Negotiating Crime
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Plea Bargaining, Problem Solving, and Dispute Resolution in the Criminal Context

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## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table of Principal Cases</td>
<td>xv</td>
</tr>
<tr>
<td>Preface</td>
<td>xvii</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>xix</td>
</tr>
</tbody>
</table>

### Part I

**Chapter 1 • Introduction**

I. The U.S. Criminal Legal System: A Basic Introduction 3

II. The Players 6

A. Judges 7

B. Prosecutors 8

C. Defense Attorneys 9

III. Theories of Punishment 12

A. Incapacitation/Public Protection 12

B. Deterrence 13

C. Retribution 13

D. Treatment/Rehabilitation 14

IV. Incarceration in the United States 14

Jacob Kang-Brown, Oliver Hinds, Jasmine Heiss & Olive Lu, *The New Dynamics of Mass Incarceration* 15

Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform* 17

Notes/Questions 19

V. Structure of This Book 24

A. Plea Bargaining 25

B. Problem Solving Courts/Therapeutic Justice 26

C. Restorative Justice 27

D. Juvenile Legal System 28

Additional Resources 30

**Chapter 2 • Charging, Discretion, and Diversion**

I. Prosecutorial Power in Filing Charges 32

Fortieth Annual Review of Criminal Procedure, *Prosecutorial Discretion* 32

Peter Krug, *Prosecutorial Discretion and Its Limits* 33
Peter Krug, *Prosecutorial Discretion and Its Limits* 37
Notes/Questions 39

II. Prosecutorial Power/Role in Grand Jury Indictments 39
Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose* 42
Notes/Questions 43

III. Concerns about Prosecutorial Discretionary Power 45
Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion — Knowing There Will Be Consequences for Crossing the Line* 48
Notes/Questions 49

IV. Diversion 53
Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System* 54
Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration* 56
Notes/Questions 57

V. Comparative Prosecutorial Powers 58
Ronald F. Wright, *Reinventing American Prosecution Systems* 59
Notes/Questions 61

Additional Resources 61

**Chapter 3 · Plea Bargaining: An Introduction** 63

I. A Short History of Plea Bargaining 64
   Albert A. Alschuler, *Plea Bargaining and Its History* 64

II. Why We Have Plea Bargaining 70
   Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye* 71

III. The Underlying Interests 72
   Notes/Questions 75

IV. The Foundational Cases 76
   A. Plea Bargaining Is Constitutional 76
      *Brady v. United States* 77
      Notes/Questions 80
   B. Limits on Prosecutorial Power? 81
      *Santobello v. New York* 81
      Notes/Questions 83
      *Bordenkircher v. Hayes* 83
      Notes/Questions 87
   C. Requirements of a Guilty Plea 87
      *Godinez v. Moran* 87
CONTENTS

Notes/Questions 92
Additional Resources 93

Chapter 4 · Plea Bargaining Rules and Practice 95
I. Statutes Regulating Plea Bargaining? 96
   Notes/Questions 97
   Notes/Questions 100
II. Defense Lawyers: Constraints and Duties 100
   A. Indigent Defense 100
      Cynthia Alkon, The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye 100
   B. The Right to Effective Assistance of Counsel 102
      Padilla v. Kentucky 102
      Missouri v. Frye 106
      Notes/Questions 112
      Lafler v. Cooper 113
      Notes/Questions 121
   C. Competent Assistance beyond Counseling? 122
III. Right to Discovery 123
      Cynthia Alkon, The Right to Defense Discovery in Plea Bargaining Fifty Years after Brady v. Maryland 123
Additional Resources 127

Chapter 5 · Plea Bargaining Concerns 129
I. Coercion 131
   John H. Langbein, Torture and Plea Bargaining 131
   Notes/Questions 133
II. The Trial Penalty 133
   Cynthia Alkon, The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye 134
   Notes/Questions 135
III. Innocent Defendants 135
   Jed S. Rakoff, Why Innocent People Plead Guilty 136
   Notes/Questions 138
   Josh Bowers, Punishing the Innocent 139
   Notes/Questions 142
IV. Prosecutorial Conduct and Power in Plea Bargaining 143
   A. Power to Charge 143
      Cynthia Alkon, The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye 144
      Notes/Questions 144
      Notes/Questions 146
Chapter 6 · Plea Bargaining Reform

I. Change the Law

A. Reform the Underlying Criminal Law


Questions/Notes

B. Limits on the Possible Plea Discount

Questions/Notes

II. Change the Process

A. Better Regulation of Plea Bargaining

Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection* 170

Questions/Notes

B. Give Defendants More of a Role in the Process


Questions/Notes

C. Ban Plea Bargaining or Increase the Number of Trials

Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study* 179

Questions/Notes

III. Change the Players

A. Changes in How Defense Lawyers Do Their Job

Questions/Notes

B. Change Prosecutorial Behavior

1. Reduce Prosecutorial Hard Bargaining


Questions/Notes

2. Improve Prosecutorial Screening of Cases

Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff* 186

Questions/Notes
CONTENTS

C. Increase the Role of Judges
  Notes/Questions 195
  Additional Resources 195

Chapter 7 · Plea Bargaining as Negotiation 197
I. Plea Bargaining Is Negotiation — with Constraints 198
  Cynthia Alkon, *Plea Bargaining: An Example of Negotiating with Constraints* 198
  Notes/Questions 202
  Gerard E. Lynch, *Our Administrative System of Criminal Justice* 200
  Notes/Questions 202
  Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?* 203
  Notes/Questions 205
  Notes/Questions 209

II. Preparation for Plea Bargaining 210
  Notes/Questions 216
  Cynthia Alkon, *Plea Bargain Negotiations: Defining Competence beyond Lafler and Frye* 217
  Notes/Questions 218
  Rebecca Hollander-Blumoff, *Getting To “Guilty”: Plea Bargaining as Negotiation* 219
  Notes/Questions 222
  Jenny Roberts & Ronald F. Wright, *Training for Bargaining* 223
  Notes/Questions 225
  A Note on Options and Flexibility in Negotiation 225
B. Elements of an Agreement, Bargaining Options and BATNA 219
  Notes/Questions 222
  Jenny Roberts & Ronald F. Wright, *Training for Bargaining* 223
  Notes/Questions 225
  A Note on Options and Flexibility in Negotiation 225
C. Outlining Interests and Setting Goals in Plea Bargaining 226
  1. Understanding Interests of All Parties 226
     Abbe Smith, *The Lawyer’s “Conscience” and the Limits of Persuasion* 226
     Notes/Questions 228
     Notes/Questions 229
  2. Setting Goals and Asking for Them 230
     Notes/Questions 231
     Jenny Roberts & Ronald F. Wright, *Training for Bargaining* 232
     Notes/Questions 233
  Additional Resources 234
Chapter 8 · Plea Bargaining — Sitting Down at the Table

I. Lawyer Reputation and Relationships — Preparing to Communicate
   Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?* 238
   Notes/Questions 240

II. Negotiation Styles
   A. Competing 241
   B. Accommodating 242
   C. Avoiding 243
   D. Collaborating 244
   E. Compromising 245
   Jenny Roberts & Ronald F. Wright, *Training for Bargaining* 245
   Notes/Questions 247

III. Communication
   A. Information Exchange
      Jenny Roberts & Ronald F. Wright, *Training for Bargaining* 249
      Notes/Questions 250
   B. Social Intuition 250
      Notes/Questions 252
   C. Choosing among Modes of Communication 252

IV. Don't Screw It Up — Understanding Negotiation Errors
   A. Working with Defendants in the Context of Plea Bargaining
      Richard Birke, *Reconciling Loss Aversion and Guilty Pleas* 254
      Notes/Questions 256
      Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial* 257
      Notes/Questions 263
   B. Understanding Prosecutor Motivations and Perspectives
      Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining* 263
      Notes/Questions 266
      Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome* 267
      Notes/Questions 269

Additional Resources 270

Part II

Introduction to Part II 275

Chapter 9 · Problem Solving Courts/Therapeutic Justice

I. How Problem Solving Courts Got Started
   A. Introduction 278
      Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts* 279
      Notes/Questions 282
      Phase 1 Requirements 284
      Phase 2 Requirements 284
## Phase 3 Requirements
285

## Phase 4 Requirements
285

## Phase 5 Requirements
286

## Notes/Questions
286

Sarah Beller, *A Day at the Drug Court*
287

## Notes/Questions
291

Aaron Levin, *Mental Health Courts: A Strategy That Works*
292

## Notes/Questions
294

Center for Effective Justice, Texas Public Policy Foundation, *Veterans Are Frequently Incarcerated*
295

## Notes/Questions
296

### II. Why Does This Work? (Or What Is the Theory Behind These Courts?)
296

297

## Notes/Questions
301

Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*
301

### III. Does This Work in Practice?
304

Richard C. Boldt, *The “Tomahawk” and the “Healing Balm”: Drug Treatment Courts in Theory and Practice*
304

## Notes/Questions
307

### Additional Resources
307

---

**Chapter 10 · Problem Solving Courts: Concerns**
309

### I. Concerns with Judges and Attorneys
310

Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*
310

## Notes/Questions
313

Tamar M. Meekins, “Specialized Justice”: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm
313

## Notes/Questions
321

### II. Concerns with Offenders and the Law
322

Norman L. Reimer, *Addicted to a Flawed Solution: Drug Courts Revisited*
322

## Notes/Questions
324

James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*
324

## Notes/Questions
330

What Do Medical Professionals Have to Say?
330

### III. Ideas for Moving Forward
331

Greg Berman, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*
331

## Notes/Questions
336

Tamar M. Meekins, “Specialized Justice”: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm
339

## Notes/Questions
339

### Additional Resources
339
CONTENTS

A. Discrimination 422
   Samantha Michaels, Black Kids Are 5 Times Likelier Than White Kids to Be Locked Up: And the Racial Disparity Is Only Growing 422
   Heather Cobb, Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court 423
   Notes/Questions 426

B. Innocent Juvenile Defendants 427
   Steven A. Drizin & Greg Luloff, Are Juvenile Courts a Breeding Ground for Wrongful Convictions? 427
   Notes/Questions 433

C. Transfer to Adult Court 434
   Christopher Slobogin, Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction 434
   Notes/Questions 435

Additional Resources 436

Chapter 14 · Are Juveniles Different? 437
I. Introduction to Neuroscience and the Juvenile Brain 438
   Lorelei Laird, States Raising Age for Adult Prosecution Back to 18 438
II. The Supreme Court Cases 439
   Roper v. Simmons 440
   Notes/Questions 444
   Graham v. Florida 444
   Notes/Questions 451
   Miller v. Alabama, Jackson v. Hobbs 452
   Notes/Questions 457

III. Juvenile Justice: A Comparative View 458
   Anthony N. Doob & Michael Tonry, Varieties of Youth Justice 459
   Notes/Questions 462

IV. Juvenile Justice Reforms Based on Brain Science? 462
   A. Are We Adults at 18? 463
      Tim Requarth, Neuroscience Is Changing the Debate Over What Role Age Should Play in the Courts 463
      Notes/Questions 464
   B. Should Juveniles Be Prosecuted? 465
      Adjusting Juvenile Justice 465
      Notes/Questions 466

Additional Resources 466

Chapter 15 · Alternative Processes for Juveniles 467
I. Juvenile Court: The Original Alternative Process 468
   Christopher Slobogin, Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction 468
   Notes/Questions 469
CONTENTS

II. Problem Solving Courts in the Juvenile System 470  
  Daniel M. Filler & Austin E. Smith, *The New Rehabilitation* 470  
  Notes/Questions 472  
  Erin R. Collins, *Status Courts* 473  
  Notes/Questions 478  
III. Teen Courts 478  
  Julieta Kendall, *Can It Please the Court? An Analysis of the Teen Court System as an Alternative to the Traditional Juvenile Justice System* 479  
  Notes/Questions 482  
IV. Restorative Justice for Juveniles 482  
  Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School* 482  
  Notes/Questions 489  
Additional Resources 494  

Bibliography 495  

Index 503
# Table of Principal Cases

Bordenkircher v. Hayes, 434 U.S. 357 (1978), 83, 87, 154, 155  
Brady v. Maryland, 373 U.S. 83 (1963), 8, 123, 182  
Brady v. United States, 397 U.S. 742 (1970), 76, 77, 81, 82, 87, 89, 153  
Gideon v. Wainwright, 372 U.S. 335 (1963), 10, 100  
Missouri v. Frye, 106, 109, 113, 118, 121, 182, 197, 199  
Montgomery v. Louisiana, 136 S. Ct. 718 (2016), 457  
Padilla v. Kentucky, 98, 102, 107, 112, 114, 181  
Santobello v. New York, 404 U.S. 2567 (1971), 25, 81, 110, 152  
United States v. Jackson, 390 U.S. 570 (1968), 76  
Preface

This book is about how we resolve criminal cases in processes other than trials. Until now there has not been a single book that brings together reading about the concerns, critiques, proposals for reform, as well as focusing on the skills needed for the variety of processes beyond trial through which criminal cases are resolved.

To our readers who are law professors and law students, we understand that this book may look and feel different from a standard law school casebook. We do not focus on cases but instead have brought together reading from criminal law scholars, dispute resolution scholars, social scientists, and the media. Our focus is not on doctrine, in large part because there is very little doctrine in this area. Instead we focus on giving the reader a basic introduction, with a large dose of critical readings, to how criminal cases are actually resolved in the United States.

This book covers four topics: Plea bargaining, restorative justice, therapeutic justice, and juvenile justice. In covering each of these four topics we will first discuss what is happening on a practical level (for example, what are the stages of a plea negotiation? Who has more power in the plea negotiation process? How can you build your negotiation skills?) We will also discuss the evolution of these policies (for example, how did drug courts develop? How are these different than restorative justice processes?) Embedded into these discussions will be the policy reasons for these processes. Finally, for each topic, we will discuss concerns and recommendations for reform.

Each of the four topics that we are covering in this book is a rich area for scholarship and writings, although the four topics have not yet been brought together in one book. In fact, this likely means that some material is very familiar for our readers and some is not. For those of us steeped in criminal law and process, readings on negotiation skills and perhaps some of the alternative processes of problem solving courts or restorative justice will be relatively novel. For those of us coming from the dispute resolution field, we expect that the early chapters on plea bargaining might be particularly necessary to remind us of the current state of criminal practice or that much of the materials from criminal procedure cases to state regulations to ethical guidelines is completely unfamiliar. And for those of us from a clinical perspective, there will yet again be certain readings or theories that seem familiar while others are quite foreign. Although this may at times be frustrating, we also hope that this cross-disciplinary approach reflects the richness of this area of the law ... as well as the need to bring all of these streams together in order to capture a fuller picture of what 21st Century lawyers need to know.
Each chapter in this book includes original text and excerpts from published material. Each chapter also includes discussion points, and questions to give additional information and to focus classroom discussion. Due to the wonderful wealth of material it is impossible for us to include everything in each chapter. Instead, we have pulled together some reading that helps to start the conversation in each topic and hope that classroom time will give rise to even more discussion. We have also included a list, at the end of each chapter, of additional resources. These lists include books, scholarly articles, and other materials that further illuminate the topics covered in each chapter.

Given the cross-disciplinary nature of the book, this book can easily be used in a variety of ways. This book could be used as the text in a standard 3-credit course or seminar or as the text for clinical classes in prosecution or defense. Parts of this book could be pulled out for stand-alone classes, such as a course on plea bargaining. Parts of this book could supplement reading in more standard doctrinal classes such as in criminal procedure. This book is intended to give students a basic introduction in these areas, to challenge our thinking about these topics, and to be a jumping off point for skill building, simulations and other exercises.

Finally, we want to note that this book is premised on the fact that criminal practice is constantly evolving. It is because of that evolution, and the likely continuation of change, that we think it is so important for new lawyers to understand all of the different processes that occur under the rubric of the criminal legal system. For example, mass incarceration was not always a defining feature of the US criminal legal system. Drug courts are also fairly new. We want to equip our readers with a critical understanding of how we resolve criminal cases now so that they can be part of the continuing process of change and contribute to improving our criminal legal system. We hope that this book will support more thoughtful and meaningful approaches to criminal justice reform.
Acknowledgments

This book has been a wonderful collaboration and we are grateful to many supporters for all of their help along the way. When we first hatched this idea, we decided to spend a week together at Marquette to block out what we thought the book should look like and to write a book proposal. This one-week visit became a regular staple of the last six summers and we are thankful to both Texas A&M School of Law and Marquette Law School for supporting this time together as well as Susan Campbell and Tom Content for hosting Cynthia every summer in their subterranean suite!

As we started to write, we knew that this book would build on both shared expertise in dispute resolution and separate expertise in criminal law, criminal procedure and restorative justice. Our colleagues in all of these linked fields have been so helpful in reviewing everything from the book proposal to the table of contents to reading particular chapters. Much appreciation to Cara Drinan, Michael O’Hear, Peter Reilly, Jenny Roberts, and Ron Wright. Thank you also to Richard Birke, Amy Cohen, Aliza Cover, Eve Hanan, Art Hinshaw, Carrie Menkel-Meadow, and Melanie Reid. We are particularly grateful to Jen Reynolds who took our page proofs and taught with this book during her visit at Harvard Law School to really give this a test run. Thank you as well to Amber Baylor who introduced plea bargaining to her students in the Texas A&M Criminal Defense Clinic also using page proofs. And we thank all of the students in our respective classes at Texas A&M and Marquette who commented on the materials as they were being developed.

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We look forward to adding more thanks to each of you as you use these innovative materials and let us know how to continue to improve the book!