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The Bill of Rights may be facing its Frederick Jackson Turner moment, the day when its last frontier is being settled and cultivated.[1] Previously neglected parts of the Bill of Rights—the Ninth Amendment, the Tenth Amendment, even the Second Amendment[2]—are no longer uncharted. And now, with this Symposium, the last neglected amendment, the Third Amendment,[3] already lightly explored, is seeing the first small settlements spring up.

The questions raised elsewhere in this issue are worthy, and their answers important, but my own contribution, such as it is, is inspired by the famous words of Leon Lipson, as reported by Arthur Allen Leff: "Anything you can do, I can do meta."[4] So while others address the metes and bounds of the Third Amendment itself, I intend to address a different question: Does the Third Amendment cast penumbras? And, if so, what terrain do *they* shadow?[5] And do those shadows shed

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1. FREDERICK JACKSON TURNER, *The Significance of the Frontier in American History*, *in* REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 199 (Readex Microprint 1966) (1893) (noting the closing of the American frontier via settlement at the end of the Nineteenth Century and speculating on its implications).

2. *See* Symposium, *New Frontiers in the Second Amendment*, 81 TENN. L. REV. 407 (2014).

3. *See* U.S. CONST. amend. III ("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 to be prescribed by law.").

4. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2 (1979) ("What follows is a pure instantiation of his category." Here, too).

5. *See* Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENT. 251, 252 (1989). Greely points out that "penumbra" originated with the astronomer Johannes Kepler, who wrote that during an eclipse the central shadow, or "umbra," is dark and sharply defined, while it is surrounded by a lighter and less

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any light (mixed metaphor though that might be) on other constitutional questions?

I. DOES THE THIRD AMENDMENT CAST PENUMBRAS?

The question of whether the Third Amendment casts penumbras is an easy one: Of course it does. And we know that because the Supreme Court has told us so.[6]

When talking about constitutional rights" penumbras, speakers are sometimes describing auxiliary protections for the core right—for example, those provided in the First Amendment realm by "chilling effect" considerations, overbreadth, or prior restraint doctrine. These auxiliary protections ensure that the core right is genuinely protected by creating a buffer zone that prevents officious government actors from stripping the right of real meaning through regulations that indirectly—but perhaps fatally—burden its exercise.[7]

What would such auxiliary protections look like in the context of the Third Amendment? Such a penumbral approach to the interpretation of the Third Amendment might encourage a broader reading of the term "troops" to include any paramilitary government agency—from police or SWAT teams to DHS or Secret Service agents—and a reading of the purposes of the Third Amendment that would include such things as government-installed malware on home computers that provides for round-the-clock snooping from inside a citizen's dwelling, or government-mandated "smart" utility meters that serve similar functions.

But more often when speakers discuss penumbras, they are discussing the kind of project that the Supreme Court undertook in *Griswold v. Connecticut*—to look at various constitutional provisions, and how they interact and overlap, and to extract, from that interaction and overlapping, some new doctrines implied by that interaction.[8] This is a species of reasoning by structure and relationship, to use Charles Black's term.[9] That is what the Supreme Court did in *Griswold v. Connecticut,* and that is what I intend to discuss here.

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distinct partial shadow, or "penumbra"—from the Latin "paene" (almost) and "umbra" (shadow). *Id.*

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

7. Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 248 (2012) (describing different meanings of "penumbra" with regard to constitutional rights).

8. *Griswold*, 381 U.S. at 484–86; Reynolds, *supra* note 7, at 255.

9. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (La. State Univ. Press ed.1969).

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It is perhaps worth noting that the term "penumbra," though famously used in the *Griswold* opinion, has a much longer history in legal usage. In particular, Karl Llewellyn used the term in his *The Constitution as an Institution,* writing:

> The discussion above with reference to the nature of an institution and the inevitable character of its gradual shading off into surrounding complexes of ways (be they complementary, competing, or merely cross-currents fulfilling other needs) will have made clear my belief that, whatever one takes as being this working Constitution, he will find the edges of his chosen material not sharp, but penumbra-like. And the penumbra will of necessity be in constant flux. New patterns of action develop, win acceptance (sometimes suddenly), grow increasingly standardized among an increasing number of the relevant persons, become more and more definitely and consciously "the thing to do," proceed to gain value as honored in tradition—*i.e.*, become things to be accepted in and of themselves without question of their utility—until they take on finally, to more and more of the participants, the flavor of the "Basic."[10]

And in *Griswold v. Connecticut*, the Third Amendment's penumbra played an important role in determining a constitutional right to contraceptive use. In that case, the Supreme Court, after discussing numerous provisions of the Bill of Rights whose protection sweeps beyond their plain language,[11] commented:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as

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10. K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 26–27 (1934) (footnotes omitted); *see also* Burr Henly, "*Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83 (1987). As Henly points out, the term "penumbra" had been used by such well known authorities as Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter, and Learned Hand, as well as Justice Douglas himself and Professor H.L.A. Hart, before the *Griswold* opinion came down. *See id.* at 83–92. Nor did the use of penumbral reasoning cease with *Griswold*. *See, e.g.*, Glenn Harlan Reynolds, *Penumbral Reasoning On the Right*, 140 U. PA. L. REV. 1333 *passim* (1992) (describing use of penumbral reasoning in numerous contexts, often in support of holdings generally regarded as "right wing"); *see also* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1090, 1097–117 (1997) (following up on the earlier piece).

11. *Griswold*, 381 U.S. at 482–83.

> we have seen. *The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy.* The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
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> The Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life. . . ."
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> . . .
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> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
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> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[12]

But if penumbral reasoning means using the enumerated rights as guidepoints in determining the shape of unenumerated rights, as

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12. *Id.* at 484–86 (footnote omitted) (citations omitted) (first emphasis added); *see* U.S. CONST. amend. I, III, IV, V, & IX.

the Court did in *Griswold*,[13] how does the Supreme Court's recognition of the Third Amendment affect things today? What role did the Third Amendment's penumbras play in *Griswold*, and what role might they play in future cases? I will first take a closer look at *Griswold*, then look at the landmark Third Amendment case of *Engblom v. Carey*,[14] and then suggest some future roles for the Third Amendment in the Twenty-First Century.

II. THE THIRD AMENDMENT IN *GRISWOLD*

Griswold, of course, was a case in which a Connecticut state law—seldom enforced, but still on the books—made it illegal for any person to use any drug or device for the purpose of preventing conception.[15] After encountering some difficulty with earlier efforts,[16] the plaintiffs, the executive director of Planned Parenthood, and a physician working for its clinic, managed to get their challenge before the court.[17]

As noted in the passage quoted above, the Court, through Justice Douglas, adopted a penumbral approach in arriving at its conclusion that the Connecticut statute was one of those laws which "sweep unnecessarily broadly and thereby invade the area of protected freedoms."[18] But what work, exactly, was the Third Amendment doing here? The Court's horror at searching the "sacred precincts" of the marital bedroom for "telltale signs" of the use of contraceptives[19] would appear to be the sort of thing generally protected by the Fourth and Fifth Amendments.[20] Indeed, the Court said, quoting *Boyd v. United States*,[21] that:

> The principles laid down in this opinion [by Lord Camden in *Entick v. Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the

13. For an extensive discussion of the methodology in *Griswold* and a response to a leading critic of the decision, see Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold*, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 *passim* (1990).

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

15. *Griswold*, 381 U.S. at 480.

16. Poe v. Ullman, 367 U.S. 497 (1961).

17. *Griswold*, 381 U.S. at 480–81.

18. *Id.* at 485.

19. *Id.*

20. *Id.* at 484.

21. Boyd v. United States, 116 U.S. 616 (1886).

> government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other.[22]

So what work, then, is being done by the Third Amendment and its penumbras? The Third Amendment does not forbid the searching of homes or the subpoenaing of diaries—that's the work of the Fourth and Fifth Amendments—but rather the insertion of state agents into the fabric of an individual's private life. The real problem with having troops quartered in one's home, after all, is not the necessity of providing bed and board at one's own expense, irksome as that might be. Rather, it is the disruption of one's domestic life, the occupation of one's hearth, the inability to engage in domestic confidences, displays of affection, or even spats without the interfering presence of a third party observer. *This* is why having troops quartered in one's home is more of an intrusion than, say, simply being taxed to support the quartering of troops elsewhere.

In *Griswold*, then, the penumbra of the Third Amendment was triggered by the fact that Connecticut's law, which interposed itself between a married couple and their physicians, similarly invaded the couple's domestic life. And by co-opting the state-licensed medical providers, the Connecticut law treaded on the penumbra, if not the core, of the Third Amendment. Where the Fourth and Fifth Amendments limit government searches and compelled testimony, the Third Amendment prohibits the government from inserting itself into a domestic situation and observing (or influencing) events as they happen.

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22. *Griswold*, 381 U.S. at 484 n.* (quoting *Boyd*, 116 U.S. at 630 (alteration in original) (citation omitted).

III. BEYOND *GRISWOLD*

This is a comparatively narrow penumbral reading of the Third Amendment, though one with potentially great application in the Twenty-First Century, where a combination of technological advancement and government nannyism make such insertion considerably more likely. But the Second Circuit opinion in *Engblom v. Carey*[23] broadens the penumbra significantly. *Engblom* involved dormitory-like residences occupied by New York correctional officers.[24] When those officers went on strike, the state evicted them and housed National Guard troops in their place.[25]

When the correctional officers sued, claiming, *inter alia*, a violation of their rights under the Third Amendment,[26] the Second Circuit held: (1) that National Guardsmen were "soldiers" for purposes of the Third Amendment; (2) that the Third Amendment was applicable against the states via incorporation under the Fourteenth Amendment, something assumed but not made explicit by *Griswold*;[27] and (3) most importantly, that the Third Amendment "was designed to assure a fundamental right of privacy."[28] What's more, that right was to be enjoyed by anyone legitimately occupying a dwelling, whether in fee simple, by leasehold, etc.[29]

So what does it mean that the Third Amendment assures "a fundamental right of privacy" in a dwelling-place? If that right is not to be mere surplusage—and, as we know, constitutional rights are never presumed to be mere surplusage[30]—then it must do something that isn't already done by the Fourth and Fifth Amendments. The Fourth Amendment limits searches to circumstances where there is probable cause.[31] But does the Third Amendment impose additional limitations, even in the presence of probable cause?

I think that it does. By carving out an area of domestic privacy that is immune from intermeddling state officials, the Third Amendment's penumbra reaches beyond the prohibitions and limitations on government criminal investigations contained in the Fourth and Fifth Amendments. Instead, the "sacred precincts" of the domestic sphere possess their own, independent immunities, even

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23. Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982).
24. *Id.* at 958–59.
25. *Id.*
26. *Id.* at 958.
27. *Griswold*, 318 U.S. at 484.
28. *Engblom*, 677 F.2d at 961–62.
29. *Id.* at 962.
30. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).
31. U.S. CONST. amend. IV.

where non-criminal aspects of government operation are concerned, as well as when criminal procedure doctrines—e.g., probable cause—might otherwise permit government intrusion. After all, the notion of searching marital bedrooms for telltale signs of the use of contraception was abhorrent in itself, without reference to whether such use was a crime, and whether the government might have probable cause to search.

Third Amendment penumbras might also affect other, non-physical intrusions into the home: "Affirmative consent" laws, sodomy laws, and other state regulations into the sexual behavior of consenting adults—perhaps even those who are unmarried—would seem quite close to the core *Griswold* holding, certainly affecting the "sacred precincts" of conjugal, if not actually marital, bedrooms. And going beyond sex, one might imagine that intrusive governmental regulations of childrearing, education, diet, and other domestic elements might fall within the Third Amendment's penumbral protections. All seem as closely related to the maintenance of unmolested domestic bliss as, say, the right to have a diaphragm or condoms in the nightstand.

IV. THE THIRD AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS

In *Griswold*, of course, the Third Amendment did not do its work alone. Instead, it operated in tandem with other constitutional protections, including the Ninth Amendment's provision that the enumeration of certain constitutional rights should not be construed to deny or disparage other rights retained by the people, though not specifically enumerated.[32] One might argue—and, in fact, I *have* argued elsewhere, at tedious length[33]—that the Ninth Amendment may be read, in part, as a command to use penumbral reasoning as a means of determining what unenumerated rights are protected.

The broadened and strengthened role for the Third Amendment as a general protector of household privacy found in *Engblom* may thus serve to increase the impact of the Third Amendment beyond whatever effect (apparently significant) that it had in *Griswold*. In determining, for example, whether municipal ordinances involving guns in the home violate the Constitution, courts should look both at the Second Amendment's right to arms[34] and at the general protection of domestic privacy provided by the Third Amendment. Likewise, in

32. U.S. CONST. amend. IX.
33. *See* Reynolds, *supra* note 13, at 1083–84.
34. U.S. CONST. amend. II.

assessing the legitimacy of, say, no-knock SWAT raids on residences, courts should look not only at the protections provided by the Fourth Amendment[35] but also, again, at the Third Amendment's protection of a fundamental right of privacy in one's dwelling. The penumbras of the Third Amendment, in conjunction with those other provisions, may impel stricter limits on official intrusions than would be provided by the Second or Fourth Amendments alone. These implications of the Third Amendment, read in light of the Supreme Court's analysis in *Griswold*, all seem quite straightforward to me, but I must confess that I am not enormously optimistic that the courts will see things this way. There are reasons for that, none of them especially compelling, but nonetheless likely to sway many courts.

The first and most important is that many critics of *Griswold* have gone out of their way to give penumbral reasoning a bad name. Of course, the term "bad name" is particularly descriptive here: Courts go on using penumbral reasoning—because it is almost indispensable—they just take care to avoid using the word "penumbra," preferring instead terms like "the tacit postulates of federalism."[36] Thus, despite the *Griswold* critics, penumbral reasoning has continued apace, camouflaged, perhaps, by carefully chosen language, but no less real for all that.

The second reason, though, is that in our topsy-turvy judicial system today, finding new rights on the part of citizens is out of favor. Interpreting the Commerce Clause or the Taxing Power to allow the government to do things that the Framers never contemplated has somehow come to be seen as straight-up judicial reasoning, while finding new rights—even though the Bill of Rights specifically states that such unenumerated rights exist[37]—has somehow come to be seen by many as fuzzy-headed and unprincipled. This is a matter of judicial fashion and like all fashions is subject to change. But while it lasts, I fear that the Third Amendment's penumbras will do less work than, properly speaking, they should.

CONCLUSION

The Second Amendment has passed from subject of academic discussion into the realm of ordinary constitutional law. The Third Amendment, as yet, has not. Though there is solid judicial precedent giving Third Amendment protections force, there is not, as of yet, a body of Third Amendment law comparable in extent to that enjoyed

35. U.S. CONST. amend. IV.

36. *See* Denning & Reynolds, *supra* note 10, at 1098–1101, 1104–05 (describing modern uses of penumbral reasoning); Reynolds, *supra* note 10.

37. U.S. CONST. amend. IX.

by other Bill of Rights provisions, even the comparatively newly recognized Second Amendment.

But constitutional law abhors a vacuum, and it is thus inevitable that the Third Amendment should draw more attention. While it may be some time before the Third Amendment's penumbras get as much attention as this brief Essay suggests they deserve, that day is, I submit, more or less inevitable. I am delighted to have been part of this Symposium, which is doing so much to advance the day when the Third Amendment enjoys the recognition that it deserves.