

# U.C.L.A. Law Review

## The Rugged Individual's Guide to the Fourth Amendment: How the Court's Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights

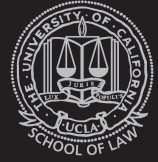
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### ABSTRACT

Few figures inspire us like individuals who stand up for their rights and beliefs despite the peril that may follow. One cannot help but feel awe looking at the famous photograph of the lone Tiananmen Square protestor facing down a line of Red Army tanks, his willowy frame clothed in a simple white shirt and black pants as he holds a shopping bag. Or who can help but feel humbled by the courage of Rosa Parks, a seamstress, who was willing to be arrested rather than sit in the back of the bus?

But while these stories of everyday individuals acting with remarkable courage inspire us, we would hesitate to say that before a citizen can enjoy his or her constitutional rights, he or she must exhibit a similar fortitude. A close examination of Supreme Court cases, however, shows that the Court has imposed exactly such an expectation when it comes to the Fourth Amendment. The Court has repeatedly turned to the archetype of an idealized citizen—the “rugged individual” who will unflinchingly stand up to government authority—to define Fourth Amendment rights, and it has had disastrous consequences. The Court's use of the rugged individual has created an unrealistic threshold for exercising one's Fourth Amendment rights, which is a primary reason current Fourth Amendment doctrine has proven so impotent in addressing the violent police-citizen encounters that have erupted in cities across the country including Seattle, Chicago, Ferguson, and Baltimore, with each day's headlines seemingly adding another city to the list.

This Article examines the Court's use of the rugged individual archetype in its Fourth Amendment jurisprudence, demonstrating how instead of promoting values like dignity and autonomy that the archetype was intended to represent, it has actively undermined those values to devastating effect. Not only does the empirical evidence show that acting like the rugged individual is beyond the reach of most citizens when confronted by the police, but it also shows that, when applied to minority communities, the archetype creates an especially dangerous situation that alienates and effectively disenfranchises a large swath of citizens from their rights. The Article concludes by examining the various reasons the Court continues to rely on the rugged individual and why that reliance must change. In its place, the Article proposes a rights-bearing citizen as an archetype that far better promotes the Fourth Amendment's underlying values—an archetype that presumes that every citizen, whatever their race, income, or neighborhood, desires to exercise their Fourth Amendment rights and aligns Fourth Amendment jurisprudence with the realities of a police-citizen encounter.



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## INTRODUCTION

Would the U.S. Supreme Court have imposed the exclusionary rule on the states without Dollree Mapp? Perhaps, but if a case's facts help shape the law, Dollree Mapp cutting a Joan of Arc figure as she carried the exclusionary rule banner to the Supreme Court certainly did not hurt. For those with only a hazy memory of Dollree's actions, Justice Clark's recitation of the facts recounts her role as Fourth Amendment heroine:

Upon their arrival at that house, the officers knocked on the door and demanded entrance but [Dollree Mapp], after telephoning her attorney, refused to admit them without a search warrant. . . .

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases.<sup>1</sup>

Perhaps only if Dollree Mapp had been swaddled in an American flag as she defiantly placed the bogus warrant in her bosom with one hand, while clutching a copy of the Bill of Rights in her other, could the facts have been any better for her.

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1. Mapp v. Ohio, 367 U.S. 643, 644–45 (1961) (alterations in original) (footnote omitted).

Part of our constitutional indignation on behalf of Dollree Mapp is of course triggered by the flagrancy of the police misbehavior. By breaking down her home's doors, running "roughshod" over her, and then rifling through her drawers and searching every private nook and cranny, the police's actions cannot help but take us back to our schoolchild lessons about the Redcoats ransacking colonists' homes in the name of the King. But indignation at the police misbehavior only explains part of our response to her case—if being treated badly by law enforcement officers were sufficient to turn an accused person into a constitutional martyr, many a defendant's arrest would have us wanting to throw tea into Boston harbor.

Rather, Dollree Mapp's actions possess an additional dimension that makes one particularly inclined to find that she should be protected by the U.S. Constitution. Instead of being a passive victim of government misbehavior, Dollree Mapp exhibited a certain constitutional *joi de vivre* in standing up for and asserting her rights. When the police banged on her door, she defiantly stood at her home's threshold, called her lawyer, and refused them entrance without a warrant. And when the police returned to force down her door, unbowed she once again asserted her rights, this time by bodily wrestling the supposed warrant away from the officer. As she defended her rights, one can almost hear in the background the fife notes of the march up Bunker Hill; she may have been "belligerent," but she was doing so in the name of the Bill of Rights, earning her the later sobriquet of being "the Rosa Parks of the Fourth Amendment."<sup>2</sup>

But as much as we might celebrate Dollree Mapp, her actions raise an important question about the nature of the Fourth Amendment:<sup>3</sup> Should we all be expected to respond in the same "belligerent" manner before we can claim the Amendment's protection? This question might seem surprising at

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2. See Ken Armstrong, *Dollree Mapp, 1923–2014: "The Rosa Parks of the Fourth Amendment"*, MARSHALL PROJECT (Dec. 8, 2014, 3:55 PM), <https://www.themarshallproject.org/2014/12/08/dollree-mapp-1923-2014-the-rosa-parks-of-the-fourth-amendment> [<https://perma.cc/36E3-GV6C>]; see also William Yardley, *Dollree Mapp, Who Defied Police Search in Landmark Case, Is Dead*, N.Y. TIMES (Dec. 9, 2014), [http://www.nytimes.com/2014/12/10/us/dollree-mapp-who-defied-police-search-in-landmark-case-is-dead.html?\\_r=0](http://www.nytimes.com/2014/12/10/us/dollree-mapp-who-defied-police-search-in-landmark-case-is-dead.html?_r=0).

3. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

first because Dollree Mapp stands out precisely because her actions are exceptional and we generally think of constitutional rights as not requiring us to stand up and defend them. Most of us, in Justice Brandeis's famous words describing the Fourth Amendment, want to "be let alone,"<sup>4</sup> and we tend to think of the Bill of Rights as omnipresent protections that shield the citizen—especially the vulnerable or unpopular citizen—from a too powerful government. But as we will see, the Supreme Court has increasingly demanded that a citizen show Dollree Mapp's constitutional fortitude by placing the burden on the citizen to actively stand up to the police and assert her Fourth Amendment rights during an encounter.<sup>5</sup>

This threshold requirement that citizens actively assert their Fourth Amendment rights in order to obtain the Amendment's protections has received surprisingly little attention as a constitutional proposition, and yet the requirement has critical implications for the nature and scope of the Amendment. By placing the obligation on the individual to stand up to the police, the Court has effectively limited Fourth Amendment rights to only certain segments of the citizenry. This curtailment is made apparent by empirical evidence showing that many individuals are not inclined to stand up to the police, and by the reality that for some communities the active assertion of one's rights may be unrealistic and even dangerous. As the Department of Justice's recent Ferguson Report distressingly highlights, if a young African American were to exhibit the "belligerence" necessary to assert his rights, it could have tragic consequences.<sup>6</sup>

This Article will explore a primary reason that the Court has adopted this approach. We shall see that when faced with questions of how a person should behave in a given situation, the Court has turned to the archetype of the rugged individual as representative of the values that the Court believes an individual should demonstrate. The rugged individual is an idealized citizen who, like Dollree Mapp, possesses the constitutional resolve to stand up to the government and actively assert his or her rights, unafraid of the consequences. This vision of the rugged individual thus harkens back to de Tocqueville's

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4. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

5. See *infra* notes 86–121 and accompanying text.

6. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 28–37 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/QY5N-XETW>] (detailing various police department abuses such as the use of tasers and police dogs in retaliation for the filming of police behavior or protestations that a stop was not justified); see also *infra* notes 131–147 and accompanying text (discussing minority community relations with police).

America and the heroic qualities of self-sufficiency and individualism often ascribed to the pioneer spirit of those who first settled the colonies and founded the United States.<sup>7</sup>

But while we might celebrate such qualities in the abstract, the Court's reflexive invocation of the rugged individual to define constitutional behavior is in grave need of examination. As already noted, the Court's use of the rugged individual in evaluating interactions under the Fourth Amendment has very troubling real-life consequences because many citizens realistically cannot meet such a standard. But scrutiny of the archetype also shows that, unless critically applied, the Court's approach to defining constitutionally expected behavior can have the effect of disenfranchising certain segments of the citizenry. Therefore, what emerges from a close analysis of the Court's use of the rugged individual archetype is the need to identify a new archetype for the Fourth Amendment that more accurately reflects the Amendment's underlying constitutional values.

This Article examines the Court's use of the rugged individual as the touchstone for defining Fourth Amendment rights in four parts. In Part I, the rugged individual is seen in his constitutional finest, at least for those favoring a strong interpretation of individual rights in the trial setting. In this context, the Court uses the heroic rugged individual archetype to channel the Framers' desire to provide the citizen with the means to stand up to the government. In Part II, however, we see how the Court can also utilize the archetypal figure of the rugged individual to restrict constitutional rights. Using Fourth Amendment search and seizure cases, this Part explores how the Court often unrealistically expects citizens to act in the same manner that it envisions the heroic rugged individual would behave. This Part highlights, therefore, how instead of promoting core constitutional values, the use of the archetype for assessing police-citizen encounters jeopardizes basic democratic values and beliefs. In particular, this Part explains how the Court's expectation that every citizen demonstrate the constitutional fortitude of the rugged individual has a disproportionate impact in denying many citizens—especially minority and poor citizens—the ability to exercise their Fourth Amendment rights.

Part III examines why the Court might use the rugged individual archetype to define Fourth Amendment doctrine and critiques these possible justifications. The Part explores how the Court's reliance on the archetype may stem from an empathy gap on the part of the Justices and an inability to

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7. See *infra* notes 8–12 and accompanying text.

understand how police encounters unfold. It also considers whether the Court has made the exercise of Fourth Amendment rights difficult out of a belief that rights should be aspirational and that requiring citizens to actively exercise their rights will result in a stronger constitutional regime. The Part concludes by critiquing the Court's tendency to interpret the Fourth Amendment by emphasizing the need to aid law enforcement at the expense of individual rights.

The final Part looks at how the Court might address the rugged individual archetype's shortcomings when it comes to the Fourth Amendment. Two possibilities are explored. The first option uses Justice Black's Sixth Amendment right to counsel opinions to explore how the rugged individual can be conceptualized in a way that makes the ideal of the rugged individual align more closely with the realities of human behavior. The second and preferred option is to fashion a new archetype that better promotes Fourth Amendment values, especially for groups and community segments that are at a particular power disadvantage when it comes to police-citizen encounters. The possibility of a 'rights-bearing citizen' archetype is proposed as a way of better ensuring that all citizens, whatever their race, income, or neighborhood, are secure in their persons and effects and have the autonomy to control their interactions with the police.

## I. THE RUGGED INDIVIDUAL AS CONSTITUTIONAL HERO

The rugged individual is a familiar figure, whether in politics, popular culture, or the law. The archetype embodies those qualities that are often associated with "American exceptionalism"<sup>8</sup>—the self-reliant person who asks for no more than a fair shake from his fellow citizens and to be left unhindered by the government so that he can sink or swim by the virtue of his own skills and industriousness. In contemporary parlance, the rugged individual possesses "grit" as a defining notion of his character: He knows what he wants to achieve, is intent on persevering, and is not easily deterred.<sup>9</sup> And like his colonial ancestors who secured the nation's independence, the rugged individual is unafraid to stand up to the government and unflinching

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8. SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1996). For a distinctly less romantic view, at least of the early colonial settlers, see BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS, 1600–1675* (2012).

9. *See generally* ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2016).

in asserting his rights. The rugged individual thus represents many of those values that Seymour Martin Lipset distilled as the essential qualities of “Americanism”—beliefs in “liberty, egalitarianism, individualism, populism, and laissez-faire.”<sup>10</sup>

These themes of self-sufficiency and individualism resonate with many of the values traditionally associated with the nation's founding. Not surprisingly, then, the rugged individual's heroic role in Supreme Court opinions is sometimes intertwined with an invocation of the Founders in their revolutionary finest. Justice Scalia, one of the most vocal Justices in casting the rugged individual as a heroic figure, for instance, summoned the Founders' ghosts when questioning the constitutionality of frisks for weapons based only on reasonable suspicion: “I frankly doubt . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity . . . .”<sup>11</sup> He similarly objected to the gathering of DNA without particularized suspicion by arguing that while such practices might have “the beneficial effect of solving more crimes, . . . I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”<sup>12</sup>

And, indeed, reliance on the rugged individual archetype in the proper constitutional context can promote underlying constitutional values such as individual autonomy and dignity. These contexts usually arise when the Court perceives the citizen to be taking on the role of David fighting the governmental Goliath and is willing to help place the rock in David's slingshot.

#### **A. The Right to Self-Representation: Using the Rugged Individual Archetype to Channel the Framers' Intent**

The Court's reliance on the heroic rugged individual to justify expanding a constitutional right is perhaps most readily seen in *Faretta v. California*'s<sup>13</sup> recognition of a right to self-representation under the Sixth Amendment. By himself, Anthony Faretta was an unlikely heroic figure, a defendant charged with grand theft who had represented himself once before and who did not want the public defender's office to represent him because

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10. LIPSET, *supra* note 8, at 31.

11. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (critiquing the Court's “stop and frisk” doctrine in *Terry v. Ohio*, 392 U.S. 1 (1968)).

12. *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

13. 422 U.S. 806 (1975).



“that office was very loaded down with . . . a heavy case load.”<sup>14</sup> The trial judge, however, had refused to allow Faretta to represent himself.<sup>15</sup> Consequently, just a little over a decade after having declared in *Gideon v. Wainwright* that lawyers were “necessities, not luxuries” for guaranteeing a fair trial,<sup>16</sup> the Court had to decide whether, in the words of the Second Circuit, “even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner.”<sup>17</sup>

In finding an independent right to self-representation, Justice Stewart’s opinion for the five-justice majority sounded a strong note in support of the idea that “[t]he right to defend is personal”<sup>18</sup> and that as the one who bears the consequences of the conviction, the accused “must be free personally to decide” whether to conduct his own defense.<sup>19</sup> For the majority, deciding how to defend against a criminal charge constituted far more than simply crafting a winning legal strategy;<sup>20</sup> it also was a statement about the defendant and his beliefs. As a result, to force a lawyer upon a defendant would mean “the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists.”<sup>21</sup>

In characterizing the right to self-representation in this way, the image of the heroic rugged individual standing up for his beliefs was central to the majority’s argument. The Court observed: “In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England. The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers.”<sup>22</sup> This distrust was founded upon a view of lawyers as representing

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14. *Id.* at 807 (internal quotation marks omitted).

15. The judge refused despite Faretta’s rather impressive performance when subjected by the trial judge to a Socratic method inquiry about hearsay. Faretta handled questions about the hearsay rule with a deftness that many a law student taking Evidence would have envied. *See id.* at 808–10 n.3, 810.

16. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

17. *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965).

18. *Faretta*, 422 U.S. at 834.

19. *Id.*

20. The majority also was open to the idea that a pro se defendant “in some rare instances” may present his case more effectively than a lawyer. *Id.* One empirical study has surprisingly found that pro se felony defendants in state courts on the whole fare as well or better in acquittal rates than defendants with representation. *See* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

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

22. *Id.* at 826.

only “the upper class”<sup>23</sup> and “bent on the conviction of those who opposed the King’s prerogatives, and twisting the law to secure convictions.”<sup>24</sup> The Court surmised that since it was “[i]n the heat of these sentiments [that] the Constitution was forged,”<sup>25</sup> “[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation.”<sup>26</sup> In a footnote, the majority even argued that the Founders saw the right to self-representation as a fundamental natural right grounded in the “‘natural law’ thinking that characterized the Revolution’s spokesmen.”<sup>27</sup>

The Court also gave a recognizable face to the heroic rugged individual in the figure of William Penn. The majority recounted the story of how Penn, as a young Quaker preacher, had been arrested for the crime of tumultuous assembly after preaching a sermon in the streets of London that had not been sanctioned by the Church of England. Although “unacquainted with the formality of the law,” Penn requested at trial the “liberty of making my defence.”<sup>28</sup> Penn’s case thus encapsulates almost perfectly the archetype of the individual standing up to a government that is trying to use criminal charges to suppress his freedoms and who wants nothing more than the chance to speak his defense in his own words. Penn’s story even has a fairytale ending since the jury acquitted him after he was allowed to present his own “defence.”<sup>29</sup>

The majority’s historical recounting, while important to its argument that the Framers had intended for the Sixth Amendment to embody a right to self-representation, also served as a springboard for an even more fundamental point: *how* a right can be exercised may be as important in defining the relationship between the citizen and the government as the substance of the right itself. The *Farett* opinion relentlessly stressed the unfair imbalance of power that results

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23. *Id.* at 827.

24. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 7 (1911), *quoted in Farett*, 422 U.S. at 826.

25. *Farett*, 422 U.S. at 827.

26. *Id.* at 832.

27. *Id.* at 830 n.39.

28. *The People’s Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead, 1670, reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 144, 147 (1971), *quoted in Farett*, 422 U.S. at 829 n.37.

29. *Farett*, 422 U.S. at 829 n.37. The *Farett* majority had “no doubt” that Penn’s experience “inspired” the colony of Pennsylvania to include a provision in its Frame of Government of 1682 that “all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves.” *Id.* at 828–29 n.37. As the majority also noted, Pennsylvania’s approach was not unique as the right to self-representation became widely enshrined in colonial constitutions and statutes. *Id.* at 828–29.

when the government demands that a citizen answer a criminal charge, but then tells the citizen that he can only answer in a way that the government determines to be in the citizen's best interests. Indeed, the majority's ruling has a strong First Amendment undercurrent in objecting to the government's choice of who can speak for the accused, observing: "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."<sup>30</sup> Even more egregiously, the Court noted, not only is the defendant being denied an opportunity to express his beliefs, but he is also actively being forced to adopt the speech of the government:

The language and spirit of the Sixth Amendment contemplate that counsel . . . shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment. . . . [T]he right to make a defense is stripped of the personal character upon which the Amendment insists.<sup>31</sup>

If one thinks of William Penn as the iconic rugged individual in this context, the egregiousness becomes all the more apparent. Imagine, for instance, if Penn had been forced to accept a lawyer and the lawyer had presented a defense over Penn's objection conceding that the Crown could ban religious preaching not in accord with the Church of England, but then argued that Penn's message was reconcilable with official church doctrine. In such a situation, Penn no doubt would have preferred a conviction to an acquittal if it meant compromising his personal religious beliefs.

Importantly, therefore, the crux of the majority's reason for finding that the defendant has the right to decide whether to represent himself was the need to vindicate the "respect for the individual which is the lifeblood of the law."<sup>32</sup> And on this broader score, the Court thought the Framers' intent clear: "[W]hatever 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."<sup>33</sup> To the majority, then, it was unthinkable that those

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30. *Id.* at 821 (emphasis in original).

31. *Id.* at 820.

32. *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring), *quoted in Fareta*, 422 U.S. at 834.

33. *Fareta*, 422 U.S. at 833–34. The Court added in a footnote: "Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding. For example, '[e]very criminal defendant is privileged to testify in

who settled the colonies with their “appreciation of the virtues of self-reliance” would have given up their autonomy to the government on a matter so “personal” as how to defend a criminal charge.<sup>34</sup>

Despite cases that have caused some to question whether the right to self-representation undermines the adversarial process,<sup>35</sup> the rugged individual's “banner” of self-representation still flies four decades later.<sup>36</sup>

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his own defense, or to refuse to do so.” *Id.* at 834 n.45 (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

34. *Id.* at 826, 820. If the majority wanted a contrast to their heralding of the citizen as the rugged individual in control of his own decisions, the two dissenting opinions could hardly have provided a more jarring juxtaposition. The dissenting opinions are notable for their far more paternalistic and dismissive view of an individual's decision to proceed pro se. Chief Justice Burger saw the majority as giving an accused the right to dispense with counsel on a “whim” and as providing an “instrument of self-destruction” based on the “lame explanation that the defendant simply availed himself of the ‘freedom’ to go to jail under his own banner.” *Id.* at 838–40 (Burger, C.J., dissenting) (quoting *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965)). Justice Blackmun characterized the right to self-representation as making “a criminal prosecution [subject] to the whimsical—albeit voluntary—caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification” and as “a constitutional right . . . to make a fool of himself.” *Id.* at 849, 852 (Blackmun, J., dissenting). The dissenters would have left waiver of the right to counsel up to “the trial judge [who] is in the best position to determine whether the accused is capable of conducting his defense.” *Id.* at 840 (Burger, C.J., dissenting).
35. Perhaps the most notorious case was that of Colin Ferguson who killed six and wounded nineteen commuters on the Long Island Railroad. Among other bizarre moments was the spectacle of Ferguson cross examining the victims he had shot; when Ferguson would refer to “the gunman” during a question, the witnesses would correct him by stating “you.” See Janet Cawley, *In Bizarre Trial, Accused Gunman Defends Self*, CHI. TRIB. (Feb. 16, 1995), [http://articles.chicagotribune.com/1995-02-16/news/9502160137\\_1\\_alton-rose-bizarre-trial-colin-ferguson](http://articles.chicagotribune.com/1995-02-16/news/9502160137_1_alton-rose-bizarre-trial-colin-ferguson) [<https://perma.cc/9PXX-L9BP>]. More recently, Dylann Roof, who killed nine African American churchgoers at a historically black church in the hopes of starting a race war, represented himself at the penalty phase of his trial; putting on no mitigating evidence, he received a death sentence. See Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES (Jan. 10, 2017), [https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html?\\_r=0](https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html?_r=0). One of the most articulate judicial critiques of *Faretta* came from Judge Reinhardt in *United States v. Farhad*, 190 F.3d 1097 (9th Cir. 1999), where he used the defendant's “complete disaster” of a trial to argue that the right to self-representation should be subordinated to the right to a fair trial. *Id.* at 1101–09 (Reinhardt, J., concurring).
36. The banner does have a few tatters. See, e.g., *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) (finding no right to pro se representation on appeal); *McKaskle v. Wiggins*, 465 U.S. 168, 168–69 (1984) (allowing standby counsel to participate over a defendant's objection so long as the jury still perceives the defendant as controlling his defense). In *Indiana v. Edwards*, 554 U.S. 164 (2008), the Court held that a state can deny a defendant's request for self-representation even if the defendant is competent to stand trial if he “lacks the mental capacity to conduct his trial defense.” *Id.* at 164–65. The lower courts are still struggling with the vagueness of the Court's standard and how broad a power it gives a trial judge to deny self-representation. See John H. Blume & Morgan J. Clark, “Unwell”: *Indiana v. Edwards* and the Fate of Mentally Ill Pro Se

Indeed, when several Justices expressed reservations in dicta about *Faretta*,<sup>37</sup> it was Justice Scalia who rallied to the rugged individual's cause in a strongly worded concurrence. In making his defense, Scalia echoed the idea that self-representation reflected the Framers' desire to empower the citizen who wants to stand up to the Government:

I do not share the apparent skepticism of today's opinion concerning the judgment of the [*Faretta*] Court . . . . I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power—including judicial power—that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel by the government to plead a criminal defendant's case.<sup>38</sup>

Scalia continued by forcefully reiterating the idea that individual freedom encompasses the autonomy not to exercise a right, even if marching under one's banner might result in a less favorable outcome:

That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable—and no more a basis for withdrawing the right—than is the fact that proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage. Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.<sup>39</sup>

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*Defendants*, 21 CORNELL J.L. & PUB. POL'Y 151, 165 (2011) (documenting how the “*Edwards* Court’s failure to articulate a standard has made it virtually impossible” for the lower courts to apply the holding; the authors argue that, as a result, seriously mentally ill defendants are still representing themselves). For a nuanced but sympathetic critique of *Edwards*, see Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO ST. J. CRIM. L. 391 (2009).

37. *Martinez*, 528 U.S. at 161 (“No one . . . attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient.”). Justice Breyer, in a concurrence, sounded a similar chord when he observed that “judges closer to the firing line have sometimes expressed dismay about the practical consequences of that holding,” but he then declined to “reconsider the constitutional assumptions . . . under[ly]ing” *Faretta* without further empirical evidence. *Id.* at 164–65 (Breyer, J., concurring).

38. *Id.* at 165 (Scalia, J., concurring) (emphasis omitted).

39. *Id.*

To hold otherwise, Justice Scalia concluded, was to, “[a]s Justice Frankfurter eloquently put it, . . . imprison a man in his privileges and call it the Constitution.”<sup>40</sup>

## B. The Rugged Individual as Literary Trope

As the *Faretta* Court’s argument demonstrates, one of the rugged individual archetype’s useful attributes is its effectiveness in acting as an embodiment of who the Court sees a constitutional right as historically protecting. By envisioning the self-reliant colonist distrustful of government power as the impetus behind the Sixth Amendment, it becomes far easier to find that the Framers would have wanted to enshrine a right to represent one’s self. The *Faretta* opinion also raises an additional benefit of the rugged individual: The archetype offers a way of injecting arguments into the legal debate that may otherwise be difficult to raise. Values such as autonomy and dignity, for example, may be more effectively incorporated into the constitutional conversation when raised through the image of the type of citizen who the Framers were trying to empower instead of simply being invoked as free-standing values. Used in this way, invoking the rugged individual archetype can serve as a literary trope that also enables a judicial opinion to make reference to nontraditional sources and justifications for the constitutional interpretation being put forward. A brief look at several of the Court’s holdings addressing the Sixth Amendment right to confrontation illustrates how the archetype can serve this purpose.

Justice Scalia’s opinion in *Coy v. Iowa*<sup>41</sup> is notable for its reliance on non-legal sources, drawing from the Bible,<sup>42</sup> Shakespeare,<sup>43</sup> and folk sayings<sup>44</sup> in finding that the Confrontation Clause includes the right to face-to-face confrontation. One of the opinion’s most vivid summonings of the rugged individual is found in Scalia’s recounting of a recollection from President Eisenhower:

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40. *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)).

41. 487 U.S. 1012 (1988).

42. *Coy v. Iowa*, 487 U.S. 1012, 1015–16 (1988) (quoting Roman Governor Festus in his treatment of Paul: “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.”).

43. *Id.* at 1016 (reciting from *Richard II*: “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . .”)

44. *Coy*, 487 U.S. at 1018 (“Look me in the eye and say that.”).

President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to “[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.”<sup>45</sup>

The anecdote exudes a distinctive Americana feel by invoking an unwritten “code” passed down from the hardy settlers of the Great Plains and enables the majority to make a from-the-gut argument about fairness in support of face-to-face confrontation that it could never articulate in the language of legalese. Eisenhower’s recollection allows the majority to suggest that there is something cowardly and untrustworthy about an accuser who is unwilling to make a face-to-face accusation, especially in contrast to the down-to-earth rugged individual who wants to confront his accuser and say, “look me in the eye and say that.” The anecdote also helps shift attention away from the fact that the “showdown” in *Coy* involved two thirteen-year-old girls alleging that the defendant had sexually abused them to a far broader and more factually appealing plateau of American values.

Given that Justice Scalia often had taken other Justices to task for relying on sources outside his view of what constituted originalism, the *Coy* dissenters had some fun at Justice Scalia’s expense and his “apparent fascination with the witness’ ability to see the defendant,” arguing that “[t]he weakness of the Court’s support . . . is reflected in its reliance on literature, anecdote, and dicta.”<sup>46</sup> Indeed, Justice Blackmun’s dissent dryly juxtaposed Scalia’s anecdotal accounts with the writings of John Henry Wigmore, the preeminent authority on evidence:

Whether or not “there is something deep in human nature,” [as the majority claims] that considers critical the ability of a witness to see the defendant while the witness is testifying, . . . “There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross examination.” 5 J. Wigmore, *Evidence* . . . I find Dean Wigmore’s statement infinitely more persuasive than President Eisenhower’s recollection of

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45. *Id.* at 1017–18 (alteration in original) (quoting Dwight D. Eisenhower, U.S. President, Address at the B’nai B’rith Anti-Defamation League (Nov. 23, 1953), reprinted in Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 381 (1959)).

46. *Id.* at 1028 (Blackmun, J., dissenting).

Kansas justice or the words Shakespeare placed in the mouth of his Richard II concerning the best means of ascertaining the truth.<sup>47</sup>

Yet, while the *Coy* dissent scores points with its historical jab, the majority arguably lands the far stronger rhetorical punch by invoking the image of the rugged individual heroically standing up to the government and demanding a fair fight. Implicit throughout the opinion is the idea that the individual who wants to face his accuser demonstrates moral courage that should be constitutionally rewarded. The *Coy* Court thus saw itself as fulfilling the purposes of the Confrontation Clause<sup>48</sup> by coming to the rugged individual's defense in a situation where the government was trying to hamstring the rugged individual on the rationale that the government knew better than the Founding generation.<sup>49</sup> It may sound more folksy than highbrow, but for the majority that meant giving the rugged individual the right to issue the demand: "Look me in the eye and say that."

A similar substitution of the heroic rugged individual for the actual defendant occurred in *Crawford v. Washington*.<sup>50</sup> This time it was the swashbuckling figure of Sir Walter Raleigh making an appearance in what

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47. *Id.* at 1028–29 (emphasis omitted) (citations omitted) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 158 (James H. Chadbourn rev. ed. 1974)).

48. Even prior to *Coy*, this meant that at a minimum the Confrontation Clause guarded against the Government using a Kafkaesque type trial, or as Justice Harlan put it, "the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring).

49. As the Court's later curtailment of *Coy* in *Maryland v. Craig*, 497 U.S. 836 (1990), demonstrates, the rugged individual archetype does not always carry the day. The *Craig* Court by a 5–4 margin allowed a judge in child abuse cases to use procedures preventing face-to-face confrontation if the judge specifically found confrontation would harm the child witness. *Id.* at 857. Unsurprisingly Justice Scalia authored a strong dissent with wrongfully accused parents in the role of the rugged individual:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, 'it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?' Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

*Id.* at 861 (Scalia, J., dissenting).

50. 541 U.S. 36 (2004).



would otherwise be a run-of-the-mill assault case. The Court insisted that it needed to revisit “the great political trials of the 16th and 17th centuries” to determine whether it violated the Confrontation Clause for a trial judge to admit otherwise inadmissible hearsay on the rationale that the hearsay possessed “adequate ‘indicia of reliability.’”<sup>51</sup> As Justice Scalia explained:

One such [trial] was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh’s alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh’s trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: “Cobham is absolutely in the King’s mercy; to excuse me cannot avail him; by accusing me he may hope for favour.” Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . .” The judges refused . . . and, despite Raleigh’s protestations that he was being tried “by the Spanish Inquisition,” the jury convicted, and Raleigh was sentenced to death.

One of Raleigh’s trial judges later lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.”<sup>52</sup>

Raleigh’s trial thus had all of the elements that tend to incline the Court to rally to the heroic rugged individual’s cause: a person standing up to the government, vigorously protesting his innocence, and “demand[ing]” no more than that he be able to face his accuser to prove his innocence. This allowed the *Crawford* majority to not only use Raleigh’s trial as an illustration of the type of inquisitorial abuse that the “founding-era rhetoric decried,”<sup>53</sup> but also to have it represent the larger values at stake, values that the Court candidly acknowledged are too easily obscured if the defendant’s name is Michael Crawford rather than Sir Walter Raleigh:

We have no doubt that the courts [in Crawford’s case] were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this

51. *Id.* at 40, 44. Prior to *Crawford*, the Court had held in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), that a trial judge could admit an unavailable witness’s statement if the statement bore “adequate ‘indicia of reliability.’”

52. *Crawford*, 541 U.S. at 44 (alteration in original) (citations omitted) (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 435, 520 (1832); and quoting 2 HOWELL’S STATE TRIALS 15–16). Scalia also cited to the famous prosecutions of Sir Nicholas Throckmorton and Sir John Fenwick, the latter in which one witness “had been spirited away.” *Id.* at 43, 45.

53. *Id.* at 50.

assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . . They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like [Michael Crawford's], the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*' providing any meaningful protection in those circumstances.<sup>54</sup>

And, in contrast to Chief Justice Rehnquist's opinion with its dry historical argument for retaining a more flexible hearsay approach,<sup>55</sup> Sir Walter Raleigh's appearance in the role of the rugged individual<sup>56</sup> provides a far more gallant and compelling figure around which to fashion a constitutional rule.<sup>57</sup>

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54. *Id.* at 67–68 (citations omitted).

55. *See id.* at 69–76 (Rehnquist, C.J., concurring in judgment only).

56. Raleigh makes a number of appearances throughout the majority's opinion. At one point, the majority used Raleigh's trial to sarcastically illustrate how the *Roberts* rule could leave a defendant defenseless: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court." *Id.* at 51. Similarly, the majority used Raleigh's trial to illustrate how the *Roberts* rule essentially was what the Crown utilized to railroad Sir Walter:

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, that they were not made in the heat of passion, and that they were not "extracted from [him] upon any hopes or promise of Pardon." It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

*Id.* at 62 (alteration in original) (citations omitted) (quoting HOWELL'S STATE TRIALS, *supra* note 52, at 29).

57. As with its curtailment of *Coy*'s holding, *see supra* note 49, the Court later narrowed the scope of its initial ruling in *Crawford* as well. *See generally* Josephine Ross, Crawford's Short-Lived Revolution: How Davis v. Washington Reins in Crawford's Reach, 83 N.D. L. REV. 387 (2007).

## II. THE RUGGED INDIVIDUAL MEETS THE FOURTH AMENDMENT

As we have just seen, in the proper context the rugged individual archetype can allow a discussion of values, such as autonomy and dignity, that otherwise might not arise in the constitutional conversation. The archetype also can provide a way to invoke historical icons whose stories animate what the Court views as the values at stake: figures like William Penn, Sir Walter Raleigh, or those who settled the American frontier. The difficulty, as this Part explores, is that while the archetype's celebration of self-reliance and a willingness to stand up to authority can inspire the Court in some settings to strengthen or broaden a constitutional right, in other situations it can perversely undermine the very values the archetype is meant to promote. The different ways in which the archetype can work, both for good and for bad, is especially important to the Fourth Amendment.

### A. The Rugged Individual's Right to Be Let Alone

As an initial proposition, the Court appears to have used the archetype in a way that bolsters the citizen's autonomy and power under the Fourth Amendment to be free from government interference. The Court, for instance, has generally been hostile to stop-and-identify statutes that make it a crime to not identify one's self when asked by a police officer. These statutes, with their origins in early English vagrancy laws requiring a person to give "a good [a]ccount of themselves" even where an officer lacked evidence that a crime was being committed,<sup>58</sup> strongly grate against the idea of the rugged individual being at liberty to go about his business without having to justify himself, and the Court has reflected this umbrage in its rulings.

Perhaps not coincidentally, the Court's first cases addressing stop-and-identify statutes involved defendants who reacted in classic rugged individual fashion upon being stopped. In *Brown v. Texas*,<sup>59</sup> for example, Zackary Brown was stopped without reasonable suspicion and repeatedly refused to identify himself as he "angrily asserted that the officers had no right to stop him"<sup>60</sup>; moreover, his refusal appears to have been based purely on principle since the three separate searches conducted by police revealed no

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58. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 183 (2004) (quoting 15 Geo. 2, ch. 5, § 2 (1744) (Eng.)).

59. 443 U.S. 47 (1979).

60. *Id.* at 49.

contraband.<sup>61</sup> Similarly, in *Kolender v. Lawson*<sup>62</sup> Edward Lawson stubbornly and consistently refused to identify himself despite being arrested on “approximately 15 occasions” over a twenty-two month period for refusing to provide “credible and reliable” identification and “account for [his] presence.”<sup>63</sup> Like Brown, Lawson refused to cooperate as a matter of principle and expressed the view that he was being arrested each time simply because he was a young African American male.<sup>64</sup>

In both cases, the Court came down strongly on the side of the rugged individual. The *Brown* Court observed that the local trial judge had captured the crux of the issue when he had asked the state’s attorney: “I’m not asking whether the officer shouldn’t ask questions [of a person]. I’m sure they should ask everything they possibly could find out. *What I’m asking is what’s the State’s interest in putting a man in jail because he doesn’t want to answer something.*”<sup>65</sup> A unanimous Supreme Court thought the answer clear: “In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant’s right to personal security and privacy tilts in favor of freedom from police interference.”<sup>66</sup>

In *Kolender*, the problem was not with the basis for the stop because the statute had been interpreted to require reasonable suspicion before a stop could be made.<sup>67</sup> Instead, the Court focused on the requirement that the

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61. *Id.*

62. 461 U.S. 352 (1983).

63. *Id.* at 353–54.

64. For a sense of how Edward Lawson embodied the rugged individual’s attributes of standing up to authority and perseverance, see IRATE Productions, *U S Supreme Court – San Diego ID Law – Kolender v. Lawson* (461 U.S. 352, 1983), YOUTUBE (Sep. 21, 2015), <https://www.youtube.com/watch?v=zCx8Rw-Eomg>, in which Lawson narrates his odyssey in challenging the identification statute. Lawson became something of a civil rights celebrity, appearing on shows such as Oprah and Larry King on a variety of issues involving the police and minority communities. See, e.g., ECL2012, *Edward C. Lawson on CNN’s LARRY KING LIVE, JUNE 1987 Part 1/3*, YOUTUBE (Nov. 26, 2011), <https://www.youtube.com/watch?v=fjH5Ttc15a0>; ECL2012, *Edward C. Lawson on Oprah Winfrey Show, JANUARY 1987 – RACISM Part 1/3*, YOUTUBE (Nov. 26, 2011), <https://www.youtube.com/watch?v=CwN4L49LhDA>. Lawson also tried to bring attention to the issues underlying the arrests of poor individuals almost a decade before the Ferguson Report exposed them more broadly. See EdLawsonTV, *Edward Lawson – New Jersey Arrest*, YOUTUBE (Dec. 4, 2009), <https://www.youtube.com/watch?v=gTvXjcMD08A>.

65. Despite the trial judge’s consternation, the judge still ruled that the statute was constitutional. *Brown*, 443 U.S. at 54 (emphasis in original).

66. *Id.* at 52.

67. *Kolender*, 461 U.S. at 355–56. The Court, however, described in a footnote the facts of several of Lawson’s stops in a way that suggested doubts over whether reasonable suspicion in fact had existed. *Id.* at 354 n.2; see also *id.* at 356 n.5 (noting that a state court had misstated the *Terry* test in a way that would have violated the Fourth

stopped individual had to produce identification that the police officer found to be “credible and reliable.” The Court held that the idea that the citizen has to satisfy “the whim of any police officer” before being allowed to go on his way or else face arrest was so vague that it violated Due Process.<sup>68</sup> The majority was especially concerned that the “full discretion” any “particular officer” possessed in deciding whether an individual had produced “credible and reliable identification”<sup>69</sup> would allow officers to engage in “harsh and discriminatory enforcement . . . against particular groups deemed to merit their displeasure.”<sup>70</sup> Although the majority did not invoke a specific historical figure as the face of the rugged individual, it is easy to see how this “virtually unrestrained power to arrest and charge” would create “the potential for arbitrarily suppressing First Amendment liberties” of a nonconformist like a William Penn and “implicate[] . . . the constitutional right to freedom of movement.”<sup>71</sup>

Even in *Hiibel v. Sixth Judicial District Court*,<sup>72</sup> the one case where the Court gave the police a little leeway to make the rugged individual identify himself, it did so cautiously. In *Hiibel*, the police had received a report of a man assaulting a woman in a truck parked on the side of the road. The police approached the man and asked if he had “any identification.”<sup>73</sup> As he made clear in an op-ed piece written after the Court’s decision, *Hiibel* saw himself as the classic rugged individual in refusing to identify himself:

I hadn’t been argumentative; I wasn’t picking a fight. Basically, when Deputy Dove demanded my papers—and he didn’t ask for them, he demanded them—I didn’t say, “Hey cop, I’m not going to give you nothing.” I just asked why he wanted them. “What have I done?” I asked. If he’d explained what he was

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Amendment, but assumed that it meant to adopt the *Terry* standard). The Court expressly declined to reach the Fourth and Fifth Amendment issues of whether individuals could be punished for failure to identify themselves if only reasonable suspicion existed. *Id.* at 361 n.10. The Court later addressed these issues in *Hiibel*. See *infra* notes 78–81 and accompanying text.

68. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965), *quoted in Kolender*, 461 U.S. at 358, 361–62.

69. *Id.* at 360. Justice O’Connor cited a hypothetical raised at oral argument that an officer, for instance, might be allowed to require a jogger “to answer a series of questions concerning the route that he followed.” *Id.*

70. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972), *quoted in Kolender*, 461 U.S. at 360.

71. See *Kolender*, 461 U.S. at 358, 360 (first quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring); and then quoting *Shuttlesworth*, 382 U.S. at 91).

72. 542 U.S. 177 (2004).

73. *Id.* at 181.

doing there, perhaps it could have been settled on the spot. But his position was that he wanted the papers first.

Here's why this was so important to me: I don't believe that the authorities in the United States of America are supposed to walk up to you and ask for your papers. I thought that wasn't lawful. Apparently I was wrong, but I thought that that was part of what we were guaranteed under the Constitution. We're supposed to be free men, able to walk freely in our own country—not hampered, not stopped at checkpoints. That's part of what makes this country different from other places. That's what I was taught.

And it's not just because it's in the Constitution. It's something that you just kind of know. It's kind of obvious. If you haven't committed a crime, you shouldn't be harassed by the police. If they suspect you of something, I don't see why they shouldn't explain it. I wasn't violent. And it was proven later in court that I hadn't committed any crimes.

These days, it's like we're all guilty until proven innocent. You walk into an airport and everybody's a suspect. Like the way people were treated in Soviet Russia, in Red China, in Castro's Cuba.

We don't want the United States to become that.

I don't have a super-clear understanding of the Constitution. I'm not an attorney. I've never even read the whole thing. I only went through eighth grade. But I remember what I learned, and it seems to me that the whole idea of "your-papers-please" goes completely against the grain of the American people.<sup>74</sup>

Because a dashcam video of the arrest exists, we can watch the interaction between Hiibel and the police and decide for ourselves whether he was being "argumentative."<sup>75</sup> But even if Hiibel might not have used the Queen's English in asserting his rights,<sup>76</sup> Hiibel certainly left no doubt that he was not going to identify himself each of the eleven times he was asked.<sup>77</sup>

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74. Larry Dudley Hiibel, Opinion, *We All Lose If Cops Have All the Power*, L.A. TIMES (June 24, 2004), [http://articles.latimes.com/2004/jun/24/opinion/oe-hiibel24\\_](http://articles.latimes.com/2004/jun/24/opinion/oe-hiibel24_) [<https://perma.cc/2Q93-9469>].

75. Felix Tam, *Encounter Between Larry Hiibel and Nevada Highway Patrol*, YOUTUBE (May 2, 2007), <https://www.youtube.com/watch?v=APynGWwqD8Y>.

76. Justice Kennedy described Hiibel's manner of refusing to identify himself as "taunt[ing] the officer" while appearing to be inebriated. *Hiibel*, 542 U.S. at 180–81.

77. Hiibel was convicted and fined \$250 for obstruction of a "public officer in attempting to discharge his duty" by refusing to comply with the request to identify himself. *Id.* at 182.

Even as a narrow five-justice majority upheld *Hiibel*'s conviction for obstruction of justice, it clearly was mindful of not wanting to be seen as treading on the rugged individual's freedom of movement, especially given prior dicta stating that someone detained only on reasonable suspicion need not identify himself.<sup>78</sup> The majority cast its holding as a limited, pragmatic, and commonsense holding: A police officer stopping someone based on reasonable suspicion<sup>79</sup> should be able to find out the name of the person with whom he is dealing where the "officer's action [is] 'reasonably related in scope to the circumstances which justified the interference.'"<sup>80</sup> Even then, the detained individual could "not be compelled to answer any other inquiry of any peace officer" or be required to provide any documentation.<sup>81</sup> Whether one agrees with the outcome—and four justices strongly disagreed<sup>82</sup>—Justice

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78. The majority was faced with explicit statements in prior cases such as Justice White's concurrence in *Terry v. Ohio*: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest, although it may alert the officer to the need for continued observation." 392 U.S. 1, 34 (1968) (White, J., concurring). In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court had similarly stated in dicta: "[An] officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." *Id.* at 439. The *Hiibel* majority read these cases as simply saying that "the Fourth Amendment itself cannot require a suspect to answer questions" but as leaving unanswered whether the state could require the questions to be answered. *Hiibel*, 542 U.S. at 187. The notion that Justice White or the *Berkemer* Court would have felt the need to write specially to clarify that "the Fourth Amendment itself cannot require a suspect to answer" is a curious one since as Kennedy acknowledges, "the Fourth Amendment does not impose obligations . . . but instead provides rights." *Id.* It at least would have been a more forthright opinion to simply have said that the Court was finally addressing the Fourth and Fifth Amendment issues directly (in *Kolender* the Court had struck down the statute based on Due Process vagueness) and despite twenty years of statements to the contrary, those statements were dicta and the majority was finding the Fourth Amendment was not violated. See *id.* at 198 (Breyer, J., dissenting) (discussing prior cases and concluding that "while technically dicta, [statements that individuals could not be required to answer questions during *Terry* stops] [was] the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years").

79. In *Hiibel*'s case, the state courts had found reasonable suspicion existed that a domestic assault was occurring because *Hiibel* had been fighting with a woman who turned out to be his daughter. *Hiibel v. Sixth Judicial Dist. Court ex rel. County of Humboldt*, 59 P.3d 1201, 1207 (Nev. 2002), *aff'd*, 542 U.S. 177.

80. *Hiibel*, 542 U.S. at 185 (quoting *United States v. Sharpe*, 470 U.S. 675, 682 (1985)).

81. NEV. REV. STAT. § 171.123(3), *quoted in Hiibel*, 542 U.S. at 187. The Nevada Supreme Court had interpreted the statute as requiring only that the person communicate their name and need not provide any documentation. *Hiibel*, 542 U.S. at 177.

82. The two dissenting opinions formed a tag team. Justice Stevens argued that the statute violated the Fifth Amendment privilege against self-incrimination because giving a name "can provide the key to a broad array of [incriminating] information," or "why else would an officer ask for it?" *Id.* at 196 (Stevens, J., dissenting). Justice Breyer

Kennedy's opinion basically boils down to viewing the request for an individual's name as a limited "commonsense inquiry" by a police officer that is related to the "practical demands of a *Terry* stop."<sup>83</sup>

Taken together, *Brown*, *Kolender*, and *Hiibel* thus endorse a relatively robust view of the rugged individual's right to wander anonymously without having to give any justification for his activities. At most he can be required to give his name if detained based on reasonable suspicion, and even then cannot be required to give a "good account of himself" or to provide documentation.<sup>84</sup> This approach is consistent with the Court's general willingness to constitutionally empower the rugged individual who wants to interact with the government on his own terms, or as the Court has come to characterize the principle in the Fourth Amendment context, the citizen has the constitutional right "to go about one's business free from unwarranted government interference."<sup>85</sup>

And if the Court's use of the archetype in the Fourth Amendment had stopped here, its use would be a noncontroversial vindication of the values of autonomy and dignity we have seen the archetype represent. The Court, however, has relied upon the rugged individual archetype to define other Fourth Amendment principles as well, and in these contexts has used the archetype in a manner that undermines the very values the archetype is meant to embody.

## **B. When the Rugged Individual Archetype Fails the Fourth Amendment**

Unfortunately for Hollis King, Lady Luck was not one of his guests on the night the police made a controlled buy outside his apartment complex.<sup>86</sup> After the undercover agent had made his purchase, the seller moved quickly into a breezeway as an observing officer radioed uniformed officers to "hurry

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(joined by Justices Ginsburg and Souter) maintained that the Fourth Amendment barred requiring an individual to even give his or her name, reasoning that "the Fourth Amendment protects the 'right of every individual to the possession and control of his own person.'" *Id.* at 197 (Breyer, J., dissenting) (quoting *Terry*, 392 U.S. at 9).

83. *Id.* at 188, 189 (majority opinion). The majority also addressed whether the name request violated the Fifth Amendment privilege against self-incrimination, ruling that in almost all cases no violation occurs, because "[a]nswering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances." *Id.* at 179.

84. 2 WILLIAM HAWKINS, *PLEAS OF THE CROWN*, ch. 13, § 6, at 130 (6th ed. 1787), quoted in *Hiibel*, 542 U.S. at 183.

85. *INS v. Delgado*, 466 U.S. 210, 226 (1984). As discussed in later parts of this Article, this phrase has become the Court's catchphrase. See *infra* notes 97–121 and accompanying text.

86. *Kentucky v. King*, 563 U.S. 452, 455–56 (2011).



up and get there” before the seller disappeared into an apartment. The pursuing officers heard a door shut at the end of the breezeway but did not hear the observing officer’s radio transmission that the seller had gone into the apartment on the right. Instead, not having seen which apartment the seller had disappeared into, but smelling marijuana smoke coming out of the apartment on the left, they pounded on the door and shouted “as loud as [they] could . . . Police, police, police.”<sup>87</sup>

According to the officers, their banging and shouting led to sounds of movement inside the apartment, which in turn led the officers to believe that “drug-related evidence was about to be destroyed.”<sup>88</sup> As a result of this belief, the officers announced that they were coming in and kicked down the door to find Hollis, his girlfriend, and a guest who was sitting on a couch smoking marijuana. The officers found marijuana and cocaine in plain view and upon a further search found crack, cash, and drug paraphernalia. The officers also eventually arrested the original subject of their chase in the apartment across the hallway.

The Kentucky Supreme Court ruled the entry of King’s apartment invalid on the grounds that by “knocking on the apartment door and announcing ‘police,’” the police had foreseeably created the very exigent circumstances that the State was now relying on as the justification for not obtaining a search warrant before entering.<sup>89</sup> The U.S. Supreme Court, however, voted 8–1 to reverse the state court. After methodically reviewing and rejecting various approaches that lower courts had taken to limit when the police could rely on exigent circumstances that stemmed from their own actions, the majority settled on a basic rule: Exigent circumstances allow the dispensing with a warrant so long as “the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.”<sup>90</sup>

Whether one agrees with the ultimate holding, what is remarkable about Justice Alito’s majority opinion is how the encounter is depicted more like an event to be governed by the Uniform Commercial Code than like an episode from *The Wire*. As if reviewing a lease agreement, Alito notes that an “occupant has no obligation to open the door or to speak” and that “even if an occupant chooses to answer the door and speak . . . the occupant need not

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87. *Id.* at 456.

88. *Id.*

89. *King v. Commonwealth*, 302 S.W.3d 649, 656 (Ky. 2010), *rev’d*, 563 U.S. 452.

90. *King*, 563 U.S. at 462.

allow the officers to enter . . . and may refuse to answer any questions.”<sup>91</sup> Keeping with the civilized tone of the perceived encounter, Alito suggests that upon answering the door, “Citizens who are startled . . . may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.”<sup>92</sup> In short, according to the Court, Hollis King’s misstep was in failing to realize that the banging on his door and shouting of “Police, police, police” at the top of the officers’ lungs was nothing more than an invitation to a constitutional tête-à-tête.

The surreal aspect of Justice Alito’s description of how King could have interacted with the police makes sense only if one realizes that the Court envisions the heroic rugged individual answering the apartment door rather than Hollis King, a young African American man living in a rundown apartment building. And because the Court has the rugged individual answering the door, it is able to state with a straight face that under cases like *Brown* and *Kolender*,<sup>93</sup> King as “said occupant” theoretically “ha[d] no obligation to open the door or to speak” with the police and could have refused them entry. From the majority’s viewpoint, therefore, King had been given the constitutional tools to forge his own fate. Consequently, if he failed to show the constitutional fortitude to use those tools by answering the door and telling the police to go away, well, then that failure is his and not the Court’s or the police. Indeed, Justice Alito was admirably forthright in saying exactly that: “Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence *have only themselves to blame* for the warrantless exigent circumstances search that may ensue.”<sup>94</sup>

Like the holding in *King*, many of the Court’s Fourth Amendment rulings become far more comprehensible, even if not defensible, if the rugged individual serves as one’s guide. Take, for example, the Court’s oft-criticized cases defining what constitutes a seizure under the Fourth Amendment.<sup>95</sup> In examining the Court’s application of its test for when a Fourth Amendment

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91. *Id.* at 469–70.

92. *Id.* at 468.

93. See *supra* notes 59–71 and accompanying text.

94. *King*, 563 U.S. at 469–70 (emphasis added). One can almost hear several of the Justices under their breath muttering: “Dollree Mapp most certainly would have answered that door and told the officers exactly what they could do without a warrant.”

95. See generally, Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988); Thomas K. Clancy, *The Supreme Court’s Search for a Definition of a Seizure: What Is a “Seizure” of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619 (1990).

seizure has occurred—whether under all of the circumstances a reasonable person would have felt free to leave when confronted by the police<sup>96</sup>—one again discovers the Court using the rugged individual archetype to define the right's operation: a citizen is entitled to claim the Fourth Amendment's protections only if he acts in the manner that the Court perceives the rugged individual would have, which means actively standing up to law enforcement and asserting one's rights. As a result, while a citizen has the theoretical right to refuse to cooperate with the police, unless he acts like the rugged individual, he will be characterized by the Court as in some way having acquiesced to the police activity.

The critical question, therefore, is whether ordinary citizens would find it possible to emulate the rugged individual during these law enforcement encounters. It would be illuminating, for example, to ask a random sample of individuals whether they would feel free to refuse to cooperate with the law enforcement agent in the following situations:

- a. You are of Hispanic origin as two-dozen Immigration and Naturalization Service (INS) agents arrive at the factory where you work. As agents guard the exits, the other agents go up and down the rows of your fellow workers showing their badges, asking questions, and handcuffing those whom they suspect of being illegal aliens and leading them away. Do you feel free to refuse to answer questions when approached and go about your business?<sup>97</sup>
- b. You are on a Greyhound bus as three armed police officers board the bus and flash their badges. One officer stations himself on the driver's seat looking towards the back of the bus. The other two officers move to the rear and while one officer remains at the back of the bus the officer begins moving forward row by row. The bus is cramped and all of the passengers are seated, so when the officer leans in towards you his face is 18 inches away and looking down at you. In a low tone, he asks about your travel plans and if they can search your luggage. Do you feel free to ignore the officer's questions?<sup>98</sup>

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96. The test derives from Justice Stewart's statement in *United States v. Mendenhall*, 446 U.S. 544 (1980), that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

97. See *INS v. Delgado*, 466 U.S. 210 (1984).

98. See *United States v. Drayton*, 536 U.S. 194 (2002).

- c. You are on the same Greyhound bus and the person in the seat next to you has just been searched and arrested for possession of drugs. The officer now turns to you knowing that the person just arrested was your travelling companion and asks, "Mind if I check you?" Do you feel free to say, "Yes, I do mind," and then go about your business?<sup>99</sup>
- d. As you see a marked police car with four officers approaching, you start running and turn a corner. The police car accelerates to follow you and turns the corner until it is now driving parallel to you as you run. Do you feel free to ignore the officers and go about your business?<sup>100</sup>

Those familiar with Fourth Amendment case law will know that all of the above situations were benignly characterized by the Court as "classic consensual encounters"<sup>101</sup> that fell outside the Fourth Amendment's reach. In each case, the Court decided that a reasonable person would have felt free to refuse to cooperate and "go about one's business."<sup>102</sup>

The holdings in this area often have an "air of unreality"<sup>103</sup> about them, whether they are assessed from common experience or empirical evidence.<sup>104</sup> Indeed, the opinions sometimes exude an Orwellian Newspeak feel: INS raids are characterized as "surveys"<sup>105</sup> and row-by-row requests on buses to search carryon luggage as "interviews."<sup>106</sup> In one particularly memorable line, then-Justice Rehnquist, in arguing that the INS factory raids would not have led a worker to feel seized, placidly explained as if it were an everyday occurrence: "While the surveys did cause some disruption, *including the efforts of some workers to hide*, the record also indicates that workers were not prevented by the agents from moving about the factories."<sup>107</sup> The sentence has to be read

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99. See *id.*

100. See *Michigan v. Chesternut*, 486 U.S. 567 (1988).

101. *Delgado*, 466 U.S. at 221.

102. *Id.* at 226 (Brennan, J., concurring in part and dissenting in part).

103. *Drayton*, 536 U.S. at 208 (Souter, J., dissenting).

104. See generally, Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153; Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993); Alisa M. Smith et al., *Testing Judicial Assumptions of the "Consensual" Encounter: An Experimental Study*, 14 FLA. COASTAL L. REV. 285 (2013).

105. *Delgado*, 466 U.S. at 214.

106. *Florida v. Bostick*, 501 U.S. 429, 441–42 (1991) (Marshall, J., dissenting).

107. *Delgado*, 466 U.S. at 218 (emphasis added).

several times to make sure that Justice Rehnquist is not pulling our leg Jonathan Swift-style by suggesting that one actually would serenely go about one's work, perhaps whilst whistling a little ditty, as fellow workers are ducking under their desks. He is not.

As we now know, the key to understanding these cases is to recognize that their tone of obliviousness is largely due to the core notion that the rugged individual would be willing to stand up to the police if he wanted to go about his business. A further reading of the cases allows us to learn even a bit more about the Court's perception of the rugged individual's personality.

First, the rugged individual intuitively knows when his rights are at stake and does not need to be told about them. One might posit, for example, that when conducting the bus "interviews," the police should have been required to advise each passenger that they were free to not cooperate and could refuse to have their bags searched. The Court, however, has adopted a default position that all individuals will be like Zackary Brown and Edward Lawson and intuitively know that they can "go about [their] business" and refuse to cooperate when approached by the police.<sup>108</sup> Consequently, absent blatant coercion or a claim that the defendant suffered from a particular impediment, any decision to acquiesce will be treated as an informed and free choice.

Second, the rugged individual will invoke the right to "go about their business" in a particular and proper manner, which means standing one's ground against the government and expressly letting the officers know that one is refusing to cooperate. In *Illinois v. Wardlow*,<sup>109</sup> for example, a four-car caravan of uniformed police officers "converg[ed]" on an area known for narcotics trafficking. Wardlow who was standing on the corner "holding an opaque bag . . . looked in the direction of the officers and fled."<sup>110</sup> The police chased Wardlow down and a frisk revealed a .38 handgun. Wardlow argued, and the Illinois Supreme Court agreed, that because refusal to cooperate is a constitutional right, and because one's exercise of that right cannot justify a police stop, "[Wardlow's] flight may simply be an exercise of this right to 'go on one's way,' and . . . could not constitute reasonable suspicion."<sup>111</sup>

The Supreme Court adamantly disagreed. First, the Court minimized how someone in Wardlow's situation would have perceived a four-car police caravan converging on the street corner where he was standing, characterizing it as "a brief encounter between a citizen and a police officer on

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108. *Drayton*, 536 U.S. at 209 (Souter, J., dissenting).

109. 528 U.S. 119 (2000).

110. *Id.* at 121–22.

111. *Id.* at 123.

a public street.”<sup>112</sup> The majority then gave a formal nod to its prior statements by noting: “[T]he individual has a right to ignore the police and go about his business. And any ‘refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.’”<sup>113</sup> The majority, however, rejected the idea that Wardlow was exercising his constitutional right of refusal by running:

But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.<sup>114</sup>

In other words, the rugged individual “stays put” and refuses to cooperate face-to-face rather than turning his back and running.<sup>115</sup> And, as a result, the decision to flee transformed the individual from a citizen into a “fugitive.”<sup>116</sup>

Finally, the Court has assumed that although the rugged individual possesses the courage and knowledge to stand up to the police, he in fact generally will want to cooperate. In the bus “interview” cases, for example, Justice Kennedy argued that “bus passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.”<sup>117</sup> Kennedy also noted that the officer who had conducted the “interviews” had testified that “most people are willing to cooperate. Some passengers go so far as to commend the police.”<sup>118</sup> In other words, the fact that so many people consent to searches is not indicative of a shortage of

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112. *Id.*

113. *Id.* at 125 (citation omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)).

114. *Id.*

115. This inclination to face one’s accusers, as we have seen, is a hallmark of the rugged individual in the Confrontation Clause context. See *supra* notes 41–57 and accompanying text.

116. In a sharp break from *Wardlow*, the Supreme Judicial Court of Massachusetts recently held:

Where a suspect is under no obligation to respond to a police officer’s inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously undermined.

*Commonwealth v. Warren*, 58 N.E.3d 333, 341–42 (Mass. 2016).

117. *Drayton*, 536 U.S. at 205.

118. *Id.* at 198.

rugged individuals, but rather simply shows that rugged individuals will normally voluntarily stand down in the name of community interests.<sup>119</sup>

What emerges from this group of cases, then, is a counterpoint to the heroic rugged individual cases where the Court used the archetype to expand or strengthen a constitutional right. In those cases, the Court acted to protect individuals who it saw as trying to stand up to the Government in a manner that promoted the rugged individual's dignity. In this latter group of cases, by contrast, the rugged individual still shapes the contours of the right, but the focus is on the less-than-rugged individuals who fail to assert the rights that the Constitution has provided, and their passivity is seen as making them unworthy of having the right protected. *Drayton* also advanced a premise that will be examined more closely later<sup>120</sup>—the idea that a constitutional right's vitality is in some sense dependent upon its being actively invoked. As Justice Kennedy explained in justifying why a defendant must affirmatively assert his refusal to consent:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.<sup>121</sup>

This romanticized vision of democracy-in-action works, however, only if the citizenry is in fact capable of acting like the archetypal rugged individual.

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119. If the doctrine's purpose is in part to promote law enforcement use of consent searches, this assumption is highly useful to the Court in providing a facile explanation of why so many individuals consent to police procedures: "It is no part of the policy underlying the Fourth [Amendment] to discourage citizens from aiding [the police] to the utmost of their ability' . . . . Rather, the community has a real interest in encouraging consent . . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971)). The assumption of the desire to cooperate also means, of course, that the rugged individual who refuses to cooperate is something of a jerk for not being willing to subjugate his own interests in the name of the community, which is consistent with the majority's depiction of Hiibel. See *supra* note 76 and accompanying text.

120. See *infra* notes 164–172 and accompanying text.

121. *Drayton*, 536 U.S. at 207 (emphasis added).

### C. An Unromantic View of the Realities of the Fourth Amendment

The criticism that the Court's current Fourth Amendment jurisprudence does not accord with reality was voiced early and vehemently by Justice Marshall. In objecting to the Court's 1973 holding in *Schneckloth v. Bustamonte*<sup>122</sup> that police were not required to inform a citizen of her right to refuse a consent search, Justice Marshall bluntly stated:

The proper resolution of [when a consent search occurs] turns, I believe, on a realistic assessment of the nature of the interchange between citizens and the police, and of the practical import of allocating the burden of proof in one way rather than another. The Court seeks to escape such assessments by escalating its rhetoric to unwarranted heights, but no matter how forceful the adjectives the Court uses, it cannot avoid being judged by how well its image of these interchanges accords with reality. Although the Court says without real elaboration that it "cannot agree," the holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few.<sup>123</sup>

Marshall's critique has proven well-founded over the ensuing decades based both on empirical studies and actual police-citizen interactions in the field.

Dating back to Stanley Milgram's famous experiment<sup>124</sup> that has since been replicated in a number of contexts, empirical research has established that the human condition is one that generally defers to authority.<sup>125</sup> As social scientist Janice Nadler found when she meticulously dissected the Court's search-and-seizure doctrine in light of empirical studies on consent and authority, the Court's intuitive assumptions "struggle[] against a wealth of

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122. 412 U.S. 218.

123. *Id.* at 289 (Marshall, J., dissenting) (emphasis added) (citation omitted).

124. Stanley Milgram did pioneering work in the study of obedience. His most famous experiment involved a subject who believed that he was able to deliver increasing levels of electrical shocks to an individual if that person answered a question incorrectly. The person answering the questions was not actually receiving electrical shocks and as part of the experiment would give increasingly distressed sounding responses as the supposed voltage was increased, culminating in screams and eventually not responding. The subject administering the shocks would often look with concern to the experimenter who was telling him to increase the voltage, but upon being told to continue, almost all subjects continued. See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974). The takeaway lesson was "the extreme willingness of adults to go to almost any lengths on the command of an authority." *Id.* at 5.

125. See generally Frederick Schauer, *Do People Obey the Law?*, 51 SAN DIEGO L. REV. 939 (2014) (reviewing empirical literature).



social science evidence.”<sup>126</sup> This “wealth” of scientifically validated factors—the pressure to comply with authority; the force of social validation; how individuals understand statements by authority figures differently; how the physical intrusion of high-authority figures into personal space lessens the ability to resist; the stresses of a time-pressured decision—led Nadler to conclude: “[T]he Court’s Fourth Amendment consent jurisprudence is . . . based on serious errors about human behavior and judgment . . . .”<sup>127</sup>

Empirically, then, we know that a police officer’s request for consent or for submission to an “interview” is an event that takes place on a psychologically uneven playing field. Despite the Court’s conceptualization of the citizen in a police encounter as the rugged individual who knows that she can refuse and has the constitutional backbone to do so, citizens in fact appear to be consenting not out of a knowing desire to cooperate, but because of the psychological pressures of the moment. One study found that the vast majority of those consenting did so either because of fear of the consequences if they refused or from a belief that they would be searched even if they said “no.”<sup>128</sup> Nor is such a fear irrational when the public reads or hears about cases where individuals are arrested or harassed even though they calmly, clearly, and properly exercised their rights.<sup>129</sup> The heroic rugged individuals who stand up for their rights like Dollree Mapp and Edward Kolender, in other words, are notable precisely because they are the exception rather than

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126. Nadler, *supra* note 104, at 222.

127. *Id.* at 156. Nadler also holds out the possibility that the Court is aware of the lack of an empirical basis and is engaging in a fiction to reach a desired result. See *infra* note 180 and accompanying text.

128. See Nadler, *supra* note 104, at 201–03 (discussing Lichtenberg study). In the study, Illya Lichtenberg randomly sampled fifty-four individuals stopped on Ohio interstates between 1995–97 who were asked for consent to search their vehicles. *Id.* at 202. Forty-nine of fifty-four consented to the search, and the vast majority (47 of 49) of those who consented did so because they feared the consequences of refusing and believed that a search would occur whether or not they consented. *Id.* at 202 & n.160.

129. Great attention, for example, was given to Nurse Alex Wubbels who calmly and correctly stated she would not allow the police to draw blood from one of her patients without a warrant. She was then arrested and removed from the hospital sobbing. Derek Hawkins, *‘This Is Crazy,’ Sobs Utah Hospital Nurse as Cop Roughs Her Up, Arrests Her for Doing Her Job*, WASH. POST. (Sept. 2, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/09/01/this-is-crazy-sobs-utah-hospital-nurse-as-cop-roughs-her-up-arrests-her-for-doing-her-job/?utm\\_term=.b9925771c32f](https://www.washingtonpost.com/news/morning-mix/wp/2017/09/01/this-is-crazy-sobs-utah-hospital-nurse-as-cop-roughs-her-up-arrests-her-for-doing-her-job/?utm_term=.b9925771c32f) [https://perma.cc/4UAT-TP3J]. Although heralded for standing up to the police and the illegal arrest later elicited apologies from the police and mayor, an individual who watched the trauma of her being arrested would no doubt hesitate before refusing a police officer’s request even if he or she believed they were constitutionally entitled to refuse. See also *infra* note 170 (describing a case where an individual had his truck seized for refusing to accede to border patrol officials’ demand without cause that he unlock his phone so they could search it).

the rule and, of course, because they paid a price: The only reason they came to the Supreme Court's attention was because they were willing to be arrested rather than give up their rights.<sup>130</sup>

Critically, though, as destructive as the rugged individual archetype may be for the general citizenry's exercise of Fourth Amendment rights, it has an even more damaging and pernicious effect when considered in the context of minority communities.<sup>131</sup> The premise that a citizen must stand and assert his rights as a Hispanic American being confronted by INS agents or as a young African American man standing on a street corner as four cars brimming with police descend, seems downright surreal. As Justice Sotomayor wrote in a highly personalized objection to the Court's continued loosening of the exclusionary rule:

For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.<sup>132</sup>

Or, as Justice Stevens suggested in response to the argument that an individual would abide by the proverb “the righteous are as bold as a lion” and stand his ground as police cars descend upon him, the far more apt proverb for a young black man would be: “A shrewd man sees trouble coming and lies low; the simple walk into it and pay the penalty.”<sup>133</sup>

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130. Insight can be gained from studies that have found that less than ten percent of individuals refuse to submit to a consent search and that most of those consenting are doing so because they do not see refusal as a realistic option. Nadler, *supra* note 104, at 202 & n.160.

131. While this Article focuses on the effects of racial and ethnic minorities, the analysis could be extended to the uniqueness of interactions based on gender, age, and mental capacity. See Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2192 (2016) (critiquing the Court's use of the “behavior of a theoretical privileged, able-bodied, white, adult male” and explaining empirical basis for how women, juveniles, and intellectually disabled individuals would react differently).

132. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting)

133. *Illinois v. Wardlow*, 528 U.S. 119, 129 n.3 (2000) (Stevens, J., concurring in part and dissenting in part) (first quoting *Proverbs* 28:1; and then quoting *Proverbs* 22:3). Justice Stevens noted that he had objected before to the proverb that the “wicked flee” because “its ‘ivory-towered analysis of the real world’ fails to account for the experiences of many citizens of this country, particularly those who are minorities.” *Id.* (quoting *California v. Hodari D.*, 499 U.S. 621, 630 n.4 (1991) (Stevens, J., dissenting)). Justice Stevens did add, however, that his objection did not mean that the argument that flight constitutes suspicious behavior is “inaccurate in all instances.” *Id.*; see also Tracey Maclin, “*Black and Blue Encounters*”—Some Preliminary Thoughts About Fourth

Professors Rachel Godsil and Song Richardson have recently provided an empirical lens through which to better understand the unique dynamic of police encounters with minority citizens.<sup>134</sup> By looking to the well-established phenomenon of “racial anxiety,”<sup>135</sup> the authors explain:

From the [minority] civilian’s perspective, racial anxiety refers to the fear of being the victim of police racism, leading to worries that one will be subjected to police brutality on the one hand and rude, disrespectful and harassing treatment on the other. This anxiety can influence a person’s behaviors and judgments as well as the attributions he or she makes about an officer’s conduct during an interaction.<sup>136</sup>

Moreover, the police officer will be bringing her own “racial anxiety” to the interaction, adding to the volatility of the situation and moving it even further away from the dynamics of a police-citizen encounter without a racial component.<sup>137</sup>

Similarly, Devon Carbado has chronicled how “stereotypes about crime and criminality, and the nexus between police abuse and race, render the nature of [police] pressure qualitatively and quantitatively different for blacks.”<sup>138</sup> Carbado contends, therefore, that the Fourth Amendment must be

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*Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 276 (1991) (suggesting different scenarios explaining why a black youth innocent of a crime might still run from the police).

134. Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235 (2017).

135. *Id.* at 2240–45 (examining the empirical studies establishing racial anxiety).

136. *Id.* at 2251. One can obtain a sense of how this dynamic plays out even in “friendly” encounters between police and African American citizens by watching the video of the police stop of Dorothy Bland, a professor out for a walk. See Michael E. Miller, *Racism? By Whom? This Video of Texas Cops Stopping a Black Professor Is a Racial ‘Rorschach Test’*, WASH. POST (Nov. 4, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/11/04/racism-by-whom-this-video-of-tex-cops-stopping-a-black-professor-is-a-racial-rorschach-test/?utm\\_term=.8761142c89a5](https://www.washingtonpost.com/news/morning-mix/wp/2015/11/04/racism-by-whom-this-video-of-tex-cops-stopping-a-black-professor-is-a-racial-rorschach-test/?utm_term=.8761142c89a5) [<https://perma.cc/4KYY-LR5G>]. While the police officers are polite, she clearly feels she is being stopped for “walking while black,” and the tension rises when she is asked for identification. The difficulty of how competing perspectives can make the same encounter appear to some as racial profiling and to others as good police work is also evident from the contrasting reactions to those who watch the video. *Id.* And, of course, this encounter is not fraught with the implicit and explicit shows of force associated with many police encounters as Bland was walking out in the open during the day in an affluent neighborhood.

137. Godsil & Richardson, *supra* note 134, at 2252–53; see also *infra* notes 185–186 and accompanying text (examining how racial anxiety can lead to violence in the police-citizen encounter).

138. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1014 n.274 (2002). Professor Carbado has been one of the most effective voices in highlighting how the Court has largely omitted race from its Fourth Amendment discussion and analysis in a way that fosters the disconnect with the realities of police-

understood differently from the perspective of a minority citizen. While whites undoubtedly also feel psychological pressure to not invoke their rights,<sup>139</sup> minorities are even less likely to feel that they can assert their Fourth Amendment rights:

First, people of color will have to give up more of their privacy—will have to consent to more intrusive searches—than whites to erase the suspicions an officer may have about their criminality. [Second,] [p]art of their racial socialization will include the idea that, in the context of encounters with the police, they should comport themselves (a) to signal racial respectability and (b) to make the officers racially comfortable. The assertion of rights can undermine that performance strategy. Specifically, it can racially aggravate or intensify the encounter, increasing the person of color's vulnerability to physical violence, arrest, or both.<sup>140</sup>

As a result of this heightened psychological vulnerability, “people of color are less likely than whites to assert their constitutional rights.”<sup>141</sup>

And as Justice Sotomayor in her *Strieff* dissent noted, minorities are disproportionately the subject of the types of police encounters where the Court places the onus on the citizen to affirmatively assert his Fourth Amendment rights: “[I]t is no secret that people of color are disproportionate victims of this type of [suspicionless] scrutiny . . . . We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’”<sup>142</sup> It seems as if the news has a daily accounting of the tragic consequences that can result if a minority citizen should in fact make any indication that he or she will not cooperate.<sup>143</sup> The effect is to leave an entire segment of society

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citizen encounters on the streets. See, e.g., *id.* at 975–88 (demonstrating how Justice O'Connor's opinion in *Florida v. Bostick*, 501 U.S. 429 (1991), by not mentioning the race of the defendant and police officers actually provides its own “construct” of race). Carbado, along with Cheryl Harris, has also pointed out that the legal academy is not immune from failing to recognize all of the various aspects of how race and ethnicity play into criminal procedure doctrine. Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011).

139. Carbado, *supra* note 138, at 1020.

140. *Id.* at 1013–14 (footnote omitted).

141. *Id.* at 1013.

142. *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (citation omitted).

143. The attention now being paid to police killings of unarmed African American men, such as Eric Garner and Walter Scott, is in part because of the advent of cellphone cameras with video capabilities, which allow the capturing of events that in past times might never have come to light. The problem to be confronted, of course, extends far beyond those situations that lead to extended media coverage. See Jamilah King, *Before Freddie Gray: A Timeline of American Unrest*, TAKEPART (Apr. 29, 2015), <http://www.takepart.com/article/2015/04/28/police->

ensnared in a Fourth Amendment Catch-22: If one remains silent and acquiesces to a police encounter, the citizen forfeits Fourth Amendment protections, but that individual's attempt at asserting or protesting his or her rights may end up in a physical altercation or even the loss of life.<sup>144</sup>

Relying on the rugged individual archetype, therefore, in a very real and destructive manner deprives certain segments of the citizenry of their rights.<sup>145</sup> And, of course, the damage of this de facto disenfranchisement of minority citizens from their constitutional rights undermines the trust and legitimacy with which the justice system is viewed by minority communities.<sup>146</sup> Unsurprisingly, this rupturing of the citizen-government

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protest-timeline [<https://perma.cc/2A56-CCVD>]; John Wihbey & Leighton Walter Kille, *Excessive or Reasonable Force by Police? Research on Law Enforcement and Racial Conflict*, JOURNALIST'S RESOURCE, <http://journalistsresource.org/studies/government/criminal-justice/police-reasonable-force-brutality-race-research-review-statistics> [<https://perma.cc/4QC5-8WXC>]; *Ferguson Unrest: From Shooting to Nationwide Protests*, BBC NEWS (Aug. 10, 2015), <http://www.bbc.com/news/world-us-canada-30193354> [<https://perma.cc/GSX2-3DHA>]; *The Targeting of Young Blacks by Law Enforcement: Ben Jealous in Conversation With Jamelle Bouie*, AM. PROSPECT (Oct. 20, 2014), <http://prospect.org/article/targeting-young-blacks-law-enforcement-ben-jealous-conversation-jamelle-bouie> [<https://perma.cc/79Q2-JNZH>]. See generally Todd Beer, *Police Killing of Blacks: Data for 2015, 2016, 2017*, SOC'Y PAGES, <https://thesocietypages.org/toolbox/police-killing-of-blacks> [<https://perma.cc/CK2P-2ZX9>]. For an account of how an encounter can quickly turn tragic, see *Running From Cops*, REVEAL (Apr. 29, 2017), <https://www.revealnews.org/episodes/running-from-cops> [<https://perma.cc/48WC-UYXK>] (minutes 15:30 through 37:00), describing the death of Jay Cook in Baltimore after fleeing police.

144. See generally Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

145. As Mary Anne Franks describes:

In the Fourth Amendment search and seizure context, which disproportionately affects black men, consent is effectively treated as the default, and only compelling evidence can move this setting. Compelling evidence in this context must be beyond showing merely that the citizen did not know he could say no, was too afraid to do so, or did not believe that saying no would have any effect.

Mary Anne Franks, *Where the Law Lies: Constitutional Fictions and Their Discontents*, in *LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* 32, 74 (Austin Sarat ed., 2015). The disproportionate targeting also results in far higher incarceration rates for minority individuals. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11–12 (2012) (documenting how the structuring of the criminal justice system had led to the incarceration of minorities in a way that has helped facilitate “the emergence of a new caste system”).

146. Justice Stevens documented the friction between minority communities and the police in his *Wardlow* dissent back in 2000. See *Illinois v. Wardlow*, 528 U.S. 119, 133 nn.8–10 (2000). The situation has only worsened with the passage of time. See *supra* note 143. One wonders whether the poignant points that Justice Stevens raised largely through footnotes concerning the majority opinion's ignoring of the realities of police-minority interactions would now receive full discussion in the text.

trust, necessary for a functioning democracy, can spawn civil unrest and protest movements.<sup>147</sup> Indeed, one way to conceptualize protest movements like Black Lives Matter is as a collective effort to assert the rights that members of their community cannot assert as individuals without risking police harassment, arrest, or worse.

### III. HOW THE COURT WENT WRONG: WHEN THE RUGGED INDIVIDUAL'S VIRTUES BECOME A VICE

From both a normative and empirical perspective, therefore, the Court's use of the rugged individual archetype to define the exercise of Fourth Amendment rights has thwarted the very values of dignity and autonomy that the archetype is intended to protect and promote. This disconnect between constitutional theory and reality has not gone unnoticed within the Court. Some Justices have called for a more "realistic assessment of the nature of the interchange between citizens and the police"<sup>148</sup> and have variously characterized the Court's findings that a citizen in a search and seizure setting could have asserted his or her rights as "reasoning [that] borders on sophism,"<sup>149</sup> "rooted more in fantasy than . . . the record,"<sup>150</sup> "profoundly unwise,"<sup>151</sup> and having "an air of unreality" with "little sign" of common understanding.<sup>152</sup>

Justice Souter in his dissent in the bus "interview" case was especially skillful in performing a psychological autopsy on the majority's conclusion that a reasonable person would have felt free to ignore the officer's inquiries.

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147. See Jonathan Capehart, *From Trayvon Martin to 'Black Lives Matter'*, WASH. POST: POSTPARTISAN (Feb. 27, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter> [<http://perma.cc/3JRP-MEA2>]; Jordan Fabian, *Obama's Toughest Challenge: Healing Racial Divide*, HILL (July 12, 2016, 6:00 AM), <http://thehill.com/homenews/administration/287316-obamas-toughest-challenge-healing-racial-divide> [<https://perma.cc/QJ4E-AR47>]; Claudia Rankine, *The Condition of Black Life Is One of Mourning*, N.Y. TIMES MAG. (June 22, 2015), <http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html> [<http://perma.cc/F3FA-ZT7P>] (discussing origins of the Black Lives Matter movement). For a thoughtful look at how these issues can be incorporated into the teaching of criminal procedure, see Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race Into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016).

148. *Schneekloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).

149. *Florida v. Bostick*, 501 U.S. 429, 450 (1991) (Marshall, J., dissenting).

150. *INS v. Delgado*, 466 U.S. 210, 229 (1984) (Brennan, J., concurring in part and dissenting in part).

151. *California v. Hodari D.*, 499 U.S. 621, 630 (1991) (Stevens, J., dissenting).

152. *United States v. Drayton*, 536 U.S. 194, 208, 210 (2002) (Souter, J., dissenting).

Souter showed step-by-step how the only “reasonable inference”<sup>153</sup> to draw when the passengers were told that the police were “conducting [a] bus interdiction”<sup>154</sup> during which they “would like . . . cooperation,” was “that [the police] would prefer ‘cooperation’ but would not let the lack of it stand in their way.”<sup>155</sup> In reaching that conclusion, Souter demonstrated how the various factors that the majority had relied upon to find that passengers would have felt free to go about their business—for example the officer’s quiet tone—were in fact quite irrelevant, because “[a] police officer who is certain to get his way has no need to shout.”<sup>156</sup> The end result of Souter’s analysis of a bus passenger within the cramped confines of a Greyhound bus confronted by three drug interdiction officers was: “No reasonable passenger could have believed that [he was free to ignore the police], only an uncomprehending one.”<sup>157</sup>

These objections, however, are almost invariably made in dissents. Why, then, might the Court have travelled down this path with its pernicious effects? If the rugged individual archetype is not in accord with the day-to-day reality of how individuals interact with the police, why does the Court continue to turn to the archetype as its constitutional measure for the assertion of Fourth Amendment rights? Several explanations are possible.

**A. The Empathy Gap: When the Fourth Amendment Is Interpreted by “the [S]ophisticated, the [K]nowledgeable, and . . . the [F]ew”<sup>158</sup>**

One possibility is that because of their societal status and background, a majority of the Justices and those of a similar professional class simply are out of touch with what it is like to interact with law enforcement in situations like those that arise in the cases. That is, an inequality gap exists for constitutional rights as in many other societal areas, only in this case it is an empathy gap.<sup>159</sup>

153. *Id.* at 211.

154. *Id.*

155. *Id.* at 211, 212.

156. *Id.* at 212.

157. *Id.* Although Justice Souter found *INS v. Delgado*, 466 U.S. 210, 212 (1984), (the case upholding “factory surveys”) to be distinguishable on the facts, he prefaced his discussion of *Delgado* with the statement, “[w]hether that opinion was well reasoned or not.” *Drayton*, 536 U.S. at 213 (Souter, J. dissenting). One need not be an overly astute reader of Supreme Court cases to be fairly confident that Souter fell in the “or not” camp.

158. *Schneekloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).

159. See Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1 (2009). The works of Professor Susan Bandes are particularly insightful for understanding the importance of empathy in judging. See, e.g., Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133; Susan A. Bandes, *Moral*

As one judge observed in a remarkably candid dissent from the majority's approval of the warrantless placing of a GPS tracking device on a car in the defendant's driveway:

There's been much talk about diversity on the bench, but there's one kind of diversity that doesn't exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live. Yet poor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. Whatever else one may say about [the defendant], it's perfectly clear that he did not expect—and certainly did not consent—to have strangers prowl his property in the middle of the night and attach electronic tracking devices to the underside of his car. No one does.

When you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep. But the Constitution doesn't prefer the rich over the poor; the man who parks his car next to his trailer is entitled to the same privacy and peace of mind as the man whose urban fortress is guarded by the Bel Air Patrol. The panel's breezy opinion is troubling on a number of grounds, not least among them its unselfconscious cultural elitism.<sup>160</sup>

This critique is especially poignant and relevant when applied to police-citizen interactions. Even with the enhanced security at airports and other venues, it is a safe wager that the likelihood that a Justice has had a confrontational encounter with law enforcement, let alone an experience like a “factory survey” or a Greyhound bus “interview,” is miniscule; even a traffic

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*Imagination in Judging*, 51 WASHBURN L.J. 1 (2011). Also see Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); Emily J. Gould, *The Empathy Debate: The Role of Empathy in Law, Mediation, and the New Professionalism*, 36 VT. B.J. 23 (2010); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); and Louise Altman, *What Blocks Our Empathy?*, INTENTIONAL WORKPLACE (Sept. 25, 2014), <https://intentionalworkplace.com/2014/09/25/what-blocks-our-empathy> [<http://perma.cc/GF4L-LHKB>]; Jill Suttie, *Do We Need More Empathic Judges?*, GREATER GOOD MAG. (June 22, 2016), [http://greatergood.berkeley.edu/article/item/do\\_we\\_need\\_more\\_empathic\\_judges](http://greatergood.berkeley.edu/article/item/do_we_need_more_empathic_judges) [<https://perma.cc/J6MC-UN7C>].

160. *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).



stop is unlikely, let alone a stop during which the Justice is likely to be asked to consent to a search.<sup>161</sup>

Justices also are far more likely to live in neighborhoods and to socialize and commute to work in ways that minimize random encounters with law enforcement that would require individual assertiveness. Odds are far greater that any encounters with law enforcement officers will be of a nature where it is the officer who is deferential to the Justice rather than the Justice needing to be assertive. And the chance that officers will mistakenly beat on their door yelling “police” as happened to Hollis King is almost nonexistent for a resident of an upscale neighborhood or a building with a doorman. A Supreme Court Justice imagining himself or herself as the rugged individual standing up to the police in the contexts in which the cases usually arise, therefore, is more of a Walter Mitty exercise than a channeling of actual experience.<sup>162</sup>

Moreover, to the extent that politically and financially powerful individuals do have encounters with law enforcement, they are far more likely to be in a position to assert their rights. This is in part because high-income individuals subject to police searches or questioning are usually the target of long-term investigations where the individual or business are already aware of the unfolding investigation and have lawyers involved. But even in an unanticipated encounter, a person of means would have a significant advantage in asserting their rights. Part of this would be because of an attitudinal advantage: A person who is accustomed to making the legal and political system work for him or her will be more inclined to believe that an assertion of their

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161. Justice Roberts, for example, during oral argument in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), indicated that he was not even familiar with the mechanics of a traffic stop. See Cristian Farias, *The Chief Justice Has Never Been Pulled Over in His Life*, SLATE (Feb. 11, 2015, 9:36 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/02/chief\\_justice\\_john\\_roberts\\_has\\_never\\_been\\_pulled\\_over\\_rodriguez\\_v\\_united.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/chief_justice_john_roberts_has_never_been_pulled_over_rodriguez_v_united.html) [https://perma.cc/YK6C-NQFV]. Perhaps reflecting her experience as a prosecutor and trial judge, Justice Sotomayor, on the other hand, made clear that she was quite familiar with the nature of a traffic stop. *Id.*

162. Interesting scholarship suggests that to the extent the Justices do share experiences with litigants—such as the possibility that one’s cell phone data is being data-mined—that the closing of the empathy gap leads to more favorable outcomes for the citizen. See John Hasnas, *Is Moral Imagination the Cure for Misapplied Judicial Empathy?* *Bandes, Bastiat and the Quest for Justice*, 51 WASHBURN L.J. 25 (2011); Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40 (2014); Tamara Rice Lave, *Protecting Elites: An Alternative Take on How United States v. Jones Fits Into the Court’s Technology Jurisprudence*, 14 N.C. J.L. & TECH. 461 (2013); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887 (1996); Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415 (2012).

rights will be meaningful. And, of course, that person will also possess a resource advantage, not only in the ability to hire an attorney, but because in many cases the individual will have a pre-existing attorney-client relationship from prior business or personal matters to which they can readily turn. In short, it is far easier to envision being the rugged individual and asserting one's rights when Williams & Connolly is on your speed dial or if one has recently lunched with the Chief of Police at the Rotary Club than if you hail from a community that sees one out of three young men arrested and one out of nine eventually incarcerated.<sup>163</sup>

## B. The Aspirational View of Constitutional Rights

A second possibility is that the Court wants the Bill of Rights to be aspirational, that the Justices fully understand that the invocation of the Fourth Amendment often will exceed many citizens' grasp, but believe that an aspirational model will in the long run lead to more robust constitutional rights. The idea is that requiring citizens to actively invoke their rights produces a citizenry energetically engaged in the constitutional process by becoming personally invested through their actions. Recall that Justice Kennedy justified making a defendant affirmatively assert his refusal to consent by claiming that:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. *It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding.* When this exchange takes place, it dispels inferences of coercion.<sup>164</sup>

This conception has something of the feel of a constitutional weightlifting regime: both the citizen and the Constitution grow stronger if the citizen is required to actively exercise their rights. In other words, we want the citizenry at times to have to actively say “no” to the government, both as a way of ensuring that citizens exercise their rights and as a means of actively

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163. See Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> [<https://perma.cc/CB3T-F598>].

164. *United States v. Drayton*, 536 U.S. 194, 207 (2002) (emphasis added).

reminding government actors that constitutional limits exist that citizens can insist be observed.<sup>165</sup>

Otherwise, the argument would proceed, the citizenry will become lazy and take its rights for granted, much in the fashion that a mechanically recited religious ritual loses its meaning.<sup>166</sup> Constitutional rights, in this sense, are rights to be continually earned, not just bestowed. To draw off of Professor Darryl Brown's insights into how the current criminal justice system often mimics free-market *laissez faire* principles,<sup>167</sup> the aspirational view can be seen as reflecting the basic premise that if one wants to reap a reward, he or she needs to put some skin in the game and earn it through personal responsibility and effort.

And if the aspirational objective is to have citizens actively exercise their rights to make for a more robust democracy, then the use of the rugged individual as a constitutional archetype makes sense. The rugged individual is the person who intuitively understands his rights and liberties and who—uncowed by authority—will insist that government agents respect his rights. Indeed, it might very well be true that if every citizen could act like the rugged individual by insisting during police-citizen encounters that her rights be honored, American democracy would be strengthened.<sup>168</sup>

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165. See Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393 (2013). Professor Eric Miller has written thoughtfully about the importance of what he calls "contestatory democracy" and the value that adheres to having citizens object and challenge police actions. See Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 357–58. He also fully recognizes, however, that given current criminal procedure doctrine and the realities of police-citizen dynamics, fulfilling the ideal of contestatory democracy may be unrealistic for minorities and women unless changes are made in police practices. See generally Eric J. Miller, *Police Encounters With Race and Gender*, 5 UC IRVINE L. REV. 735 (2015).

166. Justice Frankfurter, for example, expressed concern that applying constitutional rights with "mechanical rigidit[y]" could cause the right to become a "legal formalism" or "empty verbalism[.]" *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279–80 (1942). A rough parallel also might be made to how some pioneers of the feminist movement in the 1960s and 1970s worry that the current generation of women do not sufficiently appreciate the gains that were won by the feminist movement, and thus may be in danger of back-slipping. See, e.g., Jamie Calloway-Hanauer, *What Steinem and Albright Get Wrong About Today's Feminists*, SOJOURNERS (Feb. 10, 2016), <https://sojo.net/articles/what-steinem-and-albright-get-wrong-about-todays-feminists> [<https://perma.cc/2FTL-QMR9>].

167. See DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2016).

168. Professor Alice Ristroph makes the intriguing argument that constitutional criminal procedure has improperly become focused on regulating the police rather than being understood as empowering an individual citizen's act of resistance. Alice Ristroph,

The aspirational model, however, only works if the citizenry as a whole can realistically and safely meet the aspiration. Whether the rugged individual ever was an obtainable aspiration would make for an interesting historical inquiry. If we limit ourselves to the citizens of de Tocqueville's time<sup>169</sup>—a historical period that also did not have professionalized police forces armed with military equipment and financially incentivized to search and seize<sup>170</sup>—perhaps the average citizen did have the societal status necessary to show such fortitude. But now that we live in a far different world with societal and psychological realities that render the rugged individual less an aspirational figure than a mythical character, we must take into account another oft-quoted Frankfurter statement: To say that one possesses a right but to then make it so difficult to exercise that it cannot credibly be obtained is to “keep the word of promise to the ear . . . and break it to their hope.”<sup>171</sup>

Importantly, objecting to tying the exercise of constitutional rights to an unattainable aspirational ideal does not mean accepting a view of the citizen as a weak individual who cannot make her own decisions. Rather, the objection is that the exercise of constitutional rights is not the place where the Court's motto should be that one's grasp should extend beyond one's reach, because the inability to realistically exercise a right poses a far graver danger than that

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*Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555 (2015). One possible additional benefit, therefore, would be that by viewing constitutional criminal procedure as aimed at resistance rather than regulation we would obtain a better sense of the underlying policies at stake. As a prism through which to understand constitutional criminal procedure, Ristroph makes a persuasive argument for using a resistance perspective, but she also readily agrees that as the case law currently stands, “[a]cross the doctrines of seizures, consent searches, and waivers of rights at interrogation, we see the Court contemplating resistance, and [then] foreclosing as much of it as possible.” *Id.* at 1615.

169. The question of citizenship at the time of the Constitution was a surprisingly complicated one, but the benefits of full citizenship such as voting and property rights were basically limited to those at the top of the social ladder, primarily property-owning white males. See generally James W. Fox Jr., *Citizenship, Poverty and Federalism: 1787–1882*, 60 U. Pitt. L. Rev. 421 (1999) (describing the evolving definition of who qualifies as a “citizen”).

170. For a sense of how forfeiture laws can be used to punish someone who tries to fulfill the rugged individual ideal by standing up to the police, see Christopher Ingraham, *Customs Agents Seized a Lawful Gun Owner's Truck Over Five Bullets. Now He's Suing to Get it Back*, WASH. POST (Sept. 13, 2017) [https://www.washingtonpost.com/news/wonk/wp/2017/09/13/customs-agents-seized-a-lawful-gun-owners-truck-over-five-bullets-now-hes-suing-to-get-it-back/?utm\\_term=.c9fc166ab9c3](https://www.washingtonpost.com/news/wonk/wp/2017/09/13/customs-agents-seized-a-lawful-gun-owners-truck-over-five-bullets-now-hes-suing-to-get-it-back/?utm_term=.c9fc166ab9c3) [<https://perma.cc/93LA-3HD2>], which chronicles the saga of an individual who at the border refused to give the code to unlock his phone which led to an extensive search and seizure of his truck based on bullets he was legally allowed to possess.

171. *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

of the citizenry growing lazy or weak in their constitutional fortitude. Placing the threshold for exercising a right beyond the average citizen's reach not only gives the government unrestrained power beyond the Founders' original intentions, but it also turns those rights into empty promises and creates a real peril that the citizenry loses constitutional faith.<sup>172</sup> Consequently, when defining whether a right like those conferred under the Fourth Amendment has attached or been invoked, the Court must approach the issue with a view of crafting a standard that ensures the citizen can invoke the right in a realistic manner, rather than expecting the citizen to play a role that is beyond their reach.

### C. Striking a Bargain: Curtailing Rights to Promote Law Enforcement

The Court has acknowledged that the concern of hampering police investigations and losing convictions is a primary factor in its constitutional rights calculus. The *Schneckloth v. Bustamonte*<sup>173</sup> Court, for example, in declining to find that the Fourth Amendment requires a citizen be told that she has the right to refuse to consent to a search, was candid in acknowledging: "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."<sup>174</sup> The *Bustamonte* majority, therefore, struck its bargain in defining a voluntary consent search as necessitating only a finding that the individual was not "coerced" rather than that the individual knew she had the right to refuse.

The only way, however, that the Court can maintain that it is not sacrificing the Fourth Amendment in the name of broader law enforcement power is to fall back on the rugged individual archetype who intuitively knows his rights and can affirmatively exercise them. Acutely sensitive to the charge that they were allowing the police to capitalize on the ignorance of the citizenry, the *Bustamonte* majority protested that their standard would take into account factors like "minimal schooling" and "low intelligence,"<sup>175</sup>

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172. A remarkable video project conducted by the Mandel Clinic and the Invisible Institute interviewing teenagers on the South Side of Chicago provides a vivid sense of how that disillusionment manifests itself in the attitudes of young African Americans who have been constantly subjected to police stops. *Youth/Police Project*, INVISIBLE INST., <https://invisible.institute/ypp> [<https://perma.cc/E99L-5BGK>]; see also Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL F. 125 (describing findings based on interviews of African American high school students).

173. 412 U.S. 218 (1973).

174. *Id.* at 227.

175. *Id.* at 248.

implying that without those handicaps, the citizen would be able to play the rugged individual and not feel coerced. The majority also fell back on the premise that the rugged individual would want to cooperate: “[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.”<sup>176</sup>

This justification comes back full circle to whether any empirical justification exists for the Court’s assumption that the average citizen, let alone a minority citizen acting against a long history of police interactions with the minority community, could in fact be the rugged individual. As noted earlier, Justice Marshall in *Bustamonte* served notice that the Court’s view of police-citizen encounters was unrealistic.<sup>177</sup> He also bluntly posed the question of whether the Court was striking an illicit bargain:

I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course, it would be “practical” for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.<sup>178</sup>

And, as we also now know, the empirical science has fully contradicted the Court’s continuing assumptions about how individuals would interact with police,<sup>179</sup> leading one commentator to raise the stark possibility that the Court is ignoring reality in order to reach a result the Fourth Amendment otherwise would not tolerate: “[T]he Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence.”<sup>180</sup> Fairness thus dictates

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176. *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971), *quoted in Schneckloth*, 412 U.S. at 243.

177. See *supra* note 122–123 and accompanying text.

178. *Schneckloth*, 412 U.S. at 288 (Marshall, J., dissenting).

179. See *supra* notes 124–130 and accompanying text.

180. Nadler, *supra* note 104, at 156. Alice Ristorph further explains:

The constitutional text leaves little room to deny that in theory, individuals have rights of noncooperation. But existing doctrine seeks to minimize the likelihood

that if the Court insists on continuing to use the rugged individual archetype to place the onus on the citizen to invoke her Fourth Amendment rights despite growing empirical evidence of the impracticality of such an expectation, that the Court must then explain how its search and seizure holdings retain constitutional legitimacy.

Moreover, if the Court's reliance on the rugged individual archetype is in part to enhance law enforcement power and safety, one must ask whether the Court is wise in promoting the idea that one's Fourth Amendment rights depend on an active assertion of those rights. Do we really want to require citizens to have to actively stand up to the police to assert their rights, especially when an increasing number of individuals are lawfully carrying weapons?<sup>181</sup> An afternoon spent viewing self-made videos of individuals insisting upon "going about their own business" may show that some people can meet the rugged individual archetype (and, indeed, relish it),<sup>182</sup> but the highly charged atmosphere evident in those encounters drives home both how difficult it is for the average citizen to stand up to the police and the

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that an individual will actually exercise those rights of resistance in the moment of the encounter with the police.... Broadly, these doctrines reflect a judgment about the permissible scope of state coercion: if the looming authority of the state writ large helps individual police officers secure cooperation, so much the better. This cooperation is not voluntary as we use that word in other contexts; it depends upon individuals' fear and ignorance.

Ristroph, *supra* note 168, at 1616.

181. See, e.g., Lou Michel, *City Police See Increase in Confiscated Guns in First 4 Months of 2016*, BUFFALO NEWS (May 25, 2016), <http://www.buffalonews.com/city-region/city-police-see-increase-in-confiscated-guns-in-first-4-months-of-2016-20160525> [<https://perma.cc/6DPM-899Q>]; Ines Novacic, *As Groups Police the Police, Some Add Guns to the Mix*, CBS NEWS (Jan. 22, 2015, 6:49 AM), <http://www.cbsnews.com/news/policing-the-police-and-adding-guns-into-the-mix> [<https://perma.cc/7HHU-8YQT>]; Jason Schreiber, *Increase in Fatal Police Shootings Raises Alarm*, SEACOASTONLINE (Aug. 3, 2014, 2:00 AM), <http://www.seacoastonline.com/article/20140803/NEWS/408030328> [<https://perma.cc/S9NT-RX3R>]. For a thoughtful look at the potentially explosive collision of an expanding Second Amendment with the Fourth Amendment, see Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015).
182. See, e.g., Amy B. Wang, *Open-Carry Advocates Walked Into a Police Station With a Loaded Rifle. Officers Were Not Amused.*, WASH. POST (Feb. 7, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/02/07/open-carry-advocates-walked-into-a-police-station-with-a-loaded-rifle-officers-were-not-amused/?utm\\_term=.e113dd59e81a](https://www.washingtonpost.com/news/post-nation/wp/2017/02/07/open-carry-advocates-walked-into-a-police-station-with-a-loaded-rifle-officers-were-not-amused/?utm_term=.e113dd59e81a) [<https://perma.cc/CX3M-HPTT>]; noplannedparenthood, *Resisting Tyranny in Texas CheckPoint We Must Fight This Federalism That Is Overtaking Our State.*, YOUTUBE (Oct. 26, 2012), <https://www.youtube.com/watch?v=fKVq0NMvYX0>; OnTheMoveShow, *Open Carry: Veteran Unlawfully Disarmed, Detained & Arrested | OnTheMoveShow*, YOUTUBE (July 4, 2014), <https://www.youtube.com/watch?v=e-cvipwCcm8>; sanderson1611, *Man Refuses to Cooperate With Unconstitutional Checkpoint*, YOUTUBE (Dec. 13, 2012), <https://www.youtube.com/watch?v=uw7xr9ezGxE>; TatorTot777, *Arrested for Open Carrying a Firearm*, YOUTUBE (June 25, 2016), <https://www.youtube.com/watch?v=Xk1L1BmPhhw>.

tension that is created when the onus is placed on the citizen to actively resist police commands. Indeed, given that officers are specifically instructed that to control an encounter they must establish dominance by projecting “an aura of confidence and decisiveness,”<sup>183</sup> asking citizens to stand up to the police is obliging them to challenge the very linchpin of what officers are taught is necessary to control a situation for their own personal safety.<sup>184</sup>

This dynamic is especially dangerous when it is minority citizens who are being required to actively assert Fourth Amendment rights. As Professors Godsil and Richardson have explained, the combination of racial anxiety on the part of both the officer and minority citizen creates a particularly volatile situation:

[R]acial anxiety can cause the officer to be more likely to interpret any ambiguous behaviors he or she observes as suspicious and threatening. There are at least two reasons for this. First, research demonstrates that anxiety increases the risk that people will interpret ambiguous stimuli as threatening . . . . If officers interpret ambiguous behaviors as indicative of criminality, they will approach the individual to investigate. When these interactions are with people of color, racial anxiety can cause cognitive depletion to occur more quickly. This is because officers already use significant executive resources to monitor their environment for potential threats. Racial anxiety adds to this cognitive load as officers become hyper alert for clues that they are being evaluated as racist.

Furthermore, officers who worry that people of color will evaluate them as racist likely also suspect that these individuals do not respect them and do not view them as legitimate. These worries can translate into officers experiencing concern for their safety. As a result, any signs of resistance, no matter how small, are more likely to be viewed as dangerous. Importantly, resistance does not have to be physical. Verbal resistance can take the form of questioning officers about the reasons for a stop or showing disrespect by mouthing off, otherwise known as “contempt of cop.” Indeed, officers already interpret verbal resistance as a potential

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183. Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies*, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 674 (2009).

184. See Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 369 (2001) (arguing that this approach “encourage[s] resistance and defiance, [and] create[s] hostility. . . . [It] begin[s] a spiral of conflict that increases the risks of harm for both the police and for the public”).



safety threat, and the experience of racial anxiety can exacerbate this concern.<sup>185</sup>

In sum, if the Court's use of the rugged individual archetype is an effort to strike a tradeoff of enhancing police investigative powers by making Fourth Amendment rights more difficult to exercise, it desperately needs to revisit the balance it struck over forty years ago in *Bustamonte*. The Court's new calculus will first have to account for the rising risk that any police-citizen encounter is increasingly likely to involve weapons on both sides of the encounter and produce tragic consequences if the citizen in fact acts the role of the rugged individual.<sup>186</sup> Additionally, the Court will have to incorporate into its balance the growing empirical evidence that requiring minority citizens to tell police they are going to "go about their business" is to exacerbate what already is too often a perilous situation.

#### IV. IN SEARCH OF A NEW FOURTH AMENDMENT ARCHETYPE

Up to this point, we have seen how the Court's continued reliance on the rugged individual archetype effectively disenfranchises many citizens from the Fourth Amendment's protections. The challenge then becomes how to craft an archetype<sup>187</sup> that better captures and protects the citizenry's exercise

185. Godsfil & Richardson, *supra* note 134, at 2248–49 (footnotes omitted).

186. The recent civil rights case of *Young v. Borders*, 850 F.3d 1274 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 640 (2018), illustrates the danger well. As in *King v. Kentucky*, the police banged on the door late at night, only this time—in rugged individual fashion—the occupant answered the door with a gun in his hand. Upon seeing the police officer, the occupant began to back away from the door and was shot and killed. The police officer testified that he thought the occupant was preparing to shoot him. Dismissing the § 1983 suit, the courts cited a number of grounds for qualified immunity, including the police officer's right to "knock and talk" when investigating a crime (the state conceded that the plaintiff was innocent of the crime being investigated). *Young*, 850 F.3d at 1284–87. The dissent, on the other hand, thought that the "aggressive tactics" of continually pounding on the door late at night without identifying themselves as police "crossed far over the line from a consensual visit into a warrantless raid." *Id.* at 1288 (Martin, J., dissenting). Whether or not the courts were correct in their legal rulings, the facts highlight the increasing probability of violence when police practices like "knock and talk" take place in the context of rising gun ownership and laws protecting the use of guns in self defense. See also Mark Joseph Stern, *The Second Amendment vs. the Fourth Amendment*, SLATE (Apr. 7, 2017, 1:31 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/04/why\\_liberals\\_should\\_be\\_alarmed\\_that\\_courts\\_are\\_eroding\\_the\\_second\\_amendment.html](http://www.slate.com/articles/news_and_politics/politics/2017/04/why_liberals_should_be_alarmed_that_courts_are_eroding_the_second_amendment.html) [<https://perma.cc/YPT3-HEP3>].

187. This retooling of the archetype has parallels to how the conceptualization of the "reasonable person" can change the operation of defenses such as self-defense and heat of passion. See generally CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003) (showing how the "reasonable man"

of their Fourth Amendment rights. Two options offer themselves: (1) reconfigure the rugged individual archetype to better promote Fourth Amendment values; or (2) turn to an entirely different archetype.

**A. Recognizing That Even the Rugged Individual Needs Help Now and Then: Taking Context and Psychological Realities Into Account**

As the initial examination of the heroic rugged individual revealed, in the proper context the rugged individual archetype can embody and express values that promote underlying constitutional rights. The values of dignity, autonomy, and freedom from unwarranted interference, for example, are furthered when the rugged individual is invoked in the contexts of self-representation,<sup>188</sup> the right to confrontation,<sup>189</sup> and even in the Fourth Amendment when used to flesh out why the police should not have unbridled discretion to demand that a citizen give a “good account” of herself.<sup>190</sup> The difficulty is that the very values that the rugged individual archetype is intended to promote are perversely undermined when the citizens are expected to act in a certain manner that is beyond their realistic abilities.

The Court faced a similar challenge in using the rugged individual archetype when deciding whether the Sixth Amendment provided indigent defendants a right to counsel. In his various opinions arguing for the right's existence, Justice Black masterfully demonstrated how the rugged individual can be portrayed in a manner far more in keeping with the archetype's underlying values. As it turns out, Justice Black had a particular knack for portraying a citizen-defendant as a sympathetic figure: an Everyman caught up in events, doing his best to be the rugged individual through self-sufficiency and grit, but who, because of the government's overwhelming power, could not do so. Consequently, instead of showing little tolerance for the individual who does not live up to the Court's idealized standard and viewing him as unworthy of the constitutional right, Justice Black approached the citizen-defendant as someone who wanted to be the heroic rugged individual while also recognizing that sometimes even the rugged individual needs an assist. Examining Black's use of the archetype shows how a more

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standard has operated to exclude minority perspectives in the development of the criminal law).

188. See *supra* notes 13–40 and accompanying text.

189. See *supra* notes 41–57 and accompanying text.

190. See *supra* notes 58–71 and accompanying text.

nuanced application creates the possibility for using the archetype in a way that acknowledges that many citizens will not be able to fulfill the idealized archetype's role.

In *Johnson v. Zerbst*,<sup>191</sup> John Johnson and a co-defendant were federally prosecuted for passing counterfeit money. Because it was a federal prosecution, they had been entitled to a lawyer but had been unrepresented because they did not know that they had a right to representation. Johnson argued to the Supreme Court that he could not have validly waived his right to counsel because he was ignorant of its existence. Justice Black's description of the defendants was a sympathetic one: two young enlisted Marines on leave in Charleston, South Carolina, who after passing four counterfeit twenties suddenly found themselves facing serious criminal charges without "relatives, friends or acquaintances" nearby because they hailed from "distant cities."<sup>192</sup> Unable to make bail or afford a lawyer, they pleaded not guilty. Having "little education" and being "without funds," they had to defend themselves and were convicted and sentenced to four and one-half years in the federal penitentiary.<sup>193</sup> Adding a poignancy to his portrayal of the two young men finding themselves accused and friendless, Black quoted one defendant's description of his efforts at trial:

I tried to speak to the jury . . . I told the jury, 'I don't consider myself a hoodlum as the District Attorney has made me out several times.' I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for government service in New York. I said only fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.<sup>194</sup>

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191. 304 U.S. 458 (1938). Although the Court did not incorporate the right to counsel through the Fourteenth Amendment for state prosecutions until *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court in *Zerbst* recognized a right to have counsel appointed under the Sixth Amendment in federal prosecutions. See John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 9 (2013).

192. *Johnson*, 304 U.S. at 460.

193. *Id.*

194. *Id.* at 461. Black's use of the defendant's humble efforts in defending himself as evidence of the need to recognize a right to counsel is reminiscent of another instance when a less-than-successful speech also became evidence of the need for counsel. Lord Macaulay in his *History of England* recounted how a member of Parliament's argument for the right to counsel in treason cases benefitted from the very fact that the member was making his first speech and struggled because of it:

In the course of his speech he faltered, stammered, and seemed to lose the thread of his reasoning. The House, then, as now, indulgent to novices, and then, as now, well

The defendants tried to appeal, but because they had been put in isolation immediately after the conviction “as [was] the custom” in the district, they had missed the five-day deadline for filing a notice of appeal.<sup>195</sup>

Against this backdrop of the defendant's brief and halting insistence that he was neither a hoodlum nor from New York, Justice Black contrasted the demands of the “science of law”:

[The Sixth Amendment right to counsel] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer . . . may appear intricate, complex and mysterious. . . . “Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one.”<sup>196</sup>

Black concluded by forcefully rejecting the District Court's belief that it “unfortunate[ly]” could not provide habeas relief if the loss of right to counsel was due to the defendant's ignorance of the right. Such a view, Black noted ironically, would turn the right to counsel inside out:

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aware that, on a first appearance, the hesitation which is the effect of modesty and sensibility is quite as promising a sign as volubility of utterance and ease of manner, encouraged him to proceed. “How can I, Sir,” said the young orator, recovering himself, “produce a stronger argument in favour of this bill than my own failure? My fortune, my character, my life, are not at stake. I am speaking to an audience whose kindness might well inspire me with courage. And yet, from mere nervousness, from mere want of practice in addressing large assemblies, I have lost my recollection: I am unable to go on with my argument. How helpless, then, must be a poor man who, never having opened his lips in public, is called upon to reply, without a moment's preparation, to the ablest and most experienced advocates in the kingdom, and whose faculties are paralysed by the thought that, if he fails to convince his hearers, he will in a few hours die on a gallows, and leave beggary and infamy to those who are dearest to him!”

Thomas Babington Macaulay, 4 THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 582 (Harper & Brothers, Pub. 1856) (recounting maiden speech of Anthony Ashley Cooper in 1696), *quoted in* United States v. Plattner, 330 F.2d 271, 274 n.4 (2d Cir. 1964).

195. See *Johnson*, 304 U.S. at 462.

196. *Id.* at 462–63 (quoting *Powell v. Alabama*, 287 U.S. 45, 68, 69 (1932)).

The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.<sup>197</sup>

Consequently, a federal constitutional right like the right to counsel could be dispensed with only if a defendant waived it "competently and intelligently."<sup>198</sup>

It took a quarter of a century, but Black finally convinced the Court in *Gideon v. Wainwright*<sup>199</sup> to also extend the right to counsel to state prosecutions. Prior to *Gideon*, counsel would be constitutionally supplied in state cases only in special circumstances where the defendant was "incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like"<sup>200</sup>—or, in other words, situations where, by definition, the defendant was incapable of being the rugged individual. On the road to *Gideon*, Black labored diligently to make the point that all individuals accused of a crime, even the rugged individual, were in need of counsel. In making his point, he cast individual defendants as salt-of-the-earth people being asked to recite without preparation the science of the law's periodic table while trained legal scientists worked on the government's side.<sup>201</sup>

In *Betts v. Brady*,<sup>202</sup> for instance, the contrast between Justice Roberts's majority opinion and Black's dissenting opinion in their portrayals of Betts is striking. Roberts provides a barebones matter-of-fact account that Betts was "indicted for robbery," that he had requested counsel be appointed "[d]ue to lack of funds," and that the "judge advised him that this [could] not be done."<sup>203</sup> More importantly, Roberts saw Betts as a sufficiently rugged individual that did not need constitutional help: "[T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests . . . ."<sup>204</sup> Indeed, Roberts, apparently an early proponent of experiential

197. *Id.* at 465.

198. *Id.* at 468. *Johnson v. Zerbst* thus became the foundational cite for the principle that a constitutional right can only be waived if done so knowingly, intelligently, and voluntarily.

199. 372 U.S. 335, 340 (1963).

200. *Betts v. Brady*, 316 U.S. 455, 463 (1942).

201. See *supra* note 196 and accompanying text (Justice Black's discussion of a layperson's inability to deal with the "science of the law").

202. 316 U.S. 455.

203. *Id.* at 456–57.

204. *Id.* at 472.

legal learning, suggested that a guilty plea in a prior case made Betts more capable of standing up for himself because it meant he “was not wholly unfamiliar with criminal procedure.”<sup>205</sup>

Black, on the other hand, painted a picture of someone who was down and out, “a farm hand, out of a job and on relief.”<sup>206</sup> Black also was far more blunt in describing why Betts did not have a lawyer. While Roberts’s description sounds as if it came from an accounting statement, noting Betts did not hire a lawyer “due to a lack of funds,” Black opted for a simple unvarnished statement: “He was too poor to hire a lawyer.”<sup>207</sup> And Black was just as direct in describing the consequences:

Put to trial without a lawyer, he conducted his own defense, was found guilty, and was sentenced to eight years’ imprisonment. The court below found that the petitioner had “at least an ordinary amount of intelligence.” It is clear from his examination of witnesses that he was a man of little education.<sup>208</sup>

Black’s goal in these cases was to drag the Court away from its position that the average citizen generally did not need counsel to a recognition that the right to counsel had to be available to every citizen—even the rugged individual—to secure his other rights. In a quote reminiscent of Anatole France’s sardonic observation that “in its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets, and steal loaves of bread,”<sup>209</sup> Justice Black saw the failure to provide the right to counsel to indigent individuals as making the Bill of Right’s protections a mere facade for the poor: “[W]ould it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial . . . and yet say to him . . . that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him . . . ?”<sup>210</sup>

Black finally achieved his goal in *Gideon*, and it no doubt helped that Clarence Gideon in many ways acted the role of the rugged individual. Even after the trial judge had denied Gideon’s request for counsel by saying, “I am sorry, but I cannot appoint Counsel to represent you,” Gideon had stood up for himself insisting that, “The United States Supreme Court says I am entitled to be represented by Counsel,” and then proceeded to handwrite his own petition for

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205. *Id.*

206. *Id.* at 474 (Black, J., dissenting).

207. *Id.*

208. *Id.*

209. ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens trans., 1927) (1894).

210. *Carpenter v. Dane County*, 9 Wis. 274, 276–77 (1859), *quoted in Betts*, 316 U.S. at 476.

writ of certiorari.<sup>211</sup> The fact that Gideon believed, albeit incorrectly, that the Supreme Court had recognized such a right to counsel added to the feel that he was asking for no more than the Constitution required in order to give a person a fair shake. In other words, *Gideon* still very much kept with the idea of how the rugged individual should act, but simply acknowledged that the rugged individual cannot realistically be expected to be proficient at the “science of law.” Spicing his argument with a dash of American exceptionalism, Black cast the issue of right to counsel, therefore, not as the *Betts* majority’s question of whether there was anything deficient or lacking in the individual such as “feeble-mindedness,”<sup>212</sup> but as whether the Constitution would provide the means for a proud but poor citizen like Clarence Gideon to have a fair fight:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>213</sup>

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211. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

212. *Betts*, 316 U.S. at 463.

213. *Gideon*, 372 U.S. at 344. To herald Justice Black’s reasoning in *Gideon* is not to suggest that the holding was a panacea for the criminal justice’s shortcomings. See Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants’ Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2550 (2013) (arguing that *Gideon* has over

And with that reasoning, a citizen's right to have counsel so he could stand up to a government spending "vast sums" to take away his liberty, became kin to the other cases where the Court has seen itself as helping David stand up against Goliath.

In making his argument, Justice Black thus provided a different way to construct the rugged individual archetype. Rather than dismissing outright those who might not live up to the idealized rugged individual, Black persuasively forced the Court to recognize that the threshold question must be whether the rugged individual in the defendant's situation could exercise the right, otherwise the right itself was made into a "mockery." And because he was adept at characterizing defendants in a way that their inability to live up to the ideal of the rugged individual was not a moral failing but a result of the circumstances in which they found themselves, Black could adhere to the idea that value exists in requiring citizens to actively exercise their rights, but still insist that the ability to exercise the right must be a realistic one. Black's approach thus adds another dimension to understanding the rugged individual and how the archetype might be used in the Fourth Amendment.

One alternative, therefore, is to adapt the rugged individual so that he is aligned with Justice Black's characterizations of the everyday citizen, especially when approached by the police in an on-the-street setting without the opportunity for extensive reflection or consultation. This approach would not banish the rugged individual from the Fourth Amendment when it comes to police-citizen encounters, but would recognize, as Justice Black did, that even the rugged individual may not always be able to exercise his rights unless the right is interpreted in a manner that makes its assertion realistic. The citizen would become someone whom we should assume would live up to the civic ideals of the rugged individual, but who without the constitutional right's protection cannot exercise the very rights we wish to strengthen. The rugged individual, therefore, would be someone susceptible to the inherent pressures that adhere to a police encounter and reflect the unique dynamic of minority citizens confronted by an officer.<sup>214</sup>

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time become a "broken promise" because courts have used the case to justify the under-enforcement of Sixth Amendment adversarial rights).

214. See *supra* notes 131–147 and accompanying text (describing unique aspects of police encounters with minority citizens). Some judges have begun to express their dissatisfaction with the Court's failure to recognize the differences between citizen-police encounters based on the citizen's circumstances. See, e.g., *infra* note 222 (discussion of case arguing Fifth Amendment should recognize differences based on defendant's personal situation).



A distinct possibility exists, however, that the current rugged individual archetype is so entrenched in the Fourth Amendment that changing his character may prove not just challenging but impossible.<sup>215</sup> The Court might be especially averse to a reconceptualization of the rugged individual if the effort entails acknowledging that their idealized citizen might not have the fortitude to stand up to the government. The best alternative, therefore, may be to utilize a different archetype that more comprehensively captures underlying Fourth Amendment values in a twenty-first century world.

### **B. A New Archetype: The Rights-Bearing Citizen**

A different archetype would need to recognize that we live in a society where a great number of citizens will be at a considerable power disadvantage when dealing with the police in on-the-street encounters. The archetype would thus have to replace the rugged individual—an idealized individual primarily within reach of only a privileged segment of society—with a conceptualization that actively tries to ensure that every citizen, whatever their race, income, or neighborhood, is secure in her person and effects and has the autonomy to control their interactions with the police.

How the new archetype would look should spark a healthy debate precisely because the Court's choice of archetype requires a deep inquiry into what values are being promoted and discounted. This Article proposes an archetype of the rights-bearing citizen as a way to express the values at stake. In the Fourth Amendment context, this archetype envisions the citizen as an individual with an intrinsic right to be free from government interference so that if the government is to intrude upon their right, the government must justify and prove that the citizen was both capable of exercising her rights and given a full and free opportunity to do so.

The starting point, therefore, is a presumption that every citizen is actively exercising her Fourth Amendment rights, and the onus is on the Government to both justify the intrusion and to show that any waiver was

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215. Cf. *The Best Of – Home of Classic Music, The Who – Won't Get Fooled Again*, YouTube (Nov. 1, 2012), [https://www.youtube.com/watch?v=zYMD\\_W\\_r3Fg](https://www.youtube.com/watch?v=zYMD_W_r3Fg) ("Meet the new boss/same as the old boss."). The Court's experience with *Miranda v. Arizona*, 384 U.S. 436 (1966), may be a cautionary tale given the reemergence over time of the classic rugged individual in defining the Fifth Amendment privilege despite an initial depiction that was far more sympathetic to the effects of police interrogation on the everyday citizen. See Scott E. Sundby, *The Rugged Individual and the Privilege Against Self-Incrimination* (unpublished manuscript) (on file with author).

freely and knowingly given. As Justice Marshall observed in his *Schneckloth v. Bustamonte*<sup>216</sup> dissent: “The proper resolution [depends] on a realistic assessment of the nature of the interchange between citizens and the police, and of the practical import of allocating the burden of proof in one way rather than another.”<sup>217</sup> By focusing on the essential issue of whether the citizen has the realistic means to control the exercise of her constitutional right, the archetype allows the empirical and experiential realities of a citizen’s encounter with the police to be taken into account.

This archetype still captures the values underlying the rugged individual—including dignity, autonomy, and self-sufficiency—but frames them in a manner far more conducive to their exercise. Moreover, it can more directly and fairly take into account the situation of racial and ethnic minorities by stressing the need to find that the individual was genuinely able to exercise her right. Rather than a reconfiguring of the Fourth Amendment’s original intent, therefore, this archetype better vindicates the Framers’ original purposes. As Anthony Thompson has convincingly argued:

Judging from the history of the drafting and ratification of the Fourth Amendment, one of the primary concerns of the framers was that the state should not exercise its search powers against those who are not members of the established majority. The language of the amendment appears to have been a direct response to the concerns of political minorities of the time that a federal government would trample the individual rights of those groups or individuals who were held in disfavor. Thus, the amendment operated as a structural protection against unregulated police power.<sup>218</sup>

The rights-bearing citizen archetype has another distinct advantage over the rugged individual archetype for the Fourth Amendment. Reliance on an archetype like the rugged individual in contexts that effectively disenfranchises a segment of society from its constitutional rights inevitably causes a rupturing of the citizen-government trust necessary for a functioning democracy. If the foundation underlying our democracy is that the citizenry gives its consent to be governed and in return the government trusts the citizen to act responsibly,<sup>219</sup> the rugged individual archetype has it exactly

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216. 412 U.S. 218 (1973).

217. *Id.* at 289 (Marshall, J., dissenting).

218. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 991–92 (1999) (footnotes omitted).

219. See Scott E. Sundby, “Everyman”’s Fourth Amendment: *Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777–85 (1994) (detailing historical

backwards when it comes to who should bear the burden in justifying a Fourth Amendment intrusion. Because the government's legitimacy is derived from respect of the citizen as the source of its power, the onus must be on the government to ensure that a citizen is able to exercise her rights.

One might illustrate the difference in the archetypes by returning to a statement that Justice Kennedy made in arguing in defense of requiring the citizen to affirmatively tell a police officer he does want to cooperate:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.<sup>220</sup>

Justice Kennedy's basic principle that "the concept of agreement and consent" should be accorded "a weight and dignity of its own" is an important one. Because he envisions the rugged individual as the citizen, however, his statement ends up an incomplete exposition of the democratic and republican values at stake. A Justice with the rights-bearing citizen in mind would use an editing pen to make some critical additions:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the *police* to advise the *citizen* of her *rights under the Constitution*, of the *officer's willingness to abide by and honor her wishes*, and for the police to act in reliance on that understanding. When this exchange takes place *in a situation in which the citizen realistically can decide whether or not to waive her right*, it dispels the coercion.

Exactly how the Court's current Fourth Amendment doctrine would change with a rights-bearing citizen instead of the rugged individual as the archetype would have to be worked out over the run of cases. Some changes would be immediately self-evident: Police, for example, would need to inform a citizen that she has the right to refuse a search in a manner that provides

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argument that American republicanism is based on reciprocal trust between the citizenry and government).

220. *United States v. Drayton*, 536 U.S. 194, 207 (2002).

adequate assurances that her refusal will carry no consequences;<sup>221</sup> and a Fourth Amendment seizure would now be recognized as occurring in circumstances where a citizen without privilege would not realistically feel free to not cooperate with the police.<sup>222</sup> The Court might also find that the rights-bearing citizen archetype would require the police to be able to articulate an “objective credible reason”<sup>223</sup> even before approaching a citizen to ask questions, and to then be allowed to ask for a consent search only if the police possessed a “founded suspicion that criminality is afoot.”<sup>224</sup> The archetype should also lead the Court to revisit its decision permitting custodial arrests for minor offenses<sup>225</sup> and its cases that have allowed *Terry* stop-and-frisks to

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221. See, e.g., *State v. Trainor*, 925 P.2d 818, 828 (Haw. 1996) (holding that under state constitution consent cannot be found unless “the person encountered was informed that he or she had the right to to decline to participate in the encounter and could leave at any time” (quoting *State v. Kearns*, 867 P.2d 903, 909 (Haw. 1994))); *Penick v. State*, 440 So. 2d 547, 549 (Miss. 1983) (holding that under state constitution an individual must be “cognizant of her rights” to be a lawful consent search (emphasis omitted) (quoting *Smith v. State*, 98 So. 344, 345 (Miss. 1923))). The warning should include an express assurance that the individual has the right to decline the search and structured in a way that the officer is not biasing the decision towards consent. One possibility is to create a Fourth Amendment “app” using technology to minimize the coercive influence of the officer giving the warning and obtaining the waiver. See generally Andrew Guthrie Ferguson & Richard A. Leo, *The Miranda App: Metaphor and Machine*, 97 B.U. L. REV. 935 (2017) (proposing the use of a digital medium between the police and the suspect in explaining and obtaining a waiver of *Miranda* rights).
222. As one judge recently argued in a *Miranda* context:  
 Would it not be more consistent with the values that the Fifth Amendment has traditionally been understood to protect . . . to require the trial court to make fact-specific findings as to what a motorist in the given circumstances would reasonably have expected from his encounter with police? Shouldn't a trial court at least consider the need to distinguish, for purposes of assessing the reasonable feelings and expectations of the wayfarer, between the white businessman stopped in his Mercedes as he drives along [upscale] Brickell Avenue at lunchtime, and the teenager of color [like the defendant] stopped on his bicycle as he pedals through a low-income neighborhood at dusk?  
*State v. Santiago*, No. F16-18479, 2017 WL 449266, at \*4 (Fla. Cir. Ct. Jan. 24, 2017) (Hirsch, J.) (order denying defendant's motion to suppress).
223. See *People v. De Bour*, 352 N.E.2d 562, 572 (N.Y. 1976) (holding based on state's common law).
224. *People v. Hollman*, 590 N.E.2d 204, 210 (N.Y. 1992) (holding based on state's common law); see also *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002) (holding that under state constitution officer must have reasonable suspicion during automobile stop to request consent).
225. This change would necessitate an overruling of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), allowing custodial arrests even for non-jailable offenses. For a critique of *Atwater* as violating the principle of legality, see Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 STAN. L. REV. 987 (2014). Also see Conor Friedersdorf, *End Needless Interactions With*

become so ubiquitous;<sup>226</sup> both of these doctrines have granted the police too easy a bypass round a citizen's right to be free from unreasonable searches and seizures. An approach recognizing the difficulty that citizens, especially those of certain communities, face in having their Fourth Amendment rights honored in day-to-day street encounters<sup>227</sup> may also require that civil remedies be made more responsive to low-level violations that the exclusionary rule generally will not reach; this may mean that section 1983 will need to be structured to allow class action suits, presumed damages, and the greater availability of injunctive relief.<sup>228</sup> The archetype would not mean, of course, that citizens could never waive their rights during on-the-street encounters, but the approach would be one that assumes that the way to strengthen constitutional rights is to first and foremost ensure that the citizen is given a realistic opportunity to exercise her rights.

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*Police Officers During Traffic Stops*, ATLANTIC (July 8, 2016), <https://www.theatlantic.com/politics/archive/2016/07/end-needless-interaction-with-cops-during-traffic-stops/490412> [<https://perma.cc/WA5K-SNXB>].

226. At a minimum, the Court might unambiguously rule that an amorphous observation, for example that a citizen appeared nervous, was insufficient to constitute reasonable suspicion. See, e.g., *Carty*, 790 A.2d at 912–13. Or, the Court might not allow *Terry* stops for petty offenses. See Alexandra Natapoff, *A Stop Is Just a Stop: Terry's Formalism*, 15 OHIO ST. J. CRIM. L. 113 (2017) (arguing that *Terry* stops for misdemeanors have proven to be especially pernicious). The Court might even find it necessary to review *Terry*'s soundness in light of its doctrinal foundations and implementation in the ensuing fifty years. Cf. *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (critiquing the Court's "stop-and-frisk" doctrine in *Terry v. Ohio*, 392 U.S. 1 (1968)). Also see Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998), and Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988) (critiquing *Terry*'s doctrinal foundation).
227. See, e.g., *supra* note 172 (documenting the daily interactions of police stopping minority youth).
228. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811–16 (1994) (outlining various means through which civil remedies might be strengthened to address Fourth Amendment violations). Although Professor Amar raises these means as a substitute for the exclusionary rule, they also could be used in a complementary fashion with exclusion by allowing the addressing of violations where exclusion would not be possible because no evidence was found. See Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 571, 571 (2013) (suggesting the use of specialized constitutional small claims courts).

The approach advocated by this Article would also benefit greatly by enhanced administrative and legislative oversight of policing that a number of scholars have advocated. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016).

## CONCLUSION

This Article's mapping of the rugged individual's trek through the Court's holdings has highlighted the Court's increasing tendency to use the rugged individual archetype as a touchstone for defining how a citizen's Fourth Amendment right must be invoked. The point of the travelogue is not that the rugged individual should be exiled from the Bill of Rights; indeed, the heroic rugged individual can be a powerful way to understand a right and helpful as a rhetorical tool for explaining why a procedure should be interpreted broadly to serve as a check on government power. The themes of a 'fair fight' and autonomy that the archetype raises in the courtroom context often add an essential perspective in understanding a right, and further travels for the rugged individual can readily be imagined. The Court's recent decision limiting the Government's use of forfeiture laws to affect one's choice of counsel, for example, strongly reverberates with the heroic rugged individual's themes and may open a new frontier for the rugged individual where the defendant is indigent.<sup>229</sup> Even within the Fourth Amendment, the rugged individual may play an important role when looking at suspicionless government intrusions such as those involving drug testing or taking of DNA samples.<sup>230</sup>

Rather, this examination of the rugged individual's role has demonstrated the need to understand that the rugged individual archetype operates in a far different fashion in Fourth Amendment citizen-police encounters. In the on-the-street context, the archetype actively undermines the values it is intended to promote—dignity and autonomy—especially for segments of

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229. *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (characterizing the Sixth Amendment right to counsel of one's own choice as fundamental because of the "critical importance of trust" that a defendant must place in his lawyer to present his case); *see also* *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting) ("[An] individual has the right to choose the advocate he believes will most ably defend his liberty at trial."). *See generally* Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525 (2007).

230. Administrative or "special needs" searches implicate the Fourth Amendment in a different manner than searches and seizures directed at individuals on the street. *See* Sundby, *supra* note 226, at 418–20 (explaining the difference between "initiatory" and "responsive" searches for Fourth Amendment purposes). Because individual objection to the procedure is usually not allowed, challenges to the practice as violative of basic norms may be best expressed through the rugged individual archetype. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (objecting to suspicionless DNA testing because he doubted that "the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection").

the population where assuming the role of the rugged individual is either unrealistic, dangerous, or both. This is not an idle academic concern. Imposing an unrealistic expectation on how a citizen is to act to enjoy the protection of a constitutional right actively undercuts the foundations of the citizenry's trust and confidence in the government that are essential to keeping our system of government robust. The time has come for the Court to embrace a new archetype for defining rights in police-citizen interactions that reflect twenty-first century realities. This Article has proposed an archetype of the rights-bearing citizen as a way to start conceptualizing how to bring the Fourth Amendment more in line with the Founders' intentions.

So by all means let us celebrate Dollree Mapp, but let us herald her precisely because she was remarkable in showing a fortitude and resolve that would be beyond most of us. May she and her personification of the rugged individual rest in peace.