Spring 2015

The Third Amendment in the 21st Century

Glenn Harlan Reynolds

FOREWORD: THE THIRD AMENDMENT IN THE 21ST CENTURY

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For many years, the Third Amendment to the Constitution has been the Rodney Dangerfield of the Bill of Rights, getting no respect. Actually, even that comparison is probably unfair as, during his prime, pretty much everyone knew who Rodney Dangerfield was, while speakers at this Symposium almost universally shared stories of colleagues, upon hearing of their contribution, either asking what the Third Amendment does, or admitting to looking it up later, on the sly. Most any halfway educated American – and pretty much every American law professor -- can tell you what the other 9 components of the Bill of Rights are about. It's true that the Second Amendment has only recently come into its own as "ordinary constitutional law,"[2] rather than the stuff of letters to the editor and law review arguments, and that the Ninth Amendment has been accused of being an "inkblot," while the Tenth has only recently recovered some measure of respect after having been consigned for several decades to mere "truism" status. The Third, however, remains obscure in a way that these other provisions cannot hope to match.

That obscurity, however, is likely to fade at least a bit. One reason, of course, is this Symposium, the first (but probably not the last) on this subject. Certainly any topic for which law professors are willing to travel across the country to a beach-less destination in the dead of winter must be worthy of at least some attention, after all, and the nature of legal scholarship is probably multiplicative: The more articles that are written on a topic, the more articles that are likely to be written on that topic in the future.

Beyond that, the Third Amendment may benefit from a powerful force of nature, to wit, law professors' need for new areas of interest. Ignored and disrespected though it may have been, the Third Amendment represents one-tenth of the Bill of Rights, and ambitious scholars may think it wise to get in on the ground floor of this new field, so that future writers will have to cite them. Of such things are academic careers made.

But aside from these tawdry and self-serving motives –if it is even possible for a profession as noble as legal academia to be charged with tawdriness – there is another reason why the Third

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2. *See* Glenn Harlan Reynolds, The Second Amendment As Ordinary Constitutional Law, 81 TENN. L. REV. 409 (2014).

Amendment may get more attention in coming years, and that is the decline of domestic privacy and the likely effort by lawyers, and judges, to find ways of restraining the leviathan state as it peers in our windows, kicks in our doors, and, in the very foreseeable future, inserts micro-drones, "surveillance dust," and other imminent technologies into every corner of our abodes.

One might expect the Fourth Amendment, or even "internal" constitutional limits on federal power, to restrain such behavior, but by all appearances the former isn't up the job, and the latter have been (almost) completely abandoned by the Supreme Court. And with existing doctrine having developed to rococo levels over the past several decades, the allure of looking at matters through the lens of a previously unused constitutional provision is likely to be significant. The Third Amendment is, by design, intended to keep the grubby boots of officialdom out of the domestic realm; the Supreme Court has already (in Griswold v. Connecticut), shown itself willing to expand its reach beyond settings reminiscent of the 18th Century, and the Third's focus on the domestic realm means that judges may be less afraid of unforeseen consequences than they might be with regard to, say, an expanded reading of the Ninth Amendment. For lawyers and courts worried about government intrusiveness, the Third Amendment provides a tool for protecting the sanctity of the home – the "sacred precincts," as Justice Douglas put it – while operating from an almost clean constitutional slate.

And, of course, there is another and perhaps even more powerful reason for people to start talking more about the Third Amendment: It's fun to write about something new and previously neglected. And we need look no farther than the contributions to this Symposium to see proof of that.

It is hard to say who is having the most fun here, but it may well be Tom W. Bell, who is usually at the head of the pack in the fun department. His *Unconstitutional Quartering, Governmental Immunity, and Van Halen's Brown M&M Test* ties together constitutional law, history – Bell, of course, was an early adopter in the Third Amendment sphere, producing his first contribution over two decades ago – smart rock-and-roll business practices, and in particular some thoughts on governmental immunity that demand further discussion. Having exhausted the Third Amendment for now, perhaps the *Tennessee Law Review* should organize a symposium on Titles Of Nobility. If so, I'm in!

On a more serious note, Michael Cottone (who is usually more serious than most) points out that "The Third Amendment must mean *something*." Though this may seem a truism, it is actually a strong interpretive point. (I once considered publishing an annotated Constitution, with all the parts that had been interpreted out of existence by courts color-coded, but the prospect struck me as

too depressing.) But as Cottone notes, even parts of the Constitution that previously performed little or no work, such as the Second Amendment, remain capable of revival at any time. In analyzing the Third Amendment, Cottone tells us some interesting things about the Third, and some interesting things about constitutional interpretation in general.

When it comes to having fun, well, I always have fun when I write about the Constitution. My own contribution to this Symposium takes its cue from something Leon Lipson once said: "Anything you can do, I can do meta." So while the other participants are talking about the Third Amendment and what it does, I have branched out to discussing the Third Amendment's penumbras. This is perhaps less fanciful than it sounds, as the Supreme Court, a half-century ago in *Griswold,* has made plain that the Third Amendment does indeed have penumbras, and that they do real legal work. With that in mind, I take a look at what other constitutional terrain might be shaded by those penumbras, and what the legal consequences might be.

William Gill opens his contribution by noting that "The first thing most scholars note about the Third Amendment to the Federal Constitution . . . is its relative obscurity." But, as he notes, the history of the Third is not empty, and raises serious questions of Congressional ball-dropping. Sadly, the Third Amendment is not alone in that department.

One question not considered, presumably, by the Framers of the Third Amendment, but surely by the framers of the Fourteenth, is whether the Third is incorporated against the states under the Fourteenth. E. Duncan Getchell, Jr., Matthew D. Fender, and Michael H. Brady explore just this topic. The case, they conclude, is closer than some might believe.

Elizabeth Price Foley, meanwhile, in *The "War" Against Crime: Ferguson, Police Militarization, and the Third Amendment,* asks about local police: "In an era when police seem to be 'at war' with drugs, and crime generally, are they essentially becoming local 'soldiers?' This question, in turn, raises interesting questions about the applicability of the Third Amendment." As she notes, "While there is ample evidence that those who wrote and ratified the Fourteenth Amendment believed the amendment would make the Bill of rights – including the Third Amendment – binding on the States, there is no evidence regarding what they believed the word 'soldier' might mean, in the specific context of state law enforcement." It is my own belief that when the people breaking your door down and tromping through your den are government employees who look and act like soldiers, that's close enough, but Foley's analysis is more nuanced and sophisticated than my take,

which should surprise no one familiar with her work – or, perhaps, with mine. . . .

Speaking of mine, G.A.Z. Latner may have one-upped my "anything you can do, I can do meta" approach by focusing not on Third Amendment conclusions, but on Third Amendment rhetoric. "Rather than submitting a paper making an argument about the Third Amendment's impact on the broader constitutional debate (an unappetizing project in that it would require me to a) pick a side, b) do actual research, and c) greatly exceed the word limit), I've opted instead to offer sketches of three arguments that could be made out of the Third Amendment – one for the Absolutists, one for the Pragmatists, and one for those who find themselves in the disputed middle." Future Third Amendment scholars take note, as much of your conceptual work is already laid out.

While "Houses of the Holy" was not my favorite Led Zeppelin album,[3] that work did prefigure Erik Rassbach's contribution, which is on whether houses of worship count as "houses" for purposes of the Third Amendment. As Rassbach comments, "Troops have for centuries conquered (and usually destroyed) houses of worship, often with terrible consequences. Requisition of houses of worship to quarter soldiers seems to have come later. In the early modern period, the practice of quartering troops in private buildings of all sorts began to be widely practiced, and was closely connected to the European religious wars resulting from the Reformation. It was also during Europe's wars of religion that quartering—including quartering in houses of worship—became a method of social control." Rassbach has particular thoughts with regard to government infiltration of religious services and institutions.

Scott Gerber's contribution is particularly interesting because it contains an extensive discussion of the roots of the Third Amendment – extending back to Roman times – and also notes that the only books published regarding the Amendment to date are books aimed at children. (It is interesting the way that literature for children, whether fiction or nonfiction, often preserves things that adults are too sophisticated to notice). Gerber demonstrates that there is more Third Amendment history than most appreciate, and also concludes, correctly in my view, that "the Third Amendment is simply one piece of evidence – overwhelming in my judgment – of the Framers' continuing commitment to the political philosophy of the Declaration of Independence." The relevance of the Declaration of Independence to the Constitution may seem unclear today, but to the Framers – for whom the Declaration was recent, and important,

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3. I always favored the "Brown Bomber," Led Zeppelin II.

history – it seemed much more obvious. And the connection between that recent experience, and the Third Amendment, seems obvious indeed.

And, finally, Mark A. Fulks and Ronald S. Range III look at a topic that has been of great significance in today's culture – consent – in the context of the Third Amendment, the only part of the Bill of Rights to address the issue of consent. Fulks & Range look at Fourth Amendment issues of consent, but conclude that consent for purposes of the Third Amendment raises additional questions of voluntariness. Characterizing the resulting approach as "affirmative consent" might be a bit too clever, but would be largely accurate.

At any rate, with this brief introduction out of the way, read on and enjoy. The conversation on the Third Amendment is well begun, and I suspect that there will be more scholars joining the discussion in years to come.