Bill Stuntz did not. And Bill Stuntz included in his syllabus the topics of confrontation and habeas corpus, which I did not. However, both of our conventional syllabi presented similar problems with regard to thematic coherence. The pressure that the conventional approach exerts toward comprehensive coverage of constitutional issues at every stage of the criminal process inevitably will produce syllabi that contain a jumble of issues that do not speak to one another—nor to the most pressing problems of the criminal justice system.

II. A LESS CONVENTIONAL APPROACH

Mindful of some of the pitfalls of the conventional approach, we (Adriaan Lanni and Carol Steiker) collaborated to create a new criminal adjudication syllabus that would resist the conventional approach's commitment to comprehensive, chronological coverage of constitutional law. This new approach offers a set of curated themes instead of a comprehensive or strictly chronological approach, and promotes engagement with wide-ranging readings, real-life case studies, and visiting speakers that augment a much scaled-back consideration of constitutional doctrine.

A. Themes

Instead of starting with the initial appearance and ending with appellate and post-conviction review (i.e. instead of the comprehensive chronological approach), we decided to be selective about the themes covered, scaling back to eight themes from the eighteen or so topics that I (Carol Steiker) covered in my conventional course. Some of the themes we chose—such as "counsel," "charging," and "the jury"—are familiar topics that no doubt would appear on

any conventional syllabus as well. Moreover, we chose to order some of our themes in a chronological fashion, with "charging" preceding "plea bargaining," and "plea bargaining" preceding "sentencing," for example.

Despite these apparent similarities to the conventional approach, our thematic approach diverges more substantially from a conventional syllabus than a superficial glance at our themes might suggest. First, our thematic approach allowed us to leave out many topics that are often included in a chronological survey of constitutional issues. For example, we did not include consideration of the initial appearance, the right to a speedy trial, confrontation, cross-examination, compulsory process, prosecutorial argument, double jeopardy, appellate review, or habeas corpus. Our thematic syllabus simply makes no pretense at comprehensive coverage of constitutional issues in the criminal process, which frees up time to go deeper and to go well beyond constitutional doctrine on the selected themes.

Second, the syllabus diverges significantly from a chronological organization. The first theme on the syllabus—"counsel"—gets extended treatment that includes materials not only on the right to representation at trial and during plea bargaining but also on appeal, as well as materials on post-trial review for effectiveness of counsel, and an in-depth look at structural reform litigation and other avenues to address systemic problems in the funding and delivery of indigent defense services. This systemic focus pervades our thematic approach with the conscious intent that the students see each theme not as a successive "stage" of the criminal process, but rather as a facet of a complex and interwoven "system" of criminal justice. The biggest divergence from a chronological approach comes in the last theme in the syllabus, "Outcomes: Racial Effects and the Problem of Innocence." The problems of discrimination and wrongful conviction pervade the entire criminal process and are the cumulative product of choices made all along the way from "bail to jail." By explicitly naming "outcomes" as a theme, we deliberately step away from a focus on procedure to consider systemic effects.

In short, our thematic approach not only streamlines and deepens consideration of the chosen topics, it does so in a way that signals that the course is not one on "constitutional criminal procedure," as the conventional approach would have it; rather, it is a course about adjudication within our criminal justice *system*.

B. A Problem-Centered Approach

The second innovation was to include coverage of important topics that are not fully addressed by Supreme Court doctrine. In many instances, we used a problem-centered approach, offering doctrinal and non-doctrinal readings, and discussion questions to address a particular issue—for example, the funding of indigent defense counsel, the exercise of prosecutorial discretion, racial impacts, and innocence—rather than using the case law to organize these

topics. In some instances, this involved relatively minor reframing and supplementation of the traditional doctrinal readings. In others, we made room in the syllabus for topics that are traditionally not covered or covered only briefly. And in some cases, we created substantially new material. For example, we engaged a writer from the Harvard Law School Case Studies Program to help us develop a case study of the charging and plea bargaining process in the Aaron Swartz prosecution.[7] We also brought in a number of visiting speakers to address emerging issues.

One relatively minor change was to begin each topic with policy-based readings rather than begin with a case and fold in policy questions as part of the discussion/critique of the case. For example, rather than jumping right into the case law on the right to counsel, we introduced this topic by comparing the current methods of providing counsel for indigent defendants with potential alternatives, like voucher systems. While these topics are typically discussed in criminal adjudication classes, getting the students in the mindset of thinking about the status quo and its alternatives placed these policy questions on an equal footing with the standard doctrinal topics that we also covered. In some cases, the problem-oriented framing suggested new questions for discussion. For example, we briefly considered alternatives to our charging system, including historical examples of private prosecution systems. We also assigned a reality TV show of a French homicide prosecution to give an example of a more inquisitorial-style civil law system.

The problem-centered approach also led us to include material for some of our themes that are absent or mentioned only briefly in the notes in most casebooks. We devoted a day to systemic challenges to underfunding of indigent defense counsel. In addition to discussing representative cases, we invited speakers involved in current systemic litigation: the first year, Steve Hanlon talked about his lawsuit challenging Missouri's system of funding counsel for the indigent; the next year, Steve Bright discussed a similar case in Georgia. As part of our sentencing topic, we devoted part of a day to the problem of "debtor's prisons," discussing *Bearden v. Georgia*[8] (which is mentioned only in a note in the casebook we used) and the Department of Justice's report on the Ferguson Police Department.[9] We also discussed

7. For a description of the problems this case presented, see ADRIAAN LANNI, CAROL STEIKER & ELIZABETH MORONEY, PROSECUTORIAL DISCRETION IN CHARGING AND PLEA BARGAINING: THE AARON SWARTZ CASE (A) (June 2014), http://casestudies.law.harvard.edu/prosecutorial-discretion-in-charging-and-plea-bargaining-the-aaron-swartz-case-a/ [http://perma.cc/JG9J-9RVC] (click on "Add to Cart" and follow steps for free download of the PDF publication).

8. Bearden v. Georgia, 461 U.S. 660, 664, 667–68 (1983).

9. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–43, 100 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-re

problem-solving approaches to sentencing through readings and speakers. One year, a judge spoke about drug and mental health courts; in another, we had a speaker from a local restorative justice community-police partnership.

A major impetus behind the course innovation was our sense that constitutional doctrine did not adequately address the process of charging and plea bargaining. In a world of guilty pleas, the prosecutor's determinations of what to charge and what bargain to offer are the ball game, yet the case law regulates this process only minimally. Whether they become prosecutors or defense lawyers, students who hope to work in the criminal justice system must understand the process of charging and plea bargaining. While some casebooks provide short charging problems, we wanted an in-depth case study that would allow the students to role-play the entire charging and bargaining process in a case. We chose the Aaron Swartz prosecution because information about successive plea offers, as well as details about the alleged crime and the defendant, were readily available. Of course, Aaron Swartz is far from a typical defendant. But the public controversy over his prosecution and the criminal penalties authorized under the Computer Fraud and Abuse Act[10] invited a lively discussion about the extent to which the case was or was not representative of more ordinary prosecutions. The case study teaching plan (available with the case study from the Harvard Law School Case Studies Program[11]) calls for students to play the role of either the prosecutor or defense attorney at a series of decision points, such as each charging decision and plea offer. At each decision point, students are asked to articulate the considerations that may have led the prosecutor or defense counsel to a particular position, and whether they would have taken a different approach.

Two of our themes—race and innocence—are not typically taught as stand-alone topics.[12] The readings we put together on racial impacts included both cases (*United States v. Armstrong*[13] and *McCleskey v. Kemp*[14]) and secondary readings, including material on statistical disparities in the criminal justice system, implicit bias research, and portions of Michelle Alexander's *The New Jim Crow*.[15] The class on innocence focused less on doctrine than on the sources of error in false convictions and related reform proposals. Teaching race and innocence as independent topics, instead of talking about them briefly

leases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [http://perma.cc/T7RG-C9SH] [hereinafter DOJ INVESTIGATION].

10. 18 U.S.C. § 1030 (2013).

11. LANNI, STEIKER & MORONEY, *supra* note 7.

12. *See* Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race Into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016).

13. United States v. Armstrong, 517 U.S. 456, 464–65 (1996).

14. McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987).

15. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

and intermittently in the course of the standard tour of the case law, allows students to analyze these problems more openly and comprehensively. This approach encourages discussion of which doctrinal and structural features play the greatest role in problematic criminal justice outcomes, and which reform proposals would be likely to have the greatest impact.

III. WHAT WORKED AND WHAT DIDN'T

I (Adriaan Lanni) have taught the redesigned Criminal Adjudication class twice. Although a thematic approach inevitably necessitates some trade-offs, my impression is that the new course is more cohesive and gives our students a better understanding of criminal adjudication than the more traditional "bail to jail" approach. However, the course is still very much a work in progress. Here are some thoughts on what worked, what could be improved, and some things to keep in mind for those who are considering adopting this approach.

Most obviously, the thematic approach comes at the cost of eliminating a fair amount of doctrine. I did not cover double jeopardy or the right to a speedy trial at all. Although we read *Blakely v. Washington*,[16] we did not study the various twists and turns of the *Apprendi*[17] doctrine in detail. Some students accustomed to courses that focus on doctrine and assignments exclusively from a casebook were surprised to see the amount of supplemental reading in the syllabus. I found that it was helpful to explain the rationale behind the course in the first class so that students understood why the syllabus was unconventional. This introduction also gave them fair warning that the non-doctrinal materials were important and would be discussed in class and tested on the exam. One drawback is that editing down the secondary sources to capture only the important ideas and evidence takes a significant amount of time; we definitely assigned too much reading and plan to do more editing, particularly of the law review articles, in the future.

The Swartz case study was a highlight of the course. Initially, I was a bit skeptical about the value of the case study method, but this approach is very well suited to analyzing prosecution and defense perspectives during the charging and bargaining process. The entire class was engaged throughout, and the discussion was much more nuanced and specific than the general discussions about prosecutorial discretion I tend to see in my substantive criminal law class. One challenge with this case study was ensuring a balanced discussion. Some students felt very strongly that the prosecution was improper. Although a defense of the prosecution's point of view came through during the role-play, only a few students were willing to express their agreement with any of the prosecution's bargaining positions. I suspect that there was more

16. Blakely v. Washington, 542 U.S. 296 (2004).
17. Apprendi v. New Jersey, 530 U.S. 466 (2000).

sympathy for the prosecution's tactics among the students than was voiced. I am considering using clickers to anonymously poll students both at the beginning and end of discussion of each decision point. If I am right that the students' views of the case were more divided than it appeared, the anonymous polls might encourage students holding minority views to speak up.

The students reacted most positively to the inclusion of emerging issues, such as "debtors' prisons" and systemic litigation related to indigent defense funding. They commented that these topics made the class seem more relevant and connected to current developments on the ground. Several students expressed gratitude that the class included discussion of the prosecutor's handling of the grand jury investigation of the shooting of Michael Brown in Ferguson and the Department of Justice's Ferguson Report,[18] which was published while the course was being taught. The course's thematic approach made it possible to integrate discussion of such important current issues without having it seem like a digression from the normal business of the class.

The visiting speakers, some of whom attended in person, while others spoke via videoconference, also helped bridge the gap between Supreme Court doctrine and recent developments. Since a significant amount of class time is handed over to visiting speakers, it is vital to choose speakers who are thoughtful about their work and are open to discussing criticisms of their points of view. One of our best sessions was on restorative justice, in large part because the speaker (clearly an excellent facilitator!) openly encouraged the students to critique the specifics of her program as well as the restorative justice approach more generally. Another potential drawback of visitors is that their schedules do not always allow them to visit the class on a particular day, which may make it necessary to rearrange the syllabus and split up themes.

The racial impacts topic was set for the end of the course. It was successful, though it did involve some compromises elsewhere in the syllabus. Including *Armstrong*[19] under this theme meant that we did not read this important case during our earlier discussion of prosecutorial discretion. And it might have been helpful for the students to have read about implicit bias research earlier on in the term. Although we discussed race in conjunction with doctrine many times over the course of the class, I sometimes felt as though I was holding back a broader discussion on this topic until we reached the racial impacts section of the syllabus. Nevertheless, as we discussed earlier, this approach did foster a more comprehensive discussion of the problem and potential reforms. This topic also helped tie the topics of the course together by inviting students to reconsider the various stages of the criminal process.

The thematic, problem-oriented approach to teaching the course affected the way that students demonstrated their mastery of the material on the final

18. DOJ INVESTIGATION, *supra* note 9.

19. United States v. Armstrong, 517 U.S. 456, 464–65 (1996).

exam. The exam included a doctrinal fact pattern, an essay, and a set of "identifications" that required students to identify and discuss the significance of short quotations from cases and other course readings. Some of the identifications explicitly tested non-doctrinal material, but the exam did not look all that different from a conventional criminal adjudication exam. However, I did find that the students' answers to the identification and essay questions were different from what I would expect in a conventional course. Students' discussions of the significance of a doctrinal test, for example, tended to be broader and include the holding's implications for the system as a whole as well as for the specific area of legal doctrine. And the answers to the essay questions were significantly more sophisticated and thoughtful than what I normally see in other courses. Both the experience of teaching the course and the student mastery demonstrated on the final exam have encouraged me to continue to use a thematic, problem-oriented approach to criminal adjudication.

APPENDIX

CRIMINAL ADJUDICATION SAMPLE SYLLABUS[20]

I. RIGHT TO COUNSEL

1. INTRODUCTION

Excerpt from Stephen Bright & Sia Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright*,* 122 YALE L.J. 2150 (2013)

Excerpt from Heather P. Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341

Excerpt from Carol Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694 (2013)

Excerpt from Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309 (2013)

Excerpt from Adam Liptak, *Need-Blind Justice*, N.Y. TIMES, Jan. 4, 2014

Powell v. Alabama
Gideon v. Wainwright

2. THE SCOPE OF THE RIGHT TO APPOINTED COUNSEL

Argersinger v. Hamlin; *Scott v. Illinois*
Gagnon v. Scarpelli; *In re Gault*
Ross v. Moffit

Excerpt from John P. Gross, *What Matters More? A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55 (2013)

Excerpt from Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287 (2013)

20. Each numbered topic is meant to take roughly one 1.5-hour class period. Most criminal procedure textbooks include edited versions of the majority of the cases in this syllabus and would work for this class.

3. INEFFECTIVE ASSISTANCE OF COUNSEL PART 1

A. Assessing Counsel's Effectiveness

Strickland v. Washington
Rompilla v. Beard
Bobby v. Van Hook
Excerpts from Carol Steiker, Gideon's *Problematic Promises*, 143 DAEDALUS 51 (2014)

4. INEFFECTIVE ASSISTANCE OF COUNSEL PART 2

B. Assessing Prejudice

Lockhart v. Fretwell; *Glover v. United States*

C. *Strickland* and Guilty Pleas

Padilla v. Kentucky
Missouri v. Frye
Lafler v. Cooper

D. Per Se Ineffectiveness

Cronic; *Bell v. Cone*

5. SYSTEMIC CHALLENGES/REFORMS TO INDIGENT DEFENSE COUNSEL SYSTEMS

(Guest speaker involved in current systemic reform litigation)

Excerpt from Cara H. Drinan, *The Third Generation of Indigent Defense Litigation***,** 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009)
Hurrell-Harring v. State of New York
Lavallee v. Justices in Hampden Superior Court
State ex rel. Missouri Public Defender Commission v. Waters
Excerpt from ABA, "The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards" (2014)

6. THE RIGHT TO CONFLICT-FREE REPRESENTATION; THE RIGHT TO SELF-REPRESENTATION

A. The Right to Conflict-Free Representation

Holloway v. Arkansas
Cuyler v. Sullivan; *Burger v. Kemp*; *Mickens v. Taylor*
Wheat v. United States

B. Right to Self-Representation

Faretta v. California
United States v. Kaczynski

II. BAIL AND PREVENTIVE DETENTION

7. BAIL AND PREVENTATIVE DETENTION

Listen to/read NPR report: "Behind the Bail Bond System"
Excerpts from Vera Institute of Justice, "Fair Treatment of the Indigent: The Manhattan Bail Project"
Summary of Bail Reform Act of 1984
United States v. Dreier
United States v. Salerno

III. CHARGING, PLEA BARGAINING, AND THE GRAND JURY

8. THE COMPARISON TO CIVIL SYSTEMS; THE PROSECUTORIAL DECISION WHETHER TO CHARGE

Watch: 30-minute reality TV show depicting a homicide prosecution in France (http://www.youtube.com/watch?v=u9ttrUx-5tE)
Attica v. Rockefeller
Ari Phillips, "How Two Guys, a Lobster Boat, and a District Attorney Made Climate History" (2014) (http://thinkprogress.org/climate/2014/ 09/10/3565445/lobster-boat-district-attorney-climate-history/)
Excerpts from William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004)
Excerpts from Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009)

9. THE GRAND JURY AND SCREENING

Costello v. United States
United States v. Williams
Excerpts from Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265 (2006)
Excerpts from Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY (Roger Fairfax ed., 2010)
Excerpts from media accounts and transcripts from *State of Missouri v. Darren Wilson* grand jury proceedings

10. THE GRAND JURY AND INVESTIGATIONS

(Assistant U.S. Attorney guest speaker)

United States v. Dionisio
United States v. R. Enterprises
ABA proposed grand jury reforms

11. PLEA BARGAINING

Excerpts from Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004)
Excerpts from Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992)
Excerpts from Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984)
Brady v. United States
United States v. Kupa
Bordenkircher v. Hayes
United States v. Pollard
United States v. Ruiz
FED. R. CRIM. P. 11

12. PROSECUTORIAL DISCRETION IN CHARGING AND PLEA BARGAINING: THE AARON SWARTZ CASE

Harvard Law School Case Studies Program, The Aaron Swartz Case Study

IV. DISCOVERY

13. DISCOVERY PART 1

FED. R. CRIM. P. 16; Jencks Act
Arizona v. Youngblood
Williams v. Florida
Taylor v. Illinois

14. DISCOVERY PART 2

The *Brady* Rule (*Brady*; *Agurs*; *Bagley*; *Kyles v. Whitley*)
Excerpts from Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, CHAMPION, May 2013
Excerpts from Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987)

Excerpts from Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009)
Proposed Fairness in Disclosure of Evidence Act
Excerpts from Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425 (2013)

V. JURY

15. THE JURY RIGHT

Duncan v. Louisiana
Jury size (*Williams*; *Ballew*)
Unanimity (*Apodaca*)
Excerpts from Michael Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1 (1997)

16. JURY SELECTION AND COMPOSITION

Duren v. Missouri
Batson v. Kentucky
Powers v. Ohio; *Georgia v. McCollum*; *J.E.B. v. Alabama*
Purkett v. Elem; *Hernandez v. New York*
Excerpt from Jeffrey B. Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125
Excerpts from Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011)
Excerpts from Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1 (2005)

17. JURY DELIBERATIONS AND VERDICT; PRETRIAL PUBLICITY

A. Jury Deliberations and Verdict

Tanner v. United States
United States v. Thomas
Excerpts from Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995)

B. Pretrial Publicity

Skilling v. United States
In re Tsarnaev

VI. SENTENCING

18. COURTS VS. LEGISLATURES VS. JURIES; DISCRETIONARY VS. GUIDELINES APPROACHES

Williams v. New York
Brief description of Federal Sentencing Guidelines
Excerpts from Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005)
Excerpts from Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010)
Excerpts from Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003)
Excerpts from Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359 (2005)

19. LIMITS ON JUDICIAL SENTENCING

A. *Apprendi* and Its Progeny

Apprendi v. New Jersey
Blakely v. Washington
Kimbrough; *Gall*

B. Fines and Probation

Bearden v. Georgia
Excerpts from DOJ Ferguson Report
Excerpt from Note, *Policing and Profit*, 128 HARV. L. REV. 1723 (2015)

20. RESTORATIVE JUSTICE

(Guest speaker from restorative justice community-police partnership)

Excerpts from HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE (2002)
Proposed MA Senate Act 1001 "An Act Promoting Restorative Justice Practices"

VIII. OUTCOMES: RACIAL EFFECTS AND THE PROBLEM OF INNOCENCE

21. RACIAL EFFECTS

Excerpts from Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012)

Excerpts from Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012)
Excerpt from MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012)
McCleskey v. Kemp
Excerpts from Randall Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988)
United States v. Armstrong

22. SENTENCING AND RACIAL DISPARITY

(Guest speaker from The Sentencing Project)
Excerpts from Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S (2011)
Excerpts from U.S. Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011)
Excerpts from Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16 (2008)

23. INNOCENCE

(Guest speaker from an innocence project)
Excerpts from National Registry of Exonerations Report (2014)
Excerpts from Steven Krieger, *Why Our Justice System Convicts Innocent People and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333 (2011)
Excerpts from Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008)
Excerpts from BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011)

24. EVALUATIONS OF THE SYSTEM AND PROSPECTS FOR REFORM

Excerpts from Judge Harvie Wilkinson III, *In Defense of American Criminal Justice,* 67 VAND. L. REV. 1099 (2014)
Excerpts from WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011)
Excerpts from the Honorable Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1 (2015)
Excerpts from Sentencing Project, "The State of Sentencing 2014" (2014)