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STORMING THE CASTLE: *FERNANDEZ V. CALIFORNIA* AND THE WANING WARRANT REQUIREMENT

*Joshua Bornstein**

I. INTRODUCTION

“The ‘war on terror’ has come home.”¹ Surplus military hardware is being given to local police through the 1033 Program.² Trained in military tactics, donning military-style clothing and semi-automatic weapons, and driving mine-resistant ambush protected (MRAP) vehicles, the police have become “militarized.”³ Shielding American citizens from this new breed of “warrior cop” stands the constitutional protections enumerated in the Fourth Amendment and its warrant requirement.

The Fourth Amendment states:

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,

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1. See Alex Kane, *11 Chilling Facts About America’s Militarized Police Force*, SALON (Jul. 4, 2014, 5:00 AM), http://www.salon.com/2014/07/04/11_disturbing_facts_about_americas_militarized_police_force_partner/.

2. See *Department of Defense Excess Property Program (DoD 1033)*, MO. DEP’T OF PUB. SAFETY, <http://www.dps.mo.gov/dir/programs/cjle/dod.asp> (last visited Jan. 21, 2015) (explaining that the 1033 Program provides surplus Department of Defense military equipment to state and local civilian law enforcement agencies); Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS & WORLD REP. (Aug. 14, 2014 10:13 AM), <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>.

3. See AM. CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* 45 (2014), available at <https://www.aclu.org/criminal-law-reform/war-comes-home-excessive-militarization-american-police-report>.

and particularly describing the place to be searched, and the persons or things to be seized.⁴

Once axiomatic, early Fourth Amendment jurisprudence upheld the proposition that “a man’s house is his castle” such that “[t]he poorest man may in his cottage bid defiance to all the forces of the Crown.”⁵ Yet this maxim has become anachronistic. In its place, a looser reasonableness standard has taken hold of the Court.⁶

At issue in *Fernandez v. California*⁷ was the reasonableness of a warrantless search of a home by police.⁸ After a physically present tenant refused consent to a warrantless search of his residence, he was subsequently removed by those same officers. Police thereafter obtained consent from his cotenant to a warrantless search of the premises.⁹ The United States Supreme Court held that, because the objecting occupant was lawfully removed, police acted reasonably in seeking consent from the remaining co-occupant.¹⁰ In doing so, the Court narrowed the holding of *Georgia v. Randolph*¹¹ by requiring that the objecting occupant remain physically present in order to vitiate another co-occupant’s countermanding consent to a warrantless search of the home.¹² While the result of *Fernandez* may have been predictable by some,¹³ one must look to the larger social landscape in order to fully grasp the implications of its holding.

Modern police have become “militarized.” Accordingly, they may act as if they have military power. As such, the police may treat ordinary citizens as enemy combatants. With more sophisticated weaponry, the police have become more dangerous. Therefore, having the police invade homes produces the potential for greater risks of actual or perceived police abuse than ever before. After *Fernandez*, only the most vigilant citizens, standing guard—and remaining physically present at the threshold of their homes—can

4. U.S. CONST. amend. IV.

5. *Miller v. United States*, 357 U.S. 301, 307 (1958).

6. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) (rejecting the application of the Warrant Clause and assessing the reasonableness of police officer’s “stop and frisk” of Petitioner).

7. 134 S. Ct. 1126 (2014).

8. *Id.* at 1130–31.

9. *Id.* at 1130.

10. *Id.* at 1136–37.

11. 547 U.S. 103 (2006) (discussed in detail *infra* Part III).

12. *Id.* at 1134–35.

13. *See* Orin Kerr, *My Thoughts on Fernandez v. California*, VOLOKH CONSPIRACY (Nov. 5, 2013, 5:32 PM), <http://www.volokh.com/2013/11/05/fernandez-v-california/> (discussing why author believes the State would prevail).

ensure that their privacy remains undisturbed from intruding government eyes and invasive warrantless searches.

Part II of this Comment discusses the factual background of *Fernandez*. Part III examines the historical background of consent searches. Part IV analyzes the Supreme Court's reasoning in *Fernandez* whereas Part V analyzes its ramifications. Finally, Part VI concludes that while the Supreme Court correctly decided *Fernandez* based upon precedent, the decision ignores current societal realities and fails to appreciate the unintended consequences that may result from it.

II. STATEMENT OF FACTS

On October 12, 2009, at about 11:00 a.m., Abel Lopez cashed a check in Los Angeles, California.¹⁴ A man, who was later identified as petitioner Walter Fernandez, approached Lopez. After a brief altercation, Fernandez took out a knife and cut Lopez on the wrist.¹⁵ Three or four men ran out of from a nearby building, hit Lopez repeatedly, and took his phone and wallet.¹⁶

Several minutes later, police and paramedics arrived. An unidentified man directed the police to a nearby apartment building.¹⁷ Detective Kelly Clark and Officer Joseph Cirrito heard screaming coming from one of the building's units.¹⁸ Clark and Cirrito knocked on the door.¹⁹

Roxanne Rojas opened the door holding a baby.²⁰ Rojas's face was red and she had a bump on her nose.²¹ She appeared to have been crying.²² Fresh blood was visible on her shirt.²³

Officer Cirrito asked Rojas if she would step outside of the apartment.²⁴ Walter Fernandez, wearing only boxer shorts, then appeared at the threshold of the door.²⁵ Fernandez stated, "You don't

14. *People v. Fernandez*, 145 Cal. Rptr. 3d 51, 52 (2012).

15. *Id.* at 53.

16. *Id.*

17. *Fernandez*, 134 S. Ct. at 1130.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

have any right to come in here. I know my rights.”²⁶ Officer Cirrito removed Fernandez from the house and placed him under arrest.²⁷

Approximately one hour after Fernandez’s arrest, Detective Clark returned to the apartment and informed Rojas that Fernandez had been arrested.²⁸ “Detective Clark requested and received both oral and written consent from Rojas to search the premises.”²⁹ In the apartment, the police found gang paraphernalia, a butterfly knife, boxing gloves, black pants, and a light blue shirt.³⁰ “None of the items stolen from the victim was ever found.”³¹

Walter Fernandez was charged with robbery; infliction of corporal injury on a spouse, cohabitant, or child’s parent; possession of a firearm by a felon; possession of a short-barreled shotgun; and felony possession of ammunition.³² Before trial, Fernandez moved to suppress the evidence found in the apartment as products of a warrantless search.³³ After a hearing, the court denied his motion.³⁴ Fernandez was sentenced to fourteen years of imprisonment.³⁵

On appeal, the California Court of Appeal affirmed.³⁶ The appellate court found that the holding of *Georgia v. Randolph*³⁷ was to be narrowly applied such that the objecting occupant’s physical presence is “indispensable to the decision of *Randolph*.”³⁸ Because Fernandez was no longer physically present in the residence, Detective Clark was not required to seek a warrant and acted reasonably by having obtained the consent from Rojas instead. Accordingly, the evidence found inside the apartment was not the fruit of an unlawful search.

The California Supreme Court denied Fernandez’s petition for review.³⁹ However, the United States Supreme Court granted

26. *Id.*

27. *Fernandez*, 145 Cal. Rptr. 3d 51, 53 (2012).

28. *Fernandez*, 134 S. Ct. at 1130.

29. *Id.*

30. *Fernandez*, 145 Cal. Rptr. 3d at 54.

31. *Id.*

32. *Fernandez*, 134 S. Ct. at 1131.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See Fernandez*, 145 Cal. Rptr. 3d at 52.

37. 547 U.S. 103, 106 (2006) (holding that “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him”).

38. *Fernandez*, 145 Cal. Rptr. 3d at 66.

39. *Fernandez*, 134 S. Ct. at 1131.

certiorari.⁴⁰ In doing so, the Court sought to clarify the rules pertaining to consent law as it applies to dueling co-occupants.

III. HISTORICAL BACKGROUND

“[T]he Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁴¹ The right to privacy is one of the foundational sources of these emanations.⁴² The Fourth Amendment directly targets the objectionable practice of breaking in and searching homes without warrants issued by magistrates.⁴³ “Its protection consists in requiring that the inferences drawn to conclude that a search is warranted be made by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”⁴⁴ In the absence of a warrant, a search is reasonable only if it falls within the ambit of a specific exception to the warrant requirement.

One such exception is a search conducted pursuant to consent.⁴⁵ Consent searches are permissible warrantless searches and are reasonable when the consent voluntarily comes from the sole occupant of the premises.⁴⁶ Moreover, warrantless entry is lawful where police reasonably believe consent comes from a party with common authority.⁴⁷

In *United States v. Matlock*,⁴⁸ the Supreme Court faced the issue of consent as it applies to co-inhabitants. In *Matlock*, the respondent, Matlock, was arrested on his front lawn.⁴⁹ While officers did not ask Matlock for consent to search his home, they did go to the front

40. *Id.*

41. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

42. *Id.* The Fourth Amendment creates a “right to privacy, no less important than any other right carefully and particularly reserved to the people.” *Id.* at 485.

43. *Katz v. United States*, 389 U.S. 347, 367 (1967) (Black, J., dissenting).

44. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

45. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

46. *See, e.g., id.* at 218; *see also* *United States v. Matlock*, 415 U.S. 164, 165–66 (1974) (identifying *Schneekloth* as reaffirming “the principle that the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment”); *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014) (“it is clear that a warrantless search is reasonable when the sole occupant of a house or apartment consents”).

47. *See Illinois v. Rodriguez*, 497 U.S. 177, 177 (1990).

48. 415 U.S. 164 (1974).

49. *Id.* at 166.

door.⁵⁰ There, they sought and received consent from Matlock's housemate.⁵¹ Because Matlock was not physically present inside his home, the Court recognized that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."⁵²

More recently, in *Georgia v. Randolph*,⁵³ the Court faced a slightly different set of facts. Scott Randolph and his estranged wife, Janet, were engaged in a domestic dispute.⁵⁴ Janet called the police.⁵⁵ When the police arrived, Janet informed the officers that her husband had illegal drugs inside the home.⁵⁶ The officers asked for consent to search the house.⁵⁷ While Janet "readily gave" consent, Scott "unequivocally refused."⁵⁸ The Supreme Court held that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."⁵⁹

The Court based its decision upon "widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules."⁶⁰ The Court elaborated:

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions.⁶¹

Thus, the *Randolph* Court limited the scope of *Matlock*. When there is an express refusal by a physically present occupant, "a warrantless search of a shared dwelling for evidence . . . cannot be justified as reasonable as to him on the basis of consent given to the

50. *Id.*

51. *Id.*

52. *Id.* at 170.

53. 547 U.S. 103 (2006).

54. *Id.* at 107.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 122–23.

60. *Id.* at 111.

61. *Id.* at 113.

police by another resident.”⁶² When there is disagreement between cotenants, “a resolution must come through voluntary accommodation, not by appeals to authority.”⁶³

IV. REASONING OF THE COURT

The *Fernandez* Court faced circumstances that included aspects of both *Matlock* and *Randolph*. Like the respondent in *Randolph*, Fernandez expressed a clear objection to a warrantless police search of his home while he was physically present. Yet, similar to the circumstances in *Matlock*, the police received consent from a co-occupant after Fernandez was no longer within his home. As such, the Court faced the temporal issues arising from consent searches as they relate to an objecting, physically present occupant, who is subsequently removed.

Fernandez argued that a physically present occupant’s stated objection should remain in force “until officers learn that *the objector* no longer wishes to keep the police out of his home.”⁶⁴ The Court however, reiterated that *Randolph* was decided in the interest of “simple clarity” and “administrability.”⁶⁵ As such, Fernandez’s proposal was deemed unreasonable in that it created “a plethora of practical problems.”⁶⁶

The Court focused on a hypothetical pair of joint tenants, a husband and wife.⁶⁷ The husband is sent to prison for fifteen years.⁶⁸ Under Fernandez’s proposed rule, the wife would be unable to consent to a search of her house, presumably, for the next decade.⁶⁹ This, the Court determined, was unreasonable.⁷⁰ Another concern for the Court was the lack of procedural safeguards, which would be necessary in order to reaffirm a continuing objection.⁷¹ Fernandez’s proposed rule would also have required the police to reasonably

62. *Id.* at 120.

63. *Id.* at 113–14.

64. Brief for Petitioner at 8, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (No. 12-7822).

65. *Fernandez*, 134 S. Ct. at 1135 (quoting *Randolph*, 547 U.S. at 121–22).

66. *Id.*

67. *Id.* at 1135–36.

68. *Id.*

69. *Id.*

70. *Id.* at 1136.

71. *Id.*

determine “whether, after the passage of time, an objector still had ‘common authority.’”⁷²

Lastly, the Court was unwilling to expand *Randolph* because the scope of a stated objection remained unclear. Would an occupant’s objection bind only the officers who were present? Would it be enforceable against officers who were unaware of the objection? Would it be limited in any other salient way?⁷³ In the interest of clarity, administrability, and protecting the rights of an occupant who is willing to consent,⁷⁴ the Court held that “an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.”⁷⁵ In so holding, the Court opened the door to the risk of actual or perceived police abuse amid public mistrust.

V. ANALYSIS

The holding of *Fernandez* continued the modern diminution of the warrant requirement.⁷⁶ Four decades ago, the Supreme Court announced, “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”⁷⁷ The Supreme Court has “long adhered to the view that the warrant procedure minimizes the danger of needless intrusions.”⁷⁸

Since that time, various exceptions to the warrant requirement have been made.⁷⁹ Some of these exceptions have been predicated upon society’s expectations of privacy.⁸⁰ In measuring these

72. *Id.*

73. *See id.*

74. *Id.* at 1137.

75. *Id.* at 1134.

76. Compare *Katz v. United States*, 389 U.S. 347 (1967) (holding that by recording the petitioner’s telephone conversations in a phone booth without a warrant, the FBI “violated the privacy upon which he justifiably relied”), with *Maryland v. King*, 133 S. Ct. 1958 (2013) (holding that obtaining the DNA sample of an arrested suspect via a cheek swab is reasonable under the Fourth Amendment). See, e.g., Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 594–671 (2014) (discussing the shift from a warrant regime to a reasonableness standard in Fourth Amendment Supreme Court cases); see also Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1665–67 (2012) (discussing the infrequency of warrants used by police when conducting searches).

77. *United States v. U.S. Dist. Ct. for E. Dist. Mich.*, 407 U.S. 297, 313 (1972).

78. *Payton v. New York*, 445 U.S. 573, 586 (1980).

79. See, e.g., *Arizona v. Gant*, 556 U.S. 332 (2009) (discussing the automobile exception).

80. See, e.g., *New York v. Class*, 475 U.S. 106, 114 (1986) (articulating that the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one’s home).

expectations, the home has been the Court's barometer, which it uses to identify the place possessing the greatest expectation of privacy.⁸¹ Taken in isolation, *Fernandez* is a simple application of *Matlock*. Yet, when viewed through the lens of history, *Fernandez* signals the weakening of the Fourth Amendment's protection of the home.

This Part first analyzes the similarities between *Fernandez* and *Randolph* as articulated by the *Fernandez* dissent. It then argues that the *Fernandez* Court's clarification of *Randolph*'s dictum opens the door to the potential of actual or perceived police abuse. Next, it examines the implications of *Fernandez* within the current social landscape of "militarized" police forces. Finally, this Part reflects upon Justice Scalia's concurring opinion, which examined *Fernandez* within the context of property law.

A. Similarities Between *Randolph* and *Fernandez*

While Detective Clark could easily have sought a warrant under the circumstances,⁸² the Court affirmed the proposition that seeking consent from Rojas was reasonable under the circumstance despite *Fernandez*'s prior objection.⁸³ In doing so, the Court constricted the holding of *Randolph* to a narrow exception.⁸⁴ While the Court treated *Fernandez* as substantially distinguishable from *Randolph*, the facts of those two cases are not dissimilar.

In her dissent in *Fernandez*, Justice Ginsburg pointed out that here, as in *Randolph*, the purpose of the search was purely evidentiary.⁸⁵ Moreover, the objecting party clearly expressed his objection to the officers seeking entrance.⁸⁶ Thirdly, "the officers might easily have secured the premises and sought a warrant permitting them to enter."⁸⁷

Unlike the officer in *Randolph*, the police in *Fernandez* forcibly removed the objecting occupant. Yet, with *Fernandez* in custody, there was no longer any danger to people on the premises.⁸⁸ Nor was

81. *Id.* at 114–15.

82. *See* *Missouri v. McNeely*, 133 S. Ct. 1522, 1562 (2013) (noting the "technology-based developments" enabling expeditious warrants); *see also* *Fernandez v. California*, 134 S. Ct. 1126, 1142 (2014) (Ginsburg, J., dissenting).

83. *Fernandez*, 134 S. Ct. at 1137 (majority opinion).

84. *Id.* at 1129.

85. *Id.* at 1139 (Ginsburg, J., dissenting).

86. *Id.*

87. *Id.* (quoting *Georgia v. Randolph*, 547 U.S. 103, 126 (2006)).

88. *Id.*

there any “risk that evidence might be destroyed or concealed, pending request for, and receipt of, a warrant.”⁸⁹

Despite Fernandez’s physical presence while he was objecting, the Court deemed Rojas’s subsequent consent reasonable under the circumstances. Focused on the interests of “simple clarity,” the majority opinion repudiated the centuries-old position that “a generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.”⁹⁰ The Framers intended to ensure that “the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.”⁹¹ Put differently, the Fourth Amendment was not written in the interests of simplicity, but to protect society from unchecked police activity.⁹²

The majority opinion found that Fernandez’s absence took him outside the purview of an analysis based upon widely shared social expectations articulated in *Randolph*.⁹³ In so finding, a simple mathematical calculation was made; two dueling cotenants minus one objector equal a reasonable warrantless search.

However, an unintended anomaly that undermines the protections of the Fourth Amendment may have been created by the Court’s majority opinion. Police may now easily solve the problem of dueling cotenants by removing an objecting occupant. Yet, “*Randolph* . . . trained on whether a joint occupant had conveyed an objection to a visitor’s entry, and did not suggest that the objection could be ignored if the police reappeared post the objector’s arrest.”⁹⁴ By ignoring this salient point, veiled in the cloak of “administrability,” the Court ignored a more time-honored tradition⁹⁵: obtaining a warrant through the judicial process.

89. *Id.*

90. *Randolph*, 547 U.S. at 115 n.5.

91. *Fernandez*, 134 S. Ct. at 1143 (Ginsberg, J., dissenting) (quoting *Mincey v. Arizona*, 437 U.S. 385, at 393 (1978)).

92. *See id.*

93. *Id.* at 1135 (majority opinion).

94. *Id.* at 1140 (Ginsberg, J., dissenting).

95. *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (examining the history of Fourth Amendment jurisprudence and highlighting the warrant requirement).

B. Clarifying the Dictum of Randolph

While Fernandez’s assertion of his rights did not cause his removal,⁹⁶ the door is now left open for the police to use coercion to remove an objecting, physically present occupant in order to obtain consent to conduct a warrantless search of the home from those who remain on the premises. The *Randolph* Court stated, in dictum:

So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant’s permission when no fellow occupant is on hand, the other according dispositive weight to the fellow occupant’s expressed contrary indication.⁹⁷

The *Fernandez* Court addressed this dictum by stating that it was “best understood to refer to situations in which the removal of the potential objector is not objectively reasonable.”⁹⁸ Yet, as noted by the majority, the Court has historically avoided subjective intent analysis when it comes to the police.⁹⁹ Accordingly, as long as police do not reveal their unlawful intentions for removing an objector—and an objectively reasonable excuse is plausible—police, then, may unscrupulously remove an objecting party in order to facilitate the desired result of proceeding with a warrantless search. Yet, this possible scenario squarely undermines the intended safeguards imposed by the Fourth Amendment. Moreover, it does not reflect today’s social landscape.

96. *Fernandez*, 134 S. Ct. at 1134.

97. *Georgia v. Randolph*, 547 U.S. 103, 105 (2006).

98. *Fernandez*, 134 S. Ct. at 1128.

99. *See Whren v. United States*, 517 U.S. 806, 807 (1996) (“[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”); *id.* at 813 (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); *see also United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (finding subjective intent of the DEA agent irrelevant unless actually conveyed to the respondent).

*C. Implications of Fernandez: From “Peace Officers”
to “Warrior Cops”*

Following the Boston bombings in 2013, the town of Watertown, Massachusetts, initiated a “shelter-in-place” request.¹⁰⁰ Police can be seen on video going door-to-door, ordering civilians from their homes at gunpoint.¹⁰¹ While this Comment does not challenge the constitutionality of those public safety measures, the public misperception created is real and lasting. This misperception is that police do not need warrants to search homes. Indeed, it appears one must be well versed in constitutional law in order to know that there exists a warrant requirement to the Fourth Amendment.

Similarly, unfolding on live television, the events in Ferguson, Missouri, have gripped the nation. Following the police shooting of an unarmed eighteen-year-old, who may have been a robbery suspect or who may have been an aggressor attacking a police officer, protesters clashed with police in the streets.¹⁰² Over the ensuing nights, police armed with military equipment sought to quell the developing unrest.¹⁰³ Eleven reporters covering the news were arrested.¹⁰⁴ This sparked a national debate about the “Militarization of Police.”¹⁰⁵

The current fear is that a militarized police force will act as if it has military power. Accordingly, the police may treat Americans as enemy combatants.¹⁰⁶ As the police employ military-style weaponry, the risks created that innocent people will be harmed increase.¹⁰⁷

100. See Nate Rawlings, *Was Boston Actually on Lockdown?: What “Shelter in Place” Really Means*, TIME (Apr. 19, 2013), <http://nation.time.com/2013/04/19/was-boston-actually-on-lockdown/>.

101. See America, *We Need to Talk About the Boston “Lockdown” and Manhunt for Dzhozar Tsarnaev*, POOR RICHARD’S NEWS, <http://poorrichardsnews.com/post/48566461810/america-we-need-to-talk-about-the-boston-lockdown> (last visited Sept. 24, 2014).

102. See Colby Itkowitz, *Timeline of Events in Ferguson, MO*, WASH. POST (Aug. 16, 2014), http://www.washingtonpost.com/politics/timeline-of-events-in-ferguson-mo/2014/08/16/02f37e8c-2580-11e4-86ca-6f03cbd15c1a_story.html.

103. See *id.*

104. See Brian Stelter, *6 More Journalists Arrested in Ferguson Protests*, CNN (Aug. 19, 2014, 8:31 PM), <http://www.cnn.com/2014/08/19/us/ferguson-journalists-arrested/>.

105. See Jonathan Topaz, *Critics Slam “Militarization” of Police*, POLITICO (Aug. 14, 2014, 9:23 PM), <http://www.politico.com/story/2014/08/ferguson-critics-police-militarization-110017.html>.

106. See Kara Dansky, *How Many People Must Be Maimed or Killed Before We End the Militarization of Our Police Forces?*, AM. CIVIL LIBERTIES UNION (Oct. 7, 2014, 4:59 PM),

Whichever side of the debate one takes, a message has been delivered to the civilian population: the police have changed.¹⁰⁸ No longer keepers of the peace, the police may now be perceived as military enforcers armed to control the masses with force. The civilian population may sense that its civil rights are being trampled. Yet, this societal change has not been reflected in current Supreme Court jurisprudence.¹⁰⁹ These current events call into question the very voluntariness of consent searches and the degradation of civil rights enacted to equally protect all members of society.

A recent report published by the American Civil Liberties Union focused on the “warrior” mentality of modern police forces.¹¹⁰ “This shift in culture has been buoyed by the U.S. Supreme Court’s weakening of the Fourth Amendment . . . through a series of decisions that have given the police increased authority to force their way into people’s homes, often in drug cases.”¹¹¹ Indeed, the three dissenters in *Fernandez* noted this. “Instead of adhering to the warrant requirement, today’s decision tells the police they may dodge it”¹¹² Aside from the message *Fernandez* gives to the police, the message delivered to the American people is that amidst great public apprehension, police have even greater authority.

Justice Alito concluded his majority opinion by stating, “Denying someone in Rojas’ position the right to allow the police to enter *her* home would also show disrespect for her independence.”¹¹³ While the majority was focused on protecting victims of domestic violence, it ignored the fact that getting a warrant in this situation would be simple. Moreover, this statement ignores today’s societal

<https://www.aclu.org/blog/criminal-law-reform-free-speech/how-many-people-must-be-maimed-or-killed-we-end-militarization>.

107. *See id.* (discussing Georgia police officers who threw a flashbang grenade into the crib of 19-month old, Bounkham Phonesavanh, leaving a hole in his chest).

108. *See, e.g.,* Radley Balko, *Rise of the Warrior Cop: Is It Time to Reconsider the Militarization of American Policing?*, WALL ST. J. (Aug. 7, 2013, 4:44 PM), <http://online.wsj.com/news/articles/SB10001424127887323848804578608040780519904> (noting that since 2002, the Department of Homeland Security has handed out \$35 billion in grants, “much of the money going to purchase military gear such as armored personnel carriers”).

109. *See, e.g.,* *Michigan v. Jackson*, 475 U.S. 625 (1986), *overruled by* *Montejo v. Louisiana*, 556 U.S. 778 (2009).

110. *See* AM. CIVIL LIBERTIES UNION, *supra* note 3, at 3.

111. *Id.*

112. *Fernandez v. California*, 134 S. Ct. 1126, 1139 (2014) (Ginsburg, J., dissenting).

113. *Id.* at 1137 (majority opinion).

sea change; modern police are institutionally more aggressive.¹¹⁴ Citing to *Randolph*, Justice Alito wrote, “Such an occupant may want the police to search in order to dispel ‘suspicion raised by sharing quarters with a criminal.’”¹¹⁵ Yet, a fair reading of *Randolph* would show the next paragraph informative.

But society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant’s refusal to allow a warrantless search. The co-tenant acting on his own initiative may be able to deliver evidence to the police . . . and can tell the police what he knows, for use before a magistrate in getting a warrant.¹¹⁶

One can imagine Roxanne Rojas in 2014, in Ferguson, Missouri. Police knock on the door. There is no warrant, but officers are asking to come inside. What happens if Roxanne says, “no”? It is not unreasonable for one to suspect that this presents a Hobson’s choice. A wrong answer may lead to arrest. Indeed, Rojas already observed Fernandez object and then be placed under arrest. Causality issues aside, the Bill of Rights was intended to protect the People from the Government, not the other way around. Consent must be voluntarily given, not gained through subtle coercion.¹¹⁷ These concerns may easily be dissipated with a neutral magistrate issuing a warrant.

Had Fernandez’s stated refusal remained dispositive as to him, the police were not without recourse. The majority’s concern about the “plethora of practical problems” inherent in Fernandez’s proposal easily subside once police receive a warrant.¹¹⁸ While the majority opinion upholds the letter of the law, it does damage to the spirit of the Fourth Amendment. “Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.”¹¹⁹

114. See Justin Moyer, *Study: Those Lockstep Riot-Police Phalanxes Make Cops More Aggressive*, WASH. POST (Aug. 28, 2014), <http://washingtonpost.com/news/morning-mix/wp/2014/08/28/researcher-in-ferguson-and-elsewhere-riot-police-may-make-riots-worse/>.

115. *Fernandez*, 134 S. Ct. at 1137 (quoting *Georgia v. Randolph*, 547 U.S. 103, 116 (2006)).

116. *Randolph*, 547 U.S. at 116.

117. *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

118. *Fernandez*, 134 S. Ct. at 1141 (Ginsburg, J., dissenting) (“Warrant in police hands, the Court’s practical problems disappear.”).

119. *McDonald v. United States*, 335 U.S. 451, 456 (1948).

D. Justice Scalia and the Role of Property Law

Writing only for himself, Justice Scalia authored a concurring opinion in *Fernandez* based upon property law. In it, he stated that *Fernandez* would have been a more difficult case to decide “if it were established that property law did not give petitioner’s cotenant the right to admit visitors over petitioner’s objection.”¹²⁰ It could not be shown that a guest would commit a trespass where one cotenant invited the guest to enter while the other objected.¹²¹

Yet, while property law influences the Court’s decision—and Justice Scalia’s Fourth Amendment opinions as of late¹²²—it is important to distinguish “when the police may enter without committing a trespass, and when the police may enter to search for evidence.”¹²³ A police officer may approach a home and knock because it is “no more than any private citizen might do.”¹²⁴ Searching for evidence, however, is a power exclusive to law enforcement. Even if property law gives a license to the police so as to not commit a trespass, “that unwelcome[d] visitor’s license would hardly include free rein to rummage through the dwelling in search of evidence and contraband.”¹²⁵

In the 1960s, the Supreme Court recognized the powerful influences of a “police-dominated atmosphere.”¹²⁶ While limited to custodial interrogation, such a description arguably reflects the new social paradigm of militarized police. Accordingly, a finer distinction should be made between what constitutes a mere trespass and what police actions are tolerable for evidentiary purposes. The Court, however, appears unwilling to make such a clear distinction for fear that it would endanger victims of domestic violence by preventing police from entering.¹²⁷ However, no question is raised about the authority of the police to enter a home in order to protect a victim from domestic violence. Such exigent circumstances are

120. *Fernandez*, 134 S. Ct. at 1137–38 (Scalia, J., concurring).

121. *Id.* at 1138.

122. *See* *United States v. Jones*, 132 S. Ct. 945 (2012); *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

123. *Georgia v. Randolph*, 547 U.S. 103, 118 (2006).

124. *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011).

125. *Fernandez*, 134 S. Ct. at 1141 (Ginsburg, J., dissenting).

126. *Miranda v. Arizona*, 384 U.S. 436, 456 (1966).

127. *See Fernandez*, 134 S. Ct. at 1137 (“Having beaten Rojas, petitioner would bar her from [consenting to a police search of their shared home after petitioner’s refusal]. The Fourth Amendment does not give him that power.”).

well-recognized exceptions.¹²⁸ The situation presented by *Fernandez* was one in which no exigency existed. As such, mere trespass theory provides little assurances for evidentiary protections.

VI. CONCLUSION

In reducing *Randolph* to a “narrow exception,” the *Fernandez* Court further facilitated the modern waning of the warrant requirement. Expressed in terms of reasonableness, the Court articulated a rule with the aims of simple clarity, administrability, and protecting victims of domestic violence. Yet, embedded within its opinion, the majority behaved as if the police abuses from which the Court once protected the public no longer exist. Such a rule ignores contemporary societal ills. While the outcome of *Fernandez* may have been a logical extension of *Matlock*, *Fernandez*’s broader implications that diminish citizens’ protections in the home from warrantless searches loom large. It remains to be seen whether the Fourth Amendment’s protection of the home—the castle fortified by the Constitution—has, indeed, been besieged.

128. See, e.g., *Randolph*, 547 U.S. at 118.