The idea of due process of law, or fair procedures, means little to the average citizen unless and until he or she is arrested and charged with a crime. This is because many of the basic rights set out in the U.S. Constitution apply to people accused of crimes. Accused people are entitled to have a jury trial in public and without undue delay, to be informed of their rights and of the charges against them, to confront and cross-examine witnesses, to compel witnesses to testify on their behalf, to refuse to testify against themselves, and to be represented by an attorney. These rights are the essence of due process of law. Taken together, they make up the overall right to a fair trial.

Right to Trial by Jury

The right to a jury trial in criminal cases is guaranteed by the Sixth Amendment to the U.S. Constitution. It is applicable in all federal and state courts. However, a jury is not required in every case. In fact, juries are not used very often.
Most criminal cases are resolved by guilty pleas before ever reaching trial. Jury trials are also not required for certain minor offenses—generally, those punishable by less than six months in prison. Furthermore, defendants can waive, or give up, their right to a jury trial and instead have their cases heard by a judge in a bench trial. In some states, waivers occur in the majority of cases that are tried.

Jury panels are selected from voter registration or tax lists and are supposed to be generally representative of the local community. In some communities potential jurors are selected from drivers’ license rolls. In federal courts, juries consist of 12 persons. While many states also use 12-person juries, they are not required to do this by the U.S. Constitution. The U.S. Supreme Court requires only that states have at least six jurors. Juries in federal courts must reach a unanimous verdict before finding a person guilty. Similarly, most states require unanimous verdicts in criminal cases, but the Court, in interpreting the Constitution, has not required unanimous verdicts in criminal cases that are tried in state courts.

Once the potential jurors for a case are assembled, the prosecutor and defense lawyer select the members of the jury through a process called voir dire. This is the process by which lawyers select certain jurors to hear a case. They do this by asking prospective jurors questions to determine possible bias. Either lawyer can request that a potential juror be eliminated for some specific reason by using a for-cause challenge. A for-cause challenge could be used, for example, if a juror knew the defendant or the victim in the case. Each side also has a limited number of peremptory challenges, which do not have to be based on a specific reason. In some cases each party hires consultants to help them make judgments about which prospective jurors are most likely to be favorable to their side.

The Supreme Court has ruled in a number of cases that attorneys may not exclude prospective jurors from serving on a jury solely because of their race, gender, or national origin. Preventing discrimination in the selection of jurors has been a challenge for the justice system. Supreme Court decisions indicate that criminal trials with juries selected in a discriminatory manner harm the defendant, injure the persons removed from the jury for discriminatory reasons, and damage society in general. The Sixth Amendment right to trial by jury is considered a basic constitutional right in the United States. Most countries around the world, however, do not have jury trials.

Problem 14.1

a. Why is the right to a jury trial guaranteed by the Bill of Rights? Why might someone choose not to have a jury trial?

b. Do you think jury verdicts should be unanimous? Why or why not?

c. Do you think juries should deliberate and come to a conclusion in private, or should this proceeding be televised and made public? Explain.
Right to a Speedy and Public Trial

The Sixth Amendment to the U.S. Constitution provides a right to a speedy trial in all criminal cases. The Constitution does not define speedy, and courts have had trouble deciding what this means. To remedy this problem, the federal government and some states have set specific time limits within which a case must be brought to trial. Without the right to a speedy trial as an element of due process, an innocent person could await trial—in jail—for years.

If a person does not receive a speedy trial, the case may be dismissed. However, defendants often waive their right to a speedy trial because of the unavailability of an important witness or because they need more time to prepare their cases. Before dismissing a case, courts will consider the cause and reasons for the delay and whether the defendant was free on bail or in jail during the pretrial period.

**Problem 14.2**

*a.* Why is the right to a speedy trial important?

*b.* How soon after arrest should a person be brought to trial? What are some reasons for and against bringing a defendant to trial quickly?

*c.* Do you think that televising criminal trials is a good idea? Explain.

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**Jury Nullification**

Jurors and juries have a great deal of power in the U.S. legal system. Some see the jury box, like the ballot box, as an essential element of democracy and as a check on the government. Juries determine the facts provided at trial and apply the law based on instructions from the judge. However, there is a long history in the United States of juries disregarding the law and the judges’ instructions when they believe they must do so in the interest of justice. This disregard is called jury nullification.

For example, during the nineteenth century, some juries refused to convict people who hid runaway slaves, even though it was illegal to do so at that time. Today, juries sometimes refuse to convict when they believe a law is unfair or is being unfairly enforced.

While legal scholars acknowledge the history of jury nullification in the United States, some experts believe that expanded use of this extraordinary power could lead to anarchy or an undermining of the rule of law. Others argue that it is an effective way for citizens in a democracy to check government abuse of power.
Right to Compulsory Process and to Confront Witnesses

Defendants in criminal cases have a right to compulsory process for obtaining witnesses. This means that the defendant can get a subpoena—a court order—requiring a witness to appear in court to testify. Without this basic right, defendants would have great difficulty establishing a defense.

The Sixth Amendment provides people accused of crimes with the right to confront (be face to face with) the witnesses against them and to ask them questions by way of cross-examination. Although a defendant has the right to be present in the courtroom during all stages of the trial, the U.S. Supreme Court has said that this right may be restricted if the defendant becomes disorderly or disruptive. In such instances, a judge has the power to remove the defendant from the courtroom, to cite him or her for contempt of court, or, in extreme circumstances, to have the defendant bound and gagged.

The right to confrontation is sometimes modified for child witnesses, especially in abuse cases. Many courts in these cases install closed-circuit television cameras. This practice enables the child to testify on camera in a room separate from the one in which the defendant is located and reduces the potential for additional harm to the child.

The Tape-Recorded Witness Statement

Crawford and his wife went to a man’s apartment, where a fight broke out between Crawford and the man. The man was stabbed during the fight, after which he called the police. Crawford was arrested later that night. The police interrogated him and his wife separately. Crawford claimed that the man had attempted to rape his wife and that he acted in self-defense. His wife’s story, which the police tape-recorded, did not match his. Crawford was eventually tried and convicted of attempted murder. State law where he lived did not allow one spouse to testify in a criminal case against the other spouse without that spouse’s consent. Crawford did not agree to have his wife testify at his trial. However, the prosecutor played a tape-recording of what she told police. On appeal, Crawford argued that use of this tape recording violated his Sixth Amendment right to confront a witness against him because there was no way to cross-examine the recording.

Problem 14.3

a. What are the strongest arguments for Crawford?

b. What are the strongest arguments for the state?

c. How should this case be decided?
Freedom From Self-Incrimination

Freedom from self-incrimination means that you cannot be forced to testify against yourself in a criminal trial. This right comes from the Fifth Amendment and can be exercised in all criminal cases. Defense attorneys may counsel their clients not to take the stand for their own protection. In addition, the prosecutor is forbidden to make any statement drawing the jury's attention to the defendant's refusal to testify. While defendants in a criminal case have a right not to testify, they also have a right to take the stand and testify if they wish. (In some other countries, defendants in criminal cases are required to testify.) A defendant does not have to answer an inappropriate question if her attorney objects to it and the judge sustains, or agrees with, that objection. This is true for all witnesses, but once a defendant takes the stand, the prosecutor can use anything she says to elicit contradictory and harmful statements that can be used against her.

Related to the right against self-incrimination is the concept of immunity. Being granted immunity means that a witness cannot be prosecuted based on information provided in a testimony. A person with immunity must answer all questions—even those that are incriminating. Prosecutors often use immunity laws to force people to testify against codefendants or others involved in the crime.

Problem 14.4

a. Suppose you are a defense attorney. What are the advantages and disadvantages of having a criminal defendant testify at trial?

b. If you were a member of the jury in a criminal trial, what would you think if the defendant refused to testify? Would you be affected by the judge's instruction not to draw any conclusion from this?

c. If a defendant is forced to stand in a lineup, give a handwriting sample, or take an alcohol breath or urine test, does this violate the privilege against self-incrimination?

d. Do you think that U.S. law should be changed so that defendants are required to testify in criminal cases? Explain.

Right to an Attorney

The Sixth Amendment provides that “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” At one time, this meant that, except in capital cases—those involving the death penalty or life imprisonment—a defendant had the right to an attorney only if he or she could afford one. However, in 1938, the U.S. Supreme Court decided a case that required the federal courts to appoint attorneys for indigent defendants—those without financial means—in all federal felony cases.
Twenty-five years later, in the case of *Gideon v. Wainwright* (1963), the Court extended the right to counsel to all felony defendants, whether in state or federal court. In 1972, the Court further extended this ruling by requiring that no imprisonment may occur, even in misdemeanor cases, unless the accused is given an opportunity to be represented by an attorney.

The right to the assistance of counsel is basic to the idea of a fair trial. In a criminal trial, the state (the people) is represented by a prosecutor who is a lawyer. In addition, the prosecutor’s office has other resources, including investigators, to help prepare the case against the accused. At a minimum, the defendant needs a skillful lawyer to ensure a fair trial.

As a result of these Supreme Court decisions, criminal defendants who cannot afford an attorney have one appointed to them free of charge by the government. These attorneys may be either public defenders or private attorneys. The public defender’s office is supported by the government. The job of the public defender’s office is to represent poor people in criminal cases. Lawyers appointed by the court to handle criminal cases for indigent defendants are typically paid less than private lawyers hired directly by a defendant. Some people criticize the overall quality of representation that poor criminal defendants receive in this country. These critics say that criminal defendants with money to hire their own lawyers have a much better chance of being found not guilty than do economically disadvantaged defendants.

**Problem 14.5**

**a.** Assume a defendant wants to handle his or her own defense. Should this be allowed? Do you think this is a good idea?

**b.** Assume a lawyer knows that his or her client is guilty. Is it right for the lawyer to try to convince the jury the person is not guilty? Explain.

**Criminal Appeals**

If the jury returns with a “not guilty” verdict, this is normally the end of the case. The state—or prosecution—cannot appeal after the defendant has been acquitted of the offenses for which he or she was tried. The Fifth Amendment’s *double jeopardy* language means that a defendant cannot be prosecuted a second time for the same offense after either an acquittal or a conviction. If the verdict is “guilty,” then the sentencing will follow.
Once the trial judge has entered the final judgment in the case, defendants who think they have been wrongly convicted have several options. The defendant can ask the judge to overturn the jury’s verdict and enter a verdict of not guilty, or he or she can ask the judge to set aside the jury’s verdict, declare a mistrial, and ask for a new trial. These strategies are seldom successful. The defendant can also appeal to a higher court. An appeal requests that a higher court review and change the decision of the trial court. In the appeal, the defendant can challenge either the conviction or the sentencing decision.

Sometimes the defendant will want to hire a different lawyer for the appeal. This happens because lawyers who do trial work may not specialize in appellate work. It might also happen because the defendant’s appeal may be based on an alleged violation of the Sixth Amendment, which guarantees the right to effective assistance of counsel. Depending on the resources available, the public defender’s office may or may not be available to provide assistance to indigent defendants who wish to appeal.

Remember from the discussion in Chapter 5 that trial courts determine questions of fact, such as guilty or not guilty in a criminal case, and that appellate courts determine questions of law. In order to win an appeal, the defendant—now called the petitioner or appellant—must convince the appeals court that there were serious errors of law made at the original trial. Appeals courts tend to defer to trial judges and are not usually eager to overturn the result of the trial. If there are legal errors of a minor nature, the outcome of the trial will not be changed. Sometimes an appeals court will say that the constitutional right of the defendant is to a fair trial, not to a perfect, or error-free, trial.

In addition to appeals, the defendant may apply to a court for help by seeking a writ, which is an order from a higher court to either a lower court or to a government official, such as the warden of a jail or prison. The writ of habeas corpus—which literally means “to produce the body”—claims that a defendant is being held illegally and requests release. The writ can sometimes be used when an appeal could not be. For example, a defendant might use a writ to argue for his innocence based on DNA testing that occurred after the trial, a point that could not be made using an appeal.

The writ of habeas corpus can be filed with a state court for alleged state law violations or with a federal court for alleged violations of federal law. The writ of habeas corpus gives criminal defendants the right to ask for relief from confinement, but of course filing this writ does not necessarily mean that the court will grant the relief.