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I. INTRODUCTION

The Third Amendment to the United States Constitution provides that: "No soldier shall in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner prescribed by law."[1] This amendment was adopted, before the days of the standing army, in response to centuries of abusive quartering of troops that not only invaded the sanctity of the home

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1. U.S. CONST. amend. III.

but also invariably fueled incursions against the family and its personal property. In modern times, many commentators have discarded the Third Amendment as a useless relic of antiquity. Practical reality supports this belief but only to the extent that the Third Amendment is applied in the traditional sense in which it arose. However, recent events suggest that, while the Third Amendment may have been dormant for some time, it still has an important role to play.

In response to civil unrest in Ferguson, Missouri, the National Guard was activated and deployed among the people to maintain the peace. This incursion gave rise to questions concerning the long-term stationing of military forces among the American people and the rights of the citizenry. Moreover, as police forces across the country grow more and more militarized, with tanks and machine guns galore, the once clear line between police officer and soldier grows murky. This article argues that the Third Amendment still has a role to play, and that that role grows with each incident of unrest and each police acquisition of military technology.

II. A VERY BRIEF HISTORY OF THE THIRD AMENDMENT[2]

Citizen opposition to the quartering of soldiers in their homes dates back to at least 1628, when Parliament enacted the Petition of Right in opposition to various acts of oppression, including the forcible quartering of soldiers, suffered at the hands of the Stuart kings.[3] The Petition of Right included the first recorded prohibition of the quartering of soldiers without consent.[4] The prohibition of quartering soldiers was re-enacted in the British Bill of Rights of 1688.[5] For these reasons, the colonists in America were sensitive to the issue and understandably took umbrage at the Quartering Act of 1765 and the acts that followed, including another Quartering Act.[6] The First Continental Congress addressed the quartering of soldiers, along with other "grievous acts and measures" to which the colonists would not submit, in its Declarations and Resolves of October 14,

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2. The history of the Third Amendment has received extensive treatment elsewhere, so we need not tarry long on the issue for our purposes here.

3. *See* Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723 (1949–1951) (citing HANNIS TAYLOR, THE ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION 599–600 (3d ed. 1895)).

4. *Id.* at 724 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 413 (4th ed. 1899)).

5. *Id.* at 724 (citing 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 637 (8th ed. 1927)).

6. *Id.* at 724–26.

1774.[7] The Declaration of Independence followed soon after, referring to quartering of soldiers and related coercive laws as acts of tyranny.[8] From that point, the prohibition of quartering soldiers was carried forward to the Third Amendment in the Bill of Rights and the constitutions of the incipient states.[9]

In light of this history, which establishes the quartering of troops as an oppressive atrocity, it is not surprising that the Third Amendment received little explanatory treatment by early commentators on the Bill of Rights.[10] In 1833, Joseph Story saw little need to expound upon the intricacies of the Third Amendment, instead explaining it thusly:

> This provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion. The billeting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril. In the petition of right, it was declared by parliament to be a great grievance.[11]

Other early writers gave the Third Amendment similarly short shrift.[12] William Winthrop relegated it to a footnote,[13] and Westel Willoughby expended a single sentence on the subject.[14] This trend

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7. *Id.* at 726–27 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 63, 739 (Oct. 1774)).

8. *Id.* at 727 (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

9. *Id.* at 727–28.

10. It was beyond debate that preventing the government from housing soldiers in private homes — and thereby preventing the inevitable thievery and violence that would result from such quartering — was a good idea.

11. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1893 (1833) (internal citations omitted); Wurfel, *supra* note 3, at 729. Four years later, Justice Story reduced his Third Amendment commentary: "This provision speaks for itself. In arbitrary times it has not been unusual for military officers, with the connivance, or under the sanction of the government, to billet soldiers upon private citizens, without the slightest regard to their rights, or comfort." JOSEPH STORY, 1 A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 452 (1840).

12. Wurfel, *supra* note 3, at 729.

13. *Id.* (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 16 n.8 (2d ed. 1920)).

14. *Id.* at 729 (quoting WESTEL W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 500 (2d ed. 1938)).

has carried forward to modern scholarship, with some constitutional law text books omitting the Third Amendment entirely.[15]

Likewise, it is not surprising that the Third Amendment has spurred little, if any, litigation. The United States Supreme Court has yet to decide a case that directly implicates the Third Amendment, and its jurisprudence includes only a few cases that even make passing reference to it.[16] Although the Court has looked to the Third Amendment to support the right to privacy in a plethora of cases,[17] the only reported case to address the Third Amendment on the merits is *Engblom v. Carey*.[18] In that case, two corrections officers filed suit under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3) & (4), seeking to recover damages that resulted from the quartering of National Guard soldiers in the officers' apartments in the staff housing building during a corrections officer strike.[19] The apartments in the staff housing building were the only residences the officers maintained.[20] When the strike began, the officers were denied access to their apartments.[21] Eventually, the apartments were put to use housing National Guard troops who were activated to temporarily replace the striking corrections officers at the prison.[22] Upon returning to their apartments after the strike, the officers found that the troops had taken some of their personal property.[23] The lawsuit was aimed at recovering damages for the use of their apartments and their resulting loss of personal property.[24]

The Second Circuit noted the dearth of Third Amendment case law and turned to analogous principles of law for interpretive guidance, most notably the Fourth Amendment.[25] After noting that the Third Amendment "was designed to assure a fundamental right

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15. *See* GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, CONSTITUTIONAL LAW (2d ed. 1991), which does not include the Third Amendment among its subjects.

16. Wurfel, *supra* note 3, at 730–32 (discussing Block v. Hirsh, 256 U.S. 135 (1921); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884); Luther v. Borden, 48 U.S. 1 (1849)).

17. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 765 (2010); Osborn v. United States, 385 U.S. 323, 341 (1966); Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Bell v. Maryland, 378 U.S. 226, 254 (1964); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

18. Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).

19. *Id.* at 958–59.

20. *Id.* at 959.

21. *Id.* at 960.

22. *Id.*

23. *Id.*

24. *Id.* at 960–61.

25. *Id.* at 961–62.

to privacy,"[26] the Court made three rulings: first, that the National Guard troops were soldiers under the Third Amendment;[27] second, that the Third Amendment is incorporated into the Fourteenth Amendment and applies to the states;[28] and finally, that "property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others."[29] In adjudicating Third Amendment issues, the Court also noted that the primary source of law for a determination of property rights under the Third Amendment is state law.[30]

Scholars have wondered if the lack of attention paid to the Third Amendment indicates that the amendment is dead or dormant.[31] In 1893, Supreme Court Justice Samuel F. Miller wrote: "This amendment seems to have been thought necessary. It does not appear to have been the subject of judicial exposition; and it is so thoroughly in accord with all our ideas, that further comment is unnecessary."[32] More recently, writing on the Bicentennial of the Bill of Rights, Morton Horwitz wrote that "no one cares about the Third Amendment; no one even has any interest in perpetuating its memory."[33] He went on to declare that "the Third Amendment was consigned to the graveyard of history, to be remembered only on occasions like [the anniversary of its adoption]."[34]

Since Miller's time, scholars have continued to question the Third Amendment's relevance and applicability to modern life. In 1962, Judge Madge Taggart, an associate judge on the City Court of Buffalo, New York, opined that "[i]n this day . . . it is hard to visualize the need for the Third Amendment to the Constitution."[35] Judge Taggart conceded, however, that "[w]e always need laws to guarantee that we are not governed by men alone, and to insure that

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26. *Id.* at 961.

27. *Id.*

28. *Id. But see* McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (noting that the Third Amendment had never been fully incorporated by the Supreme Court into the Fourteenth Amendment for application to the states).

29. *Engblom*, 677 F.2d at 962.

30. *Id.*

31. *See, e.g.*, Morton J. Horwitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991).

32. SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 646 (1893).

33. Horwitz, *supra* note 31, at 209.

34. *Id.*

35. Madge Taggert, *The Third Amendment*, 48 WOMEN LAW. J. 13, 13 (1962).

the military is subordinate to civil authority."[36] Scholars have continued to ponder this question even after the events that lead to the decision in *Engblom v. Carey* and as recently as the past few years.[37]

Despite the lack of attention that the Third Amendment has received over the years, reports of its demise may be premature. Recent events give rise to the question of whether the quartering of troops may be necessary to stop the flow of illegal immigrants across the Mexican border into the United States. Similarly, riots that have arisen in the aftermath of the police shooting in Ferguson, Missouri and the strangulation of Eric Garner give cause to wonder if state and local governments may resort to quartering as a means of maintaining order during times of violent civil unrest. Last, but certainly not least, the increasing militarization of police forces across the country has blurred the line between a soldier and a police officer. Presumably, the former would be prohibited from occupation of private homes by the Third Amendment and the latter would not. As long as quartering remains even a remote possibility, scholars should continue to analyze the Third Amendment and its applicability to contemporary issues. To that end, we evaluate the issue of consent to quartering and the remedies that are available to property owners for violations of the Third Amendment's Consent Clause.

III. INTERPRETING THE CONSENT CLAUSE

As previously noted, the Third Amendment prohibits the quartering of soldiers during times of peace "without the consent of the owner."[38] The issue of consent to quartering of troops—or potentially militarized police officers—under the Third Amendment has not been litigated, nor has it been addressed by Third Amendment scholars. In keeping with the Third Amendment interpretive approach adopted by the Second Circuit in *Engblom*, scholars may find guidance through the interpretation of the consent clause in analogous areas of the law.[39] Scholars may also find interpretive guidance in the references to the Third Amendment

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36. *Id.* at 17.

37. Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 WASHBURN L.J. 179 (2014); Sandra Eismann-Harpen, *Rambo Cop: Is He a Soldier Under the Third Amendment?*, 41 N. KY. L. REV. 119 (2014); Thomas G. Spranking, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112 (2012).

38. U.S. CONST. amend. III.

39. Engblom v. Carey, 677 F.2d 957, 961–62 (2d Cir. 1982).

found in the Supreme Court's right to privacy cases.[40] This series of cases collectively discovers and expands on the right to privacy that the Third Amendment, in conjunction with other amendments such as the First, Fourth, and Fifth, affords citizens.[41]

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court explained that the Third Amendment is a reflection of the supremacy of civil government over the military and protects citizens from having their houses seized for military use.[42] Indeed, Justice Jackson noted that this protection was a distinguishing feature of the United States of America.[43] Justice Harlan described the Third Amendment as our "explicit Constitutional protection" of the "privacy of the home,"[44] and in *Bell v. State of Maryland*, the Supreme Court further connected the Third Amendment to the right to privacy.[45] In *Griswold v. Connecticut*,[46] the Court recognized that the Third Amendment "creates a zone of privacy" that is protected from government intrusion.[47]

These cases demonstrate that, although the Supreme Court has yet to apply the substance of the Third Amendment to a case decided on the merits, the Court sees the Third Amendment as a Constitutional bulwark against governmental incursions into citizens' homes. Such a framework is therefore appropriate for our analysis of the Third Amendment throughout this article.

A. Consent under the Fourth Amendment

Because the Third Amendment's Consent Clause has never been adjudicated, scholars, and jurists must turn to other sources of law for interpretive guidance. In this regard, the Fourth Amendment's consent-to-search jurisprudence provides the principles for evaluating an alleged violation of the Third Amendment's Consent

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40. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1964) (discussing the Third Amendment's contribution to the "penumbra[l]" right to privacy).

41. *See id.*

42. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Douglas, J., concurring).

43. *Id.*

44. Poe v. Ullman, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting).

45. Bell v. Maryland, 378 U.S. 226, 254 (1964) (Douglas, J., concurring).

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

47. In a footnote in *Katz*, the Supreme Court noted that "[t]he Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion." Katz v. United States, 389 U.S. 347, 351 n.5 (1967); *see also* Osborn v. United States, 385 U.S. 323, 341 (1966) (quoting Griswold, 381 U.S. at 484).

Clause. There are three aspects of the Fourth Amendment's consent jurisprudence that have obvious application to the Third Amendment's Consent Clause: voluntariness, scope, and revocation.

1. Voluntariness

The United States Supreme Court held that a search conducted pursuant to consent is reasonable under the Fourth Amendment in *Davis v. United States*,[48] and several cases that followed,[49] without explaining the parameters of consent. The Court recognized shortly thereafter that consent must be "freely and voluntarily given" to be a valid exception to the warrant requirement.[50] The meaning of voluntariness was later addressed in *Schneckloth v. Bustamonte*.[51] In that case, the Court explained:

> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. . . . 'This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. . . .' To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity.[52]

"Voluntariness," Blackmun noted in his concurrence in *Schneckloth*, "is a question of fact to be determined from all the circumstances, and . . . the subject's knowledge of a right to refuse is a factor to be taken into account . . . ."[53] Further, the Supreme Court

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48. Davis v. United States, 328 U.S. 582, 593–94 (1946).

49. *See, e.g.*, Vale v. Louisiana, 399 U.S. 30, 35 (1970); Katz, 389 U.S. at 358; Zap v. United States, 328 U.S. 624, 630 (1946).

50. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

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

52. *Id.* at 228–29 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

53. *Id.* at 248–49.

has explained that "consent" that is the product of official intimidation or harassment is not consent at all.[54] The Supreme Court in *Florida v. Bostick* expanded the voluntariness requirement and held that reluctant compliance with a coercive request is not a waiver of any constitutional protection.[55]

2. Scope of Consent

Under the Fourth Amendment, once consent is given voluntarily the question of the scope of consent remains. In *Walter v. United States*, the Supreme Court explained that "the scope of the search is limited by the terms of its authorization" and that "the scope of every authorized search [must] be particularly described."[56]

The scope of consent under the Fourth Amendment is that of objective reasonableness, which asks what a reasonable person would have understood by the consent to search.[57] Additionally, "[t]he scope of a search is generally defined by its expressed object."[58] For example, the Supreme Court has held that it is "objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs."[59] On the other hand, the Supreme Court has also recognized that consent to search a garage would not include permission to search the house as well.[60]

3. Withdrawal of Consent

Consent to search may be withdrawn at any time after it has been granted. "A consent to search is not irrevocable, and thus if a person effectively revokes . . . consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent."[61] Although the United States Supreme Court has not addressed the issue of withdrawal of consent, the

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54. *See* Florida v. Bostick, 501 U.S. 429, 438 (1991).

55. *Id.*

56. Walter v. United States, 447 U.S. 649, 656–57 (1980) (internal citations omitted).

57. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing Illinois v. Rodriguez, 497 U.S. 177, 183–89 (1990); Florida v. Royer, 460 U.S. 491, 501–02 (1983) (opinion of White, J.); *id.* at 514 (Blackmun, J., dissenting)).

58. *Jimeno*, 500 U.S. at 251 (citing United States v. Ross, 456 U.S. 798 (1982)).

59. *Id.*

60. *See Walter*, 447 U.S. at 657.

61. WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(f) (3d ed. 1996).

lower federal courts are in agreement: "Once given, consent to search may be withdrawn."[62] To effectively withdraw consent to search, the consenter is only required to indicate the withdrawal "by unequivocal act or statement."[63] There are no "magic words" required to withdraw consent.[64]

To clarify the matter of effective withdrawal, one court explained: "[C]onduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both."[65] For example, an individual who twice grabbed an officer's hand to stop him from searching a pack of cigarettes has withdrawn his earlier consent, and the search, consistent with the Fourth Amendment, must stop.[66] Similarly, an individual may withdraw his consent to search by putting his hands into his pockets to prevent the officer from searching his person.[67] Additionally, an officer has no authority to instruct an individual to comply with a consensual search.[68]

On the other hand, consent may not be withdrawn through ambiguous actions, such as merely moving ones hands into the vicinity of the search.[69] For example, one court found that consent was not withdrawn when the consenter put his hand in his pocket and turned away because the consenter removed his hand from his pocket when asked to do so.[70] Moreover, refusal to sign a written

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62. *See, e.g.*, United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005); Painter v. Robertson, 185 F.3d 557, 567 (6th Cir. 1999) ("[T]he consenting party may limit the scope of [the] search, and hence at any moment may retract his consent"); United States v. McFarley, 991 F.2d 1188, 1191 (4th Cir. 1993) (noting that "once consent is withdrawn or its limits exceeded, the conduct of the officials must be measured against the Fourth Amendment principles"), *cert. denied*, 510 U.S. 949 (1993); United States v. Dyer, 784 F.2d 812, 816 (7th Cir. 1986).

63. United States v. Gray, 369 F.3d 1024, 1026 (8th Cir. 2004) (citation omitted).

64. *Id.*

65. Burton v. United States, 657 A.2d 741, 746–47 (D.C. Cir. 1994) (footnotes omitted).

66. Jimenez v. State, 643 So. 2d 70, 72 (Fla. Dist. Ct. App. 1994).

67. Lowery v. State, 894 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 2005).

68. *Id.*; *see also* United States v. Ibarra, 731 F. Supp. 1037, 1039 (D. Wyo. 1990) (noting that closing and locking a car trunk after a consensual search amounted to withdrawal of consent to further search of trunk); Cooper v. State, 480 So. 2d 8, 11 (Ala. Crim. App. 1985) (locking plane doors after consensual search revoked consent for subsequent search of plane).

69. State v. Mattison, 575 S.E.2d 852, 857 (S.C. Ct. App. 2003).

70. *Burton*, 657 A.2d at 748.

consent form after oral consent does not act as an effective withdrawal of the prior oral consent.[71]

B. Consent under the Third Amendment

1. Voluntariness

The Fourth Amendment principles of voluntariness provide a good starting point for Third Amendment analysis. However, the inherently coercive presence of soldiers and militarized police forces necessitates enhancement of Fourth Amendment voluntariness restrictions, and liberal enhancement at that. Otherwise, the protection provided by voluntariness restrictions will be lost. The necessary Third Amendment enhancement may be achieved by requiring procedures that the Fourth Amendment does not. Thus, while consent under the Fourth Amendment clearly does not require officers to inform suspects of the right to refuse consent to search,[72] consent under the Third Amendment should be interpreted to require the military to affirmatively advise homeowners that they have a right to refuse consent to quartering and to impose a corresponding burden of proof of alleged consent upon any military force seeking to quarter soldiers.

The Third Amendment should also be interpreted to require the military to affirmatively advise homeowners that they have a right to limit the scope of their consent to quartering and that their consent may be withdrawn at any time.[73] Moreover, any consent to

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71. *See* United States v. Thompson, 876 F.2d 1381, 1384 (8th Cir. 1989) (holding consent was voluntary although defendant refused to sign written consent form), *cert. denied*, 493 U.S. 868 (1989); United States v. Castillo, 866 F.2d 1071, 1081–82 (9th Cir. 1988) (holding refusal to execute written consent form did not vitiate prior oral consent); United States v. Boukater, 409 F.2d 537, 539 (5th Cir. 1969) (holding the same).

72. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 207 (2002) (holding that Fourth Amendment does not require police officers to advise bus passengers of right to refuse consent to searches); Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (Ginsburg, J., concurring) ("it [would] be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary"); United States v. Mendenhall, 446 U.S. 544, 558 (1980) ("[T]he Constitution does not require 'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.'"); Schneckloth v. Bustamonte, 412 U.S. 218, 234 (1973) ("[K]nowledge of a right to refuse is not a prerequisite of a voluntary consent.").

73. Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

quartering should be required to be in writing.[74] This final provision is in compliance with the age-old principle of the Statute of Frauds that agreements concerning real property be in writing. By following these procedures, military forces may be compelled to produce written evidence of consent to quartering, or they face immediate eviction and liability for their wrongful occupation upon any challenge to the voluntariness, scope, or withdrawal of consent.

2. Scope of Consent

The Fourth Amendment may also serve as a guide for the scope of consent under the Third Amendment, but enhanced protections are even more important here than in the realm of voluntariness because of the Fourth Amendment's notion of general consent. Under the Fourth Amendment, the scope of consent to search is measured by a standard of objective reasonableness according to the expressed object of the consent.[75] In this way, the United States Supreme Court has concluded that general consent to search a car includes consent to search containers in the car.[76] Moreover, the Supreme Court expressly rejected the position that explicit authorization should be procured before opening individual containers.[77] The Court concluded that the (potentially unknown) right to limit the scope of consent was sufficient protection under the Fourth Amendment.[78]

One does not have to tax the imagination to see where this notion of general consent may lead in the context of consent to quartering. Succinctly put, soldiers would have the run of the place and would, it seems, be free to ransack citizens' residences. Yet, this is precisely the scenario that the Third Amendment was designed to prevent. Thus, to preserve the protection provided by the Third Amendment, courts should turn to the obverse of Fourth Amendment general consent. The scope of consent to quartering should be interpreted as limited and strictly construed in compliance with the terms of a written agreement, or otherwise, as an agreement to provide the barest of necessities.

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74. The Fourth Amendment permits consent to search to be obtained orally. *See, e.g.*, United States v. Saenz, 474 F.3d 1132, 1136–37 (8th Cir. 2007) ("Consent can be given orally or in writing, and it is not necessary to use a written consent form"); *Castillo*, 866 F.2d at 1082 (holding that a search may be justified by a voluntary oral consent even in the absence of a valid written consent).

75. *Jimeno*, 500 U.S. at 251.

76. *Id.* (discussing United States v. Ross, 456 U.S. 798 (1982)).

77. *Id.*

78. *Id.*

Moreover, an important aspect of the scope of consent is the matter of duration. Under the Fourth Amendment, again, the test is one of reasonableness. It is worth noting here that the Third Amendment does not leave the determination of consent to objective reasonableness because it has no reasonableness component. Instead, it provides for peace-time quartering only upon consent.

3. Withdrawal of Consent

Withdrawal of consent to quartering soldiers should likewise be interpreted under a similar framework to withdrawal of consent to search under the Fourth Amendment. The Fourth Amendment framework provides logical limits for a Third Amendment analysis.

Consent to quartering should, of course, remain fully revocable at all times, consistent with Fourth Amendment interpretations. However, it would create a myriad of problems to conclude that consent to quartering could be equivocally withdrawn. The requirement of an unequivocal act or statement to effectively withdraw consent to quartering must therefore remain. Thus, as with the proposal to honor consent only if the military forces inform the citizen of the right to refuse consent, the consenter must be made aware of the right to withdraw consent at any time, and the requirement that such a withdrawal be unequivocal. No citizen benefits from unknown rights, and clearly the potential to have armed soldiers outstaying their welcome in citizens' homes justifies additional protection beyond the typical Fourth Amendment analysis.

IV. THE EFFECT OF MILITARIZATION ON OUR ANALYSIS

As noted previously, the rampant militarization of police forces across the country is a catalyst that drives our opinion that the Third Amendment deserves a closer look. The Third Amendment, by its terms, applies to "soldiers."[79] While the National Guard troops employed in recent incidents of civil unrest would qualify for this prohibition, it is also quite possible that overly-militarized police forces could qualify as "soldiers" for Third Amendment purposes as well. Clearly, that finding would increase the applicability of the Third Amendment, and consequently, of this analysis. The Pentagon has sent over $5 billion worth of military style weaponry and vehicles to civilian police forces over the last 20 years.[80] While a

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79. U.S. CONST. amend. III.

80. Kara Dansky, *An MRAP is Not a Blanket*, AMERICAN CIVIL LIBERTIES

mine-resistant ambush-protected vehicle (colloquially known as an "MRAP") is useful and even necessary on the streets of Baghdad, the same vehicle in the untrained hands of local law enforcement does not make a lot of sense. According to the Washington Post's Radley Balko, "The Pentagon offers no training to police departments when it gives [MRAPs] away."[81] Aside from the obvious problems associated with police using automatic weapons, grenades, and armored vehicles,[82] the presence of military equipment on street corners is intimidating to citizens.

It is not a far leap to believe that consent to search or quartering would be more likely denied to an officer driving an Impala and wearing a holstered semi-automatic pistol than to an officer with an M-16 rifle and a bulletproof vest driving an armored truck. There are many problems inherent in militarizing our police forces, but one problem that seldom gets the discussion it deserves is the effect that such militarization has on citizens' views of and interactions with police officers. Though this article's analysis generally addresses only "soldiers" and "military forces," the same reasoning can and should apply to militarized police officers.

V. CONCLUSION

It may be prudent to implement prophylactic protections similar to those associated with the issuance of a search warrant. Another consideration that supports more stringent protections is the Castle Doctrine. It has long been recognized that a man's home is his castle. More specifically, many jurisdictions recognize that the right to self-defense inside the home includes the right to use deadly force.[83] Thus, quartering carries with it a high risk of danger in the event

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UNION BLOG OF RIGHTS (Dec. 2, 2014, 4:41 PM), https://www.aclu.org/blog/criminal-law-reform-immigrants-rights-technology-and-liberty/mrap-not-blanket.

81. Radley Balko, *Congratulations! Your tiny town has an MRAP and is ready for war*, THE WASHINGTON POST (Apr. 18, 2014), http://www.washingtonpost.com/news/the-watch/wp/2014/04/18/congratulations-your-tiny-town-has-an-mrap-and-is-ready-for-war/.

82. The 2014 incident in which a Georgia police officer threw a flash grenade into a toddler's crib is just one example of the problems inherent in giving police officers military weapons. *See* Dansky, *supra* note 80.

83. *See, e.g.*, TENN. CODE ANN. § 39-11-611(c) (2014) (reasonable belief of "imminent death or serious bodily injury to self, family, a member of the household or an invited guest" is presumed and justifies deadly force against another who "has unlawfully and forcibly entered the residence"). *See generally* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653 (2003) (discussing the Castle Doctrine in the United States).

that any abuses, such as those carried out historically, are inflicted upon citizens inside their own home.

It is not farfetched, however unlikely it may be, to imagine a scenario in which civil unrest results in the activation of the National Guard to maintain law and order. Once that becomes necessary or occurs, the question of housing troops inevitably arises. However, it is perhaps even more likely that a (militarized) police unit will choose to occupy private property and damage the property. Of course, the National Guard will look to established military bases in the first instance and, perhaps, to public accommodations, such as hotels, in the second instance. But, there may be occasions when the National Guard cannot find suitable quarters and must turn to private property owners. In such cases, given the history of quartering and the history of coercion by government military forces, it is not difficult to imagine a scenario in which the National Guard disregards the requirements of the Third Amendment.

In *Laird v. Tatum*,[84] the Supreme Court discussed the American people's "deep and strong resistance" to military interference with day-to-day civilian life. The Court stated that:

> [The Third Amendment's prohibitions on quartering soldiers] are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.[85]

At the very least, courts should adopt an advice of rights requirement for the Third Amendment, similar to the advices required by the Fifth Amendment under *Miranda v. Arizona*.[86] We propose the following: You have the right to refuse to consent to our request to quarter soldiers in your home. If you consent to quartering, we will reduce the agreement to writing. Any consent to quartering is invalid if it is not in writing. If you consent to quartering, you have a right to set the limits on your consent and

84. Laird v. Tatum, 408 U.S. 1, 15–16 (1972).

85. *Id.*

86. Miranda v. Arizona, 384 U.S. 436 (1966).

maintain your privacy in any areas of your house and grounds that you choose. You have a right to withdraw your consent to quartering at any time without notice and, upon receipt of your withdrawal of consent, all quartered soldiers will immediately vacate your home. You have a right to reasonable compensation for the use of your house and grounds and recovery for any damages that may result. Advice of this nature will assure that the military abuses of the past are not revisited on the citizens of the present.