

# THE RESISTANCE DEFENSE

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## ABSTRACT

*This Article explores a previously ignored set of defendants—those who choose to rely on a defense of resistance. From Warren Jeffs, the polygamist recently convicted of child rape in Texas, to John Brown, the fiery abolitionist who led a raid on the federal armory at Harper’s Ferry in the hopes of triggering an armed insurrection, these defendants waived their procedural rights and transformed their criminal trials into a commentary on the deficiencies of the law and the system that supports it. Though their belief systems have varied, defendants like these appear throughout history in moments of social or political crisis and challenge the capacity of the law to encompass their story.*

*While their eventual convictions are not surprising, their reliance on a defense of resistance highlights two compelling but underexplored components of criminal law. First, the procedural rights that compose the right to a defense are more than individual rights; they have a communal value. The defendant may utilize them to challenge the accusation, but the community relies on them as well to legitimate the process and outcome. If a defendant forgoes these protections, the process is curtailed and questions of its legitimacy inevitably follow. Second, these procedural rights have a substantive component. They help to define notions of guilt and appropriate punishment. If a defendant chooses to forgo these rights, he or she effectively alters what it means to be convicted or to deserve punishment, skewing the meaning of the law itself.*

*In a time when political identity and legitimacy are in play (with movements from Occupy Wall Street to the Tea Party) and the Supreme Court’s decisions in Apprendi and Crawford place renewed faith in the citizen–jury to construct meaning in the law, the question of how the law should respond to competing narratives looms. Resistance defendants serve as a powerful reminder that the system is only as strong as its ability to*

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*contemplate a counter-narrative and that the law ultimately draws its meaning from the lives of the governed. If the system is unable to encompass some lives and their stories, it loses some meaning and risks becoming foreign to the citizens themselves. This Article examines the causes and consequences of the dilemma posed by the resistance defense and proposes ways the criminal justice system might adapt and improve in response.*

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The *New York Times Magazine* recently ran a cover story describing the in-prison transformation of former political radical Judith Clark.<sup>1</sup> While the article focused on Clark's reformation in prison and made powerful arguments for her release, it noted, almost in passing, one of the most

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1. See Tom Robbins, *Judith Clark's Radical Transformation*, N.Y. TIMES, Jan. 12, 2012, [http://www.nytimes.com/2012/01/15/magazine/judith-clarks-radical-transformation.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2012/01/15/magazine/judith-clarks-radical-transformation.html?pagewanted=all&_r=1&); see also Affidavit of Judith Clark, *New York v. Clark*, Indictment Nos. 81-285 & 82-6, 2002 WL 34439639 (N.Y. Co. Ct. Dec. 12, 2002) [hereinafter Clark Affidavit].

interesting aspects of Clark's defense at trial—its absence.<sup>2</sup> In 1981, Judith Clark, a single mother and a militant radical, participated in an armed robbery that left three people dead.<sup>3</sup> By the time she drove away in one of the getaway cars, Judith Clark's politics had ventured beyond even the most extreme poles of conventional discourse.<sup>4</sup> She had crossed over into some no-man's-land that pushed her political righteousness beyond debates over coffee, marches in the streets, or even acts of civil disobedience.<sup>5</sup> Her objective was the defiance and resistance of the government and society as a whole.<sup>6</sup> Two years later, in custody and facing a string of criminal charges that would effectively end her free adult life, Judith Clark declined legal representation and embarked on one last radical act—she refused to participate in her own trial.<sup>7</sup> From a basement cell in the courthouse, she allowed the testimony against her to roll on without her.<sup>8</sup> She offered virtually no challenge to the government's evidence.<sup>9</sup> Instead, she maintained a steadfast adherence to the righteousness of her cause, culminating in her refusal to participate in what she characterized as the political process of her oppressors.<sup>10</sup>

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2. Robbins, *supra* note 1 (noting that Clark declined counsel and refused to even come into the courtroom for the majority of her trial); *see also* Clark Affidavit, *supra* note 1, at ¶¶ 1–2, 39–44 (explaining that Clark viewed her refusal to participate in the trial as an act of “single-minded fanaticism”); Clark v. Perez, 450 F. Supp. 2d 396, 403, 407 (S.D.N.Y. 2006), *rev'd*, 510 F.3d 382 (2d Cir. 2008), *cert. denied*, 55 U.S. 823 (2008).

3. Robbins, *supra* note 1. Clark was convicted of “three counts of Murder in the Second Degree, six counts of Robbery in the First Degree, and related lesser crimes” for her role in the conspiracy that led to these deaths. Clark, 450 F. Supp. 2d at 402 (footnotes omitted); Clark Affidavit, *supra* note 1, ¶¶ 1, 2 (describing Clark's participation in the crime).

4. Clark Affidavit, *supra* note 1, ¶¶ 4, 13, 19 (describing Clark as a member of a “tightly knit self-defined ‘revolutionary anti-imperialist organization’” and noting that she no longer identified with “mainstream culture and values”).

5. Robbins, *supra* note 1; Clark Affidavit, *supra* note 1, ¶¶ 9–10 (describing Clark's increasing hostility and ostracization from friends and family members who did not share her radical political viewpoints).

6. Clark Affidavit, *supra* note 1, ¶¶ 4–5, 11 (noting that Clark's mindset placed her at war with the country); Clark, 450 F. Supp. 2d at 409 (describing Clark's refusal to participate in voir dire or the rest of the trial because it was “illegitimate” and “fascist”).

7. Clark Affidavit, *supra* note 1, ¶ 1; Clark, 450 F. Supp. 2d at 410–12 (describing Clark's decision to forgo representation and her subsequent refusal to participate in or even appear at her own trial).

8. Robbins, *supra* note 1; Clark Affidavit, *supra* note 1, ¶¶ 1, 57–69.

9. Clark Affidavit, *supra* note 1, ¶ 68; Clark, 450 F. Supp. 2d at 410–13 (detailing Clark's failure to contest the government's evidence, opting instead to absent herself from the courtroom). The sole defense witness called by Clark and her co-defendants, Sekou Odinga, testified exclusively to the “tenets of the New Afrikan political movement and the Black Liberation Army,” a topic the judge prohibited the jury from considering in its deliberations. *Id.* at 412.

10. Clark Affidavit, *supra* note 1, ¶¶ 29, 34, 39–44; Clark, 450 F. Supp. 2d at 403–406, 410 (repeatedly characterizing Clark's decision not to appear or participate in her trial as an effort to highlight what she perceived as deficiencies in the process and the illegitimacy of the court).

Not surprisingly, Judith Clark was convicted in short order.<sup>11</sup> At sentencing, the trial judge admonished her decision to make a mockery of the proceeding and sentenced her to seventy-five years in prison.<sup>12</sup> Whether Judith Clark may have had a viable defense available to her seems irrelevant.<sup>13</sup> It was not the defense she wanted. Her defense was resistance.

Judith Clark's decision to exercise a defense of resistance placed her in the ignoble company of John Brown, Warren Jeffs, Mary Surratt, Zacharias Moussaoui, Bobby Seale, and countless defendants who, seeing their trials as political moments, waived their procedural rights as an act of defiance against the forces that were prosecuting them. Instead of seeking shelter in the protections afforded them by the Constitution, these defendants opted out. To these defendants, the right to a defense—a right integral to the American legal system—was the right to a sanctioned, bound narrative. And they wanted no part of it.

In their acts of resistance, they sought to tell a different story—one that is fundamentally different from other boundary-pushing defenses, such as jury nullification or justification. On some level the resistance defense serves a similar function to these non-factual or legal-exception defenses, in that each creates the opportunity for the jury to weigh in on the legitimacy of the law, or at least its legitimacy as applied to the defendant in question.<sup>14</sup> Each of these defenses implores the jury to consider and align itself with some alternative vision of the law.<sup>15</sup> Each exposes the jury to a narrative previously absent or at least not contemplated by the text of the law.<sup>16</sup> For each of these defenses, a verdict of acquittal carries a larger theoretical message—the law is out of sync with either popular

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11. *Clark*, 450 F. Supp. 2d at 413.

12. Clark Affidavit, *supra* note 1, ¶ 1; *Clark*, 450 F. Supp. 2d at 413.

13. In fact, one of Clark's co-defendants who also opted to go pro se attempted to offer a defense to the charges based on the defendant's political belief system. *Clark*, 450 F. Supp. 2d at 410. The presiding judge instructed the attorney that such remarks were disallowed and that he should direct his remarks to the facts and the law in the case. *Id.* The attorney responded that he could not recognize the authority of the court that would so limit his opening remarks, stating that he "would rather not be dealing with this Court at all, but [he] didn't ask for this charade." *Id.* (citing Trial Transcript, at 2786-88, August 8, 1983). For her own part, Clark took a similar position, that if she was not allowed to present her defense in political terms, she would prefer not to participate at all. *Id.*

14. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1156-58 (1997) (discussing jury nullification as a defense in the context of other defenses that challenge the law or seek to justify the defendant's rejection of the law).

15. See Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 703-07 (2012) (discussing the role of nullification as a means to legitimate the law in the eyes of the community); Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705 (1995) (arguing that jury nullification creates an opportunity for African-Americans to reclaim the construction of the law).

16. See Butler, *supra* note 15, at 678-80, 715-18 (arguing that nullification creates an opportunity for previously excluded populations to have some say in the application of the law).

understandings of justice or communally recognized constitutional norms.<sup>17</sup> The jury's allegiance to the defendant's story over that presented by the State either in the construction of the law or in the prosecution's theory of the case sends a larger and more lasting signal that criminal law is constantly accountable to the people and must be responsive to community norms and understanding to survive.<sup>18</sup>

For the resistance defense, however, there is a significant theoretical difference. Defenses such as nullification and justification urge an expansion of the law in a way that will vindicate the defendant's narrative and exonerate his conduct.<sup>19</sup> But they place the defendant's narrative in the context of the existing structure and argue that justice requires acquittal. Nullification, therefore, creates a mechanism whereby the previously static construction of the law is rendered fluid and nimble in the face of competing stories.<sup>20</sup>

In contrast, the resistance defense stands outside the law's structure and rejects the previously existing substantive and procedural legal norms. Resistance defendants decline to map their narrative onto the criminal justice system's existing procedural and substantive template, arguing instead that such a structure is incapable of contemplating their story. They reject the notion that a more expansive interpretation of the law by the jury to encompass the defendant's counter-narrative will suffice. At the core of their defense is the notion that the process and the law that the process applies are incapable of recognizing their story. In this they pursue a much larger systemic critique.

The resistance defense, therefore, carries distinct ramifications for the criminal justice system. Resistance defendants use their right to a trial to reject the larger system and, in their silence and resistance, to shout a message as disturbing as the State's accusation: no matter how good the

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17. See Carroll, *supra* note 15, at 697 (arguing that the greatest possibility of nullification exists when the law ceases to reflect community values and norms). Whether the defendant's narrative seeks an outright rejection of the law as a whole or only as applied may well be a distinction without practical difference as the jury's verdict will only directly affect the individual case before the jury. See *id.* at 696–97 (noting the limiting effects of nullification as a defense to bring about systematic change). But see Butler, *supra* note 15, at 715–18 (arguing that repeated nullification surrounding a particular issue can bring about larger social and political change in the construction and application of the law).

18. Butler, *supra* note 15, at 715–18; see also Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983) (stating that the law must encompass competing narratives to be made whole).

19. See Carroll, *supra* note 15, at 704 (arguing that nullification requires a reconceptualization of the law within existing procedural norms).

20. See Carroll, *supra* note 15, at 662 (describing nullification as a means of creating direct citizen review of the law and its application).

appointed lawyer<sup>21</sup> or how public the trial<sup>22</sup> or how many witnesses they were allowed to confront,<sup>23</sup> the system had no capacity for their story. They see their right to a defense as a sham constructed to comfort the outside world. When such defendants are ultimately convicted, the result is not surprising, but it does not sit exactly right either. In their refusal to play an assigned role or abide by the rules, they sound a warning of a system come apart. By removing their voices and their stories from the criminal process, they communicate the utter state of disempowerment they feel at the moment of trial, if not throughout the events in their lives that have led to that moment. And we are reminded of how incomplete the process is without their story. These defendants were convicted based on the narrative of the accusation alone. Their juries determined their culpability without the benefit of their own account. In the end, the system seems smaller, contracted, one-sided. In their silence, they remind us that the story matters—even the story of a disempowered, political radical. They remind us that it is the defendant's story juxtaposed against the State's accusation that transforms criminal law from a static and foreign set of rules to a fluid body that draws its meaning from the narratives that surround it.

Criminal law is unique in that it is a moment of unfiltered contact between the government and the people.<sup>24</sup> Unlike other forms of the law, the citizen need not wait for a trickle-down effect to realize that the law exists. In criminal law, the government is given license to arrest, hold, and punish individuals. This exercise of raw power is accepted, even encouraged, in part because the citizenry has faith that the government will not exercise the power arbitrarily.<sup>25</sup> Arrests are not made without reason. Punishments are deserved and meted out only after a jury's review of the evidence.

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21. U.S. CONST. amend. VI (providing the accused the right “to have the Assistance of Counsel for his defence”); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

22. U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .”); U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”); see also *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

23. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”); see also *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

24. George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 287 (1998) (describing the application of criminal law and the punishment that flows from it as “the most elementary and obvious expression of the state’s sovereign power” over the individual).

25. JOHN RAWLS, *Two Concepts of Rules*, in COLLECTED PAPERS 20, 20–27 (Samuel Freeman ed., 1999) (concluding that individuals grant the government the power to punish based on a belief that the government will act only when justified, though Rawls notes that there is no real way to tell when actions are justified rather than just a product of “systematic deception”).

In each defendant's individual story, however, the possibility that the government has breached this trust hovers. The rest of us watch and listen for some sign that the government has overstepped. We are ever wary of the possibility that the government is not a benign and protective force, but an oppressive one that would arbitrarily deny individuals their liberty. The defendant is the embodiment of our fears of a darker face of governance. The defendant who mounts a defense of resistance—or as I prefer, a resistance defense—forces us to confront that fear head on, and so to confront the possibility that all our protections are failing.<sup>26</sup> Some arrests are for the wrong reason or without reason at all. Some punishments are arbitrary or vindictive. For some, the promise of the jury and the procedural and substantive rights that accompany a trial in the end are illusory. They offer no cover for the innocent or the justified. The resistance defendant challenges the comfortable notion that the system is reasonably balanced between the government's power to accuse, convict, and punish, and the individual's power to challenge the government's bona fides through the criminal process.<sup>27</sup> No matter how sacred the right to a defense, these defendants challenge the notion that the right means anything beyond what the government wants it to.

This challenge is troubling in no small part because the right to a defense is integral to the American criminal justice system. It is rooted in the Constitution's promises of confrontation, counsel, and proof of guilt beyond a reasonable doubt in public before a citizen jury.<sup>28</sup> Taken together these rights hold the promise of the opportunity to tell a counter-narrative to the State's accusation. They are the possibility of an independent and citizen-driven check on the government's exercise of power. These resistance defendants reject this ideal vision of the right to a defense. They assert instead that the procedural and substantive checks on government power are defined and controlled by the government itself.<sup>29</sup> As such, these ordinary protections are insufficient for a defendant whose story is written in terms of resistance.

While a resistance defendant's factual guilt is often readily apparent, or even admitted, her conviction carries a sense of loss and foreboding. Perhaps it comes down to this paradox. Criminal law has long struggled to

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26. As John Locke noted, the individual who rejects the established law “live[s] by another rule than that of reason . . . ; he becomes dangerous to mankind” because he has broken the ties and promises of the laws that secure the citizen “from injury and violence.” JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ch. 2, ¶ 8 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690).

27. See *infra* notes 251–270 and accompanying text.

28. The Sixth Amendment promises the rights of confrontation, counsel, and a public jury trial. See U.S. CONST. amend. VI. The Fifth and Fourteenth Amendments' Due Process Clauses establish the presumption of innocence and the burden of proof as beyond a reasonable doubt in criminal cases. See U.S. CONST. amends. V, XIV § 1; *In re Winship*, 397 U.S. 358, 364 (1970).

29. See *infra* notes 243, 241–250 and accompanying text.

separate the procedural from the substantive, defining each as a separate sphere.<sup>30</sup> The resistance defense raises the possibility that the procedural and the substantive cannot always be divorced. One creates the expectation of the other. In those moments when a defendant abandons the procedural protections of the right to a defense, the inevitable conviction of the defendant is tainted because it was achieved without proper process. In this sense, the substance of the law—what it means to commit a crime, to be guilty, and to deserve punishment—is rendered deficient by the lack of procedural protections. It whispers of possible future oppression or misapplication and manipulation of the law. Even if only for a moment, the relationship between the citizen and the government is altered, the substantive expectation shifted by the procedural contraction.

This paradox of procedure becoming substance is especially critical now. Procedural trial rights are enjoying a renaissance of sorts. In *Apprendi*<sup>31</sup> and *Crawford*,<sup>32</sup> the Supreme Court has revitalized procedural protections as a mechanism of shoring up the legitimacy of the criminal system and the punishments it allows the State to impose on individuals.<sup>33</sup> These lines of authority are part of an emerging judicial philosophy that values jury consideration of the evidence that would support a defendant's conviction and punishment.<sup>34</sup> Both cases represent a radical reconfiguration of the system away from a formalistic construction of the law, toward a more functional one in which the community has an opportunity to interpret the law and so to expand or to contract its power over the defendant.<sup>35</sup>

On a practical level, both *Apprendi* and *Crawford* force evidence that might have previously circumvented juror consideration to undergo juror scrutiny in the name of promoting the legitimacy of the outcome.<sup>36</sup> In short, these are cases about allowing the community (through the jury) to bear

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30. See V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1743–45 (2003).

31. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

32. *Crawford v. Washington*, 541 U.S. 36 (2004).

33. See *infra* notes 174–181 and accompanying text.

34. See *Apprendi*, 530 U.S. at 477 (characterizing the importance of juror consideration of the factual basis of a conviction and the subsequent sentence, emphasizing the role of the jury as a “guard against a spirit of oppression and tyranny on the part of rulers”); *Crawford*, 541 U.S. 36 (noting that the right to confront witnesses not only allows a defendant to face his accuser, but allows the jury to complete their obligation to judge the veracity of that witness's statements). See also, Justin J. McShane, Joshua R. Auriemma & Sebastian C. Watt, *A Post-Bullcoming World: Does Justice Sotomajor's Concurrence Undermine the Majority Opinion*, THE CHAMPION, Oct. 2011, at 22, 26 (noting that the cases that have emanated from the *Crawford* line have preserved the value of allowing the jury, rather than the judiciary, to decide the testimonial reliability of witness statements as critical to the Sixth Amendment promise of confrontation).

35. See *infra* notes 174–181 and accompanying text.

36. See *Blakely v. Washington*, 542 U.S. 296 (2004); *Crawford*, 541 U.S. 36; *Apprendi*, 530 U.S. at 490.



witness to the process and, in doing so, to find meaning in the otherwise formalistic construction of the law.<sup>37</sup> They are about fundamentally changing the relationship between the governed and the government, promoting the governed to a more active role in assessing when the government's exercise of power (through accusation, conviction, and punishment) is justified and when it is not. To turn Hannah Arendt's concept of space and totalitarianism on its head, the philosophy behind these cases seeks to secure freedom and individuality by reducing the space between the governed and the law.<sup>38</sup> By opening a new and direct forum for the citizen construction of law in the jury, they force an accounting of the law's application in the context of each case. Without this opportunity for citizen interpretation, the law risks becoming nothing more than elite doctrine devoid of significant or direct communal input, and enforced by a government only nominally attached to the will of the people.<sup>39</sup> In this, *Apprendi* and *Crawford* seamlessly merge procedure and substance, enforcing procedural protections as a mechanism to bring a substantive meaning that the law otherwise lacks.

At this moment in history, this judicial revolution parallels another revolution of sorts. From Zuccotti Park to the ballot box, citizens have ceased to accept at face value the construction of law, order, or even the system just because it is propagated by the government.<sup>40</sup> For a growing number of Americans, the government's claim that it is acting in the best interest of the people is no longer sufficient to trigger blind allegiance. As movements from the Tea Party to Occupy Wall Street take hold across the nation, they signal a growing national crisis in which the collective values of the majority are in play.<sup>41</sup> These movements reflect not only the financial and social crisis facing the nation, but also a growing discontent with the story that political figures have constructed around this crisis.

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37. See Carroll, *supra* note 15, at 687–92 (discussing the *Apprendi* caseline and its significance for nullification defenses).

38. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 466 (World Publ'g Co., Ninth Meridian prtg. 1964) (1951) (arguing that by destroying the space between the individual and the state, totalitarian regimes are able to eliminate both the individual and freedom).

39. Alexis de Tocqueville described the jury as more than a mere judicial institution, but as a political one that carried with it the possibility of infusing the law with communal value. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263 (Henry Reeve trans., Lawbook Exch., ed. 2003); see also Carroll, *supra* note 15, at 690–91 (discussing the importance of juror consideration of the law).

40. See Andrew Sullivan, *You Say You Want a Revolution*, *THE DAILY BEAST* (Oct. 22 2011, 11:30PM), <http://www.thedailybeast.com/newsweek/2011/10/23/how-i-learned-to-love-the-goddamned-hippies.html> (“The theme that connects [Occupy Wall Street and the Tea Party movements] is disenfranchisement.”).

41. See Ari J. Savitzky, *The Law of Democracy and the Two Luther v. Borden: A Counterhistory*, 86 N.Y.U. L. REV. 2028, 2068 n.206 (2011) (concluding that the Occupy Wall Street and Tea Party Movements at their core are about seeking to redefine national identity in the face of crisis).

These movements simultaneously claim the mantle of the true voice of majority and of the other—those excluded and disenfranchised by a political system that seeks to cater to the few.<sup>42</sup> At their core, they are a refusal to acquiesce to governmental control or business as usual.<sup>43</sup> These movements are a call for an accounting not dissimilar to those at the heart of the *Apprendi* and *Crawford* case lines.

From Occupy Wall Street to the Tea Party, disenchantment with the power and the legitimacy of government calls out for a mechanism of change, for an opportunity for a direct and meaningful bridge between the government and the governed.<sup>44</sup> At the admittedly far end of the spectrum, the resistance defense offers this opportunity by creating a counter-dialogue that challenges the power of the government in a forum where the citizenry has a direct voice. Once a rare occurrence, the defense of resisting the system has the potential to increase as external and internal powers force a reexamination of government, the law and its systems. In the face of these revolutions, this is no time for proceduralists to sit idle and watch the wave of change sweep across the nation. Now is the time to wrestle with the fundamental but previously unanswered question of what we should do when a system of arguably best intentions has failed to account for a voice that it now seeks to hold accountable.

This Article confronts this question by examining what the resistance defense means for the criminal justice system. The argument unfolds in four parts. In Part I, I define the resistance defense by considering it in the context of five defendants. In Part II, I shift my analysis towards the construction of the right to a defense as a procedural and substantive matter. In examining this construction, I consider whom the right was intended to protect and how it achieves these goals. In Part III, I consider the larger theoretical implications of the resistance defense to criminal law and our concepts of government. I conclude that this defense has the potential to force a critical reexamination of the role of criminal law as a mechanism for creating a fluid vision of the law encompassing social value and responsive to social change for two reasons. First, the protections that

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42. See *Hundreds Arrested in Occupy Protests*, WASH. POST, October 17, 2011, at A3 (noting that members of Occupy Wall Street, while unable to agree on other substantive issues, coalesce around the notion that while they represent the 99%, the government has failed to address their needs or interests).

43. See Savitzky, *supra* note 41.

44. See Dick Arme & Matt Kibbe, *A Tea Party Manifesto*, WALL ST. J. (Aug. 17, 2010), <http://online.wsj.com/article/SB10001424052748704407804575425061553154540.html>; Jack Balkin, *Occupy the Constitution*, BALKANIZATION (Oct. 19, 2011), <http://balkin.blogspot.com/2011/10/occupy-constitution.html> (“[At its heart what Occupy Wall Street demands is] a government that pays attention to the welfare of the vast majority of its citizens . . . [and] that cares about and is responsive to the 99 percent, rather than a government that is captured by the 1 percent and . . . do[es] that 1 percent’s bidding.”).

the resistance defendant seeks to renounce are not his alone; they also have implications for the larger community in that they legitimate the outcome of the proceedings and any punishment that flows from it. Second, these protections, though characterized as procedural, in fact carry a substantive expectation. When defendants abrogate them, they effectively alter the substantive meaning of guilt and crime. Finally, in Part IV, I consider possible mechanisms for addressing the dilemma the resistance defense creates.

## I. THE STORY OF RESISTANCE DEFENSES

American legal history is replete with stories of the resistance defense. The defendants who have relied on this defense—often at times of crisis in the nation’s social or political identity—sought to put the legal system itself on trial. In the context of the criminal court, they created a singular forum for their own, previously excluded narrative. Through their defense of resistance, they sought to compel acknowledgment of the procedural and substantive shortcomings of the law that failed to account for their stories and by extension, their existence. Their defense pushed the law to reckon with the previously unimagined, and so to be transformed at the most fundamental level—the intersection of the law and the governed.

Cognizant of the procedural and substantive protections they could enjoy, these defendants instead rejected the majority of these protections, frequently exercising only their right to a jury trial. In this they transformed their trials from an assessment of their guilt into something larger. By declining to accept procedural protections, they sought to change the story told in their defense from one bounded on every side by procedural and substantive restrictions to one previously unimagined, uncognizable, and unheard—their own.

Using the resistance defense, these defendants challenged the ability of the law and the system it supported to account for their lives and stories—and by extension, the lives and stories of those like them living outside the boundaries drawn by the law. They rejected any possibility that their arrests, convictions, or sentences could be legitimate or properly sanctioned by “mere” procedural protections. They constructed instead a story of the government and the law so riddled with deficiencies that even those devices designed to check government power were seen as tools of oppression. Whether in silence or through outbursts, these defendants told a story of resistance and suppression that transcends their times and their causes to challenge the very conceptualization of the system and the law.

Their successes vary only in the degree of their failures. None of their resistance defenses succeeded in bringing about their acquittals.<sup>45</sup> But these defendants did not seem to view the task before them as actually (or merely) defending against a criminal charge. Instead they were sounding a call to revolution by the only means left to them—by challenging the authority that had oppressed them.

The resistance defendants I have chosen are by no means the only defendants who pursued this defense. They are anecdotal—representative resisters. The accounts of their convictions hover as cautionary tales around a larger narrative that is our notion of justice. Their stories are unsettling not only because their radical beliefs existed outside the conventional body politic, but also because of their refusal to lend any legitimacy to the process that would label them criminals. From John Brown to Warren Jeffs, there is no common political ideal that unites these defendants. The bond they share is their refusal to accept their roles as defendants.

### *A. John Brown*

In the decades before the Civil War, the nation seemed at a near boiling point over the issue of slavery.<sup>46</sup> As tensions mounted, violence became the norm and the narratives on both sides of the debate became more shrill, earnest, and distant from the constructed compromises produced by the formal government.<sup>47</sup> Northern juries refused to convict under the Fugitive Slave Act.<sup>48</sup> Southern raiding parties often took matters into their “own

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45. While the members of the Chicago Conspiracy (or “Chicago Eight”) were convicted of the most serious charges at trial, they did ultimately have their convictions overturned. See Joel M. Flaum & James R. Thompson, *The Case of the Disruptive Defendant: Illinois v. Allen*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 327 (1970).

46. For a detailed discussion of the lead up to the Civil War, see DAVID M. POTTER, *THE IMPENDING CRISIS* 356–84 (Don E. Fehrenbacher ed., 1976) (describing the political climate and tensions facing the country in the years prior to the Civil War).

47. As abolitionist and pro-slavery movements grew, the possibility of a permanent rift between the Northern and Southern states became more apparent. *Id.* In response, the federal government produced a series of compromise legislation designed to create unity. These compromises, including the Fugitive Slave Act and Kansas–Nebraska Act, both of which sought to appease all perspectives in the slavery debate, only seemed to fuel tensions as populations on all sides found deficiencies in the compromises. *Id.* at 371. As violence grew particularly in border states such as Ohio and Missouri and territories such as Kansas, even formal government officials joined in kind. On May 22, 1856, as the United States Senate debated the status of Kansas joining the union as a free or slave state, Senator Charles Sumner of Massachusetts took the floor and delivered an impassioned abolitionist speech entitled “The Crime Against Kansas.” As he exited the floor, Senator Preston Brooks of South Carolina rose and clubbed him senseless with a gold-topped cane. See DAVID S. REYNOLDS, *JOHN BROWN, ABOLITIONIST: THE MAN WHO KILLED SLAVERY, SPARKED THE CIVIL WAR, AND SEEDED CIVIL RIGHTS* 158–59 (2005).

48. See *United States v. Morris*, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (chronicling the refusal of Northern jurors to convict under the Fugitive Slave Act despite factual support for conviction); see also JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF*

hands,” not trusting the promises of the law to protect their “property” or what they viewed as their “way of life.”<sup>49</sup>

By the time John Brown staged his famous raid on Harper’s Ferry in December of 1858, he had already gained national attention as a committed abolitionist not afraid to use violence to accomplish his goals.<sup>50</sup> That the raid did not go as planned<sup>51</sup> did not dampen Brown’s status as a hero to many abolitionists.<sup>52</sup> Nonetheless, the raid alone would hardly have elevated him beyond a mere footnote in the history of the struggle to end slavery. Brown’s greatest impact was not what he did on December 20, 1858, in the federal armory, but what he did after. When put on trial, Brown, though assisted by counsel, used the proceedings to highlight the failings of the system that would accuse him of a crime and to continue to press his political agenda.<sup>53</sup>

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DEMOCRACY 82 (1994); Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249 (2003). Both note a tendency among Northern jurors to decline to enforce the Fugitive Slave Act even when defendants acknowledged they had violated the terms of the law. This nullification by the jurors reflected the prevailing communal rejection of the law particularly in larger northern metropolises, such as Boston, where abolitionism enjoyed widespread support.

49. See BRIAN MCGINTY, *JOHN BROWN’S TRIAL* 37–39 (2009) (detailing confrontations between pro- and anti-slavery settlers following the passage of the Kansas-Nebraska Act); see also REYNOLDS, *supra* note 47, at 163–64; Ken Chowder, *The Father of American Terrorism*, 51 AM. HERITAGE 81, 81–87 (Feb./March 2000).

50. See 4 JAMES FORK RHODES, *HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850*, at 385 (1892) (noting Brown’s disagreement with the pacifism of the larger abolitionist movement and quoting Brown as saying, “These men are all talk. What we need is action—action!”). Prior to his role in the raid on the federal armory at Harper’s Ferry, Brown had allegedly spearheaded the Pottawatomie Massacre in May of 1856 in which five pro-slavery Southerners were killed. *Id.* For a complete discussion of the Pottawatomie Massacre and Brown’s alleged role in it, see MCGINTY, *supra* note 49, at 38–39; REYNOLDS, *supra* note 47, at 162–64; and Chowder, *supra* note 49.

51. See POTTER, *supra* note 46, at 384–86; REYNOLDS, *supra* note 47, at 7 (both noting that the raid on Harper’s Ferry was a disappointment to Brown on several levels, though he was particularly disappointed by the unwillingness of free blacks and slaves to join in the raid).

52. See MCGINTY, *supra* note 49, at 256, 262–72 (chronicling Northern abolitionists’ support for the raid on Harper’s Ferry and Brown’s near canonization by Northern abolitionists following his execution); Alexander R. Boteler, *Recollections of the John Brown Raid*, 26 CENTURY MAG., at 399, 399–411 (1883) (recalling that after Brown was arrested for the raid on Harper’s Ferry, large groups of Northern abolitionists held fundraising events on his behalf in the hopes of procuring his acquittal).

53. Any discussion of Brown’s trial is inevitably complicated by several facts. First, the trial’s timing. Brown was arrested on October 18, 1859, following a marine raid of the engine house at the Harper’s Ferry armory. MCGINTY, *supra* note 49, at 56–57. The State of Virginia commenced court proceedings against Brown two days later, when the judge convened a grand jury panel to indict him on October 20. *Id.* at 85–88. The trial itself commenced a mere two days later and lasted only six days. *Id.* at 146. Despite repeated requests for continuances from Brown and his lawyers, complex legal issues surrounding the sufficiency of the indictment and even the definition of the crimes alleged, and the real possibility of the imposition of a death sentence, the court repeatedly denied requests to delay the trial, even briefly. Second, though Brown repeatedly requested alternative appointment of counsel, the court declined to grant a continuance and instead appointed local counsel to Brown who did not share his political sentiments and arguably had a conflict of interest in the case. *Id.* at 114–16, 118–20, 152, 173–74, 177–78, 194. Both attorneys owned slaves and one of them had a nephew who had been killed during the raid by Brown’s men. *Id.* at 100–02. By all accounts, including Brown’s own, these attorneys

From the outset, Brown questioned the capacity of the system to afford him a fair trial.<sup>54</sup> The trial seemed, to him, a formality conducted by a power foreign to his own belief system and unable or unwilling to contemplate his own narrative. When brought before the judge for arraignment, Brown announced: “If you seek my blood, you can have it at any moment without this mockery of a trial.”<sup>55</sup> Brown, injured in the recapture of Harper’s Ferry, spent the entire trial lying on a cot in the courtroom.<sup>56</sup> As the trial proceeded around him, he rose only to express his outrage at the proceeding itself.<sup>57</sup> He told the court in response to one

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presented a reasoned defense, but one that appeared at odds with Brown’s notion of the appropriate defense. *Id.* at 115, 135, 160, 168, 174–75, 224–26. As a result, Brown repeatedly interrupted the proceedings and ultimately his attorneys moved to withdraw when Brown indicated that they were not proceeding in his interests. *Id.* In response, the court granted the motion to withdraw counsel and appointed alternative counsel who had only arrived that morning in Charlestown. *Id.* at 174–75. When the newly appointed counsel requested a continuance of a day or two to familiarize themselves with the prior testimony (which they had not been present to hear), the court denied the request. *Id.* at 177–78, 184–85, 194. Finally, the issue of Brown’s health cast a shadow over the trial and the verdict. *Id.* at 115–116, 120, 125, 175, 180. Brown had been injured during the assault on the engine house. REYNOLDS, *supra* note 47, at 327. According to witnesses, he suffered saber wounds to his chest, stomach, and head during the raid. *Id.* Throughout the trial he lay on a cot in the courtroom and at times appeared unconscious. MCGINTY, *supra* note 49, at 115–16, 120, 125, 175, 180. Nonetheless, the court declined to continue the case to allow Brown to recover from his injuries and to participate more fully in his own trial. *Id.* Certainly by the time he was executed in December 1859, Brown had sufficiently recovered so that he was able to walk to the scaffold and to stand unassisted until hanged. *Id.* at 258. Each of these facts led Brown, and sympathetic observers, to suggest that the trial itself was loaded politically and that the court’s curtailment of Brown’s ability to present his own political motivations as the basis of his defense assured that only one political perspective was present in the courtroom. *Id.* at 260–87; REYNOLDS, *supra* note 47, at 8.

54. See MCGINTY, *supra* note 49, at 96–130. Brown’s objections to the trial were numerous but seemed to focus on three key points. First, he objected that the judge, jury, prosecutor—and even his own attorneys—were all slaveholders who fundamentally disagreed with the political beliefs which had motivated his actions at Harper’s Ferry. *Id.* at 97. Second, he objected that the indictment was “false and exaggerated” and failed to account for the underlying motives of the raid. *Id.* at 117 (quoting David Hunter Strother’s 1868 lecture on John Brown in Cleveland). Third, he objected that the trial was being rushed to accommodate the State’s desire to dispose of the matter quickly, either to keep the federal government from assuming jurisdiction or to prevent Brown from receiving the counsel he wanted and presenting the defense he desired. *Id.* at 82–83.

55. *Id.* at 99 (quoting a *New York Herald*, Oct. 27, 1859 account of Brown’s statements to the court).

56. Brown repeatedly requested continuances from the court based on injuries he had sustained during the raid. MCGINTY, *supra* note 49, at 115–16, 120. During his first appearance in court, Brown rose and addressed the judge before his attorneys could speak. *Id.* at 115. He stated:

I have a severe wound in the back, or rather in one kidney, which enfeebles me very much. But I am doing well, and I only ask for a very short delay of my trial, and I think that I may be able to listen to it; and I merely ask this that, as the saying is, “the devil may have his dues,” no more.

*Id.* at 115 (quoting a *New York Herald*, Oct. 27, 1859 article). When the prosecution objected to such a delay and the court seemed inclined to deny it, Brown continued, “I wish to say further that my hearing is impaired and rendered indistinct in consequence of wounds I have about my head.” *Id.* at 116. He explained that he was requesting only a short delay so that he could recover and “be able at least to listen to my trial.” *Id.* The judge denied the continuance. *Id.*

57. Brown rose repeatedly to address the court directly even after appointment of counsel. See, e.g., *id.* at 173–74.

witness's statements: "May it please the Court: I discover that, notwithstanding all the assurances I have received of a fair trial, nothing like a fair trial is to be given me . . . ." <sup>58</sup>

Brown's counsel did attempt to mount a defense on his behalf, but it was rooted in technicalities and seemed a poor choice given the emotions that surrounded Brown's alleged crime. <sup>59</sup> Brown himself declined to pursue an insanity defense that might well have been more palatable to his audience. <sup>60</sup> Regardless of whether Brown could have succeeded, such a defense would have clearly undermined Brown's larger message that the system was broken. For Brown, a government that would condone slavery could not possibly comprehend his story, rooted as it was in a rejection of slavery. <sup>61</sup> Because Brown's own way of thinking about the raid and the events preceding it was so distant from that of the men who put him on trial, Brown saw no point in explaining his perspective by any other means than resistance. By calling the court's attention—and that of the watching public—to what he perceived to be the farcical nature of the proceedings, Brown's conviction was elevated to a new status. The conviction and the legal system that produced it seemed narrow and unable to encompass the rising tide of opposition to slavery.

In contrast, Brown conceived of himself as engaged in a principled struggle against the violent and inhumane institution of slavery. <sup>62</sup> The

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58. *Id.* (quoting a *New York Herald*, Oct. 29, 1859 article).

59. Brown attempted to persuade his defense counsel to present a defense based on his belief that a desire to free slaves was benevolent, not criminal. *Id.* at 127. They largely declined; instead Brown's defense contended that he could not be guilty of treason because he was not a citizen of the state against which the treason was alleged. *Id.* at 112–13. As a citizen of New York, he could not commit treason against Virginia as he owed Virginia no allegiance. *Id.* The defense continued that Brown's attempt to free the slaves was completely benevolent, *id.* at 127, and not done to make "rebellion" or "insurrection," as he was charged. *Id.* at 109, 110. Finally, the defense characterized the deaths of the citizens during the raid not as "murders" but as the unfortunate and necessary outcome of a military battle. Therefore, these deaths were not murders within the definition of Virginia law. *Id.* at 127–28. None of these defenses were well received in the Virginia courtroom. *Id.* at 204–05.

60. While Ohio abolitionists pushed Brown to consider an insanity defense, he considered such a defense to be "pretext." *Id.* at 135 (quoting a *New York Herald*, Oct. 28, 1859 article). He said: "[I]f I am insane, of course I should think I know more than all of the rest of the world. But I do not think so." *Id.* at 136. He instead rejected the opportunity to plead insanity. *Id.* Whether or not such a defense would have succeeded is a question hotly debated by historians, with some concluding that he did not in fact exhibit any of the symptoms of mental illness. *Id.* (discussing the internal scholarly debate about the likely success of an insanity defense for Brown). Though Brown was, at least in theory, entitled to a federal trial, he was tried in state court in Charlestown, Virginia, surrounded by slave owners and those who supported the institution. *Id.* at 85–88. In addition, the judge had removed all acknowledged abolitionists from the jury, but allowed slave owners to remain. *Id.* at 125–26. Needless to say, Brown's philosophy on the immorality of slavery was not well received. *Id.* at 156–78. The story that he was insane would certainly have been more consistent with what his audience likely thought of him in the first place.

61. *See id.* at 115–116, 120.

62. Nowhere is this more apparent than in Brown's early writings. For a survey of these, see LOUIS A. DECARO JR., JOHN BROWN: THE COST OF FREEDOM (2007), and REYNOLDS, *supra* note 47.

narrative of his life and the defense that he attempted to construct focused on this identity. That his actions would be criminalized, and that he would be tried, convicted, and executed for a plan designed to further his righteous cause was not a surprise to Brown.<sup>63</sup> Rather, Brown's criminal charges confirmed that the government and the legal system on which it relied would do anything to preserve the institution he loathed, including sacrificing justice. The court's ruling that any discussions surrounding the legality or morality of slavery were to be excluded as irrelevant confirmed its inability or unwillingness to hear Brown's narrative and so to account for a shifting political and social tide.<sup>64</sup> Unable to separate who he was from the crime he committed, Brown's trial became as much about the story that was not told as about the one that played out in the courtroom. Brown, while allowing his lawyers to present a traditional defense, also chose the only true defense available to him: he challenged the system and refused to follow the court's mandates. For this, Brown is remembered. When Brown took the gallows he became more than a murderer and a thief, or even a martyr to the abolitionist cause.<sup>65</sup> He became a warning that there were stories that the courts could not hear and for which the law could not account, exposing the risk that the law would lose sight of the will and interests of the governed.

### *B. Eugene V. Debs*

Seventy years later, Eugene V. Debs emerged in the midst of similar tensions of different origins. In the early twentieth century, the nation reeled under the twin wonders (or burdens) of mass industrialization and the immigration needed to supply a cheap, constant, and docile work force for the new industries. As the power elite teetered on the creation of international policy that would simultaneously establish the United States as a world super power and embroil it in World War I, Debs challenged notions of class supremacy and appealed to a growing discontent among the working poor. On June 16, 1918, when Debs took the pulpit in Canton, Ohio, and criticized the United States' involvement in World War I, he knew he was risking arrest and conviction under the Espionage Act.<sup>66</sup> But Debs, a railroad union organizer, leader of the Socialist Party, and three-time presidential candidate, was no stranger to criminal convictions or

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63. MCGINTY, *supra* note 49, at 225–26 (quoting a *New York Herald*, Nov. 3, 1859 article).

64. For a discussion of shifting attitudes toward slavery at this time, see REYNOLDS, *supra* note 47, at 438–79.

65. Brown was hanged on December 2, 1859. MCGINTY, *supra* note 49, at 257–58.

66. See ERNEST FREEBERG, DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT 50, 68 (2008) (describing Debs's decision to deliver his speech in opposition to the war despite warning that such a speech would result in a violation of the Espionage Act).



political ideals, so he made the speech anyway.<sup>67</sup> He was arrested shortly afterwards.<sup>68</sup>

By way of defense, Debs chose resistance. He did not contest the factual basis of the charge—that he had made a speech that called for the overthrow of the United States government. Instead, he sought to put the Espionage Act itself, and the government’s efforts to enforce the act, on trial.<sup>69</sup> Debs’s defense was that the system and the law itself had failed so that patriots had no choice but to resist the application of the law.<sup>70</sup> He challenged jurors, and all Americans, to look beyond the facts of his case to the larger question of where free speech stood in the face of government power, mass propaganda, and even war.<sup>71</sup>

As Debs steered his defense further and further away from the factual basis of the allegation towards a critique of government and the law, the judge allowed him surprising leeway.<sup>72</sup> This may have been an easy concession since Debs’s own defense appeared to admit his guilt and all but guaranteed his conviction.<sup>73</sup> Before the jury began its deliberations, the judge reminded the jurors that Debs, not socialism or free speech, was on trial.<sup>74</sup> The jury’s verdict was swift and, even to Debs himself, unsurprising.<sup>75</sup>

But Debs, despite his conviction, had succeeded in transforming his trial into a national platform for his cause.<sup>76</sup> While there could be no question that Debs had violated the law as it stood, questions lingered about what the law stood for. Debs, while unable to contest his factual innocence, was able to call for systematic change. His resistance accomplished what his defense could not. The judge may not have allowed the jury to consider Debs’s argument for change, but Debs’s defense raised the question anyway. Debs challenged the nation to consider the value of free speech if

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67. See *id.* at 78; MELVYN DUBOFSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 161 (6th ed. 1999); NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* 72–73, 149 (1982) (chronicling Debs’s storied history as an organizer and advocate for the working poor).

68. FREEBERG, *supra* note 66, at 79.

69. See *id.* at 5, 98 (describing Debs’s choice of his defense as rooted in his political beliefs).

70. *Id.* at 98–101. In his closing statement, Debs told the jury, “I am the smallest part of this trial. . . . I am not on trial here. There is an infinitely greater issue that is being tried today in this court. . . . American institutions are on trial before a court of American citizens.” *Id.* at 101.

71. *Id.* at 101–02.

72. *Id.* at 99 (noting that the judge instructed the jury to consider only Debs’s actions, not the validity or constitutionality of the law itself, but nonetheless allowed Debs to make sweeping arguments regarding the validity of the law).

73. *Id.* at 98–101

74. *Id.* at 103–04.

75. *Id.* at 105.

76. *Id.* at 109. After his conviction, Debs received more than a million votes for president even though he ran from jail. *Id.* at 5. This popularity was widely seen as a protest vote. *Id.* Those who cast their ballots for Debs may not have shared his enthusiasm for economic revolution, but they did respect his stance on free speech. *Id.*

it could be curtailed so easily when it challenged the government. While the media and the government may have tried to cast Debs as part of a radical minority, his defense was disquieting because it drew on traditions that had founded the nation. In his closing argument, Debs's attorney reminded the jury and the nation that to Jefferson and Madison, freedom of speech and conscience were cornerstones of liberty and self-government.<sup>77</sup> The law may have supported the conviction, but the conviction was unsettling for the truth it revealed—that the government may well have used the power of the law to silence those who would question its authority. For a nation struggling still to define its democracy and its channels of power, this was a hard truth to face.

### C. *The Chicago Eight*

In 1968, America was at yet another crossroads. Casualties in the Vietnam War surpassed 30,000 with no end in sight.<sup>78</sup> As protests against the war mounted, they grew increasingly confrontational. Students seized the office of the President at Columbia University and held three people hostage in a protest over the University's involvement with the Department of Defense.<sup>79</sup> The Black Panthers took to the streets of Chicago and California to monitor police use of power and to challenge the singular authority of the government.<sup>80</sup> Two Jesuit priests broke into a Selective Service Center in Maryland and burned hundreds of draft records.<sup>81</sup> The Civil Rights Movement experienced its own violence following the assassination of Martin Luther King, Jr., in Memphis in April 1968.<sup>82</sup> Thousands took to the street in protests. "Riots erupted in 125 cities . . . , leaving forty-six dead."<sup>83</sup> On the political front, Lyndon Johnson, criticized for his support of the Vietnam War, declined to seek the Democratic nomination for President.<sup>84</sup> Robert Kennedy entered the race only to be gunned down as he met with supporters on the night of his victory in the California primary.<sup>85</sup> Socially, the country seemed equally unstable. Flower

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77. *Id.* at 125–26.

78. WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* 345–46 (2d ed. 1991).

79. *Id.* at 405–06 (describing this as one of many anti-war demonstrations taking place on college campuses).

80. *Id.* at 413.

81. Deirdre Carmody, *9 War Foes Begin Baltimore Trial: 1,500 Supporters Heckled as They Stage a March*, N.Y. TIMES, Oct. 8, 1968, at 13.

82. CHAFE, *supra* note 78, at 367–69.

83. AL KUETTNER, *MARCH TO A PROMISED LAND: THE CIVIL RIGHTS FILES OF A WHITE REPORTER, 1952-1968*, at 173 (2006).

84. CHAFE, *supra* note 78, at 360.

85. *Id.* at 372.

children and draft protesters promoted a climate of social freedom, feminists picketed the Miss America pageant, and African-American students challenged their universities to offer Black Studies.<sup>86</sup> Everywhere, ordinary citizens questioned the ability of the government to represent their interests and to balance emerging narratives of race-, gender-, and class-based disenfranchisement. Amid this climate, a group formed to discuss staging a protest at the Democratic National Convention in Chicago.<sup>87</sup>

Politically diverse, the members of this group focused on drawing attention to perspectives they believed had been ignored by the mainstream political parties. The group agreed on a meeting place, Chicago, and a general theme of protest, but otherwise its disparate members seemed to have little cohesion.<sup>88</sup> Despite this apparent lack of leadership,<sup>89</sup> or anything resembling a unifying purpose,<sup>90</sup> eight individuals were arrested and charged with, among other things, conspiracy to incite a riot after protestors failed to obey an 11:00 p.m. curfew imposed by the City of Chicago.<sup>91</sup> The defendants included members of a variety of the controversial, political movements<sup>92</sup> including the Youth International Party (the “Yippies”),<sup>93</sup> the National Mobilization Committee to End the War in Vietnam (the “MOBE”),<sup>94</sup> and the Black Panther Party.<sup>95</sup>

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86. *Id.* at 323–27, 331.

87. *See* THE CONSPIRACY TRIAL 350–51 (Judy Clavir & John Spitzer eds., 1970).

88. FRANK KUSCH, BATTLEGROUNDS CHICAGO: THE POLICE AND THE 1968 DEMOCRATIC NATIONAL CONVENTION 134 (2008) (quoting Abbie Hoffman’s statement during trial that there could not have been a conspiracy because “[w]e couldn’t agree on lunch” and defense witness Norman Mailer’s statement that “Left-wingers are incapable of conspiracy because they are all egomaniacs.”).

89. *See* JOHN SCHULTZ, NO ONE WAS KILLED: THE DEMOCRATIC NATIONAL CONVENTION AUGUST 1968, at 28 (Univ. Chi. Press 2009) (1969) (describing the absence of any leadership structure).

90. *Id.* at 2–3 (indicating that while many of the participating organizations sought to influence the Democratic National Convention and society at large, they lacked any coherent unifying purpose).

91. *Id.* at 25, 289; *see generally id.* 9–21, 49, 51, 76–78, 86–92 (describing the events that led up to and the eventual charges brought against the Chicago Eight).

92. CONSPIRACY IN THE STREETS: THE EXTRAORDINARY TRIAL OF THE CHICAGO EIGHT, at 3 (Jon Weiner ed., 2006).

93. The Yippies were a radical offshoot of the free speech and anti-war movements. Their organizational efforts varied from performance art pieces, including an attempt to nominate a pig named Pegasus the Immortal for President, to street protests. While they declined to name formal leaders, their founders included Abbie Hoffman, Anita Hoffman, Jerry Rubin, Nancy Kurshan, and Paul Krassner. *See* CHAFE, *supra* note 78, at 374.

94. The MOBE was a coalition of anti-war organizations that sought to stage mass demonstrations in an effort to shift public support towards ending the war in Vietnam. It was formed in 1967 and disbanded in 1969. Its leadership included Tom Hayden and Dr. Benjamin Spock. *See* CONSPIRACY IN THE STREETS, *supra* note 92, at 7–8.

95. The Black Panther Party, or the Black Panther Party for Self Defense, was a militant black rights organization founded in Oakland in 1966 by Huey Newton and Bobby Seale. Originally the party sought to respond to police brutality, but it quickly expanded to address issues its membership perceived as underrepresented by more mainstream civil rights movements. *See id.* at 5–6.

From the beginning the trial did not go as the Government might have hoped. The defendants refused to cooperate or to observe basic niceties of the trial process. Yippie defendants Abbie Hoffman and Jerry Rubin saw the trial as a means to promote their political message.<sup>96</sup> They dressed in police uniforms and judicial robes.<sup>97</sup> They brought a birthday cake to the courtroom, blew kisses to the jury, bared their chests, placed flags of the National Liberation Front on their defense table, and offered a running, often vociferous commentary on their “faith” in the justice system generally and in Judge Hoffman (no relation), the trial judge, in particular.<sup>98</sup> For his part, Black Panther Bobby Seale insisted on the right to represent himself, a right that Judge Hoffman adamantly denied.<sup>99</sup> For his continuous and often hostile outbursts, the court ordered Seale bound to his chair and gagged.<sup>100</sup> Seale’s prosecution was eventually severed from the trial.<sup>101</sup>

From the perspective of a resistance defense, these defendants are unique both in the outcome they achieved and in their mix of traditional legal arguments with their now eponymous resistance tactics. On the one hand, with the exception of Seale, these defendants acquired high profile and respected defense counsel.<sup>102</sup> They offered a factual defense to the charges. They asserted that they were political idealists who had reacted spontaneously to the government’s abuse of power, first in its imposition of the curfew and second in its decision to send out the police, armed with tear gas, to enforce the curfew on a previously peaceful demonstration.<sup>103</sup>

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96. Jona Goldschmidt, *Autonomy and “Gray-Area” Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J. L. & SOC. POL’Y 130, 134 n.36 (2011); Flaum & Thompson, *supra* note 45.

97. See *In re Dellinger*, 461 F.2d 389, 429, 433 (7th Cir. 1972); *Independent Lens: Chicago 10*, PUB. BROAD. SERV., <http://www.pbs.org/independentlens/chicago10/trial.html> (last visited Jan. 16, 2013).

98. See *id.*; J. Anthony Lukas, *Judge Hoffman Is Taunted at Trial of the Chicago 7 After Silencing Defense Counsel*, N.Y. TIMES, Feb. 6, 1970, at 41.

99. JASON EPSTEIN, *THE GREAT CONSPIRACY TRIAL* 228–69 (1970) (providing a detailed account of Seale’s repeated requests to proceed pro se and Judge Hoffman’s response to such requests).

100. See, e.g., *id.*; Robert Davis, *The Chicago Seven Trial and the 1968 Democratic National Convention*, CHI. TRIB., Sept. 24, 1969, available at <http://www.chicagotribune.com/news/politics/chicagodays-seventrial-story,0,6172471.story> (describing Judge Hoffman’s orders that Seale be gagged and tied to his chair in court to present his further outbursts); see also GREAT AMERICAN TRIALS 587–88 (Edward W. Knappman ed., 1994) (stating that Judge Hoffman bound and gagged Bobby Seale after repeated outbursts in which he compared the judge to a slave owner and referred to the judge as a pig and fascist).

101. See GREAT AMERICAN TRIALS, *supra* note 100, at 588. With Bobby Seale’s case severed the Chicago Eight became the Chicago Seven.

102. Richard L. Abel, *The Globalization of Public Interest Law*, 13 UCLA J. INT’L L. & FOREIGN AFF. 295, 304 (2008) (noting that the Chicago Eight were represented by William Kunstler and Leonard Weinglass, both well known civil rights and criminal defense attorneys).

103. See generally EPSTEIN, *supra* note 99 (describing throughout the narrative the ideals of the Chicago Eight defendants).

On the other hand, these defendants expanded their defense beyond the question of their own guilt to the larger question of the country's policies in Vietnam. When Judge Hoffman attempted to exclude such evidence as irrelevant, they turned their trial into the farce they believed it to be.<sup>104</sup> As they viewed the judge's rulings as becoming increasingly tyrannical, they upped their antics—performing in more and more shocking fashion.<sup>105</sup> In the process, like Brown and Debs before them, they called into question the legitimacy of the proceedings themselves. In the end Judge Hoffman did not even wait for the jury's verdict before he began sentencing the defendants and their lawyers for contempt of court.<sup>106</sup> When the jury ultimately convicted five of the seven defendants for crossing state lines with the intent to incite a riot, the defendants used even the sentencing hearing as a political platform.<sup>107</sup> Tom Hayden stated, "We would hardly [have been] notorious characters if they had left us alone in the streets of Chicago last year. . . . [I]nstead we became the architects, the masterminds, and the geniuses of a conspiracy to overthrow the government. We were invented."<sup>108</sup>

On November 21, 1972, the U.S. Court of Appeals for the Seventh Circuit reversed the defendants' convictions.<sup>109</sup> The appellate court based its decision on, among other things, Judge Hoffman's open hostility towards the defendants and his improper limiting of the voir dire process. In short, the process the defendants criticized was, in fact, deficient. In this sense, these defendants won both their battle *and* their war. They transformed their trial into a commentary on the system that would try them and, ultimately, forced a self-examination of the system. As Norman Mailer noted when testifying about whether the defendants had engaged in a conspiracy, they "under[stood] that you don't attack the fortress any more. You just surround it and make faces at the people inside and let them have nervous breakdowns and destroy themselves."<sup>110</sup>

While the Chicago Eight were unique among resistance defendants in that they ultimately avoided conviction, they are similar in fundamental ways. Faced with what they perceived to be an oppressive accusation, they went beyond traditional defenses and raised defenses that called into question the meaning of the trial and restrictions on the narratives they

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104. See EPSTEIN, *supra* note 99, at 380–95.

105. *Id.* at 397–419.

106. *In re Dellinger*, 461 F.2d 389, 391–92 (7th Cir. 1972).

107. See Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 LAW & LITERATURE 381, 384–85 (2004).

108. See CONSPIRACY IN THE STREETS, *supra* note 92, at 243.

109. *United States v. Dellinger*, 472 F.2d 340, 409 (7th Cir. 1972).

110. ROBERT STEIN, *MEDIA POWER: WHO IS SHAPING YOUR PICTURE OF THE WORLD?* 203 (iUniverse 2005) (1972).

could present. This suggests two things. First, as disenfranchised as they may have felt, they were sufficiently empowered (perhaps with the exception of Bobby Seale, who sat bound and gagged until his case eventually was severed) to speak and to try to co-opt the trial for their own political purposes. Second, like their brother and sisters before them, their political message, while extreme in its presentation, had salience with a significant portion of the population. In this sense it was cognizable on some level—if not by the court, then by the rest of the population watching the trial. Regardless of the court’s ability to comprehend their narrative, it rang true with a population that had begun to ask similar questions about the ability of the law and the government to reflect their own lives and experiences. To be sure, the Eight offered an extreme vision of the government,<sup>111</sup> but it appealed to many who seemed to fear that the government had ceased to offer them any sense of comfort or order.

#### *D. Judith Clark*

In many ways, the story of Judith Clark is a continuation of the political and social turmoil that produced the Chicago Eight. Clark had a long history of escalating radicalism, including a conviction for rioting in 1969 during Chicago’s Days of Rage.<sup>112</sup> As a member of the May 19th organization, Clark sought to bring armed revolution to America in an effort to force a political and social catharsis.<sup>113</sup> On October 20, 1981, she served as a getaway driver for a Brinks armored truck robbery.<sup>114</sup> The goal of the robbery was both to gather funds for the revolution and to draw attention to their political beliefs.<sup>115</sup> Despite the plot’s idealist beginnings, it left three men dead and one badly injured.

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111. A review of the transcript of the trial gives some insight into the political vision of the defendants who by their own descriptions likened the process to Nazi proceedings and expressed the hope that one day they could create the “Woodstock Nation” to replace the oppressive current “regime.” *Testimony of Abbie Hoffman*, FAMOUS AM. TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Hoffman.html> (last visited Jan. 15, 2013). See generally *The Chicago Seven Trial: Excerpts from the Trial Transcript*, FAMOUS AM. TRIALS, [http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Chi7\\_trial.html](http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Chi7_trial.html) (last visited Jan. 15, 2013).

112. Chicago’s Days of Rage was a series of increasingly violent anti-war protests in 1969 in which activist converged on several Chicago neighborhoods smashing windows and attempting to “reclaim” the streets. See CHAFE, *supra* note 78, at 408. Clark, who had been expelled from the University of Chicago for her role in student protests became part of an increasingly radicalized left. In the mid-1970’s she joined the May 19th Communist Organization that sought to aid in what they believed was an impending black-led revolution. See Robbins, *supra* note 1.

113. See Robbins, *supra* note 1.

114. See *Clark v. Perez*, 450 F. Supp. 2d 396, 402–03 (S.D.N.Y. 2006), *rev’d*, 510 F.3d 382 (2d Cir. 2008), *cert. denied*, 55 U.S. 823 (2008).

115. See Robbins, *supra* note 1.

Judith Clark clung to her radicalism throughout her trial, using her defense—or lack of a defense—as a critique of a system she considered a foreign and hostile power. Like other resistance defendants, Clark sought to transform her trial from a focused assessment of her culpability to a commentary on the power of government both to isolate and to exclude narratives that opposed it. Judith Clark’s belief system stood in stark contrast to the allegiances of the majority of the country.<sup>116</sup> Nonetheless, the circumstances of her conviction garnered attention.<sup>117</sup> Her simultaneous refusal to accept counsel and to appear and participate in her defense called into question the value of those procedural protections for someone in her position.<sup>118</sup> Although her guilt was readily apparent—mainly by her own admissions—the imposition of a punishment for those actions without any procedural or substantive challenge was unsettling. Like the resistance defendants before her, Clark’s silence in the face of the government’s accusation was perhaps the most powerful message she could project. It at least had the potential to speak compellingly to those who did not share her radicalism.

#### *E. Warren Jeffs*

Warren Jeffs, the self-proclaimed leader and prophet of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, is a resistance defendant who defined his narrative in religious as opposed to political terms.<sup>119</sup> Jeffs was hardly a stranger to the criminal justice system when he was extradited to Texas in 2010 to stand trial for sexual assault of children in connection with his marriage to girls ages twelve and fifteen.<sup>120</sup> Jeffs had been previously charged in Utah and Arizona with similar crimes surrounding similar marriages.<sup>121</sup> While his religious beliefs placed him on an extreme end of the religious spectrum, his trial came at a time when religious faith in general and a return to conservative religious values in

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116. Even Tom Robbins, a former friend of Clark’s, noted that at some point her politics became so radicalized that she lost touch with all mainstream colleagues. Robbins, *supra* note 1.

117. *Id.* (describing the lingering fascination with Clark’s conviction).

118. *Id.*

119. This is not to say that Jeffs was the only resistance defendant with religious motivation; John Brown’s radicalism was certainly influenced by his religious belief system. See MCGINTY, *supra* note 49, at 8.

120. See Jennifer Dobner, *Judge Rejects Petition to Block Warren Jeffs Extradition*, DESERET NEWS (Nov. 15, 2010, 10:48 PM), <http://www.deseretnews.com/article/700082212/Judge-rejects-petition-to-block-Warren-Jeffs-extradition.html>; *Times Topics: Warren S. Jeffs*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/j/warren\\_s\\_jeffs/index.html](http://topics.nytimes.com/top/reference/timestopics/people/j/warren_s_jeffs/index.html) (last updated Aug. 9, 2011) (describing both the proceedings against Jeffs as well as his prior indictments).

121. John Gibeaut, *Violation or Salvation?*, A.B.A. J. (Feb. 21, 2007, 3:32 AM) [http://www.abajournal.com/magazine/article/violation\\_or\\_salvation/](http://www.abajournal.com/magazine/article/violation_or_salvation/) (detailing the previous indictments and the failures to gain convictions in each state).

particular were enjoying a revival. Jeffs's self-proclaimed mission to follow God's will above any man-made legal construction, while certainly extreme in its presentation, is rhetorically similar to many more mainstream organizations' efforts to integrate religious values into the construction of law.<sup>122</sup>

On the eve of his trial in Texas, Jeffs announced to the court that he had dismissed his counsel and wished to proceed pro se.<sup>123</sup> Judge Barbara Walther warned Jeffs of the risks of proceeding without counsel, but he responded that his lawyers could not truly present his defense.<sup>124</sup> Only he could do that.<sup>125</sup> The following day, Jeffs sat silent throughout the proceedings.<sup>126</sup> He declined to give an opening statement or to cross-examine any witnesses.<sup>127</sup> Walther again called Jeffs to the bench and questioned his ability and sincerity in proceeding pro se.<sup>128</sup> Jeffs responded that the trial was an act of religious oppression and he would not legitimate

122. Current debates over topics ranging from contraception/abortion to gay marriage are couched in a desire to integrate religious values into secular law. For a sample of the debate, see Dan Amira, *Rick Santorum Fine with Shaming Women in Certain Situations*, N.Y. MAG. (Feb. 15, 2012, 1:30 PM), <http://nymag.com/daily/intel/2012/02/rick-santorum-contraception-birth-control-sex.html>; Daniel Bates, *Rick Santorum Says Rape Victims Should 'Make the Best of a Bad Situation' If They Get Pregnant and Give Birth to the 'Gift from God.'* THE DAILY MAIL (Jan. 24, 2012, 11:56 AM), <http://www.dailymail.co.uk/news/article-2091170/Rick-Santorum-Rape-victims-gift-baby-pregnant.html>; Amanda Greene, *Both Sides Gear Up in N.C. Gay Marriage Fight*, WASH. POST (Feb. 22, 2012), [http://articles.washingtonpost.com/2012-02-22/national/35444933\\_1\\_washington-state-and-maryland-marriage-protection-amendment-gay-marriage-fight](http://articles.washingtonpost.com/2012-02-22/national/35444933_1_washington-state-and-maryland-marriage-protection-amendment-gay-marriage-fight); David A. Drachsler, *Precedent for Contraception Coverage*, NAT'L L. J. (June 4, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202556661193&Precedent\\_for\\_contraception\\_coverage&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202556661193&Precedent_for_contraception_coverage&slreturn=1).

123. Debra Cassen Wise, *Polygamist Leader Warren Jeffs Fires His Lawyers Minutes Before Trial; Judge Refuses Delay*, A.B.A. J. (July 29, 2011, 9:29 AM), [http://www.abajournal.com/news/article/polygamist\\_leader\\_warren\\_jeffs\\_fires\\_his\\_lawyers\\_minutes\\_before\\_trial\\_judge/](http://www.abajournal.com/news/article/polygamist_leader_warren_jeffs_fires_his_lawyers_minutes_before_trial_judge/) (describing the proceeding in which Jeffs indicated his desire to proceed pro se); *Polygamist Religious Leader Fires His Lawyers*, NPR (July 28, 2011, 3:00 PM), <http://www.npr.org/2011/07/28/138795717/polygamist-leader-fires-his-lawyers> (describing attorney Deric Walpole's statement in open court the day trial was set to begin that Jeffs had fired his attorneys over disagreements about the defense and would be representing himself).

124. *Id.* (both quoting Judge Walther's colloquy with Jeffs regarding his decision to proceed without counsel).

125. *Id.* (describing Jeffs's motivation for releasing counsel). There was some irony in this statement, given Jeffs's defense attorney, Deric Walpole, had pursued a religious theme throughout jury selection. See *Defense: Polygamist Leaders' Rights Were Violated*, USA TODAY (July 26, 2011, 11:02 PM), [http://usatoday30.usatoday.com/news/nation/2011-07-26-warren-jeffs-polygamist-leader-trial\\_n.htm](http://usatoday30.usatoday.com/news/nation/2011-07-26-warren-jeffs-polygamist-leader-trial_n.htm).

126. See Matthew Waller, *FLDS Trials: Jeffs, Representing Himself, Is Silent as Case Is Built Against Him*, THE SAN ANGELO STD.-TIMES (July 28, 2011), <http://www.gosanangelo.com/news/2011/jul/28/jeffs-silent-as-case-is-built-against-him-say-of/>.

127. See *Representing Self, Warren Jeffs Sits Silent Rather than Present Case*, CNN JUSTICE (July 28, 2011, 6:30 PM), [http://articles.cnn.com/2011-07-28/justice/texas.polygamist.jeffs\\_1\\_warren-jeffs-sexual-assault-fundamentalist-church?\\_s=PM:CRIME](http://articles.cnn.com/2011-07-28/justice/texas.polygamist.jeffs_1_warren-jeffs-sexual-assault-fundamentalist-church?_s=PM:CRIME).

128. *Id.*



it by participating.<sup>129</sup> Walther countered that Jeffs's choice was to participate or to suffer appointment of counsel over his objections.<sup>130</sup>

While Jeffs's participation began in earnest after this encounter with the judge, his efforts were arguably no more effective than his silence.<sup>131</sup> Walther blocked Jeffs's primary defense—that his decision to enter into “celestial marriages” with twelve- and fifteen-year-old girls who were members of his religious community was an integral component of his religion and, as such, could not be criminalized.<sup>132</sup> The judge explained that while that might be Jeffs's explanation of his actions, it was not a recognized defense to the criminal charges he faced and, therefore, he could not present it to the jury or to ask them to render a verdict on the theory.<sup>133</sup>

As a purely factual matter, Jeffs's conviction is hardly shocking. He admitted that he had married both girls and had had prohibited contact with them. What distinguished his case from other child rape cases was his decision to defend his actions by challenging the authority of the court over him and by his repeated claims that the court was precluding the only true narrative in the case—his own religiously based account of his act of faith. Even a nation that seemed united in its rejection of his belief system was disquieted by his resistance to the judicial system.

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129. *Id.*

130. *Id.*

131. After the judge's warning, Jeffs expanded his defense efforts considerably, at one point offering a thirty minute “objection” to testimony. *Id.*; see also Andrea Canning, Katie Kindelan & Gianna Toboni, *Warren Jeffs Remains Mute as Sex Trial Begins*, ABC NEWS (July 29, 2011), <http://abcnews.go.com/US/warren-jeffs-remains-mute-sex-trial-begins/story?id=14187511> (describing Jeffs's original decision to remain mute but also his subsequent participation); *Polygamist Leader Jeffs Slows Sex Abuse Trial*, USA TODAY (Aug. 4, 2011, 12:50 AM) [http://www.usatoday.com/news/nation/2011-08-03-polygamist-warren-jeffs-trial\\_n.htm](http://www.usatoday.com/news/nation/2011-08-03-polygamist-warren-jeffs-trial_n.htm) (describing Jeffs's original decision to remain mute but also his subsequent participation); Nate Carlisle & Lindsay Whitehurst, *Warren Jeffs Found Guilty of Child Bride Rapes*, SALT LAKE TRIB. (Aug. 4, 2011, 11:05 PM), <http://www.sltrib.com/sltrib/news/52325829-78/jeffs-walther-girl-jury.html.csp> (noting that during Jeffs's thirty-minute closing he primarily stood silent for twenty minutes staring forward and then looked at the jury and said “I am at peace” and then sat down after six more minutes of silence).

132. Jeffs characterized the defense in slightly more colorful terms, promising that if convicted, God would rain horror down on the jury and cripple the judge. See Will Weissert, *Prosecutors Rest in Warren Jeffs Trial After Playing Tape of Alleged Assault with 12-year-old*, SALT LAKE CITY DESERT NEWS (Aug. 3, 2011, 4:58 PM), <http://www.deseretnews.com/article/705388635/Prosecutors-rest-in-Warren-Jeffs-trial-after-playing-tape-of-alleged-assault-with-12-year-old.html?pg=all> (providing a description of the case and the defense as well as Jeffs's definition of “celestial marriage” as one ordained by God and appropriate with girls under the legal age of consent as they were “honorable vessels” and “willing to obey”); Carlisle & Whitehurst, *supra* note 131 (noting that Jeffs made a motion to allow the jury to find him innocent based on “pure religious intent”).

133. See Paul Bentley, *Warren Jeffs Sentenced to Life Plus 20 in Prison as Picture Emerges of 50 Brides, Bred to Worship the Polygamous 'Prophet'*, DAILY MAIL (Aug. 9, 2011, 3:11 PM), <http://www.dailymail.co.uk/news/article-2024150/Warren-Jeffs-trial-Paedophile-gets-life-sentence-50-brides-photo-emerges.html> (describing Judge Walther's admonition to Jeffs and the jury).

*F. Brothers and Sisters in Arms*

While their causes and politics differ, each of these defendants asserted resistance defenses. Rather than merely challenging the factual basis of the charges against them, they chose instead to challenge the system itself. They questioned the fundamental legitimacy of the government, the criminal justice system as a mechanism for punishment, or both. They asserted that regardless of the procedural or substantive protections afforded, their trials suffered fundamental flaws given the system's inability to contemplate their experience and to hear their narrative. To these defendants the right to a defense was illusory, and they declined in varying degrees to participate in any process that might suggest otherwise.

These defendants, and the stories they sought to tell, existed beyond the margins contemplated by the law, in some no man's land of idealism and disenfranchisement. Their alleged crimes were integral to their identities. Take Warren Jeffs's child rape charges. If you believe that Jeffs held the religious beliefs he espoused, then his religion dictated whom he should marry and when he should marry them. Secular laws or norms that contradicted or criminalized these dictates would have required him to abandon his firmly held belief system—something he was unable to do. To Jeffs, his crime was who he was, and who he was—a religious leader and a man—was criminal. To the outside world, Jeffs's religious beliefs were utterly foreign and harmful, but Jeffs saw himself as falling within a long tradition of people who break secular laws to maintain their religious faith. Religious adherents refuse to fight wars<sup>134</sup> (or even register for drafts<sup>135</sup>); they serve their children alcohol;<sup>136</sup> they assist illegal immigrants entering the country;<sup>137</sup> they help slaves escape their masters;<sup>138</sup> they refuse medical treatment for their children,<sup>139</sup> they are exempted from school dress codes.<sup>140</sup> They do all this in the name of their faith that trumps any loyalty to secular norms and laws. Some of their behavior enjoys codified legal exceptions to the practices. Quakers, for example, are excused from

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134. See Adam Fraser, Note, *Protected from Their Own Beliefs: Religious Objectors and Paternalistic Laws*, 18 *BYU J. PUB. L.* 185, 224 (2003).

135. *Id.*

136. See Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 *TENN. L. REV.* 351, 358 (2010).

137. See Steven W. Bender, *Compassionate Immigration Reform*, 38 *FORDHAM URB. L.J.* 107, 126–27 (2010).

138. See Kathleen L. Villarruel, Note, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 *S. CAL. L. REV.* 1429, 1435–36 (1987).

139. See Laura M. Plastine, Comment, *"In God We Trust": When Parents Refuse Medical Treatment for Their Children Based upon Their Sincere Religious Beliefs*, 3 *SETON HALL CONST. L.J.* 123, 142 n.79 (1993).

140. See Lund, *supra* note 136, at 357.

registering for the draft.<sup>141</sup> Catholics are permitted to serve children wine in the sacrament of Communion.<sup>142</sup> Where legal exceptions have not been created, cultural norms make up for the lack of legal exceptions.<sup>143</sup>

But Jeffs's exercise of his religion meets no such exception or tolerance, undoubtedly because society views the harm of this exercise as simply too great. Any societal interest in maintaining Jeffs's religious faith is overridden by concerns over the welfare of the girls who are its subject. To Jeffs, however, there is another explanation. Jeffs feels he is being punished because his religion is too far removed from the mainstream. The threat he poses society is not in his decision to have a sexual relationship with a twelve-year-old girl, but in his decision to exist and to practice a religion that is utterly foreign to the rest of the nation. He is the other—someone outside the accepted boundaries of faith. As such, he is twice victimized by the criminal justice system. First, his prosecution is as much about who he *is* as what he is accused of doing. Second, because his identity and his act are inseparable, procedural or substantive protections that might allow him to explain or excuse his behavior provide no shelter.

To Jeffs, the protections the criminal justice system provides for the accused are meaningless. They are not for him; they are for everyone else. That is, they function only to legitimate Jeffs's foregone conviction. For Jeffs and his fellow resistance defendants, the only mechanism by which they can give voice to their narratives—their only defense—is to resist.<sup>144</sup>

141. See Fraser, *supra* note 134, at 226.

142. See Lund, *supra* note 136, at 358.

143. See Carroll, *supra* note 15, at 681 (describing evolving social norms that rendered previously “criminal” behavior immune from prosecution); Villarruel, *supra* note 138, at 336 (describing social pressure not to convict participants in the Underground Railroad or the Sanctuary movement).

144. To be clear, the resistance defense is distinct from the more palatable concept of civil disobedience. While a civil disobedient may violate the law based on some strongly held belief system, civil disobedience is about changing a system, not destroying it. See Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1898 n.2 (2005). Those who burned their draft cards or openly flaunted the Fugitive Slave Act sought to bring about a social change. See Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1175–76 (1987). Even in their disobedience, they had faith that the system and society, once made aware of the law's inconsistencies or failures, would correct itself. *Id.* The resistance defendants reject the system outright. They seek complete separation from it, or the destruction of it, in the hopes of building a society that encompasses their own belief system.

As a result of this fundamental difference, necessity, justification, or even nullification defenses that might shelter a civil disobedient from a criminal conviction offer no such shelter to the resistance defendant. *Id.* at 1198–99. These defendants reject the system, and any cooperation with the system is viewed not only as an abandonment of their principles, but futile. In this realization, they pose the greatest challenge. Their failure to contest the factual basis of the allegations against them renders their convictions a virtual inevitability. But to the extent they raise questions about the legitimacy of the system itself or expose a previously excluded or unimagined narrative, they serve as a constant reminder that criminal law is a tangible, unfiltered, and constant exercise of state power in our lives. See also, *supra* notes 14–20 and accompanying text for a discussion of the similarities and differences between defenses of justification and nullification and resistance.

## II. INGREDIENTS OF THE RIGHT TO A DEFENSE

The Constitution does not explicitly articulate a right to a defense, yet it emerges from a variety of sources. The Constitution's numerous procedural requirements for criminal prosecutions help to ensure the right to a defense. Although the Constitution itself does not provide the content of the substantive defenses to otherwise criminal conduct, defenses abound in every jurisdiction.<sup>145</sup> A defense is expected. It is integral to the American concept of justice. Without the defendant's counter-narrative to the State's accusation, the trial is incomplete and one-sided. To understand the significance of the resistance defendant's decision to forgo some or all of his right to a defense, it is first necessary to consider the construction of that right, both from a procedural and substantive perspective.

*A. Procedural Defense*

While the Constitution creates no explicit procedural or substantive right to a defense, a variety of procedural protections combine to create such a right. These protections are found in the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments. They include the right to remain silent,<sup>146</sup> to confront witnesses,<sup>147</sup> to receive assistance of counsel,<sup>148</sup> to have a speedy and public jury trial,<sup>149</sup> and to be presumed innocent until the state proves guilt beyond a reasonable doubt.<sup>150</sup>

Two distinct realities animate these protections. The first is the possibility of a defendant's competing or counter-narrative in response to the government's accusation. This story, or defense, carries a value in and of itself. It completes the story that begins with the accusation and ends with a verdict. Without the defendant's competing narrative, the accusation is unchecked; there are limited means to determine if it has merit or not. Second, these protections recognize that a forum for the defendant's story—and the means to tell it—may not naturally occur. These rights are necessary to create the space for this responsive story and the means by which the story may be told and heard in the larger context of the justice system and the law. Without this opportunity to speak, the defendant's narrative, while present, may be suppressed or incomprehensible to mainstream society.

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145. For an excellent comparison of substantive defenses, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

146. U.S. CONST. amend. V.

147. U.S. CONST. amend. VI.

148. *Id.*

149. *Id.*

150. U.S. CONST. amends. V, XIV; *In re Winship*, 397 U.S. 358, 364 (1970).

Like the defendants who evoke them, these procedural protections are varied. The right to a public jury trial, to confront a witness, to appointed counsel, and to require the State to prove its accusation beyond a reasonable doubt all rest on a unifying concept—that the criminal courtroom is a space where the defendant’s story can and should be told. Without this possibility of the defense, the defendant’s guilt—and the legitimacy of punishment that flows from that guilt—are untested propositions. While not explicit in their provisions, these protections coalesce around a single goal: to create a forum and an opportunity for the defendant’s counter-narrative.

These procedural protections can be grouped into two categories. One category is the rights that create the forum for the defense—the right to proof beyond a reasonable doubt in public before an impartial jury through live witness testimony. The other category is the right that creates the mechanism by which the defense story is told: the right to counsel. Both categories of rights carry benefit for the defendant and for the larger community because both serve as legitimating forces in the process. The Court has interpreted the right to counsel, however, as fundamentally grounded in a defendant’s autonomy, setting it apart as a right that a defendant may unilaterally waive. In this unique characterization of this right, the Court enabled the resistance defense by vesting in the defendant the ultimate control of the mechanism of his narrative.

### *1. Public Jury Trial, Confrontation of Witnesses, and the Burden of Proof*

The Sixth Amendment and Article III of the Constitution combine to guarantee a defendant the right to a public trial in front of an impartial jury drawn from the state and district in which the crime allegedly occurred.<sup>151</sup> In addition, the Supreme Court has interpreted the First Amendment as granting the press and the general public the right to attend criminal trials.<sup>152</sup> At their most basic level, these protections preserve the

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151. See *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968); see also U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .”); U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”). The Supreme Court has limited this right to a jury trial to “serious” offenses as determined by the maximum sentence authorized for the offense. See *Lewis v. United States*, 518 U.S. 322, 325–26 (1996).

152. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602–03, 610–11 (1982) (holding that the First Amendment creates the right for the press and the public to be present even during difficult portions of trials).

defendant's right to an audience for his story.<sup>153</sup> But these rights serve another critical function: they protect the defendant by creating a citizen check on the government's exercise of power.<sup>154</sup> The right to a public jury trial creates transparency around the accusation.<sup>155</sup> Coupled with the presumption of innocence and the government's burden to prove guilt beyond a reasonable doubt, these rights ensure that a defendant cannot be convicted by the government accusation alone.<sup>156</sup> Whatever other power the three formal branches of government may enjoy to prohibit behavior, to levy accusations, or to impose a sentence, the ultimate power to convict is vested in the citizen jury.<sup>157</sup>

The public nature of the trial, conviction, and punishment creates a secondary check on the government. Monitoring citizens may have no direct power to create or overturn a verdict, but their presence ensures a degree of transparency to the process.<sup>158</sup> Defendants are not tried behind closed doors where their rights and liberties might be arbitrarily curtailed.<sup>159</sup> Instead, the government must make its accusation and present its evidence, and the defendant is entitled to present his counter-narrative, in the light of a public proceeding.<sup>160</sup> In this, the right to a public jury trial ensures the possibility of a fair trial for the defendant.<sup>161</sup>

But the benefits for the defendant of a public jury trial also accrue to the public. The right to a public jury trial also creates legitimacy.<sup>162</sup> Not

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153. Indeed the Supreme Court has described this right as creating a critical forum for the right to a defense. *See* *United States v. Bailey*, 444 U.S. 394 (1980).

154. *See* *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan*, 391 U.S. at 156) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); *see also* LYSANDER SPOONER, AN ESSAY ON TRIAL BY JURY 16 (1852) (concluding in describing the jury that "there can be no legal right to resist the oppressions of the government, unless there be some legal tribunal, other than the government, and wholly independent of, and above, the government, to judge between the government and those who resist its oppressions" (emphasis in original)).

155. *See* *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *People v. Jones*, 391 N.E. 2d 1335, 1340 (N.Y. 1979)) (describing the "intangible, societal loss that flows" from nonpublic criminal proceedings).

156. In incorporating the right to a public trial to the states, the Court noted the value of the public proceeding. *In re Oliver*, 333 U.S. 257, 273 (1948).

157. Certainly this right has been limited in a variety of ways from the restrictions on defenses to judicial control of the types and form of evidence admissible, but the fundamental right appears to remain intact. *See* *Carroll*, *supra* note 15, at 680–82.

158. *See* *Davis v. United States*, 247 F. 394, 395 (8th Cir. 1917) (describing the power of observing jurors to safeguard against abuses of power).

159. *Oliver*, 333 U.S. at 268–69 n.22 (recounting the Founders' construction of the right to a public trial as a rejection of the English Star Chambers practice in which accused persons were "grilled in secret . . . in an effort to obtain a confession").

160. *Id.* at 269–70.

161. *Id.*

162. *See* *United States v. Cianfrani*, 573 F.2d 835, 853 n.6 (3d Cir. 1978) (noting the right to a public trial extends benefits far beyond the defendant); *see also* Douglas Hay, *Property, Authority and*

only does the public jury trial create transparency, but citizens have an opportunity as jurors to weigh in on its validity.<sup>163</sup> Citizen jurors serve as a literal check on the unbridled exercise of government power.<sup>164</sup> The right to a local jury creates the opportunity for the ordinary individuals most affected by the alleged crime to accept or reject the government's accusation in the form of their verdict.<sup>165</sup> In this, the citizenry can force accountability not only from the government but also from the law.<sup>166</sup> The jury's verdict is a reflection of community values and norms.<sup>167</sup> It is a commentary on the community's answer to the dual questions presented in every criminal proceeding: did the defendant actually violate the law, and is it worth enforcing? In these answers lies the unrecognized value of the jury trial—that the verdict can serve as the singular moment when the law can be laid side-by-side with the citizen's own life (whether the juror's or the defendant's) and judged for its ability to encompass his or her own experience in its text.

In this, the jury transforms the law from a static body to a fluid one, capable of nimbly accounting for shifting communal values or the exceptional circumstances of a particular defendant's narrative. Without a public jury trial, the validity of the verdict and the resulting sentence is diminished. If procured in secrecy, its meaning is obscured. The citizenry loses faith not only in the verdict itself but also in the system and law that produced it. The right to a public jury matters not only for the defendant but also for the community. The right, in serving its two masters, legitimates the law, the system, and the verdict.

Similarly, the Sixth Amendment's promise of a right to confront and cross-examine adverse witnesses<sup>168</sup> furthers the right to a defense and serves the same masters. Confrontation ensures not only the accuracy of the witness's testimony, but also legitimates the process and its verdict.<sup>169</sup>

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*Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 38 (1975).

163. *Oliver*, 333 U.S. at 270 (concluding that the right to a public trial places an "effective restraint on possible abuse of judicial power" by creating public accountability).

164. *See Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

165. *See ABRAMSON*, *supra* note 48, at 22; *Carroll*, *supra* note 15, at 660.

166. *See Carroll*, *supra* note 15 (describing nullification as a mechanism to force the law to respond to social norms and citizens' expectations of the law).

167. *Id.* at 705–07 (describing the importance of the community's voice in the law as represented by the jury's verdict).

168. U.S. CONST. amend. VI (stating in the pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *see also Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Sixth Amendment right to confront to the states through the Due Process Clause of the Fourteenth Amendment).

169. *See Maryland v. Craig*, 497 U.S. 836, 846 (1990) (stating that "face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person"); *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) (stating that the Confrontation Clause protects against false testimony being used as the basis for a conviction).

Witnesses are not permitted to hide in the shadows when an individual's liberty is at stake.<sup>170</sup> The presentation of evidence—the justification of the accusation—is a public process.<sup>171</sup> Defendants are permitted to see and to question their accusers face to face.<sup>172</sup> The defendant juxtaposes his own narrative directly against the witness's story, and the public is permitted to witness this process.

The Supreme Court's treatment of these protections in recent cases underscores the critical nature of these rights. When coupled with the Due Process Clause's requirement of proof beyond a reasonable doubt, these rights combine to create the forum for the right to a defense and a means to protect both the defendant and the community. In recent cases, the Supreme Court has underscored the importance of proof before the jury as a safety valve against the government's unchecked use of power. In both the *Apprendi* and *Crawford* case lines, the Court revitalizes the role of the jury in criminal law as a means to legitimate the resulting verdict.<sup>173</sup>

In *Apprendi*, the Court held that the Constitution requires any fact used as a basis for punishment to be proven to a jury using the beyond a reasonable doubt standard.<sup>174</sup> *Apprendi* and its progeny represent a return to the historical notion that a jury's consideration of the factual basis for a defendant's sentence legitimates the conviction and the punishment that will flow from it.<sup>175</sup> On a theoretical level, *Apprendi* recognizes the jury trial as a unique moment of interpretation, in which the law is made whole in its application by the community to the defendant.<sup>176</sup> Without the opportunity for this moment, the law risks becoming detached from the citizens it seeks to govern. In cementing its notion of the jury as a check on government power, the Court in *Apprendi* described the jury as the “guard against a spirit of oppression and tyranny on the part of rulers, and as the great bulwark of [our] civil and political liberties.”<sup>177</sup>

*Apprendi* represents a significant shift away from a formalistic construction of the jury towards a more functional one.<sup>178</sup> *Apprendi* vests

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170. See *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973).

171. *Id.* at 302.

172. *Id.*

173. See Carroll, *supra* note 15, at 706 (concluding that the *Apprendi* caseline revitalizes the possibility of juror nullification).

174. *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000).

175. *Id.* at 477; see also Carroll, *supra* note 15, at 687–92 (discussing *Apprendi*'s reliance on the historical role of the jury as a means to provide a communal check to the construction and application of the law).

176. See Carroll, *supra* note 15, at 705–07.

177. *Apprendi*, 530 U.S. at 477 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)) (internal quotation marks omitted).

178. See Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 959–60 (2006).



the ability to define (and even, at times, construct) the law in the hands of ordinary citizens who must most directly live with the consequences of their decisions—the community jury. Under *Apprendi*, the jury serves as a bridge between what the law would seek to punish and what the citizenry will accept from the law in their own lives. The jury becomes a microcosm of democracy and a mechanism to give the law real meaning. This notion of the jury as a bridge depends on the presentation of competing narratives within the courtroom in the form of the State’s presentation in support of the indictment and the defense’s response to the accusation.

The *Crawford* line follows a similar vein, holding that the Sixth Amendment’s Confrontation Clause requires evidence that is testimonial in nature to be presented live, in court.<sup>179</sup> Just as *Apprendi* represented a shift in the Court’s construction of the Due Process Clause and the Sixth Amendment right to a jury, *Crawford* reexamined the Court’s approach to hearsay, striking down previous rulings that had carved out vast exceptions to the Confrontation Clause.<sup>180</sup> As the cases that followed *Crawford* have sought to shore up the murky parameters of the Court’s notion of “testimonial” evidence, what clearly emerges is the Court’s view that the ends of justice are best served when accused and accuser face one another in a public courtroom, so that jurors can judge for themselves the veracity of the witness’s statement.<sup>181</sup> Without this opportunity, the process risks dilution.

On a theoretical level, the *Crawford* line is linked to *Apprendi*’s notion that jurors are more than twelve warm bodies sitting in a courtroom. They create a vital nexus between the law and the governed. As such, their verdict is a critical moment when the law takes on a meaning in application to the defendant. Without the opportunity to hear and weigh evidence, the State may not only be able to convict a defendant on evidence that suffers deficiencies, but the conviction moves further and further away from the community it affects. It ceases to be a consensus reached only after careful consideration and observation of the evidence. Rather, it becomes a conclusion dictated from afar by the government. *Crawford*, like *Apprendi*, re-empowers the jury to bring some meaning to the law through the verdict and depends on the presence of two stories in the courtroom.

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179. *Crawford v. Washington*, 541 U.S. 36 (2004).

180. *Id.* at 61.

181. Two cases following *Crawford* sought to further shore up the importance of the Confrontation Clause and its limitations. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *Davis v. Washington*, 547 U.S. 813, 823–26 (2006).

## 2. *The Right to Counsel*

If the rights to a public jury trial and to confront witnesses encompass a defendant's right to tell a story and a community's right to hear that story, then the right to counsel is the right to have the story told in a way that it can and will be heard. It is the mechanism by which the right to a defense is realized. The Sixth Amendment literally promises "the Assistance of Counsel for his defence."<sup>182</sup> How that assistance would materialize, or precisely what defense it would enable, was left to interpretation. But the Sixth Amendment's own words envision a right that would help the defendant at the moment he faces the State's accusation.

The Court's modern discussion of the right to assistance of counsel began in the 1932 decision, *Powell v. Alabama*,<sup>183</sup> which imagined the right to counsel through the lens of the Due Process Clause.<sup>184</sup> In this decision, the Court forever linked representation by counsel to the larger goals of ensuring fairness and legitimacy in the criminal justice system.<sup>185</sup> This characterization included a communal component, that is, the right to counsel would assure the larger community of the legitimacy of the process.<sup>186</sup> Without a skilled and educated advocate assisting the defendant, faith in the system and in the resulting verdict was at risk.<sup>187</sup> Without a meaningful right to counsel, the trial ceased to be an adversarial process and became a David-and-Goliath battle, in which the government might as easily bully a finding of guilt as prove one. This inequity, or even the perception of it, tainted any resulting verdict—regardless of its factual accuracy—with the stain that it was the product of the government's overwhelming power rather than a just system.<sup>188</sup> This in turn raised larger questions about the law itself: if the people could not trust the system, how could they ever trust the construction of the law that emerged from it?

*Powell* cast the right to counsel as more than a mere physical presence in the courtroom; it is a right to speak and to be heard that is fundamental to concepts of justice.<sup>189</sup> The Court linked the right to counsel to notions of

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182. U.S. CONST. amend. VI (emphasis added).

183. *Powell v. Alabama*, 287 U.S. 45 (1932).

184. *Id.* at 65. Of course, the case had to be brought under the Due Process Clause because the Court had yet to incorporate the Sixth Amendment to the states.

185. See Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 455 (2012).

186. See Laura I. Appleman, *The Community Right to Counsel*, 17 BERKELEY J. CRIM. L. 1, 53–54 (2012) (outlining the historical right to counsel as carrying a communal component).

187. *Id.* (stressing the post-colonial focus on the right to counsel as a mechanism to establish the legitimacy of the fledgling legal system in the United States).

188. See *Powell*, 287 U.S. at 72.

189. *Id.* at 69 (concluding that a fair trial "would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel").

advocacy.<sup>190</sup> Without effective and meaningful assistance of counsel, a defendant could not adequately prepare to defend against an accusation.<sup>191</sup> He was silenced, his narrative absent from the record. This mattered, not because it would change a verdict (the Court in *Powell* engaged in little analysis of actual prejudice), but because a failure to provide the defendant with some meaningful representation called into question the fairness of the system and its outcome. Regardless of whether the defendant was capable of presenting a winning defense (and indeed on retrial the defendants in *Powell* were not), he was entitled to a defense, presented with the aid of counsel, and the larger community was entitled to hear that defense and to judge it.<sup>192</sup>

So the revolution in the right to counsel had begun (albeit somewhat fitfully at first).<sup>193</sup> Three decades later, in *Gideon v. Wainwright*,<sup>194</sup> the Court affirmed the right to counsel in felony cases and held the right applicable to the states.<sup>195</sup> Harkening back to its earlier ruling in *Powell*, the Court spoke of the right to representation as fundamental to fairness and due process.<sup>196</sup> Without a right to counsel, the adversarial process failed—a defendant stood alone against an all-powerful government and accusations went untested.<sup>197</sup> Lawyers were not luxuries but necessities, not only for the defendant, but for the community at large that relied on the adversarial system to ensure fairness and to check governmental abuses of power.<sup>198</sup> Almost a decade later, *Argersinger v. Hamlin*<sup>199</sup> extended the right to counsel to any criminal trial where the defendant's liberty was at stake.<sup>200</sup> The Court concluded that the right to counsel was necessary for a fair trial, even in the most minor of prosecutions.<sup>201</sup> Without this adversarial protection, there was no way to ensure the fairness of the outcome.

In each of these cases, there are salient themes. First, the right to counsel emerges unfettered by a “Founders’ vision” or any historical support. Scholars have made much of the Court’s failure to provide citation to precedent or common law for its invocation of a long-established faith in

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190. *Id.*

191. *Id.*

192. See Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts “Legal Lynchings,”* in *CRIMINAL PROCEDURE STORIES* 1, 14 (Carol S. Steiker ed., 2006).

193. Despite its start in *Powell*, the Court admittedly lost some momentum when it limited the right to counsel as inapplicable to the states in *Betts v. Brady*, 316 U.S. 455 (1942).

194. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

195. *Id.* at 342 (overturning *Betts*).

196. *Id.* at 343–44.

197. *Id.* at 344.

198. *Id.* at 344–45.

199. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

200. *Id.* at 30–31, 37–38.

201. *Id.* at 40.

the ability of counsel to ensure fairness and to preserve liberty interests.<sup>202</sup> The Court instead focused on the functionalism of the right, casting aside any former, formal constructions that might have limited the right so severely as to make it superficial. Second, and perhaps more significantly, the Court created a right to counsel that focused on the fairness of the trial. In this, the right to counsel served the same two masters as the other protections. While the right undoubtedly created the opportunity for the defendant to be heard, it linked this opportunity to a broader notion that a defense is fundamental to process and to a legitimate outcome. The right to a defense was not only the right to tell a story to the community, but also the right to tell the story in a way that the community could hear it and that it could compete with the government's narrative.

Then came *Faretta v. California*<sup>203</sup> and the concept of the right to counsel diverged from the other protections of the Sixth Amendment and the Due Process Clauses.<sup>204</sup> Anthony Faretta did not accept gratefully the hard fought privilege of counsel that *Powell* and *Gideon* had won him.<sup>205</sup> Instead he asked to opt out.<sup>206</sup> He requested to appear without counsel and to represent himself.<sup>207</sup> Initially, the trial court was willing to let him try, but after further inquiry into Faretta's understanding of the rules of evidence and procedure, the judge rejected his request.<sup>208</sup> Faretta's judge concluded that his self-representation would not serve "the ends of justice and requirements of due process."<sup>209</sup> In reaching this conclusion, as the dissent in *Faretta* noted, the judge followed the line emanating from *Powell* that conceived of the right to counsel as a mechanism of achieving fairness in a proceeding and not just as a question of the defendant's autonomy.<sup>210</sup>

But the majority in *Faretta* set a different course. On the one hand, the Court harkened back to its earlier Sixth Amendment jurisprudence, in which the right to counsel stood between the defendant and the overwhelming power of the criminal justice system.<sup>211</sup> It refused to abandon its previous assessment that counsel was critical to the adversarial process.<sup>212</sup> The Court quoted extensively from *Powell*, invoking memories

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202. See Klarman, *supra* note 192, at 12–13.

203. *Faretta v. California*, 422 U.S. 806 (1975).

204. See Joseph Blocher, *Rights to and Not to*, 100 CAL. L. REV. 761 (2012).

205. *Faretta*, 422 U.S. at 807.

206. *Id.*

207. *Id.*

208. *Id.* at 810.

209. *Id.* at 810 n.4.

210. *Id.* at 832–34.

211. *Id.* at 834.

212. *Id.*

of the injustice that is visited upon “[e]ven the intelligent and educated layman” when left without counsel to the “mercy” of the law.<sup>213</sup> The right to counsel, the Court reasoned, was a right to protection against wrongful conviction and arbitrary justice.<sup>214</sup> The Court also acknowledged the uphill battle that pro se defendants would surely face, noting “that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts.”<sup>215</sup>

On the other hand, and despite its apparent faith in the power of counsel, the Court ultimately declined to read the Sixth Amendment as a mechanism to foist counsel on an unwilling defendant.<sup>216</sup> “The right to defend,” the Court reasoned, “is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.”<sup>217</sup> So long as a defendant “knowingly and intelligently” waives the right to counsel before representing himself, the Sixth Amendment afforded shelter both to the right to counsel and the right to refuse counsel.<sup>218</sup> The majority, in constructing a right to proceed pro se within the Sixth Amendment’s promise of assistance, characterized the right to counsel as a critical component of the defendant’s individual right to choose.<sup>219</sup> The Court indicated that “[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”<sup>220</sup>

In finding support for its conclusion, the Court cited two primary sources of authority. First, the Court noted the historical prevalence of self-representation in state and federal courts. The right to self-representation had been codified in federal court with the Judiciary Act of 1789.<sup>221</sup> In addition, thirty-six state constitutions decreed a specific right to self-representation.<sup>222</sup> The Court reasoned that these facts were grounded in a pre-colonial and colonial legal tradition premised on “the virtues of self-reliance and a traditional distrust of lawyers.”<sup>223</sup> The legal system of the colonies and early post-revolutionary America was contrasted to the British Star Chamber of the seventeenth century, in which counsel was mandated as one more means to crush “basic individual rights” in the name of procuring conviction.<sup>224</sup> All this, the Court concluded, established “a nearly

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213. *Id.* at 833 n.43 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

214. *Id.* at 832–33.

215. *Id.* at 834.

216. *Id.* at 820.

217. *Id.* at 834.

218. *Id.* at 835.

219. *Id.*

220. *Id.* at 819–20.

221. *Id.* at 831.

222. *Id.* at 813.

223. *Id.* at 826.

224. *Id.* at 821.

universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.”<sup>225</sup>

Second, and more significantly, the Court reasoned that the rejection of counsel was more about the defendant’s right to autonomy and less about larger interests in “justice.”<sup>226</sup> The right to define the parameters and mechanisms of a defense was personal and therefore must rest with the party that bore the consequences of this decision—the defendant.<sup>227</sup> The Court recast the Sixth Amendment’s concept of assistance of counsel not as the guiding hand that, according to *Gideon*, would ensure the fairness and legitimacy of the system, but rather as a right based in personal liberties.<sup>228</sup> It reasoned that to force counsel on a defendant would violate the concept of individualism and, as such, ran contrary to the Founders’ near unwavering devotion to the concept of free choice.<sup>229</sup> The Sixth Amendment right to counsel was meant to aid the defendant, not to strip him of autonomy and control over his affairs.<sup>230</sup>

Indeed, the Court recast *Powell*’s right to be heard by counsel as a right of individual control to tell the story that the defendant wanted according to his own best judgment.<sup>231</sup> The Founders, intoned the Court, would never have “doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel.”<sup>232</sup> Thrusting counsel on an unwilling defendant did not ensure a just outcome

225. *Id.* at 817. The historical account was challenged at the time and later repudiated by the Court itself in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000). *See also* Marlee S. Myers, Note, *A Fool for a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 407–09 (1975) (alleging that the majority’s historical analysis in *Faretta* was selective, irrelevant, and incorrect); Kenneth J. Weinberger, Note, *A Constitutional Right to Self-Representation—Faretta v. California*, 25 DEPAUL L. REV. 774, 779–80 (1976) (questioning whether the Framers regarded the right to self-representation as fundamental). In *Martinez*, the Court acknowledged that *Faretta*’s characterization of the colonial concept of counsel evoked a time when “lawyers were scarce, often mistrusted, and not readily available to the average person accused of [a] crime.” *Martinez*, 528 U.S. at 156. But times had changed, and the concept of assistance of counsel had to change, too. Accordingly, twenty-five years after the Court had bestowed a right of self-representation at trial on *Faretta*, the Court declined to afford *Martinez* the same right on appeal. *Id.* at 157, 160 n.4.

226. *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 658–59 (2005).

227. *Faretta*, 422 U.S. at 831.

228. *Id.* at 832–34; *see also* Blocher, *supra* note 204, at 780 (noting that other Sixth Amendment rights such as the right to a speedy and public jury trial “exist to promote system interests—legitimacy, certainty, and so on—that are in some sense beyond the control of the rightsholder,” but a right to waive the Sixth Amendment right to assistance of counsel as defined in *Faretta* cast the right as one belonging to the individual alone or at least above any community interests).

229. *Faretta*, 422 U.S. at 833–34 (noting that “whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice”).

230. *Id.*

231. *Id.* at 816–17.

232. *Id.* at 832.

but was an act of oppression by the State that deprived a defendant of one of his most basic liberties—his autonomy, manifested in his right to effectuate his own defense.<sup>233</sup> The Court continued that, if the Bill of Rights was designed to embody free choice, then requiring a defendant to accept state-appointed counsel would damage this principle.<sup>234</sup> Faced with the prospect of conviction and sentence, the defendant is stripped by the State of almost all autonomy and power.<sup>235</sup> What he retains is a last sliver of control when he chooses whether to accept the assistance of counsel in his struggle. As vital as a lawyer may be to assure a fair trial or to afford a defendant a fair chance at justice, the Court concluded that “respect for the individual which is the lifeblood of the law” outweighs any harm that may befall the pro se defendant.<sup>236</sup> In later cases, the Court would return to this theme of autonomy and free choice to differentiate the Sixth Amendment’s right to counsel from other procedural protections in its underlying purpose, granting the defendant unilateral waiver of this right alone.<sup>237</sup> No matter what restrictions the Court later placed on the defendant’s ability to waive counsel, it clung to the notion that the ability to waive counsel, even in the face of almost certain defeat, was fundamental to the defendant’s autonomy and dignity.<sup>238</sup>

And so the Court set the stage for the resistance defense. While all the procedural rights described above combine to create a right to a defense that serves the dual masters of defendant and community, the right to counsel alone is unilaterally waivable. This ability to waive counsel enables the resistance defendant to utilize the other rights as a means to challenge the community’s faith in the process.

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233. *Id.* at 820. Later Court rulings upheld this vision of *Faretta*’s right to self-representation as a triumph of the defendant’s individual right to autonomy over broader concerns regarding the objective fairness of the proceeding. *See Flanagan v. United States*, 465 U.S. 259, 268 (1984) (characterizing the *Faretta* ruling as providing “constitutional protection of the defendant’s free choice independent of concern for the objective fairness of the proceeding.”); *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) (reiterating that the right to proceed pro se as defined in *Faretta* “exists to affirm the dignity and autonomy of the accused”); *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) (“*Faretta* establishes that the right to counsel is more than a right to have one’s case presented competently and effectively.”).

234. *Faretta*, 422 U.S. at 820.

235. *Id.*

236. *Id.* at 834.

237. *See Blocher, supra* note 204, at 778–79.

238. *See Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 160 (2000) (noting “the *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy”); *Flanagan*, 465 U.S. at 268 (holding the defendant’s right to proceed pro se is a “constitutional protection of the defendant’s free choice independent of concern for the objective fairness of the proceeding”); *McKaskle*, 465 U.S. at 176–77 (“The right to appear pro se exists to affirm the dignity and autonomy of the accused . . .”).

*B. Substantive Defense*

Unlike their procedural counterparts, the right to a substantive defense is completely absent from the Constitution. Yet substantive defenses abound in every jurisdiction.<sup>239</sup> If the criminal law seeks to set the boundaries of moral, or at least acceptable, behavior, substantive defenses demarcate those boundaries. Defenses represent the possibility of excuse or justification or failure of proof—when otherwise criminal behavior may be found to either not exist, or if present, be excusable.<sup>240</sup> Defenses are necessary on a variety of levels. First, they are expected. Stories are multifaceted. Lives, and the acts which compose them, are complex. For the State's accusation to have any context, the other side(s) must be told. Who better to tell that counter-narrative than the defendant? Perhaps it will not be the defendant himself in light of the Fifth Amendment prohibition on forced self-incrimination, but someone will tell some story that challenges, counters, or undermines in some way the State's accusation. As discussed above, this counter-narrative is not only expected, but necessary to determine the proper application of the law.

These substantive defenses, however, are not without limitations. The narrative available for a defense is defined, bounded. Generally, they fall into six categories: failure of proof defenses; offense modifications; justification; excuses; non-exculpatory policy defenses; and others that are more difficult to classify, such as necessity, self-defense, entrapment, or mistake as to a justification.<sup>241</sup> Each of these defenses either fully excuse the defendant from culpability, by placing his action outside of the defined prohibited conduct, or mitigate the defendant's culpability in some way.<sup>242</sup> They are designed to create a structure in which the defendant is permitted to tell his story. The result is two-fold.

First, these defenses limit the eligible narratives the defendant can present. Only certain types of stories are considered relevant, permitted, or cognizable.<sup>243</sup> While the defendant's story may matter, there are only certain stories the jury will be permitted to hear. This limitation certainly furthers judicial efficiency. And it is not inconsistent with other aspects of criminal law that seek to limit or control the information presented by either party (the State or the defendant) to the jury.<sup>244</sup> Some information that might be included in a "real world" account of events is either legally

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239. See Robinson, *supra* note 145, at 201–03.

240. See Nourse, *supra* note 30, at 1704.

241. See Robinson, *supra* note 145, at 203.

242. *Id.*

243. See Nourse, *supra* note 30, at 1703.

244. See Robinson, *supra* note 145, at 291.



irrelevant or inappropriate because it might encourage an “improper” verdict, or at least one not based on the construction of the law that the State will accept.<sup>245</sup>

Second, and by extension, this construction of the eligible defense narrative fosters a secondary relationship between the citizenry and the government.<sup>246</sup> While the citizens may sit as jurors in judgment over the State’s interpretation and application of the law, they do so in the relatively unacknowledged theater of the courtroom controlled by the State itself. The jury hears the defendant’s story, but only in the form that the State deems appropriate, and only in the language of the forum. The State’s decision regarding what types of narratives are appropriate serves to further the relationship between the State and governed. Take self-defense, for example.

A willingness to allow a defense of self-defense (or even defense of property or others) suggests that there must be a space for citizens to break the law in the face of competing values.<sup>247</sup> It suggests that there are moments when an individual’s adherence to ordinary prohibitions on the use of force will be excepted, and he will be allowed to respond violently in the face of equal, possible force.<sup>248</sup> Further, it suggests that the State, through the law, recognizes that there will be moments when the State abandons the citizenry, or the law is unable to protect it.<sup>249</sup> In these moments, individuals must be able to respond with impunity. Otherwise the law offers them little. It simultaneously has failed to protect their interests and yet would punish them for stepping up and preserving their own interests. Such a system would create a sense of hopelessness (or maybe even a feeling of pointlessness) among the governed. If the State fails to protect but punishes when citizens fill in the gaps, then the State serves little purpose in the lives of the governed; with sufficient momentum, they may reject it.<sup>250</sup>

Defenses such as self-defense are not a guaranteed free-for-all for citizens seeking to invoke them. The defendant must present a narrative that conforms to the notion that his use of force was justified and no more

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245. In addition to the limitations described by Robinson, *supra* note 145, the Supreme Court has sought since 1895 to restrict the jury’s consideration of questions of law, limiting assessment of guilt to factual findings alone. See Carroll, *supra* note 15, at 692–703. This exclusion of jury nullification as an “eligible” defense interferes with the jury’s ability to realize its full potential. *Id.*

246. See Nourse, *supra* note 30, at 1726–28.

247. *Id.* at 1704 (using the Bernard Goetz case to define the parameters of self-defense).

248. *Id.* at 1704–05 (noting the existence of the self-defense defense as a means of defining moments when citizens may use violence to protect themselves, others, or property).

249. *Id.* at 1706–09 (describing a willingness by the state to cede control of the use of force to the citizens in limited circumstances as defined by self-defense doctrine).

250. *Id.* at 1710 (explaining that without the possibility of self-defense, the value of criminal law and the ability of the state to convince the citizenry that punishment is deserved is limited).

than was sufficient to remedy the threat. The community, sitting as a jury, in turn must determine whether this narrative rings true and may conclude that, while the State failed to protect the defendant in the manner he expected, his own use of force nonetheless warrants punishment because it does not fall into the accepted categories of defensive force. In this, the defense, both in substance and procedural presentation, is a controlled narrative with the State defining the general parameters of the defense and the jury seeking to further define those parameters in the context of the individual case before it. The defense defines the relationship between the State and the governed but leaves open the possibility (through juror interpretation) that the relationship may be altered or modified in the face of an overwhelming narrative. In these limitations, the right to a substantive defense while present, and certainly valuable, is a limited right. It is the right to present a narrative in the forum created by the procedural rights in the language of that forum. It is bound on all sides by the law it seeks to challenge.

### III. THE RESISTANCE DEFENSE DILEMMA

When defendants invoke a defense of resistance, they pose a crucial dilemma for the criminal justice system. The quandary is a function of the procedural and substantive components of the right to a defense and the individual and communal values they seek to serve. This Part examines this dilemma by articulating the critical bond between procedural rights, substantive law, and the citizenry and by showing how resistance defendants challenge the system's ability to manage the relationship between the government and the governed in the criminal context.

#### *A. Procedure, Substance, and the Citizenry*

Unlike other forms of law, the application of criminal law creates direct and immediate contact between the government and the governed.<sup>251</sup> When the government levels an accusation against an individual using criminal law, it immediately alters his identity and relation to the government. The accused is arrested, detained, tried, and, if convicted, punished. There is no buffer between the accused individual and the government. At this moment of undiluted contact, the procedural protections described above offer both a shield and sword to the accused; he may challenge the government's accusation and force the State to meet its substantive and procedural obligations before it may inflict punishment.

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251. *Id.* at 1692 (describing the difference between criminal law and other forms of law as linked to the direct application of the law to the citizenry).

Second, while the application of criminal law involves direct contact with the citizen, its literal construction (the writing of the law) occurs at a great distance. While individuals as a whole have the power to elect the officials who will ratify, apply, and enforce the law, they are most frequently mere witnesses to the process of formal government. Statutes are rarely created by referendum. Instead, they are the product of compromise and negotiation, which may or may not reflect larger social values. Once negotiated, the law is written and static. When confronted with a shift in social values, either generally or in a particular case, the law in its stasis may appear unresponsive, foreign, or archaic.

This is not to say there are not benefits to a written construction of the law. By its nature, this construction carries the promise of uniformity. It is a fixed point. It is public, uniform, and precise in its creation. It bears all the trappings of a good contract: it is written and stable. It can be known by anyone at any moment (provided they have access to the writing and can understand it). But for all these values, a written law alone is clumsy in those moments when the individual it confronts fails to accept it or falls outside the boundaries it seeks to draw. The same characteristics that render it fair in its uniformity render it stiff and foreign in its inability to account for the nuances of people's daily lives and ever-shifting community values. In this world, *procedural* norms carry the currency that saves the law. By creating a forum and mechanism of citizen interpretation through the process of the trial, procedure serves to balance the construction and the possibility of the law. Criminal law is a constant struggle to define what freedoms individuals are willing to cede to their government in exchange for the order created by the enforcement of the rule of law.<sup>252</sup> Individuals conform their behavior to the dictates of the law because freedoms relinquished are judged as less valuable than the order instilled.<sup>253</sup>

The procedural protections contained in the Sixth Amendment and the Due Process Clauses define the borders of the government's power through the application of criminal law at the moment when the contact has reached a critical stage.<sup>254</sup> They serve both the defendant and the community.<sup>255</sup> They protect the defendant at the moment when he must directly confront

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252. See JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., 1989) (1859); RAWLS, *supra* note 25, at 27 (noting that social contracts require a relinquishment of certain individual liberties in exchange for order and safety established by a government that has the power to enforce laws and require conformity of behavior in that enforcement).

253. See MILL, *supra* note 252 (describing the trade-off of freedom for order inherent in systems that rely on the rule of law).

254. See Nourse, *supra* note 30, at 1697 (identifying procedural protections as a means of limiting governmental application of power).

255. See *supra* notes 147–202 and accompanying text.

the government's power and enable him to challenge that power.<sup>256</sup> They legitimate the process and the outcome for the community.<sup>257</sup> For both, they create a tangible check on the government's exercise of power. But these protections are chimerical in another way. While procedural in their presentation (they define the parameters of the process), they create a substantive expectation and result.<sup>258</sup> The process defines what it means to be guilty or deserving of punishment. These concepts are premised on more than mere accusation; they flow from a citizen judgment of the competing, and at times contradictory, narratives of the State and the defense. The stories each side would tell are the terms by which the community determines the defendant's guilt. Without the opportunity to weigh these differing perspectives, it is difficult to discern the basis of guilt or the justification for punishment. In this, the possibility of the defense not only legitimates the system, but it lends a meaning to the law that was previously absent. The process serves to define and bound the substance.

The procedure opens up new possibilities for a responsive law. Through these procedures, the community literally bears witness to the government's act and judges it.<sup>259</sup> The State must publicly prove its case to a jury composed of citizens who, at least in theory, are the defendant's peers.<sup>260</sup> The jury, as community, has an opportunity to hold the State and

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256. See *supra* notes 151–161, 168–172 & 182–202 and accompanying text.

257. See *supra* notes 162–172 and accompanying text.

258. See Nourse, *supra* note 30, at 1744–45.

259. See *supra* notes 151–181 and accompanying text. This is not to say the jury is the only check on government power. In fact, the Founders went to great lengths to create a formal system of checks and balances that was designed to curtail oppressive government practice. Nonetheless, they also vested value in the nimble responsiveness of twelve local citizens sitting in judgment on a single case. See 2 THE DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 5 (L.H. Butterfield ed., 1964). In constructing a post-colonial government in the United States, the Founders created a formal system of government that would exercise power over each of us while remaining accountable to (at least a portion of) the citizenry. In this formality, there was the reassurance of legitimacy. See Carroll, *supra* note 15. The government was a public enterprise, checked both by itself, in the form of overlapping government branches and hierarchy, and by each of us, in the form of direct democratic participation that in theory determined who held offices of power and what sorts of legal compromises they made in our names.

260. Though there is no right to have a jury of particular construction, the Court has long recognized that exclusion of particular groups from juror eligibility is constitutionally impermissible—in theory creating a “representative” jury of the community. See Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 356–57 (2012) (reviewing Supreme Court precedent barring juror exclusion based on race as a violation of the Equal Protection Clause); Powers v. Ohio, 499 U.S. 400, 404 (1991) (barring exclusion of jurors based on race); Lockhart v. McCree, 476 U.S. 162, 175 (1986) (“Our prior jury-representativeness cases . . . have involved such groups as blacks, women, and Mexican-Americans . . . [E]xclusion . . . on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an ‘appearance of unfairness.’” (citations omitted)); Taylor v. Louisiana, 419 U.S. 522, 535–36 (1975) (holding that the exclusion of women violates the defendant’s right to have a jury drawn from a fair cross section of the community); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.”).

the law to the highest standard at the very moment when the State would seek to deprive the individual of his liberty and to forever alter his status. The defendant's narrative pushes this moment of judgment towards a larger accounting. It opens up the possibility of the other, the defendant, separated from his government and from the law created and applied in the community's name at this moment of accusation. This narrative competes with the government's call to the jury to define and to claim the law in its construction of the verdict. The defense opens the opportunity to check the State's exercise of power. It is the opportunity to place the defendant's story side-by-side with the law and to infuse the law with a meaning grounded in real life experience and real community values. It is the opportunity to express a communal counter-narrative to formalized government and legislative compromise or to accept it.

In each of these, the jury has the power to create a fluid body out of an otherwise static construct of law and government. The men and women who sit in the jury box and weigh the defendant's guilt have an opportunity to force a response out of the government that is consistent with the will of the governed. In this, the ordinary, for one brief moment, can do the extraordinary—jurors can transform the static law into an accountable body. While the law may be created in the formal spheres of government, it is consecrated in the least formal, but most direct, of governmental organizations: the ordinary citizen sitting as juror. Jurors hold a unique power—for that single moment—to check the power of the government with the direct judgment of the verdict. In this, they vest the law with the meaning and values that they carry with them every day. The procedural protections enshrined in our Constitution recognize that this creation of substantive meaning is best realized when competing narratives exist.

Admittedly, this magnificent moment mostly passes without notice. The vast majority of criminal cases never go to trial.<sup>261</sup> For those that do, deliberations in the jury room tend to avoid weighty questions of the validity of the law, or of the government, and focus on the mundane factual questions that judges instruct jurors to consider. It would be a mistake, however, to think that because the moment does not launch a larger political debate, that it is somehow insignificant. The moment still matters, because it encapsulates that critical promise that whatever action the government takes against its citizen will be by the rules and for a just cause. By allowing a jury to weigh the defendant's narrative against the State's and resting the verdict in the citizen's capable hands, the

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261. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2568 (2004) (estimating plea bargain rates in some jurisdictions to be as high as 95%).

government promises that it will be constantly answerable to the ordinary individuals it governs.

### *B. The Resistance Defendants' Challenge*

Our constitutionally guaranteed procedural protections—centered around the citizen jury—ensure that there will always be a mechanism for democratic correction at the most critical moments when the government might act most oppressively. In this, there is a substantive expectation in each of these procedural protections. Resistance defendants, however, cast the process into doubt. Once this occurs, individuals' trust in the government may wane, as may adherence to whatever agreed upon social norms exist.

When resistance defendants pick and choose among the aspects of the right to a defense they will accept, they alter not only the foundation for the system's legitimacy but also what it means to convict these particular defendants. Ordinarily, the verdict is an accepted moment when the government can deprive a citizen of liberty because the State sufficiently proved to twelve ordinary citizens the guilt of the defendant after jumping over all the required procedural hurdles. For the resistance defendant, however, the punishment is premised on a truncated determination of guilt, in which a true adversarial process was absent. The legitimacy of such a punishment falls into a no man's land, simultaneously deserved (by the nature of the verdict) and questionable (by the absence of the expected defense and the accompanying procedural protections). Abandonment of procedural rights, even by the defendant himself, calls into question the meaning of the law and the sufficiency of the procedures themselves to supply that meaning. While the resistance defendants' convictions may not be surprising given their choice of defense, they are still unsettling because they disquiet faith in the system. They alter the perception of the substance of the law by seeking to redefine the meaning of the right to a defense.

Resistance defendants directly question the adequacy of the law and the system it supports to hear and process their narrative.<sup>262</sup> They call into stark relief the underlying problem with the construction of the right to a defense. While the system may offer the promise of the right to present a narrative, the source of this narrative is more problematic. In constructing the right to a defense, the Court and the law have created boundaries around the narrative and its sources. Implicit in this construction is the reality that some of these narratives will fall outside the lines drawn by the

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262. See *supra* notes 14–20 and accompanying text for discussion of the unique nature of the resistance defense in comparison to other defenses that question the adequacy or application of the law, such as juror nullification or justification defenses.

State. The State, therefore, seeks to control all stories told in court to some extent; it both makes the accusation and defines the permissible ways to defend against the accusation.

For all the good *Apprendi*, *Crawford*, *Bailey*, *Duncan*, *Powell*, *Gideon*, and their progeny did, at the end of the day, they do not upset this reality. They are ultimately about ensuring that defendants do not get convicted on technicalities or through insufficient process. The rights that are the subject of these cases are the mechanism by which a defendant is able to navigate the intricacies of the legal system and follow the rules. Trials run smoothly and appear fair. They carry an assurance that not only was the right person convicted, but he was convicted for the right reasons. Procedural and substantive fairness are delivered in the form of the government proving the defendant's guilt beyond a reasonable doubt in public to a jury in which live witnesses testified and the defendant enjoyed meaningful assistance of counsel. As much as the rhetoric and promise of these cases may buoy the hope for fairness, at the end of the day these cases and these protections are as much about the appearance of fairness as they are about actual fairness.

### *C. Why the Community Should Care About Resistance Defendants*

The ability to tell a different story, and to have that story heard, carries another possibility to infuse the law with a meaning that was previously absent or excluded. That meaning inures to the benefit of the broader community, even if the defendant is the only one whose liberty is at stake in any given trial. What is unclear, however, is how the procedure should respond when the narrative the defendant wishes to tell defies the very procedure that would allow it. The ability of defendants to tell their story to other people who, like them, live in the constant shadow of the government's authority helps to check the State's power to accuse arbitrarily, without sufficient evidence, or for some motive other than a desire to see justice prevail.

Admittedly these moments may be few and far between. Trials are rare. Defendants choose to plead guilty more often than they choose to go to trial.<sup>263</sup> But even as defendants forgo their right to defend and plead guilty, the narrative still matters. First, even the "decision" to relinquish the very check the system creates on government power tells a story. It may be a commentary on the truly overwhelming nature of the government's power.<sup>264</sup> Even the right to speak truth to that power pales in the face of the

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263. See Stuntz, *supra* note 261, at 2568.

264. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 87–88 (2005); Stephanos Bibas, *Plea Bargaining Outside the Shadow of*

often inevitable outcome (conviction) and the daunting consequences of daring to speak (loss of a discount for cooperation).<sup>265</sup> Perhaps it is a commentary on the precision of the government's exercise of its prosecutorial discretion, which ensures that only the truly guilty face accusation.<sup>266</sup> But perhaps it is the hopelessness of the system itself. Defendants find themselves accused by an all-powerful executive branch, only to be appointed a guardian of their rights by a judicial branch (in the form of a public defender) who, crippled by overwhelming case loads and the three branches' reluctance to grant resources to a defense, may have little choice but to recommend a triage approach to the case, regardless of the defendant's narrative.<sup>267</sup> Even with the benefit of a truly zealous advocate, a defendant may find his narrative constrained and limited in the telling, such that the right feels illusory at best, a sham at worst.

Second, all of these possibilities are interesting because, despite them all, the defendant's story still seems to carry some currency regardless of whether or not it successfully challenges the State's narrative. Regardless of the endless possible explanations for why this right to defend is frequently abandoned by the defendant, the waiver of the right to trial is not without acknowledgement of its significance and without an opportunity to enter a narrative despite the waiver. Defendants entering pleas must tell one of two stories. They must either acknowledge that the story they would tell the jury does not differ significantly from the government's—that they are guilty.<sup>268</sup> Or they must concede that without commentary on the veracity of the State's evidence or even in challenging the State's evidence, it is sufficient to support conviction.<sup>269</sup> In either scenario, resistance is futile—their story is incomplete, or it fails in the face of that told by the State. The defendant's interests are best served by taking advantage of the State's offer to trade leniency for the defendant's right to trial.<sup>270</sup> In either case, the court weighs the defendant's narrative and will not accept waiver of the right to trial without first being satisfied that such a waiver serves the same

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*Trial*, 117 HARV. L. REV. 2464, 2470–96 (2004) (suggesting that high plea rates are as much a commentary on power disparities as factual guilt).

265. See Bibas, *supra* note 264, at 2470–96 (analyzing the cost of failing to plead guilty).

266. See Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1596 (2011) (considering the effect of actual guilt on plea decisions).

267. See Anderson, *supra* note 185 (noting that the failure of public defender systems likely contributes to high plea rates).

268. See FED. R. CRIM. P. 11(b) (laying out the parameters of the required plea colloquy admitting guilt).

269. *North Carolina v. Alford*, 400 U.S. 25 (1970).

270. See U.S. SENT'G COMM'N, *DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES* 59–60 (2003) (detailing sentencing reduction based not only on willingness to plead guilty). In addition, the Court has ruled that prosecutors may file additional charges based on the defendant's decision to go to trial so long as the amendment is not motivated by vindictiveness. See *United States v. Goodwin*, 457 U.S. 368 (1982).



essential purpose that the trial would—that the State’s case is sufficient, and the application of the law to the defendant is supportable. Even when pleading guilty, the defendant’s story matters.

In a system that depends on narratives, the decision to accept the right to a defense is a moment of enormous possibility when the defendant and the citizen juror may seek to redefine the role of the state either microcosmically (in this one case, and in regard to this one defendant) or macrocosmically (when the case garners national attention and forces a shift in the political philosophies of the nation). Either way, the defense offers a moment when ordinary people, upon hearing a defendant’s story, decide what they will accept from the government in their own lives. The narrative may be limited, but its presence matters. Resistance defendants challenge the notion that a defendant’s narrative can and should be constructed by the State. In their resistance they push a story that simultaneously must and cannot be told, at least not in the courtroom. In this, they raise doubts about the value of the very system that would accuse, prosecute, and punish them. For we non-defendants, they raise a red flag that the system, at least for some, is broken or gone awry in its efforts to construct all the stories before us. In this, a moment of doubt is perhaps the greatest possibility for the law. The question, then, is how to harness it.

#### IV. OPTIONS FOR THE CRIMINAL JUSTICE SYSTEM

With the resistance defense and its implication for the larger justice system identified, the question inevitably shifts to what can be done to address the dilemma the defense creates. The question is thorny, and this Article seeks only to sketch possible approaches. The two polar positions are obvious, but each comes with its own conceptual and practical problems, and intermediate positions are not apparent. The first is to incorporate the defense; the second is to exclude it. The first proposes a new construction of criminal law; the second maintains the status quo. Either possibility presents challenges. Both highlight a central paradox of criminal law.

##### *A. Recognizing a Resistance Defense*

The first possibility is the most obvious: to carve out some space for the resistance defense in criminal law. As a practical matter, there are different options, two of which I will discuss here. Both would recognize the defense as an exception to criminal liability that justifies or excuses the defendant’s act. They would open up the opportunity for the jury, not a judge, to decide the value of the defense in the face of the State’s narrative. They would also create an opportunity and forum for the defendant to

speak and be heard. The realities of these opportunities, however, may leave something to be desired. The presence of this defense may muddle, rather than clarify, the questions the jury faces. And, at the end of the day, the defendant may still find the forum stifling and foreign. The devil is always in the details, and these possibilities are no different.

Indeed, allowing a resistance defense would raise a number of questions. How should the defense present, and what, if any, limits should be placed upon it? How should the judge instruct the jury on the defense? How should the jury weigh the defense beside the larger question of the defendant's culpability? Would the defense repudiate liability altogether or only mitigate it? To some extent, all defenses raise these questions but this defense would differ from traditional ones because it challenges the State's control of the defendant's autonomy; thus, the techniques that worked for other defenses may be insufficient here. Nonetheless, they may provide insight into the construction of a workable resistance defense.

### *1. The Limited Resistance Defense*

One possibility is to limit the resistance defense to those stories that flow from some other constitutional narrative. This construction recognizes the defense only to the extent that the defendant's story is able to link his purported belief system to those rights assigned value by the Constitution itself. For example, if a defendant can couch his argument in terms of free speech,<sup>271</sup> assembly,<sup>272</sup> or religious exercise,<sup>273</sup> his resistance defense will be recognized, and his narrative allowed. Other narratives, which are not linked to some fundamental right that is assigned constitutional value, would continue to suffer exclusion.

This method of limiting the defense would serve several purposes. First, it would recognize the key component of the resistance defense—that the defendant's act was motivated by an underlying belief system, but it would also provide a rubric to determine whether that underlying belief system was sufficiently "valuable" to alter the otherwise criminal nature of the defendant's act. Second, relying on constitutionally based rights would construct the defense in terms of values already cognizable to the jury. Finally, it would serve to limit the narrative in the hopes of narrowing the possibility of an endless stream of justification and the corresponding drain on judicial resources and juror patience. This construction of the resistance defense would mirror other, more mundane defenses, in which the defendant offers his own narrative in the context of the relevant questions

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271. See U.S. CONST. amend. I.

272. *Id.*

273. *Id.*

of the criminal case.<sup>274</sup> This effort to define the parameters of the defense recognizes the limitations of the forum of the criminal court. It seeks to force the defendant's narrative to conform to those limitations. It would, however, expand a defendant's options as compared to the current system, in which the judge herself is empowered to determine whether a constitutionally based defense is legally meritorious.

This approach to the resistance defense has its shortcomings, however. To the extent that the goal of including the defense is to quiet the discomfort created by its absence, limitations on the defense will continue to generate discomfort. From the perspective of the defendant, presenting the resistance defense within confines defined by the legal system is to quash the defense altogether. It is to box the defense within the borders drawn by the very system that it challenges. It is one more false choice afforded a defendant in an effort to create an appearance of fairness, rather than true fairness. For the resistance defendant it is, in some ways, the worst of all worlds. It co-opts and constructs the defendant's narrative in the language of the system, all the while purporting to allow the defendant to tell his story.

From the perspective of the community, constraining the presentation of the resistance defense may cause it to lose meaning. While available, the restricted defense may no longer be recognizable. The narrative exists, but only in a foreign context. It is ungrounded and can do no work to locate the law in its telling. It is forced into a discourse and tradition which it rejects at its inception. As a result, any hope of restoring a sense of legitimacy through this narrative is lost. Instead, larger questions arise about the ability of the law to encompass counter-narratives or meanings. The limited defense limits the law itself. If the defendant can only tell his story in the language chosen and revered by the law, it offers little new meaning. The law reverts to a rigid set of rules as the defense is reconstructed in the words and ideas of an established and comfortable narrative that designates certain beliefs worthy of preserving, certain stories worthy of telling. With only limited access to the defendant's narrative, the story fails to transcend. Jurors may find themselves unable to draw any meaning from it. It is an extension of the State's own narrative. It offers no enlightenment into another possibility of the law or the world in which they live. In this, their power as jurors is undermined, and the benefits that might be gained by allowing the defense are lost or diminished.

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274. See Robinson, *supra* note 145.

## 2. *The Unfettered Resistance Defense*

A second possibility would be to allow the defendant to present any justification, excuse or ideology in response to the State's accusation. This is a fluid construction of the resistance defense unfettered by legal boundaries. The defendant could tell his story in the language he chose, drawing on whatever explanation, excuse, or justification that he deems relevant to the jury's consideration of his guilt. The defendant could create a true counter-narrative that stands outside the State's construction of its own narrative or the law.

To proponents of judicial efficiency, this construction of the resistance defense is a nightmare. They can easily imagine a criminal trial in which the likes of John Brown, Eugene Debs, the Chicago Conspirators, Judith Clark, or Warren Jeffs regale the jury with endless political or religious ideals that motivated their actions but are extraneous to what the jury actually has to consider. They can see little benefit in this unfettered narrative in the forum of the criminal justice system. They will point to the likely reality that the defendant's narrative will move further and further away from the moment of the offense, conflating questions of guilt or culpability into a grander narrative. With no limits on the defendant's potential narrative, basic questions such as evidentiary relevance become difficult to determine. The narrative stretches on endlessly, consuming judicial resources and testing juror patience. Trials that once took days to complete, extend for months while the defendant diverts the jury with tales of oppression and alternative visions of the law.<sup>275</sup> In the meantime, the court's docket is congested and jurors regret ever agreeing to jury duty in the first place. Beyond these challenges, one might also doubt the ability of the forum—a criminal trial—to hold such unbounded narratives. There are finite questions before the jury and, at some point, the narrative will exceed those, whether they are ones of law or fact. The narrative may confuse more than it will enlighten. It may muddle more than it will clarify. And the jury may be unable to draw any real meaning from it, much less to contextualize it in the law itself.

Without minimizing these real concerns, in some ways these worries overlook the possibilities of this construction of the resistance defense.

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275. Though admittedly proceeding under a different set of procedural norms, the recent efforts of Khalid Sheik Mohammed and other defendants to present a resistance defense in the Guantanamo Bay military proceeding rendered what the judge anticipated to be a forty minute arraignment of five defendants, into a fourteen-hour ordeal in which the defendants alternatively refused to participate, prayed, and discussed their treatment as detainees. See Michael Isikoff, *Alleged Sept. 11 Planners Disrupt Arraignment at Guantanamo Hearing*, NBCNEWS.COM (May 5, 2012, 3:33 AM), [http://worldnews.msnbc.msn.com/\\_news/2012/05/05/11548929-alleged-sept-11-planners-disrupt-arraignment-at-guantanamo-hearing?lite](http://worldnews.msnbc.msn.com/_news/2012/05/05/11548929-alleged-sept-11-planners-disrupt-arraignment-at-guantanamo-hearing?lite) (describing both the events of the attempted arraignment as well as public reaction to the arraignment).

Allowing a fluid narrative embodies a previously unrealized conception of the law. It shifts the notion of guilt or innocence from a static moment when the defendant did or did not engage in an act with the requisite state of mind, result, and attendant circumstances, into a full epic that is simultaneously the defendant and his defense. This unbound narrative seeks to tell a broader story, in the language native to its owner. In the process, it forces the law to confront the competing narrative and asks the juror to draw some meaning from this confrontation. It may be that the meaning is a regression towards one that already exists. It may be that the broader story is too foreign to the jurors themselves and they cannot place it in the context of their law, their lives. But maybe, something in the broader narrative resonates and the law is pushed; the margin widens until it is able to encompass one more story previously excluded. In this moment, the law gains a meaning it lacked; it becomes simultaneously more fluid and more grounded in the lives of those it governs. This is not to say that the defendants who follow this course will be acquitted. But there is value in airing and considering such narratives, even if the jury ultimately chooses to convict.

As frightening as the prospect of this unfettered construction is, there is a beauty in its refusal to accept that the law can only contain one narrative at a time or that the narrative should have to be presented in a particular way. It creates an opening in the law that allows the possibility that it can encompass all perspectives, at least until a jury, after carefully weighing the evidence and the stories presented, chooses the narrative that rings most true—not just factually, but in terms of the jury's expectation of the law and government. This broad construction seeks to transform the law and the system itself into a true moment when the average citizen (as the juror or observer) can confront the different possibilities of the law or his society and not be forced to choose only one to survive.

Even this vision, however, might not satisfy the would-be resistance defendant. The mere fact that he can tell his story in the physical and legal space that is the criminal courtroom is not the same as integration of the defendant's narrative or experience into the larger social construct. Nor should the possibility of speaking be confused with the reality of being heard. Even in an imagined reality where every defendant can tell the story he feels is most reflective of his experience and best explains his act, he tells that story in the very forum he contends is incapable of recognizing it to a group of people who may find his narrative utterly foreign. In this, providing a formal space to mount a resistance defense may ultimately provide little comfort to the defendant or any real incentive not to continue to opt out.

Yet one should also ask what real harm is created by allowing the resistance defense in either a restricted or unbounded form. Would the

defense suddenly become popular, hamstringing the courts and confounding the jury process? This seems unlikely to the point of impossible. To adopt the resistance defense is to abandon all factual confrontation of the State's narrative. It is essentially to admit guilt and ask the jury to find some underlying justification or excuse that nonetheless saves the defendant from liability. For defendants either not fully committed to their cause, or for whom a more traditional defense presents, this alternative is overwhelmingly risky. Perhaps the more realistic fear is that the presence of this defense, even in a limited presentation, will so shift the jury's examination of the question of guilt that it will not only obscure the question in this single case, but it will create a system riddled with inconsistent results. This inconsistency will in turn undermine any sense of legitimacy we might hope to gain by allowing the defense in the first place. This risk, however, exists with any defense, sanctioned or otherwise. There is always a possibility that jurors, with their different perspectives, will reach different conclusions about the application of the law or the validity of a defense.

In fact, the infrequency of the resistance defense may offer some shelter. On the other hand, the benefit received from the defendant's expanded narrative may well outweigh the risk it creates of inconsistent verdicts. In many ways, allowing the resistance defense may serve another function: to demystify the narrative. By placing the defendant's story of resistance in the context of larger constitutional rights or even just as an accepted and sanctioned story in the larger body of the law, it loses some of the power that it possessed as the other. From the outside, the narrative of the resistance defendants carries all the weight and possibility of an excluded presence hovering in the shadows outside the legal boundaries. It is threatening in its other-ness, in the possibility of the alternative order it suggests. Once it is incorporated into the system, it loses that power. It is yet another alternative possibility in the construction of the law. Perhaps Tom Hayden was right—the best way to undermine resistance is to embrace it.<sup>276</sup>

### *B. Refusing to Recognize a Resistance Defense*

At the other end of the spectrum, we might disallow the defense altogether or at least refuse to provide a meaningful way for defendants to make the argument. In many ways, this is to maintain the *status quo* in which the resistance defense falls outside those recognized and designated

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276. See CONSPIRACY IN THE STREETS, *supra* note 92, at 243 (quoting Hayden's statement during his sentencing for conspiracy: "[W]e would hardly be notorious characters if they had left us alone in the streets of Chicago.").

legal defenses and, as such, is never presented to the jury. In this construction (or attempted destruction) of the defense, there is a recognition that the sphere of the criminal trial and courtroom is limited. There are stories that cannot be told in the rooms in which a defendant's guilt is decided.

This is not to say this conceptualization of the criminal process is unmovable. In fact, it carries a space and mechanism by which defense narratives are shifted, modified, and accepted in the form of ever-evolving legal norms. These are created at the moments of synergy when the defendant offers a previously unrecognized narrative that so resonates with jurors, the higher courts, or the legislative branch that it is incorporated into the larger body of the law. One need only look to the evolving defenses of post-traumatic stress disorder, the battered person's defense, or cultural defense to understand that the notion of a defense—even one bounded on all sides by the system's construct of it—is still fluid and still carries the possibility of pushing the law to contemplate realities previously uncongnizable. Jury nullification, in which jurors base a decision on something other than the facts of the case, broadens this possibility even more as it fosters the notion that law is movable in the face of the compelling narrative.<sup>277</sup>

Having said this, the resistance defense seems to hover beyond the reach of this systematic expansion. It is by its nature the outlier that chooses not to "opt in." Without some formalized recognition or carving of a space for its presence, it is unlikely to present, much less persuade, in all but the rarest of cases (none of which I was able to locate in researching this Article). As a result, all the dilemmas of the status quo continue in this (de)construction of the defense. The defendant's narrative remains on the outside, and the communal sense of faith in the system remains at play. Admittedly refusing to recognize the defense will likely create a more efficient system, but it would be a mistake to confuse a failure to recognize the defense with its complete banishment. Just as they do now, defendants will rise in courtrooms across the country and seek to present their counter-narratives. When the court moves to exclude their stories, they will respond in the only way they can: they will actively resist. Whatever efficiency is gained by seeking to block the narrative, its emergence through resistance will raise the recurring questions of the ability of the law to expand when confronted with stories that confound its original meaning. The guerilla-like presence of the untold story in the courtroom undermines what is gained by allowing narratives at all: that the law is more than a system of rules; it is a fluid body that draws meaning from the lives to whom it is

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277. Butler, *supra* note 15, at 705 (noting the power of the African-American narrative to sway drug enforcement policies).

applied. Without this mobile construction of the law, the law's legitimacy, and the legitimacy of the systems that flow from it, become increasingly dubious. Even those who do not find resonance in the defendant's belief system will be left to wonder how the law and its systems would respond if their own beliefs diverge. In this, each person's relationship with the law and the government is altered, and the absent narrative becomes the most powerful in the courtroom.

#### CONCLUSION

The narrative matters. It breathes a life into the formal construction that is the law.<sup>278</sup> Interpretation, the process of overlaying the stories of the lives of the governed onto the text of the law, gives the law meaning. These stories allow the written law to transcend. They transform the law from a series of rules most of us did not write but are bound to follow, into a living part of our own world.

There is a dilemma, however, for the defendant who wishes to present a defense that tells a story outside of, or contrary to, the system itself. The rights that compose the right to a defense—the right to a jury trial, the right to a public trial, the right to confront witnesses, and the right to counsel—exist in a constant state of duality. They belong to the defendant, but they also offer the community the promise that the government's accusation alone is insufficient for conviction and punishment, that the system can be fair and even the most disempowered can be protected. A challenge or abridgement of these rights—even by the voluntary act of the defendants themselves—may cause us to lose faith in the system. When resistance defendants reject the system's substantive and procedural offerings, they force a recognition that their narrative is excluded.

The defendants who invoke the resistance defense are admittedly few and far between. While my experience has taught me that there is a great distrust of the government in jails across the nation, few defendants choose their trials as a mechanism to voice such distrust. Fewer still are willing to waive their procedural and substantive rights and to stand silent and defiant in the face of their accusers, especially when in every juror's face there glimmers a theoretical possibility of empathy or even nullification. Most defendants play the game by the set rules, present a recognized defense with the assistance of counsel, and then shuffle forward toward some larger promise of justice with the rest of society.

But when that rare defendant emerges who will not play by the rules, or even play at all, they serve as a powerful reminder of the dualistic nature of

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278. See Cover, *supra* note 18, at 5 (compelling the law to encompass the stories of the governed).



“procedural rights.” So great is their perceived (rightly or wrongly) disenfranchisement from the system that they cannot imagine even the possibility that it could produce a just outcome. In this, despite their utterly foreign and rare status, they force a fundamental accounting from each of us. They remind us that the right to a defense is a right to tell a certain story, in certain words. For defendants who wish to tell another story, they have little choice but to conform or resist. If Judith Clark or Warren Jeffs would prefer to sit silently and unrepresented than to invoke the benefits that might protect them, then perhaps the benefits are illusory.

Herein lies the power of a resistance defense. A defendant who is willing to forgo all protections in the name of a political ideal calls into question the value of the protections and the substantive notions they define. The premise of the Court’s efforts to push the procedural envelope towards increased jury participation is that if the people can see it, if they can participate in its construction, interpretation, and weighing, then the law will carry a meaning and a sway that the government edict alone lacks. To dismantle that constructed confidence, as resistance defendants seek to do, is to lay bare the possibility that the system, in fact, excludes a population who has no confidence in its protections or outcome. In their resistance, they expose the law as a text that few of us write, but all are bound to follow, even in moments when we can find no part of ourselves in that narrative. Whatever hope the jury may offer for a responsive law that transcends its written word to incorporate the lives of the ordinary, resistance defendants dim and leave us to wonder if the law is truly capable of contemplating competing narratives. And perhaps someday our own narrative might too be excluded. As the rhetoric of resistance increases on both sides of the political spectrum, it is more important than ever to consider what the resistance defense means for the state of our criminal justice system, and whether and how the system might adapt.