Lesson Plan

A. Prosecutorial duties
    1. The prosecutor in a federal case is called a U.S. Attorney
    2. Prosecutors may be referred to as prosecuting attorney, state prosecutor, district attorney, county attorney, or city attorney
        i. Have great autonomy and are considered dominant figures in the American criminal justice system
        ii. In some jurisdictions the district attorney is the chief enforcement officer and has duty of fairness.
        iii. Have the power to bring the resources of the state against the individual and hold the legal keys to meting out or withholding punishment
    3. The Brady rule – prosecutors are not permitted to keep evidence from the defendant and her or his attorneys that may be useful in showing innocence
B. The office of the prosecutor
    1. During the pretrial process, prosecutors have a great deal of discretion in decisions
        i. Whether an individual who has been arrested by the police will be charged with a crime
        ii. The level of the charges to be brought against a suspect
        iii. If and when to stop the prosecution
    2. The attorney general is the chief law enforcement officer in any state but has limited, and sometimes no, control over prosecutors within the state's boundaries.
C. The prosecutor as elected official
    1. As an elected official, the prosecutor must answer to the voters
    2. U. S. attorneys are appointed by the president and approved by the Senate
    3. Prosecutorial politics
        i. The position is considered a stepping stone to higher political office
    4. Elections and impartiality
        i. Researchers have shown that during election years, incumbent prosecutors in North Carolina were more likely to take cases to trial and less likely to allow defendants to plead guilty
    5. Community pressures
        i. A prosecutor's electability is often enhanced by involvement in high-profile cases
D. The prosecutor as crime fighter
    1. Prosecutors are generally seen as law enforcement agents
        i. Prosecutors and the police have a mutually dependent relationship
            a. Prosecutors rely on police to arrest suspects and gather evidence
            b. Police rely on prosecutors to convict those who have been apprehended
        ii. Prosecutors and the police have a basic divergence in the concept of guilt
            a. Police officers focus on factual guilt
            b. Prosecutors are focused on legal guilt
E. Prosecutors and victims
    1. Crime victims see themselves as being on the same side
    2. Prosecutors do not represent victims but balance the rights of the accused with the rights of the victims and the best interests of the public
    3. Prosecutors rely on victims as a source of information
        i. The prosecutor must confer with the victim at various stages due to new victims' rights

F. The responsibilities of the defense attorney
    1. The Sixth Amendment right to counsel is not limited to the actual criminal trial.
        i. Defendants are entitled to representation as soon as their rights may be denied, which includes the custodial interrogation and lineup identification procedures
        ii. Important responsibility is to represent the defendant at various stages of the custodial process
        iii. Other responsibilities
            a. Investigating the incident
            b. Communicating with the prosecutor
            c. Preparing the case for trial
            d. Submitting defense motions
            e. Representing the defendant at trial
            f. Negotiating a sentence
G. Defending the guilty
    1. All defense attorneys will face a difficult question: Do I defend a guilty client?
        i. The answer is almost always yes
        ii. Obligated to use all ethical and legal means to achieve the client's desired goal, which is usually to avoid or lessen punishment for the charged crime
H. The public defender
    1. Two different types of defense attorneys—private attorneys and public defenders, who work for the government
        i. State must provide a public defender to those who cannot afford to hire one for themselves
        ii. The modern role of the public defender is established by the Supreme Court's interpretation of the 6th amendment
    2. Eligibility issues
        i. *Gideon v. Wainwright* (1963)
        ii. No guidance from *Gideon* concerning how poor the defendant needs to be to qualify for a public defender.
    3. Defense counsel programs
        i. Assigned counsel programs, in which local private attorneys are assigned clients on a case-by-case basis
        ii. Contracting attorney programs, in which a particular firm is hired to represent indigent cases
        iii. Public defender programs, in which the county assembles a legal staff to provide services
    4. Effectiveness of public defenders
        i. An indigent defendant must accept the public defender provided by the court system.
        ii. Conviction rates of defendants with private counsel versus public funded attorneys are generally the same
    5. Unreasonable caseload
        i. Three quarters of all county-based public defender programs exceed their recommended caseloads
    6. The *Strickland* standard

        i. In *Strickland v. Washington*, the Supreme Court set up a two-pronged test to determine whether counsel was not sufficient:
            a. The attorney's performance was deficient
            b. That this deficiency had more likely than not caused the defendant to lose the case

I. The attorney-client relationship
    1. The implied trust between an attorney and her or his client usually is not in question when the attorney has been hired by the defendant
        i. Time constraints may not allow the public defendant to validate much of the defendant's claims
        ii. Defendants may not trust their public defender and withhold information from them

J. Attorney-client privilege
    1. Laws require that communications between a client and his/her attorney are confidential, unless the client consents to disclosure
    2. The privilege and confessions
        i. Attorney-client privilege does not stop short of confessions, meaning a defense attorney must continue to do the utmost to serve a client even if the client confesses guilt to the attorney
    3. The exception to the privilege
        i. Per *United States v. Zolin* (1989), attorneys may disclose contents of a conversation with a client if the information concerns a crime yet to be committed

K. After an arrest is made
    1. The first step toward determining the suspect's guilt or innocence is the initial appearance
    2. Magistrate informs defendant of charges that have been brought against him or her and explains constitutional rights
    3. Defendant can have a public defender appointed if he or she cannot afford to hire a private attorney
    4. Initial appearance must occur "promptly," or within 48 hours of booking
    5. In misdemeanor cases, the defendant may decide to plead guilty and be sentenced during the initial appearance

L. Setting bail
    1. Bail is provided for under the Eighth Amendment but not guaranteed
    2. Bail guidelines
        i. There is no uniform system for pretrial detention, each jurisdiction has its own bail tariffs, some of which are very extensive
    3. Judges and bail
        i. Three contexts for bail setting:
            a. Uncertainty
            b. Risk
            c. Overcrowded jails

M. Gaining pretrial release
    1. One popular option for alternative to bail is release on recognizance (ROR)
        i. Used when the defendant is not at risk to "jump" bail and does not pose a threat to the community
        ii. Defendant is released at no cost with the understanding that he or she will return at the time of trial

2. Posting bail
    i. Those committing felonies are rarely released on recognizance
        a. These defendants may post the full amount of the bail in cash to the court
    ii. Another option is a property bond, where real property is used as collateral
3. Bail bonds agents
    i. If unable to post bail with cash or property, a defendant may arrange for a bail bond agent to post a bail bond on the defendant's behalf
        a. The bond agent promises the court that he or she will turn over to the court the full amount of bail if the defendant fails to return for further proceedings
        b. Defendant must usually give the bond agent a certain percentage of the bail in cash, which is often not returned to the defendant
    ii. Some states have abolished bail bonding because
        a. It provides opportunity for corruption
        b. They can refuse to post a bail bond
        c. About 40% of defendants released on bail are found not guilty of any crime
    iii. States who have abolished bail bonding have established an alternative known as *ten percent cash bail*

N. Bail and community safety
1. The vagueness of the Eighth Amendment requirement allows the practice to server another purpose: protection of the community
    i. Judges have the power to detain suspects who they believe pose a danger to the community by setting bail at a prohibitively high level
2. Preventive detention
    i. More than thirty states have passed preventive detention laws that authorize judges to act "in the best interests of the community" by denying bail to suspects with prior records of violence
3. Bail Reform Act of 1984 states that federal offenders can be held without bail to ensure "the safety of any other person and the community"
    i. Critics believe that it violates the United States Constitution by allowing the freedom of a citizen to be restricted before he or she has been proved guilty in a court of law
4. False positives
    i. Erroneous predictions that defendants, if given pretrial release, would commit a crime, when in fact they would not
    ii. In *United States v. Salerno* (1987), the U.S. Supreme Court upheld the federal Bail Reform Act.

O. The preliminary hearing
1. During the preliminary hearing, the defendant appears before a judge or magistrate who decides whether the evidence presented is sufficient for the case to proceed to trial
2. The preliminary hearing process
    i. Conducted in the manner of a mini-trial
    ii. A police report of the arrest is presented by a law enforcement officer, supplemented with evidence by the prosecutor
    iii. During this hearing, the defendant has a right to be represented by counsel, who may cross-examine witnesses and challenge any evidence offered by the prosecutor
    iv. Defense attorneys can take advantage of the preliminary hearing to begin the process of *discovery*

3. Waiving the hearing
    i. Preliminary hearings often seem perfunctory
        a. Usually last no longer than five minutes
        b. Judge or magistrate rarely finds that probable cause does not exist
    ii. Defense attorneys commonly advise their clients to waive their right to a preliminary hearing
    iii. Once a judge has ruled affirmatively on probable cause, the defendant is bound over to grand jury in many jurisdictions
    iv. If the grand jury believes there are grounds for a trial, it issues an indictment
    v. In other jurisdictions, the government prosecutor issues an information, which replaces the police complaint as the formal charge against the defendant for the purposes of a trial

P. The grand jury
1. Federal government and one-third of the states require a grand jury indictment to bring felony charges
2. Grand juries are impaneled for a period of time usually not exceeding three months
    i. During this time, grand jury sits in closed session and hears only evidence presented by the prosecutor
    ii. The defendant cannot cross-examine prosecution witnesses, but it can present its own witnesses
    iii. Prosecutor presents to the grand jury whatever evidence the state has against the defendant
    iv. Jurors can ask questions about relevant law to the prosecutor and judge and can ask that witnesses be recalled to take the stand a second time
3. If the grand jury finds that probable cause exists, it issues an indictment against the defendant
4. Procedural rules of the grand jury favor prosecutors
    i. Defendants are indicted at a rate of more than 99 percent

Q. Case attrition
1. Only a small percentage of those brought before a prosecutor end in incarceration
    i. Only about one in three adults arrested for a felony see the inside of a prison or jail cell; this is referred to as “case attrition”
2. Scarce resources
    i. Half of all adult felony cases brought to prosecutors by police are dismissed through *nolle prosequi*
    ii. District attorneys do not have the resources to prosecute every arrest
3. Screening Factors
    i. Most prosecutors have a screening process for deciding when to prosecute and when to “noll”
    ii. Most important factor is whether there is sufficient evidence for conviction
    iii. Prosecutors rely heavily on offense seriousness
    iv. Uncooperative victims
    v. Unreliability of victims
    vi. A prosecutor may be willing to drop a case, or reduce the charges, against a defendant who is willing to testify against other offenders

R. Prosecutorial charging and the defense attorney
    1. If the defense attorney feels strongly that the charge has been made in violation of the defendant's rights, he or she can submit pretrial motions
        i. Motions to suppress evidence gained illegally
        ii. Motions for a change of venue because the defendant cannot receive a fair trial in the original jurisdiction
        iii. Motions to invalidate a search warrant
        iv. Motions to dismiss the case because of delay in bringing it to trial
        v. Motions to obtain evidence that the prosecution may be withholding

S. Based on the information or indictment, the prosecutor submits a motion to the court to order the defendant to appear before the trial court for an arraignment
    1. At the arraignment, the defendant is informed of the charges and must respond by pleading guilty or not guilty, or plead *nolo contendere*
    2. Most frequently, the defendant pleads guilty to the initial charge or to a lesser charge that has been agreed on through plea bargaining between the prosecutor and the defendant

T. Plea bargaining in the criminal justice system
    1. Plea bargaining usually takes place after the arraignment and before the beginning of the trial
    2. Plea bargaining is a process by which the accused, represented by a defense counsel, and the prosecutor work out a mutually satisfactory disposition of the case, subject to court approval

U. Motivations for plea bargaining
    1. Prosecutors and plea bargaining
        i. In most cases, a prosecutor has a single goal after charging a defendant with a crime: a conviction
        ii. Plea bargaining removes the risk that a jury or judge may disagree with the case as presented by the prosecutor
        iii. Plea bargaining can "save" a questionable case
        iv. Plea bargaining reduces the time and money spent on each case
    2. Defense attorneys and plea bargaining
        i. Favorable plea bargains are often the best a defense attorney can do for his clients
        ii. May increase profit margins by quickly disposing of cases
    3. Defendants and plea bargaining
        i. The plea bargain allows the defendant a measure of control over his or her fate
        ii. The benefits of plea bargaining are tangible: defendants who plea bargain receive significantly lighter sentences on average that those who are found guilty at trial
    4. Victims and plea bargaining
        i. About half of states allow victims to participate in the plea bargaining process
        ii. Victims seek to be "reasonably heard" since the passage of the Crime Victims' Rights Act

V. Plea bargaining and the adversary system
    1. Strategies that induce a plea bargain
        i. Most common reason a prosecutor agrees to a plea bargain is the lack of a strong case
        ii. The most common method used by prosecutors to induce a plea bargain is the ethically questionable practice of overcharging
            1. Horizontal overcharging
            2. Vertical overcharging
    2. Protecting the defendant
        i. In many jurisdictions defendants sign a *Boykin* form waiving their right to a trial

3. Fault advice
    i. The Supreme Court ruled in 2012 that defendants have a constitutional right to effective representation during plea negotiations
    ii. If defendant successfully proves ineffective counsel during please bargaining, she or he will be given another change to make a favorable plea

W. Pleading not guilty
1. The plea of not guilty is fairly common at the arraignment
    i. This is true even the facts are stacked against the defendant
2. A not guilty plea is part of a strategy to
    i. Gain a more favorable plea bargain
    ii. Challenge a crucial part of the evidence on constitutional grounds
    iii. Submit one of the affirmative defenses discussed in Chapter 4