KING TURNED COMMONER: THE EFFECT OF *FERNANDEZ V. CALIFORNIA*

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I. INTRODUCTION

Over the years, third-party consent has evolved into a disconcerting doctrine. To elucidate this contention, consider the following hypothetical situation, which provides a glimpse into the current state of third-party consent in the United States. John lives in Florida with his live-in girlfriend, Mary, and their five-year-old daughter. An armed robbery takes place at a convenience store near John's home. Police respond and question the only witness to the event, who provides a description that matches John. The responding officers then proceed to search for the shooter.

The police officers notice John running toward his house, and, as he matches the shooter's description, they follow him. John had recently stopped at his drug dealer's home to purchase one ounce of marijuana that was given to John in multiple glassine baggies, which he had placed in his backpack. The police arrive at John's home and witness him walking inside, with his girlfriend sitting outside on the porch. The police officers walk up to the home as John walks back outside. The officers explain that they are investigating a robbery that recently took place, and they ask for permission to search John and Mary's home. John refuses. The officers return to their cruiser to run a search on John in the police database, discovering that John has a warrant out for his arrest. John is subsequently arrested. As the officers walk John to their vehicle, John yells to Mary: "No matter what happens, do not let them search the house."

After John is placed inside of the police cruiser, the officers ask Mary if she would consent to a search of her home. Mary replies, "No." The police then threaten that they will get a search warrant and take her daughter away if Mary does not cooperate. Mary acquiesces and consents to a search of her home. Following the search, the officers have in their possession John's backpack with one ounce of marijuana in multiple small baggies. The police charge John with possession of a controlled

substance with intent to sell, a third-degree felony,[1] which carries a potential five-year prison sentence.[2] The search conducted by the officers will almost certainly be considered a lawful search based on Mary's voluntary consent, and John's attempt to suppress the discovered evidence will likely be futile.

Since the country's inception, the American citizen's right to be free from warrantless searches and seizures has deteriorated over time, especially in the last century.[3] In the beginning, the Framers of the Constitution crafted the Fourth Amendment in an effort to prevent our newly formed government from possessing the ability to utilize two legal devices employed by the British: "the general warrant and the writ of assistance."[4] It has been observed that the liberties ostensibly inherent in the Fourth Amendment have been weathered away in favor of police convenience, and our country's Fourth Amendment jurisprudence seems to be slowly morphing into exactly what the Framers were trying to prevent.[5] As an illustration, after the Court decided to provide criminal defendants with greater Fourth Amendment protection by allowing an

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1. FLA. STAT. §§ 893.03(1)(c)(7), 893.13(1)(a)(2) (2014).

2. *Id.* § 775.082(3)(e).

3. *See* United States v. Matlock, 415 U.S. 164, 171, 177 (1974) (holding that justification of a warrantless search based on voluntary consent did not require that the consent was given by the defendant, but that permission obtained via a third party with common authority over the premises was sufficient); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating that an exception to the requirements of a warrant and probable cause necessary to conduct lawful searches under the Fourth Amendment is a search conducted after obtaining voluntary consent); Katz v. United States, 389 U.S. 347, 357 (1967) (describing warrantless searches as "per se unreasonable" unless approved as a judicially sanctioned exception to the warrant requirement); Johnson v. United States, 333 U.S. 10, 14, 14 n.4 (1948) (discussing the necessity of obtaining a warrant, based upon probable cause, from a neutral magistrate, as opposed to allowing warrantless searches by police officers which "would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers"); Agnello v. United States, 269 U.S. 20, 32 (1925) (stating that "[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws").

4. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Excl[u]sionary Rule in Search-and-Seiz[u]re Cases*, 83 COLUM. L. REV. 1365, 1369 (1983) (citing NELSON LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51–105 (1970)). General warrants were issued without probable cause and often without any evidence of criminal wrongdoing. *Id.* Writs of assistance were a form of a general warrant that involved taxation and import regulations imposed by the British. *Id.* at 1370.

5. *See* Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99, 123 (1996) (concluding that the discretionary authority granted to law enforcement by judicial interpretations of the Fourth Amendment is starting to resemble the authority accorded to British colonial officials under general warrants).

objecting individual to override a consenting co-tenant[6]—in contrast to its historical erosion of the Fourth Amendment's protections against unreasonable searches—the Court then stripped the new protection away within a few short years by declaring that the individual's objection loses its force if that individual leaves his or her home.[7] Further, there exists a good-faith exception for law enforcement officers. Under the good-faith exception, the actual act of drafting a warrant by police officers followed by locating a judge to sign the warrant constitutes good faith on the part of the police, which may result in a court excusing a warrant's lack of probable cause or other defects.[8] Such an exception is a slippery slope, as evidenced by one judge who went so far as to pre-sign warrants for the police to use as they pleased.[9]

This Article argues that our nation's consent-based search jurisprudence is in dire need of reform and that the consent exception to a search warrant should be eliminated. In arguing for the abolition of consent searches, the Article considers the psychological aspects of consent coupled with police officers' status as authority figures. The Article then explains how it is human nature to do what one is told by an authority figure.

Part II of this Article provides a glimpse into the history of our country's Fourth Amendment jurisprudence. It begins by highlighting the birth of the consent-search doctrine, and discussing a series of cases in which it appeared as though the Supreme Court was going to provide American citizens with more Fourth Amendment power, after having stripped so much away in the preceding years. Part III focuses on the most recent Supreme Court decision at the time of this Article's composition regarding the consent-search doctrine: *Fernandez v.*

6. *See* Georgia v. Randolph, 547 U.S. 103, 122–23 (2006) (holding that a physically present co-tenant's objection to a warrantless search is "dispositive as to him," and may not be overridden by a separate co-tenant).

7. *See* Fernandez v. California, 134 S. Ct. 1126, 1134 (2014) (holding that a co-tenant who objected to a warrantless search while physically present, but who was later lawfully removed from the premises, could have his objection overridden by a separate co-tenant still on the premises).

8. Michael D. Cicchini, *The Collapsing Constitution*, 42 HOFSTRA L. REV. 731, 735 (2014). *See, e.g.*, United States v. Merritt, 361 F.3d 1005, 1011, 1013 (7th Cir. 2004) *vacated on other grounds*, 543 U.S. 1099 (2005) (stating that, although the warrant was defective for lack of probable cause, good faith in seeking and drafting the warrant and having it signed by a neutral magistrate made the investigating officer's "reliance on the warrant . . . objectively reasonable" and resulted in an exception to the need for a valid warrant).

9. Cicchini, *supra* note 8, at 735. *See* Molly McDonough, *Accused of Providing Blank Arrest Warrants to Police, Georgia Magistrate Resigns*, A.B.A. J. (Aug. 20, 2012, 9:25 PM CDT), http://www.abajournal.com/news/article/accused_of_providing_blank_arrest_warrants_to_police_georgia_magistrate/ (reporting the resignation of a Georgia county magistrate judge accused of pre-signing blank arrest warrants to be used by police when he was unavailable).

California.[10] This Part provides the facts and circumstances surrounding *Fernandez* and the rationale behind the Court's conclusion. Part IV presents arguments both for and against the Court's decision in *Fernandez*.

Part V analyzes the effects of *Fernandez* and current consent-based search law. In this Part, the Author argues for the abolition of consent-based searches, asserting that voluntary consent—whether from a defendant or a third party—is a myth. This Part delves into the psychology of providing voluntary consent and the effect that an authority figure has upon an individual when obedience is requested. Further, the Author advocates for the increased use of search warrants as opposed to voluntary consent. In the alternative, the Author suggests using *Miranda*-like warnings[11] to apprise a defendant or third-party individual of his or her right to refuse a search without suffering any negative repercussions. Finally, the Author advocates, at a minimum, for redefining the term "present" as it applies to third-party consent searches. Part VI provides a brief conclusion, proclaiming that now is the time to reinstate the power to the Kings, lest we desire to lose what little power we Kings now hold.

II. THE BIRTH AND EVOLUTION OF CONSENT

The United States Supreme Court opened the door for warrantless, consent-based searches in *Amos v. United States*.[12] In *Amos*, federal agents arrived at the defendant's home without a search warrant and informed the defendant's wife that the agents were there to conduct a search of the premises, to which the wife ultimately acquiesced.[13] The Court determined that this search violated the Fourth Amendment based on the lack of a warrant.[14] Though the Court did not actually use the word "consent" in its opinion, the Court rejected the government's argument that acquiescence by the defendant's wife was an adequate waiver of the defendant's Fourth Amendment rights based on coercive tactics used by the agents involved.[15] Left open for debate, however, was the question of whether one co-tenant may waive another co-tenant's rights.[16]

10. 134 S. Ct. 1126 (2014).

11. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* warnings are procedural safeguards protecting defendants against self-incrimination. *Id.* at 444; *see infra* Part V(B) (providing a more detailed discussion of *Miranda* warnings).

12. 255 U.S. 313 (1921).

13. *Id.* at 315.

14. *Id.* at 315–17.

15. *Id.* at 317.

16. *Id.*

Almost a quarter of a century later, the Supreme Court decided *Davis v. United States*,[17] holding that federal agents involved in the ostensibly voluntary search of a locked room in a gas station owned by the defendant did not violate the defendant's Fourth Amendment rights.[18] The Court's decision in *Davis* was a clear departure from precedent stating that warrantless searches were unreasonable.[19]

In the years following *Davis*, a number of cases emerged involving third-party consent searches, which yielded the short-lived rule that consent given by a third party to conduct a search of another individual's residence violates the Fourth Amendment.[20] Only fifteen years later, the Court decided *Frazier v. Cupp*,[21] in which it recognized an "assumption of risk" exception, thereby allowing a third party to consent to the search of a duffel bag owned by the defendant.[22] The assumption-of-risk logic used in *Frazier* resulted in the Court's decision in *United States v. Matlock*,[23] which paved the way for our current consent jurisprudence.

In *Matlock*, at issue was whether the consent obtained to conduct a warrantless search of a shared residence from the defendant's common-law wife was valid.[24] Matlock was suspected of a bank robbery, arrested at his home, and placed in a squad car.[25] Police then met with Mrs. Graff who stated that she shared a room with the defendant and consented to a search of the residence that yielded evidence of the bank robbery.[26] Matlock argued that such third-party consent was insufficient to support the search and moved to suppress the discovered evidence.[27] The Court determined that the consent from Matlock's common-law wife was sufficient, holding that consent may be acquired by a third-party

17. 328 U.S. 582 (1946).

18. *Id.* at 593–94. Pertinent to the Court's ruling, the items sought by the searching officers, government-owned gas coupons, did not belong to the defendant, and the property searched was the defendant's "public" business, not his residence. *Id.* at 593. These two considerations appeared to be the primary reason behind the Court's decision that the search was voluntary. *Id.*

19. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 391–92 (1914) (claiming that the Fourth Amendment was intended to keep government officials in check, to limit their power, and to prevent the seizure by unlawful means).

20. Stoner v. California, 376 U.S. 483, 489 (1964) (finding consent by hotel clerk was invalid); Chapman v. United States, 365 U.S. 610, 616–17 (1961) (finding consent by landlord was invalid).

21. 394 U.S. 731 (1969).

22. *Id.* at 740. The defendant, Frazier, owned the duffel bag in question and jointly used it with his cousin who ultimately consented to its search. *Id.* The Court determined that by allowing for the joint use of the duffel bag, Frazier had "assumed the risk" that his cousin may let police search it. *Id.*

23. 415 U.S. 164 (1974).

24. *Id.* at 166.

25. *Id.* at 166, 179.

26. *Id.* at 166.

27. *Id.*

individual who has "common authority over or other sufficient relationship to the premises or effects sought to be inspected."[28]

Following its decision in *Matlock*, the Supreme Court went one step further in *Illinois v. Rodriguez*,[29] holding that the third-party consent exception to a warrantless search of a residence extended to instances when consent is obtained from a third-party individual who police reasonably believed had common authority over the residence, regardless of whether such belief was in error.[30] Years later, the Supreme Court leveled the playing field by providing an objecting third party with a little more power through its decision in *Georgia v. Randolph*.[31]

In *Randolph*, police were called to a residence where they were met by the defendant's estranged wife who informed them that the defendant used drugs and the evidence of such drug use could be found inside of the couple's residence.[32] Police asked the defendant for consent to search the premises, which he refused.[33] Police then asked the defendant's wife for consent, which she gave.[34] The subsequent search revealed evidence of drug use, resulting in the defendant's arrest.[35] The defendant moved to suppress the evidence, arguing that his wife's consent had been invalidated as a result of his refusal; the trial court denied the defendant's motion.[36] The Supreme Court granted certiorari and held that when one physically present co-tenant refuses to consent to a search of a dwelling occupied by multiple individuals, police are precluded from obtaining consent to search the premises from another co-tenant.[37]

Shortly following its decision in *Randolph*, the Supreme Court was presented with another case involving co-tenant consent in *Fernandez v. California*.[38] The Court's decision in *Fernandez* is the most recent Supreme Court decision regarding co-tenant consent searches, and its holding has left a great impact on our country's Fourth Amendment jurisprudence.

28. *Id.* at 171.
29. 497 U.S. 177 (1990).
30. *Id.* at 186.
31. 547 U.S. 103 (2006).
32. *Id.* at 107.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 107–08.
37. *Id.* at 122–23.
38. 134 S. Ct. 1126, 1129–30 (2014).

III. FERNANDEZ V. CALIFORNIA—*WHILE THE KING IS AWAY, THE POLICE MAY COME PLAY*

In *Fernandez*, police officers witnessed a man, who was suspected of involvement in a recent robbery, flee into an apartment building.[39] Police entered the apartment building, heard loud screaming that came from an apartment, and proceeded to knock upon the door of that apartment.[40] Roxanne Rojas, the defendant's girlfriend, answered the door, and the officers noticed what appeared to be fresh blood on her shirt and hand.[41] Ms. Rojas was asked to step outside so the officers could perform a protective sweep of the apartment; however, the officers were immediately confronted by the defendant who verbally objected to the police coming into his domicile.[42] The defendant, suspected of inflicting harm upon Ms. Rojas, was detained and arrested following his objection.[43] The police officers returned to the defendant's apartment approximately one hour after his arrest and requested permission to conduct a search.[44] Ms. Rojas consented to the search, both orally and in writing, which resulted in the police finding evidence inculpating the defendant in the earlier robbery.[45] The defendant unsuccessfully moved to suppress the evidence discovered after his objection to the search, and he was subsequently found guilty, receiving a fourteen-year term of imprisonment.[46] The defendant appealed the trial court's decision, which was affirmed by the California Court of Appeal.[47] The California Supreme Court denied the defendant's petition for review, and the United States Supreme Court granted certiorari.[48]

The Supreme Court was presented with the question of whether the *Randolph* decision applied to a defendant who was not present to object to a search after he was lawfully detained.[49] The Court determined the defendant's physical presence to be dispositive as to whether an objection was to hold any power.[50] The Court ultimately held in *Fernandez* that a physically present individual who objects to a warrantless search can be

39. *Id.* at 1130.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 1130–31.
46. *Id.* at 1131.
47. *Id.*
48. *Id.*
49. *Id.* at 1134.
50. *Id.*

overridden by another co-tenant if the objecting co-tenant is involuntarily made absent from the home due to a lawful detention, or, in other words: one's physical presence is a prerequisite for a *Randolph* objection to have an effect.[51] The Court's decision in *Fernandez* has subsequently been utilized by courts in determining the validity of consent-based searches involving consenting and non-consenting co-tenants.[52]

IV. TWO SIDES OF THE COIN—EVALUATING FERNANDEZ

A. Heads—If the King Is Not There, Then a Search Is Most Fair

It would appear that the government, whether federal or state employees, support the Court's decision in *Fernandez*, as it provides law enforcement officials with another tool to procure evidence of a crime. As such, this Part will focus on the various arguments brought forth by the government in support of *Fernandez*.

First and foremost, a consent search is a favorable means of protecting an individual's privacy from the arbitrary intrusion by police officers—with voluntary consent, there is "no arbitrary invasion of privacy."[53] Further, obtaining consent to conduct a warrantless search may be the only means of gathering crucial evidence of a crime.[54] Placing restrictions on consent searches can serve to "jeopardize their basic validity."[55] Given that consent searches are deemed favorable, co-tenant consent searches can be viewed as equally favorable.

Objectively, the Fourth Amendment's protection against unreasonable searches does not favor the criminal defendant over any other individual.[56] In a scenario involving co-tenant consent, a consenting co-tenant acts of his or her own volition, not as a defendant/co-tenant's agent, when exercising the right to consent or to deny consent to conduct

51. *Id.* at 1129.

52. *Compare* United States v. Watkins, 760 F.3d 1271, 1280 (11th Cir. 2014) (holding that a warrantless consent-based search of defendant's computer was reasonable given the lack of a contemporaneous objection by defendant); State v. Lamb, 95 A.3d 123, 135–36 (N.J. 2014) (holding that a warrantless consent-based search was reasonable following the voluntary departure of an objecting co-tenant and obtaining consent from the remaining co-tenant); Moore v. State, Nos. 12–13–00041–CR, 12–13–00042–CR, 2014 WL 2521537, at *6 (Tex. Crim. App. 2014) (finding that an officer's failure to leave the appellant's home following the objection by her husband was reasonable based on exigent circumstances and subsequent consent by the husband to the warrantless search), *with* State v. Coles, 95 A.3d 136, 138–39 (N.J. 2014) (holding that a warrantless consent-based search was unreasonable due to the unlawful detention of the defendant).

53. Brief for Respondent at 15, Fernandez v. California, 134 S. Ct. 1126 (2014) (No. 12-7822).

54. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

55. *Id.* at 229.

56. U.S. CONST. amend. IV.

a search of a residence.[57] Justification for co-tenant consent rests on the notion that persons with common control over the premises to be searched have "the right to permit the inspection *in his own right and that the others have assumed the risk* that one of their number might permit the common area to be searched."[58] Further, while the Fourth Amendment generally prohibits warrantless searches, a search based on an individual's voluntary consent is a "reasonable" search—regardless of whether consent is given by an individual who is suspected of wrongdoing or an innocent co-tenant.[59] The Fourth Amendment itself requires only that no government search will occur if it is "unreasonable."[60]

Further, the *Randolph* decision was meant to apply only in certain, specific situations; *Randolph* was only intended to apply where co-tenants have equal authority to consent, all co-tenants are present when consent is requested, and a dispute between co-tenants regarding consent to search the shared premises arises.[61] Social norms[62] require such an exception given the circumstances. Animosity created by the co-tenants' differing decisions regarding consent may lead to verbal or physical violence between the present co-tenants.[63] Further, social norms do not require such an exception when only a single co-tenant is present because there would be no risk of animosity and, thus, of violence resulting from the conflicting views of multiple co-tenants.[64] With its decision in *Randolph*, the Court strove to preserve *Matlock*'s central holding regarding co-tenants, 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."[65] In *Randolph*, the Court endorsed the *Matlock* Court's view that co-tenants assume the risk that another co-tenant may provide consent to enter a shared residence.[66]

57. Brief for Respondent, *supra* note 53, at 17 (citing United States v. Matlock, 415 U.S. 164 (1974)).

58. *Id.* at 18–19 (emphasis in original) (internal quotation marks omitted) (quoting *Matlock*, 415 U.S. at 171–72 n.7).

59. Brief for the United States as Amicus Curiae Supporting Respondent at 8, Fernandez v. California, 134 S. Ct. 1126 (2014) (No. 12-7822) (internal quotation marks omitted) (citing Illinois v. Rodriguez, 497 U.S. 177, 181, 183–84 (1990)) [hereinafter U.S. Brief].

60. *Rodriguez*, 497 U.S. at 183 (citing U.S. CONST. amend. IV).

61. Brief for Respondent, *supra* note 53, at 21.

62. A norm is defined as "[a] model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something." BLACK'S LAW DICTIONARY 519 (Bryan A. Garner ed., 4th pocket ed. 2011).

63. Brief for Respondent, *supra* note 53, at 21–22.

64. *Id.* at 22.

65. *Id.* (internal quotation marks omitted) (citing Georgia v. Randolph, 547 U.S. 103, 110 (2006) (quoting United States v. Matlock, 415 U.S. 163, 170 (1974))).

66. *Id.* at 22–23.

The actual, physical presence of an additional occupant refusing permission to search distinguished *Randolph* from earlier co-tenant consent cases.[67] Property rights provide no guidance regarding a situation involving multiple co-tenants with conflicting wishes on providing consent to search the shared residence.[68] Thus, *Randolph* drew a line—a line that required physical presence. "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."[69]

Justice Breyer explained in his concurring opinion that "[i]f Fourth Amendment law forced [the Court] to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, [he] believe[d] [the Court] should choose the first."[70] Justice Breyer decided to make this choice because "a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy."[71]

Additionally, an argument can be made that social expectations do not dictate a wider construction of *Randolph*. *Randolph* was decided based on the notion that a visitor would be hesitant to enter a residence when a conflict arises between two or more present residents regarding the visitor's admittance; however, this reticence to enter dissipates once the objector is no longer present.[72] As stated by the court in *United States v. Henderson*,[73] "[a] prior objection by an occupant who is no longer present would not be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation."[74]

Nor does property law require a wider construction of *Randolph*. *Randolph* recognized that "[e]ach [co-tenant] . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only

67. U.S. Brief, *supra* note 59, at 17 (citing *Randolph*, 547 U.S. at 109).
68. Brief for Respondent, *supra* note 53, at 23.
69. *Randolph*, 547 U.S. at 121.
70. U.S. Brief, *supra* note 59, at 16 (internal quotation marks omitted) (quoting *Randolph*, 547 U.S. at 125 (Breyer, J., concurring)).
71. *Id.* (internal quotation marks omitted) (quoting *Randolph*, 547 U.S. at 125 (Breyer, J., concurring)).
72. Brief for Respondent, *supra* note 53, at 26.
73. 536 F.3d 776 (7th Cir. 2008).
74. *Id.* at 784.

by the same right in the other [co-tenants]."[75] Further, it has been previously stated:

> [A] tenant in common may properly license a third person to enter on the common property. The licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting [co-tenants], particularly in the absence of excessive or negligent use of the right granted and in the absence of fraud in procuring the license.[76]

While "prejudicing" another co-tenant's property is not allowed, inviting someone who is disliked by a separate co-tenant into a shared residence does not rise to the level of prejudice that would preclude one from offering admittance; a co-tenant "must do something to the prejudice of the other, in reference to the property so situated."[77]

Additionally, allowing a *Randolph* objection to maintain its force beyond the moment when an objector is physically present would create, rather than cure, problems. Allowing a once-present individual to object and have that objection continue on indefinitely in his or her absence would be unreasonable.[78] For example, cold-case officers would not be able to return to a residence decades after an objection in an effort to obtain consent from a separate co-tenant.[79] Further, there exists no Fourth Amendment principle that would allow for an imposition of a time period to govern the length of time an objection would last.[80] While the Court has previously "set forth precise time limits governing police action," it is "certainly unusual" for the Court to do so.[81] Thus, a time limit for consent searches is unreasonable and unrealistic.

Finally, a co-tenant's permission to search a residence is acceptable "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."[82] Removal from a residence pursuant to a lawful

75. Brief for Respondent, *supra* note 53, at 29–30 (internal quotation marks omitted) (citing *Randolph*, 547 U.S. at 114 (quoting 7 RICHARD POWELL, POWELL ON REAL PROPERTY § 50.03[1], at 50-14 (M. Wolf gen. ed. 2005))).

76. 86 C.J.S. TENANCY IN COMMON § 144 (1997) (footnotes omitted).

77. Brief for Respondent, *supra* note 53, at 31 (internal quotation marks omitted) (quoting Rothwell v. Dewees, 67 U.S. 613, 619 (1863)).

78. U.S. Brief, *supra* note 59, at 25.

79. *Id.*

80. *Id.*

81. *Id.* (internal quotation marks omitted) (quoting Maryland v. Shatzer, 559 U.S. 98, 110 (2010)).

82. Brief for Respondent, *supra* note 53, at 34–35 (internal quotation marks omitted) (quoting Georgia v. Randolph, 547 U.S. 103, 121 (2006)).

arrest does not render a search illegal under *Randolph*—even though removal may deprive an individual of the opportunity to object to a subsequent search—because a Fourth Amendment violation occurs when police actions are unreasonable.[83] Thus, a lawful arrest based upon probable cause is not unreasonable, nor is returning to the scene of the arrest in an attempt to procure evidence of the crime.

Imposing consent restrictions upon remaining co-tenants following a lawful arrest may hinder crime prevention. While law enforcement officers have a variety of ways to procure evidence, there is no requirement that law enforcement officials seek a search warrant to conduct a residential search in an effort to minimally affect an individual's privacy.[84] Even with advances in technology resulting in faster procurement of a warrant, no guarantee exists that circumstances will always allow police officers to obtain a warrant in a quick and effective manner.[85] Even with the introduction of telephonic and electronic warrants, such "warrants may still require officers to follow time-consuming formalities designed to create an adequate record," and there is no "guarantee that a magistrate judge will be available when an officer needs a warrant."[86]

B. Tails—When the King Is Away, His Objection Must Stay

While some have lauded the Court's decision in *Fernandez*,[87] many are less enthusiastic given the potential implications on citizens of the United States. As such, this Part focuses on some of the various arguments brought forth by advocates in opposition to the *Fernandez* ruling.

First, privacy interests support a continuing objection. Per *Randolph*, an individual's objection should maintain force even if he or she is removed.[88] This is so because one's privacy interest does not diminish even when the individual is taken into custody.[89] The Court decided *Randolph* with social expectations in mind.[90] These social expectations are "influenced by the law of property," though they are not "controlled

83. *Id.* at 35.
84. *Id.* at 39.
85. *Id.* at 41.
86. Missouri v. McNeely, 133 S. Ct. 1552, 1562 (2013).
87. *Supra* Part IV(A) (noting that governmental employees support the Court's decision in *Fernandez* because it provides law enforcement officers greater means of procuring evidence).
88. Brief for Petitioner at 15, Fernandez v. California, 134 S. Ct. 1126 (2014) (No. 12-7822).
89. *Id.* at 16.
90. *See* Georgia v. Randolph, 547 U.S. 103, 111 (2006) (recognizing "the great significance given to widely shared social expectations" when determining whether a putative search is reasonable).

by its rules."[91] To provide an example, it is very unlikely that a visitor would feel that his or her admittance into a residence was consensual if he or she was just refused entry and, even more so if he or she was the cause of the refusing individual's absence from the residence.[92]

In terms of property law, co-tenants who share a residence also share the right to exclude.[93] "Each [co-tenant] . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other [co-tenant]."[94] Without obtaining a license from an individual to enter into his or her residence, any such subsequent entry is a trespass.[95] The Court has previously stated that "[o]ur law holds the property of every man so sacred, that no man can set his foot upon his [neighbor's] close without his leave."[96] Thus, when police, clearly informed to stay out of an individual's domicile, arrange for that individual's absence from his or her home and then seek another resident's permission to enter, they commit a common-law trespass.[97]

Further, police should not be able to return to a residence to obtain consent after having just removed and detained the individual.[98] In such circumstances, the rule of law is undermined when an individual expresses his or her desire that police not enter into his or her domicile, only to have the police override the individual's wishes without utilizing the proper legal methods to do so, such as obtaining a search warrant.[99] Police arresting an objecting individual are responsible for the individual's inability to remain physically present. Social norms would not allow an officer to obtain permission to enter the premises after the officer just removed the individual.[100]

An individual's right to exclude is at its pinnacle when at one's own home. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable

91. Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 8, Fernandez v. California, 134 S. Ct. 1126 (2014) (No. 12-7822) (internal quotation marks omitted) (quoting *Randolph*, 547 U.S. at 121) [hereinafter NACDL Brief].

92. Brief for Petitioner, *supra* note 88, at 17.

93. NACDL Brief, *supra* note 91, at 17. "Because each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers. Title may be vindicated and trespassers removed from any part by an action of ejectment brought by any joint tenant." 4 GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 31.07(d) (D. Thomas ed., 2004).

94. POWELL, *supra* note 75, at § 50.3[1].

95. NACDL Brief, *supra* note 91, at 19.

96. Florida v. Jardines, 133 S. Ct. 1409, 1415 (2013) (internal quotation marks omitted) (quoting Entick v. Carrington, 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (K.B. 1765)).

97. NACDL Brief, *supra* note 91, at 19.

98. Brief for Petitioner, *supra* note 88, at 17–18.

99. NACDL Brief, *supra* note 91, at 13.

100. Brief for Petitioner, *supra* note 88, at 19.

government intrusion."[101] Thus, society shows great respect for an individual's right to maintain the privacy of his or her home.[102] While one's decision to share a residence with another results in surrendering a portion of his or her privacy interest, doing so does not hinder his or her ability "to stand at the door of his castle and bid defiance to all the forces of the Crown."[103] Our society's perspective regarding the sanctity of one's home is such that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, *not by appeals to authority*."[104]

Second, law enforcement officers have other means of gaining entry absent consent. Should an individual refuse to allow police officers consent to search the individual's domicile, the officers have the option of attempting to procure a search warrant. The Court has previously stated that "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."[105] In the event that an individual is arrested, the arrest normally provides the "probable cause" necessary to procure a search warrant, which could be obtained with relative ease.[106] While it is true that it may take longer to obtain a search warrant than to waltz into a domicile with the owner's consent, in the event of a subsequent arrest the extra wait is immaterial given that the possibility of the destruction of evidence by any remaining resident is minimal under such circumstances. In such an event, it is more likely that any remaining residents will fly the straight-and-narrow "to deflect suspicion raised by sharing quarters with a criminal."[107]

The time required preparing a few papers and presenting evidence to a magistrate may be an inconvenience to officers, but this minor delay is not enough to justify circumventing the constitutional requirement to obtain a search warrant.[108] If time is of the essence for fear of destruction of evidence, assuming that said potential destruction does not rise to the level of exigent circumstances, warrants are now available through various avenues and can be obtained relatively quickly. For example,

101. Silverman v. United States, 365 U.S. 505, 511 (1961).
102. NACDL Brief, *supra* note 91, at 11.
103. *Id.* at 11 (internal quotation marks omitted) (quoting Miller v. United States, 357 U.S. 301, 307 (1958)).
104. *Id.* at 12–13 (emphasis in the original) (internal quotation marks omitted) (quoting Georgia v. Randolph, 547 U.S. 103, 113–14 (2006)).
105. Payton v. New York, 445 U.S. 573, 586 (1980) (internal quotation marks omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477–78 (1971)).
106. Brief for Petitioner, *supra* note 88, at 20–21.
107. *Id.* at 21 (internal quotation marks omitted) (quoting *Randolph*, 547 U.S. at 116).
108. Johnson v. United States, 333 U.S. 10, 15 (1948).

warrants may be obtained via telephone or radio communications, as well as by email or video conferencing, which allows officers to remain on the premises while attempting to procure a warrant so that they might monitor what is taking place.[109] As early as 1973, it was estimated by a district attorney's office in California that "[ninety-five] percent of telephonic warrants take less than [forty-five] minutes."[110] Further, there are several instances of new technological advances to curtail the warranting process. In 2008, a Utah program utilized electronic warrants in circumstances where an officer "requested an e-warrant for a forced blood draw on a man arrested for DUI. The warrant was approved in about five minutes."[111] A similar story out of Kansas states that "[f]rom the time the officer begins completing the search warrant affidavit form to the time the judge returns the signed search warrant is now about [fifteen] minutes."[112]

"[W]ith current computer and electronic telecommunications technology, police officers can now swiftly obtain a warrant without leaving the area of investigation."[113] Additionally, police officers may seal off the premises, removing the individuals from inside, while awaiting a warrant, which would virtually eliminate all possibility that evidence would be destroyed.[114] Moreover, as stated earlier, the exigent circumstance doctrine allows for entry without seeking a warrant or consent "to prevent the imminent destruction of evidence" or to render emergency assistance to an individual inside a residence.[115] Further, requiring the procurement of a warrant imposes no real burden upon law enforcement given that "the overwhelming majority of warrant

109. Missouri v. McNeely, 133 S. Ct. 1552, 1562 (2013).

110. NACDL Brief, *supra* note 91, at 28 (internal quotation marks omitted) (citing People v. Blackwell, 195 Cal. Rptr. 298, 302 n.2 (Cal. Ct. App. 1983)). More recently, an Arizona court stated that "the Mesa Police Department is able to obtain a [telephonic] warrant within as little as fifteen minutes and that delays of only fifteen to forty-five minutes are commonplace." State v. Flannigan, 978 P.2d 127, 131 (Ariz. Ct. App. 1998).

111. Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, POSITIVE LEO, http://positiveleo.wordpress.com/2008/12/26/utah-cops-praise-electronic-warrant-system/ (last visited Mar. 17, 2016). Going even further, the article states that, in one instance involving an e-warrant concerning a theft, "[i]t took the judge about two minutes to review the e-warrant," which supports the fact that obtaining an electronic warrant may only take a miniscule amount of time. *Id.*

112. Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, 9 THE KANSAS PROSECUTOR, no. 1, Spring 2012, at 18, http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf.

113. Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 295 (1996).

114. Illinois v. McArthur, 531 U.S. 326, 331–34 (2001).

115. Brigham City v. Stewart, 547 U.S. 398, 403 (2006).

applications submitted to judges are approved,"[116] coupled with the fact that "[t]he rate of outright rejection [of warrant applications] is extremely low."[117]

Law enforcement officers have a variety of different avenues available to gain entry into a residence. Consequently, if officers lack probable cause and there are no safety or medical concerns, nor reason from any remaining co-tenants that the residence contains evidence of criminal activity, then an objecting individual should have the ability to prevent police from entering his or her premises and the individual's right to privacy should prevail.[118] Allowing involuntary removal to negate objections to police entry is contrary to *Randolph*.

Randolph is meant to distinguish situations where there is, and where there is not, an "absence of reason to doubt" whether one tenant is able to speak for another; or rather, whether police should reasonably be aware that their presence is, in fact, welcome.[119] Requiring continued presence of an objecting individual opens the door for the possibility that police, instead of attempting to procure a warrant, will wait until an objecting individual leaves the premises and then attempt to obtain valid consent from another resident.[120] Taking circumstances one step further, allowing officers to purposefully negate an objection by lawfully detaining an individual eliminates the need for officers to even leave the objecting individual's doorstep. This allows police officers the ability "to render the objector's prior assertion of his *Randolph* rights meaningless."[121]

Third, *Randolph* objections do not result in administrative difficulties or in a complete bar from obtaining consent from a co-tenant. It would be relatively simple for officers wishing to perform a warrantless search, following an express refusal, to attempt to obtain consent again from the objector, or to speak to a different resident who could be reasonably relied on to provide such assurance that there no longer exists an objection.[122]

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116. NACDL Brief, *supra* note 91, at 27 (internal quotation marks omitted) (quoting M. Hirsch, *Fourth Amendment Forum, Featured Column*, 30 CHAMPION 50, 51 (Apr. 2006)).

117. *Id.* at 27–28 (internal quotation marks omitted) (quoting RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 27 (Nat'l Ctr. for State Courts 1985)). Outright rejection happens so infrequently that "[m]ost of the police officers interviewed could not remember having a search warrant application turned down." *Id.* at 28 (internal quotation marks omitted) (quoting VAN DUIZEND ET AL., *supra*, at 27).

118. Brief for Petitioner, *supra* note 88, at 22–23.

119. *Id.* at 24 (internal quotation marks omitted) (quoting Georgia v. Randolph, 547 U.S. 103, 112 (2006)).

120. *Id.*

121. *Id.* at 25.

122. *Id.* at 27.

The Court has stated that the determination of consent to enter a residence must be judged utilizing an objective standard, which considers whether the facts and circumstances surrounding a given situation would provide a reasonably cautious individual to believe that the consenting party had authority over the premises.[123] In other words, if it is reasonable for an officer to believe that a co-tenant could rightly attest to the fact that the objecting tenant withdraws his or her objection to a search, then police may rely on such an attestation and validly obtain consent from the co-tenant to conduct a search.[124]

Regarding obtaining consent from an individual who has previously objected and is subsequently detained, said arrested individual may well provide consent after a cooling down and reflection period.[125] In the alternative, police may attempt to enlist the help of the cooperative co-tenant.[126] For example, a cooperative co-tenant may help in trying to persuade the objector to provide consent. If obtaining consent proves to be impossible, a cooperative co-tenant may provide police with useful information that would allow for easier procurement of a search warrant.

Further, the imposition of a continuous presence rule is problematic. The term "present" itself presents difficulty as no guidance is provided regarding what exactly constitutes being "present."[127] For example, is someone present when he or she moves to his or her front lawn? What happens if he or she goes to the restroom? Is one present if he or she steps away and takes a phone call in another room? If literal presence at his or her doorway were required to maintain one's "presence," then police would be able to surreptitiously evade the legal effect of a potential or present objection.[128]

V. REINSTATING THE KING'S POWER

Both the government and advocates for the defense provide compelling arguments for and against the Court's decision in *Fernandez*. It is difficult to attempt to concoct a solution that will be agreed upon by both sides, provide citizens with much needed protection, and allow police officers to do their jobs without being needlessly impeded in their duties. The following Part suggests some resolutions to the current third-party consent problem with a focus on the intent of our nation's Founders

123. Illinois v. Rodriguez, 497 U.S. 177, 181, 188 (1990).
124. Brief for Petitioner, *supra* note 88, at 27–28.
125. *Id.* at 30.
126. *Id.*
127. *Id.* at 28.
128. *Id.* at 28–29.

in crafting the Fourth Amendment—their disdain for general warrants.

A. God Save the King—Exposing the Myth of Voluntary Consent

"[E]very man's house is his castle" is a maxim that was once used to describe the nation's view toward the Fourth Amendment of our Constitution.[129] As the Fourth Amendment has evolved to the point where a man's castle can be easily invaded, a much-needed change is in order. The Author fully realizes that, given how the nation's Fourth Amendment jurisprudence has evolved over the years, a complete ban on consent searches may seem far-fetched. Many will argue that such a ban needlessly impedes upon a police officer's duties, and that hardened criminals will be acquitted of their crimes, or that they will not be prosecuted in the first place, for lack of sufficient evidence to prosecute effectively. Further, it may be argued that consent searches are completely voluntary, and thus, any individual who wishes to refuse consent to a search of his or her domicile may do so freely without the fear of any repercussions. Unfortunately, this line of thought is misguided as voluntary consent is a myth, especially where an authority figure is involved.

Consent searches are mythical for the simple fact that most people do not willingly consent to searches.[130] In a scenario where an individual is confronted with a police officer requesting consent to search his or her domicile—as well as his or her car, purse, person, etc.—most people would not feel that they really have the power to deny a request by a police officer.[131] Many individuals are taught from an early age to respect authority figures and to do as they are told.[132] Realistically, as Professor Maclin has previously stated, "[c]ommon sense teaches that most of us do not have the [chutzpah] or stupidity to tell a police officer to 'get lost'";[133] this line of thinking likely stems directly from our upbringing.

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129. Weeks v. United States, 232 U.S. 383, 390 (1914) (internal quotation marks omitted) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 365 (5th ed. 1883)), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

130. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2001).

131. *Id.* at 236.

132. Saul McLeod, *The Milgram Experiment*, SIMPLYPSYCHOLOGY (2007), www.simplypsychology.org/milgram.html.

133. Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249–50 (1991). Professor Maclin was speaking specifically about seizures, though the analysis applies equally well to consent searches. Strauss, *supra* note 130, at 236.

Further, human psychology supports the contention that most individuals will obey authority figures "even when it is not in their own best interests to do so."[134] One would logically think that if a person were in possession of illegal drugs on his or her person, that he or she would be foolish to willingly consent to a search of his or her person; however, this is not the case.

In *United States v. Drayton*,[135] police boarded a bus stopped in Tallahassee, Florida "as part of a routine drug and weapons interdiction effort."[136] While aboard the bus, an officer ultimately made his way to two individuals, both of whom were wearing baggy clothing.[137] The officer asked one individual if he would consent to a search of his person, to which the individual responded, "Sure."[138] Upon searching the individual, the officer discovered packages of cocaine.[139] Mr. Drayton, who was seated next to the man with the cocaine, was then asked if he would consent to a search; Mr. Drayton lifted his arms, was searched, and cocaine was discovered.[140]

The defendants moved to suppress the evidence based on a lack of valid consent, but the motion was denied; the defendants were subsequently convicted in district court.[141] The District Court's decision was reversed and remanded by the Court of Appeals for the Eleventh Circuit, which based its decision on the idea that the defendants would not have felt "free to disregard police officers' requests to search absent some positive indication that consent could have been refused."[142] The Supreme Court subsequently reversed after concluding that the consent to the search was voluntary because a reasonable person would have felt free to refuse.[143]

Anomalies like that in *Drayton* occur because people are, in a sense, programed to acquiesce to the requests of authority figures. The fact that people are programed to respond in certain ways, especially if not cognitively aware of this fact, serves to hinder the ability to be objective and reasonable in terms of coming up with a solution for the problem revolving around mythical consent searches. Thus, awareness becomes

134. *Id.*
135. 536 U.S. 194 (2002).
136. *Id.* at 197.
137. *Id.* at 198–99.
138. *Id.* at 199.
139. *Id.*
140. *Id.*
141. *Id.* at 199–200.
142. *Id.* at 200 (internal quotation marks omitted) (quoting United States v. Washington, 151 F.3d 1354, 1357 (1998)).
143. *Id.* at 206, 208.

key in crafting a solution to a problem that plagues unwilling consenters each and every day.

1. Dr. Milgram and His Progeny

Stanley Milgram conducted an experiment, in part, to help determine whether there was any credibility to the concept that those involved in the mass killings during the Holocaust performed their duties as the result of strict obedience to authority.[144] Dr. Milgram's experiment consisted of an experimenter instructing an unknowing subject to shock a victim, utilizing a shock generator, which had thirty different voltage levels ranging from fifteen to 450 volts.[145] Unknown to the subject, however, was the fact that the shock generator was fake and that the other individuals involved in the experiment—the experimenter and the victim—were actors.[146] The goal of the experiment was to see "how far people would go in obeying an instruction if it involved harming another person."[147] Every subject administered every shock up through the 300-volt shock, at which point five individuals refused to continue.[148] Out of all forty subjects, twenty-six of them, or sixty-five percent, proceeded to administer all thirty shocks.[149] This is rather significant given that the researchers originally thought that few, if any, of the subjects would make it much further than the halfway point, much less all the way until the

144. McLeod, *supra* note 132.

145. STANLEY MILGRAM, *Behavioral Study of Obedience*, *in* READINGS ABOUT THE SOCIAL ANIMAL 27, 28 (Joshua Aronson & Elliot Aronson eds., 11th ed. 2011). In addition to having thirty different settings, all of which were clearly marked, the shock generator contained designations ranging "from Slight Shock to Danger: Severe Shock." *Id.*

146. *Id.*

147. McLeod, *supra* note 132. In Dr. Milgram's experiment, forty individuals, all male, were selected to take part in the experiment. MILGRAM, *supra* note 145, at 29. The individuals were obtained under the guise of helping to conduct an experiment that would measure the correlation between punishment and learning. *Id.* at 30. The subject was paired with another individual, an actor, each of whom would play the role of either the "teacher" or the "learner." *Id.* at 31. Through manipulation, the subject always played the role of the "teacher." *Id.* Following the assignment of the roles for the experiment, both individuals were placed in separate rooms and the "teacher" was told to administer a shock to the "learner" each time he responded incorrectly, moving up one level after each wrong answer. *Id.* at 31–32. The "teacher" read a list of paired words to the "learner" and then read the first word in the pair again, which the "learner" was supposed to match up with the second word of the pair. *Id.* at 31. During the course of the experiment, the "learner," as the voltage approached the top end, acted as though he was in a great deal of pain. *Id.* at 33. As the "teacher" hit the 150-volt mark, the "learner" protested and "demand[ed] to be released from the study." Jerry M. Burger, *Replicating Milgram, Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1, Jan. 2009, at 2. Should the "teacher" want to stop the experiment, the "experimenter" would then attempt to prod the "teacher" into continuing with the experiment; this continued until either the "teacher" administered the highest level of shock or refused to continue. *Id.* at 1–2.

148. MILGRAM, *supra* note 145, at 35. Most of the individuals who refused to continue administering shocks stopped between 300 and 375 volts. *Id.* at 36.

149. *Id.*

final shock.[150] The results of Dr. Milgram's experiment are such that "[o]rdinary people are likely to follow orders given by an authority figure. . . . Obedience to authority is ingrained in us all from the way we are brought up."[151]

Dr. Milgram's research into obedience toward authority has inspired a number of other scholars to conduct similar studies in an effort to confirm just how obedient individuals are.[152] In Dr. Milgram's obedience experiment, one arguable flaw was that only male participants were used.[153] Thus, many subsequent experiments have observed both male and female subjects in tandem.[154] Most studies have indicated results similar to Dr. Milgram's experiment,[155] demonstrating that many individuals are susceptible to influence from an authority figure.

In a slightly different study regarding obedience toward authority figures, in 1995, Wim Meeus and Quinten Raaijmakers studied what they called "administrative violence," involving an experimenter, a subject, and a confederate who was described to the subject as a job applicant.[156] The subjects were instructed to disturb the applicant during a test with the knowledge that if the applicant failed the test, he would be denied the job for which he was applying and end up unemployed.[157] Subjects were instructed to make fifteen negative remarks regarding the applicant's performance and personality; if they refused, much like the Milgram

150. *Id.* at 34.

151. McLeod, *supra* note 132.

152. *See* Sharon Presley, *The Present and Future of Obedience to Unjust Authority*, RESOURCES FOR INDEP. THINKING (2010), http://www.rit.org/authority/futureobedience.php (discussing the Kilham & Mann study out of Australia, the Dutch study, and the Burger study); Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, 29 J. APPLIED SOC. PSYCHOL., May 1999, at 955, 966 (discussing a variety of Milgram-like experiments subsequent to Dr. Milgram's).

153. MILGRAM, *supra* note 145, at 29. However, Dr. Milgram performed one condition in which the participants were women, resulting in the same obedience level as obtained from men. Blass, *supra* note 152, at 968.

154. *Id.* at 966.

155. *Id.* Sixty-five percent of the participants in Dr. Milgram's study were fully obedient, taking part in the study until the very end as opposed to refusing to continue. *Id.* In 1969, D. M. Edwards conducted a study out of South Africa utilizing ten male and six female participants, and the study yielded a fully obedient level of eighty-seven and a half percent. *Id.* In 1974, W. Kilham and L. Mann conducted a study out of Australia utilizing twenty-five male and female participants, yielding a fully obedient level of twenty-eight percent, which is rather inapposite of Dr. Milgram's study. *Id.* Of note, however, male participants in the Kilham & Mann study were fully obedient forty percent of the time, versus sixteen percent in women. *Id.* at 968. In 1977, M. E. Shanab and K. A. Yahya out of Jordan conducted an experiment involving forty-eight male and female participants, yielding a result of seventy-three percent of participants who were fully obedient. *Id.* at 966. In 1985, G. Schurz conducted an experiment with twenty-four males and thirty-two females resulting in an eighty percent fully obedient level. *Id.*

156. Presley, *supra* note 152.

157. *Id.*

experiment, the experimenter would attempt to prod the subject into continuing.[158] The results were such that ninety percent of participants obeyed and continued their task to fruition.[159]

The most recent study, conducted by Jerry Burger in 2009, was a partial replication of Dr. Milgram's experiment wherein participants would, like in the Milgram experiment, ask a "learner" to recall a word previously read and pair it with its partner word.[160] In this partial replication, conducted almost identically to Dr. Milgram's earlier experiment and designed to avoid ethical problems, the study would end when either the "teacher" refused to continue, or when the "teacher" decided to move past the 150-volt mark.[161] The results of this experiment were that seventy percent of participants were fully obedient.[162]

It is clear that individuals are highly susceptible to the influence of authority figures, so much so that the average individual, at the behest of a perceived authority figure, is willing to cause great bodily harm to another person if instructed to do so. Thus, in the context of consent searches, when a criminal suspect is confronted by a law enforcement official—a well-known authority figure—and asked for consent to conduct a warrantless search, the suspect is psychologically predisposed to acquiesce to the official's request, even when doing so is clearly not in his or her best interest. In the context of third-party consent searches, the lack of repercussions associated with acquiescing to a warrantless search of a shared residence, coupled with the desire to avoid any connection with the criminal activity, increases the probability that a non-suspect joint tenant will consent to the search, and provide law enforcement officers with the incentive to orchestrate the removal of any individual who objects, or who would object, to a warrantless search.

2. The Key to the Castle—A Search Warrant

In the event that a law enforcement officer is unequivocally refused consent, whether by a suspect or a third party, what options does he or she have to obtain evidence of a crime? The most obvious answer is that they may attempt to obtain a search warrant. The Fourth Amendment of the U.S. Constitution states:

158. *Id.*
159. *Id.*
160. Burger, *supra* note 147, at 6–7.
161. *Id.* at 7. The 150-volt mark is significant as, in Dr. Milgram's experiment, this was the level at which the "learner" would protest and demand to be let go, which is the same procedure that took place in Burger's experiment. *Id.* at 2, 7.
162. *Id.* at 8.

> 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.[163]

Thus, for a law enforcement officer to obtain a search warrant, he or she must demonstrate that a search is justified by reason of probable cause, support the probable cause with sworn affidavits, as well as describe, in sufficient detail, the location of the search and what is to be searched.[164] In circumstances such as those involved in *Fernandez*, where probable cause exists to justify an arrest, the arrest normally provides the probable cause necessary to procure a search warrant.[165]

Further, due to the evolution of search warrant jurisprudence and advancements in technology, search warrants may be obtained within minutes through telephonic, fax-based, or other electronic means, and without requiring officers to leave the scene of an alleged crime.[166] Additionally, police officers generally do not have to worry about being denied a search warrant given the fact that the vast majority of search warrants submitted to the judiciary are approved,[167] and that the rejection of a warrant application rarely takes place.[168] Further, while police officers have the ability to procure evidence of a crime by way of a search warrant, in the event of a third-party consent dispute, there still exists the possibility that a disputing third party will deliver any incriminating evidence to the police upon his or her own initiative; or, in the alternative, the third party may divulge any information he or she has that may ultimately help police officers obtain a warrant.[169]

Finally, requiring law enforcement officials to procure a search warrant in place of obtaining an individual's consent helps protect the

163. U.S. CONST. amend. IV.

164. *Id.*

165. Brief for Petitioner, *supra* note 88, at 20–21.

166. *See* State v. Flannigan, 978 P.2d 127, 131 (Ariz. Ct. App. 1998) (stating that a telephonic warrant may be obtained by officers "within as little as fifteen minutes"); Beci, *supra* note 113, at 295 (stating that "with current computer and electronic telecommunications technology, police officers can now swiftly obtain a warrant without leaving the area of investigation"); Benefiel, *supra* note 112, at 18 (stating that, from start to finish, a warrant may be obtained electronically within fifteen minutes); Bergreen, *supra* note 111 (stating an e-warrant was reviewed by the judge in about two minutes).

167. NACDL Brief, *supra* note 91, at 27 (citing M. Hirsch, *supra* note 116, 1t 51).

168. *Id.* at 27–28 (citing VAN DUIZEND ET AL., *supra* note 117, at 27). In fact, so few warrants are denied that the majority of interviewed officers could not recall ever being denied a requested warrant. *Id.*

169. Orit Gan, *Third-Party Consent to Search: Analyzing Triangular Relations*, 19 DUKE J. GENDER L. & POL'Y 303, 344 (2012).

private individual, while also serving to place a reasonable limit on police power. Existing law regarding consent searches allows police officers to attempt to persuade an individual to consent to a search.[170] Current law "does not preclude the police from 'wearing down' the suspect to obtain consent."[171] Indeed, courts have upheld consent searches where an individual initially refuses to allow consent but is then informed that a warrant would be obtained.[172] To further elucidate this point, following the Court's decision in *Schneckloth*, Justice Marshall, in his dissent, expressed his dismay stating that the Court has approved "a game of blindman's [bluff], in which the police always have the upper hand, for the sake of nothing more than the convenience of the police."[173] Justice Marshall's concerns rang true when researchers were informed by a police detective how obtaining one's consent to search worked in the real world.[174] According to the detective, a request for consent to conduct a search takes place similar to this scenario:

> [You] tell the guy, "Let me come in and take a look at your house." And he says, "No, I don't want to." And then you tell him, "Then, I'm going to leave Sam here, and he's going to live with you until we come back [with a search warrant]. Now we can do it either way." And very rarely do the people say, "Go get your search warrant, then."[175]

The detective's example illustrates the fiction involved in our current voluntary consent doctrine.

Further, the Court's decision in *Fernandez* serves to bolster the power of law enforcement officers in terms of allowing for the circumvention of obtaining a search warrant when involved with a consent-search scenario. In *United States v. Groves*,[176] the Seventh Circuit ruled that a particular search was valid after the defendant in question clearly refused to provide the officer consent to search his domicile, prompting the

170. Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 80 (2008) (citing Strauss, *supra* note 130, at 250–51).

171. Strauss, *supra* note 130, at 251.

172. Maclin, *supra* note 170, at 80. *See, e.g.*, State v. Livingston, 897 A.2d 977, 984 (N.H. 2006) (finding a defendant's consent to a car search was voluntary after the defendant, who had initially refused consent, was informed that his refusal would be circumvented via a canine drug sniff); State v. Watkins, 610 S.E.2d 746, 751 (N.C. Ct. App. 2005) (finding a defendant's girlfriend's consent to a search voluntary after police informed the girlfriend, who had initially refused consent, that they would procure a warrant).

173. Maclin, *supra* note 170, at 81 (internal quotation marks omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 289–90 (1973) (Marshall, J., dissenting)).

174. *Id.*

175. *Id.* (citing VAN DUIZEND ET AL., *supra* note 117, at 69).

176. 530 F.3d 506 (7th Cir. 2008).

officers to attempt to procure a search warrant, which was denied.[177] Following the denial, the officers, after waiting several weeks for the defendant to leave, returned to his home and asked his girlfriend for consent to search the premises.[178] The defendant's girlfriend testified that the officers threatened to involve Child Protective Services to remove her child if she refused to consent; she acquiesced resulting in the police officer's procurement of evidence that was used against the defendant.[179]

While *Groves* took place years before the Court's decision in *Fernandez*, the very idea that such practice was allowed is abhorrent. Clearly, this is exactly the type of unscrupulous practice that the Court's decision in *Fernandez* allows for by requiring a continually present and objecting individual. Additionally, shortly after the Court's decision in *Fernandez*, other courts issued rulings that only serve to prove that requiring a present and objecting individual to override a third-party consenter allows law enforcement officers to circumvent the Fourth Amendment's warrant requirement.[180] Thus, it is clear that the Court's decision in *Fernandez* is contrary to the spirit of the Fourth Amendment as drafted by the Founders of our nation and that radical change is necessary to rectify this wrong. It is hard to imagine that, when drafting the Fourth Amendment, the drafters could have possibly intended for an American citizen to be free from a warrantless search only so long as he or she is present in his or her home to object. Such unscrupulous practices—lying in wait for a pristine opportunity—cannot be tolerated. To allow such a blatant disregard for the principles of the Fourth Amendment demonstrates an intolerable lack of respect for our Founding Fathers.

3. The Arbitrary Determination of Voluntary Consent

In the event that a criminal defendant claims his or her consent was not voluntary, it is the government's job to show that consent was "freely and voluntarily given, a burden that is not satisfied by showing a mere

177. *Id.* at 508.
178. *Id.*
179. *Id.* at 508–09.
180. *See* United States v. Peyton, 745 F.3d 546, 549 (D.C. Cir. 2014) (demonstrating the willingness of law enforcement officers to return to a residence with the knowledge that a defendant will not be present to object in an effort to procure consent to search a domicile from a third party); State v. Coles, 95 A.3d 136, 151 (N.J. 2014) (demonstrating that an unlawful detention of an objector will result in the suppression of evidence); State v. Lamb, 95 A.3d 123, 125–26 (N.J. 2014) (providing an example of law enforcement's ability to convince an objector and a defendant to vacate a domicile in order to obtain consent from a willing third party).

submission to a claim of lawful authority."[181] In determining whether consent was voluntary or brought about by way of duress or coercion, such determination must be made by giving consideration to the totality of the circumstances.[182] In assessing the totality of the circumstances, some factors that the Court has considered include: the accused's age, education, and intelligence; lack of advice regarding the accused's constitutional rights; the length of detention; the nature of the questioning; and the use of physical punishment. None of these factors is controlling standing alone.[183] Thus, there may be an argument that there is already in place a proper check in power—the court system—that may be sufficient to ensure that an individual's voluntary consent was truly given of his or her own volition. Unfortunately for the individual, it would appear that, when considering the totality of the circumstances, a court will likely find that voluntary consent was given,[184] unless police misconduct had clearly taken place.[185] In fact, it has been suggested that a court will almost certainly find that consent was given voluntarily in the absence of police misconduct, regardless of any alternate surrounding circumstances.[186] Thus, relying on the court system as a buffer to make a

181. Florida v. Royer, 460 U.S. 491, 497 (1983).

182. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

183. *Id.* at 226.

184. *See* United States v. Perea, 374 F. Supp. 2d 961, 978 (D.N.M. 2005) (consent was voluntary where a defendant was held at gunpoint, handcuffed, placed in police cruiser, and then asked for consent to search his vehicle); State v. Weisler, 35 A.3d 970, 973 (Vt. 2011) (consent to search of a vehicle was voluntary where a motorist had witnessed two passengers being forced to the ground at gunpoint, handcuffed, and patted down and after he was warned that refusal would result in the officer attempting to secure a search warrant when said conversation took place in the officer's vehicle); State v. Stover, 685 S.E.2d 127, 133 (N.C. Ct. App. 2009) (consent was voluntary after a warrantless entry by an officer who kicked down the defendant's apartment door and aimed his gun at the defendant, where the officer subsequently lowered his gun and helped the defendant find someone to care for his child).

185. *See* United States v. Calhoun, 542 F.2d 1094, 1101–02 (9th Cir. 1976) (consent to search an apartment was involuntary where eight agents entered into a defendant's apartment unannounced with guns drawn, arrested and handcuffed him in the middle of the night, and handcuffed the defendant's wife); United States v. Whitlock, 418 F. Supp. 138, 142 (E.D. Mich. 1976) (consent to search a vehicle was involuntary where an agent, with a warrant to search the defendant's apartment, held defendant at gunpoint outside of his vehicle, handcuffed the defendant, removed the defendant to his apartment with a total of five agents, and failed to advise the defendant that he could refuse consent to search anything outside of the warrant); Thomas v. State, 127 So. 3d 658, 666–67 (Fla. Dist. Ct. App. 2013) (absent exigent circumstances, consent to search a residence was involuntary where police entered the residence without a warrant, after being verbally denied entry and removing the objector); State v. Cunningham, 4 N.E.3d 800, 806–07 (Ind. Ct. App. 2014) (consent to a pat-down search was involuntary where an officer gave the defendant an ultimatum as opposed to a request to conduct a search).

186. *See* Strauss, *supra* note 130, at 227 (stating that "consent searches are upheld except in extreme cases that almost always focus not on subjective factors of the suspect, but on the behavior of the police"); Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2225 (2006) (concluding, after analyzing a plethora of cases involving consent, that courts, in rendering evidence suppression decisions, really make their determinations based on

reasonable determination based on the totality of the surrounding circumstances as to whether an individual's consent is voluntary, as opposed to a product of duress or coercion, provides little comfort to any individual in a situation where it is not abundantly clear that police officers have engaged in some form of illegal or egregious conduct. Further, while it is seemingly true that a court will be inclined to conclude that consent is involuntary should police misconduct be alleged, there still exists the tremendous hurdle that an individual alleging misconduct must overcome—undertaking the difficult task of actually convincing the court that such misconduct has taken place.

4. Off with Its Head—Eliminate Voluntary Consent

Based on the aforementioned psychological studies, it is clear that human decisions are highly susceptible to influence by authority figures. Relevant to consent doctrine is the consideration of the private citizen versus the law enforcement official. The average individual is almost certainly unwilling to provide a law enforcement officer with the consent to perform a search in the event that such a search will yield evidence of any illegal activity, but he or she is programmed to obey authority figures, and thus, may provide consent to a search even though doing so will inculpate himself or herself.[187] Further, in the event of a third-party consent search, the likelihood that officers are given consent to search increases dramatically, given the similarity between such a situation and those situations in the aforementioned experiments.[188] Stated differently, a third party providing consent to search a domicile is much more likely to do so when no negative consequences will befall him or her. Thus, it is imperative that a solution is discovered with regard to third-party consent doctrine.

In addition to the myth of voluntary consent, law enforcement officers have at their disposal means other than consent to procure evidence of a crime—most notably, the search warrant. Requiring law enforcement officers to obtain a constitutionally prescribed warrant serves to keep police power in check. As has been previously stated by

whether police misconduct occurred, as opposed to whether the individual provided consent voluntarily).

187. *See* United States v. Drayton, 536 U.S. 194, 207 (2002) (indicating that a defendant, when presented with a request to perform a search of his person, is inclined to acquiesce to an authority figure).

188. *See* Presley, *supra* note 152 (stating that in Meeus and Raaijmaker's study, as well as in Dr. Milgram's, "participants were more likely to attribute responsibility to the experimenter for what happened," and that the results of the study were that people are to "[d]o what [they] are told and [to] . . . not question why").

the Court, "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."[189] This quote by Justice Butler serves to illustrate that police officers, likely intending no ill will, may act in a surreptitious and abrasive manner, doing whatever they can to make an arrest based on the thrill of the catch. While it is certainly comforting for law-abiding citizens to know that they have zealous law enforcement officers watching over them, such comfort cannot outweigh the need to preserve constitutionally prescribed protections—lest citizens desire to set aside what the Founding Fathers worked so hard to achieve.

Finally, it is true that an individual may rely on the court to make a determination based on the totality of the circumstances that the consent given was invalidated by reason of coercion or duress.[190] However, given that a court will almost certainly find that any consent given was voluntary, absent clearly observable misconduct on the part of the police, an individual relying on the court for help will find little solace with such a safeguard.[191]

For these reasons, even though doing away with consent searches is a drastic measure, consent searches should be abolished given that voluntary consent is a mythical creature, coupled with the irrefutable fact that law enforcement officials have at their disposal the constitutionally powerful search warrant as a means of collecting evidence, and that the court system is currently inadequate in determining whether consent is voluntary. In the alternative, at the very least, third-party consent searches should be abolished as the potential for injustice increases dramatically where a third-party co-tenant is faced with a request to conduct a warrantless search of a shared residence where there will be no ill effect resulting from the search on the co-tenant. This is especially unjust given that police officers may be inclined to act in a disreputable manner in obtaining such consent by means of removing an objecting suspect from the premises or lying in wait until he or she leaves.

B. An Ignorant King Is No King at All—*Fernandez* Warnings

In 1966, the Supreme Court decided *Miranda v. Arizona*,[192] holding that statements stemming from custodial interrogation may not be used

189. United States v. Lefkowitz, 285 U.S. 452, 464 (1932).
190. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).
191. Sutherland, *supra* note 186, at 2225.
192. 384 U.S. 436 (1966).

against a defendant unless procedural safeguards protecting the privilege against self-incrimination are demonstrated.[193] In deciding *Miranda*, the Court's concern revolved around the interrogation atmosphere and the "evils it can bring."[194] When an individual is subjected to a custodial interrogation, the individual must be apprised of his or her right to remain silent,[195] that anything said can and will be used against him or her in court,[196] that he or she has a right to confer with an attorney,[197] and that, if indigent, he or she will be appointed an attorney to represent him or her.[198]

While providing individuals in a consent-based search scenario with *Miranda*-like warnings—that consent to a search may be refused without resulting in any negative consequences upon the refusing individual—may be considered a somewhat radical measure, the line of thinking that resulted in the now-well-known *Miranda* warnings applies equally in consent-search scenarios. Thus, providing *Fernandez* warnings seems quite reasonable. Just as the Court noted in *Miranda* that in-custody interrogations by law enforcement officials trade on one's weaknesses,[199] the same can be said in both consent-search scenarios and third-party consent-search scenarios. However, the Court in *Schneckloth* attempted to distance itself from the Court's decision in *Miranda*, claiming that consent searches are not coercive in nature and that the totality of the circumstances criteria will serve to protect individuals.[200] Further, the Court in *Schneckloth* stated that requiring law enforcement to make the conclusion that an individual knowingly and voluntarily waived his or her right to consent would be impractical as such determinations were designed for the judiciary.[201] The Court also made clear that, even if law enforcement could determine whether a waiver was made knowingly and voluntarily, "there is no universal standard that must be applied in every situation where a person foregoes a constitutional right,"[202] asserting that

193. *Id.* at 444. A custodial interrogation takes place when questioning is initiated by law enforcement after an individual has been taken into custody or deprived of liberty in a significant way. *Id.*

194. *Id.* at 456. The Court notes that interrogation takes a heavy toll on one's liberty and trades on one's weaknesses. *Id.* at 455. Further, the interrogation may well lead to false confessions. *Id.* at 455 n.24.

195. *Id.* at 467–68.

196. *Id.* at 469. This warning is necessary to make the individual aware of the consequences of forgoing the right to remain silent. *Id.*

197. *Id.* at 469–70.

198. *Id.* at 473.

199. *Id.* at 455.

200. Schneckloth v. Bustamonte, 412 U.S. 218, 246–48 (1973).

201. *Id.* at 244.

202. *Id.* at 245.

a knowing waiver is not necessary regarding consent searches, as *Miranda* warnings serve to protect an individual at the pretrial stage, preserving the fairness of his or her trial.[203]

As should be clear by this point, given one's disposition to adhere to authority figures, said authority figures hold all the cards in scenarios where they are seeking to obtain consent from the average American citizen, who is not likely appraised of what a police officer can actually do. Additionally, just as the Court in *Miranda* was concerned with the possibility that interrogation may lead to false confessions,[204] so too may a police officer extract consent from a suspect or third party when the individual in question is posed with a threat by a police officer. Thus, it is in the interest of justice to reject the holding in *Schneckloth*[205] and to require police officers to expressly inform individuals that they have the unequivocal right to refuse to consent to a search, and that doing so will not be to their detriment,[206] especially because such a procedure will not unduly hinder law enforcement.[207] Indeed, providing an individual who is requested to consent to a search with *Fernandez* warnings that such consent may be refused "would not lead to the end of consent."[208] Past experience shows that many individuals, even after being informed of their *Miranda* rights, will still waive them.[209] Additionally, a number of police departments encourage employees to provide warnings in an effort to "bolster the voluntariness of a consent to search."[210]

Further, the Court in *Schneckloth* identified impracticability as a reason for disallowing consent warnings[211] because there exists an "acknowledged need for police questioning as a tool for the effective enforcement of criminal laws."[212] However, a requirement that law enforcement provide individuals with *Fernandez* warnings would result in little detriment to law enforcement practices, having "little effect on the

203. *Id.* at 237–39.

204. *Miranda*, 384 U.S. at 455 n.24.

205. Holding that "while [a] subject's knowledge of a right to refuse is a factor to be taken into account [regarding whether consent is voluntary], the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." 412 U.S. at 249.

206. Strauss, *supra* note 130, at 252–53.

207. *Id.*

208. *Id.* at 253.

209. *Id.* One explanation as to why an informed individual would decide to waive his or her *Miranda* rights is because of "the inherent psychological vulnerability of facing the state as a criminal suspect." Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 82 (1998).

210. Strauss, *supra* note 130, at 254 (internal quotation marks omitted) (quoting State v. Robinnette, 685 N.E.2d 762, 771 n.6 (Ohio 1997)).

211. Schneckloth v. Bustamonte, 412 U.S. 218, 245 (1973).

212. *Id.* at 225.

rate of consent."[213] The states of Ohio and New Jersey have proven that there exists only a miniscule effect in requiring law enforcement to provide individuals with *Fernandez* warnings.[214] Previously, both Ohio and New Jersey required law enforcement officials to give consent warnings.[215] The imposition of a consent-warning requirement in both states had little effect on the consent rate.[216] Thus, requiring *Fernandez* warnings will have little, if any, effect on law enforcement.

Additionally, while the Court has stated that the preservation of fairness in a criminal trial as a consideration differentiating *Miranda* situations and consent-search situations,[217] the similarities between *Miranda* and *Schneckloth*, even absent trial considerations, necessitate a greater degree of protection in consent-search scenarios. The Court's decision in *Miranda* was based on fear that a coercive interrogation may lead to false confessions[218]—a fear that is shared equally in consent-search scenarios. Additionally, it is well established that the Court in *Miranda* also made its decision, in part, based on how difficult it was to apply a "totality of the circumstances" analysis in determining whether a confession was voluntary[219]—the same test that the Court in *Schneckloth* has demanded be used in consent-search scenarios.[220] Determining voluntariness based on a court's application of the totality of the circumstances was not pragmatic prior to *Miranda*,[221] nor is it any more practical when used to determine voluntariness when consent is at issue, especially since courts rarely give consideration to all of the surrounding circumstances.[222]

213. Matthew Phillips, Note, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1205 (2008).

214. *Id.* at 1204–05.

215. State v. Robinette, 653 N.E.2d 695, 697 (Ohio 1995) (deciding to create "a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation"), *rev'd*, 519 U.S. 33, 40 (1996); New Jersey v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (holding that individuals must be aware of their right to refuse consent before a subsequent search may constitutionally take place).

216. Phillips, *supra* note 213, at 1205. Ohio maintained a consent rate of 94.9% and New Jersey, imposing a stricter requirement, maintained a consent rate of 88.3%. *Id.*

217. *Schneckloth*, 412 U.S. at 237–39.

218. Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966).

219. Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 163–64 (2007); Gerard E. Lynch, *Why Not a* Miranda *for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 234 (2007).

220. *Schneckloth*, 412 U.S. at 246–48.

221. *See* Kamisar, *supra* note 219, at 163–64 (indicating that the totality of the circumstances approach was unclear and fickle).

222. *See supra* note 186 and accompanying text (noting that courts, when deciding whether to suppress evidence obtained during a search, often focus on the behavior of law enforcement officers at the time of the search, rather than whether consent to the search was given voluntarily).

It is certainly correct to say that *Miranda* warnings work to preserve the fairness in a given trial on the basis that such warnings are required once trial proceedings are initiated by way of placing an individual in custody, thereby kick-starting the judicial process; however, is the same process not also started upon the finding of any evidence of a crime following consent to search? Obviously, there is a clear difference between when the judicial process actually commences and a situation in which the judicial process may start, depending upon a resulting search, but the difference is not so great as to justify the prohibition of *Fernandez* warnings to help ensure that an individual is protected—as is required by our Constitution[223]—from a warrantless and unreasonable search and seizure, especially given how similar *Miranda* and *Schneckloth* happen to be.

Indeed, *Fernandez* warnings would prove to be of paramount importance in the case of third-party consent scenarios, wherein the third party, who ultimately has nothing to lose by allowing law enforcement officers to conduct a search of his or her shared domicile, would be inclined to provide consent in an effort to steer clear of being considered a suspect.[224] In a scenario similar to that in *Fernandez*, where the individual suspected of committing a crime has been lawfully removed from his or her domicile—either by police officers or of his or her own volition—an uninformed third party, when confronted with a uniformed police officer asking for consent to search the residence, will likely feel that he or she has no other option but to provide consent, lest he or she wishes to end up the subject of the current investigation.[225] This is not to say that apprising a third party of the right to refuse to consent to a search will preclude him or her from helping law enforcement officials—this is an imperfect solution to a greater problem—but providing such warnings may serve to protect the Fourth Amendment rights of some criminal suspects, while still allowing police officers to make use of the consent search.

223. U.S. CONST. amend. IV.

224. *See* Adrian J. Barrio, *Rethinking* Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 244 (1997) (stating that innocent individuals may be inclined to provide consent to a search to both prove their innocence and avoid further surveillance by police).

225. *See id.* at 241 (stating that a police officer's uniform, badge, and gun are not only indicators of a police officer's authority, but that they may also psychologically influence an individual to believe that noncompliance with the officer's requests may result in his or her punishment).

C. An Absent King Rules His Kingdom—Redefining "Present"

One of the most disturbing revelations resulting from the Court's decision in *Fernandez* is that an individual, recently detained by police officers, sitting in a police cruiser while in plain view of his or her domicile, is not considered to be "present" for the purpose of expressing his or her *Randolph* objection.[226] Per *Randolph*, this individual, moments prior to being detained, held the complete and unequivocal power to deny police officers without a warrant the consent necessary to search his or her home.[227] Once detained, however, this same individual is transformed into a powerless being after he or she is removed from the home, whether by lawful detention, or simply because he or she needed to make a trip to the grocery store to buy some milk.[228] In the event that a suspect makes the determination to waive his or her Fourth Amendment rights and provide consent to police officers to conduct a warrantless search, it is his or her prerogative to do so; however, in the event that a third party provides consent to police officers, especially following the detention of a suspect co-tenant, such actions are tantamount to a third-party waiver of the suspect co-tenant's Fourth Amendment rights.[229] Such disregard for one's Fourth Amendment rights cannot stand.

The simplest solution for this obvious problem would be to allow an individual to be considered "present" when he or she is in police custody.[230] While the *Randolph* Court was concerned about burdening police by requiring them to locate a non-present defendant in order to ask for his or her consent,[231] requiring officers to secure consent from a detained individual does not involve this concern as officers would know exactly where the defendant is located.[232] Thus, defining "present" to include circumstances wherein a suspect is lawfully detained by law enforcement officers imposes no real burden upon them. Additionally, any third party involved is not placed in the awkward predicament of having to choose between his or her co-tenant—potentially his or her

226. Fernandez v. California, 134 S. Ct. 1126, 1134 (2014).

227. *See id.* (stating that the defendant was not present when consent was provided by a third party); Georgia v. Randolph, 547 U.S. 103, 114 (2006) (stating that a third party has no power to consent to a search in the event of a "present and objecting co-tenant").

228. *Id.*

229. Aubrey H. Brown III, Note, Georgia v. Randolph*, the Red-Headed Stepchild of an Ugly Family: Why Third-Party Consent Search Doctrine Is an Unfortunate Fourth Amendment Development That Should Be Restrained*, 18 WM. & MARY BILL RTS. J. 471, 497 (2009).

230. *Id.* at 501.

231. *Id.* (citing *Randolph*, 547 U.S. at 122).

232. *Id.*

spouse—and the police. This serves, at least in part, to help even the playing field on which both the American citizen and the law enforcement officer are required to do battle.

VI. REGAINING THE KING'S THRONE

Today's Fourth Amendment jurisprudence has transformed so much from the point of its inception that it is almost unrecognizable. Where all searches and seizures absent a valid warrant were once considered to be inherently unreasonable,[233] our nation's Fourth Amendment jurisprudence has evolved to the point where the only thing that police officers are required to do to conduct a warrantless search of a residence shared by multiple individuals is wait for the criminal suspect to leave his or her residence and then secure consent from a co-tenant, whether by means of empty threats or one's stark obedience to authority.[234] This effectively amounts to a third-party co-tenant waiving the suspect's Fourth Amendment right to be free from warrantless searches. Thus, it would seem that the nation's Fourth Amendment jurisprudence has morphed into something that would prompt the Founding Fathers to roll over in their graves.

Some scholars suggest that abolishing the consent exception to the Fourth Amendment's warrant requirement is a radical and unrealistic option.[235] However, given that voluntary consent is nothing more than a myth, eliminating consent searches is the most logical and realistic way to get Fourth Amendment jurisprudence back in-line with the intentions of the Founding Fathers, who detested the general warrants of the Crown, so as not to revert back into the very form of government from which the Founding Fathers fought so valiantly to break free. At times, radical action is the most prudent action—this is so in the case of the current consent doctrine. As the nation's Fourth Amendment jurisprudence now stands, each King who resides with another adult individual no longer rules his land, allowing for any of his subjects to usurp and overthrow him as soon as he departs his kingdom.[236] In the beginning, the King was so powerful that only with a warrant could an intruder make his or her way into the King's castle. Next, an intruder could enter the castle with the King's permission. Now, an intruder need

233. Agnello v. United States, 269 U.S. 20, 32 (1925).

234. *See* United States v. Groves, 530 F.3d 506, 508 (7th Cir. 2008) (describing an almost identical scenario involving the lengths some officers will resort to in order to obtain evidence of a crime).

235. Gan, *supra* note 169, at 346.

236. Fernandez v. California, 134 S. Ct. 1126, 1134 (2014).

only ask permission of the King's jester to gain entry into the castle. How long will it be before it becomes an intruder's prerogative to lawfully enter into a King's castle based on nothing more than a whim? It is for these reasons that radical change is necessary in order to honor and uphold the values upon which this country was constructed.