

## Everyone Forgets About the Third Amendment: Exploring the Implications on Third Amendment Case Law of Extending its Prohibitions to Include Actions by State Police Officers

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**EVERYONE FORGETS ABOUT THE THIRD AMENDMENT:  
EXPLORING THE IMPLICATIONS ON THIRD AMENDMENT  
CASE LAW OF EXTENDING ITS PROHIBITIONS TO INCLUDE  
ACTIONS BY STATE POLICE OFFICERS**

Samantha A. Lovin\*

[N]o one cares about the Third Amendment; no one even has any interest in perpetuating its memory.<sup>1</sup>

INTRODUCTION

The Third Amendment of the Constitution states, “[n]o 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.”<sup>2</sup> Though this provision may seem irrelevant in modern America, where the idea of the “right to privacy” is so ingrained in our daily lives that no one would fathom the possibility of anyone, let alone a “soldier,” entering or using a private home without express permission from the owner at any time, this was not always the case. “The Third Amendment exhibits . . . the concern of eighteenth-century Americans about how the people are to be protected from the depredations of those whom they have to rely upon to protect them.”<sup>3</sup> This is the precise issue discussed within this Note; what protections are available to “the people” when those we depend upon to protect us—specifically police officers—go beyond their constitutionally established boundaries.

Part I of this Note provides a brief explanation of the important historical events that led to the ultimate enactment of the Third Amendment, which are necessary to courts for a current analysis of the scope of the protections provided by this provision. Part II discusses the Third Amendment’s lack of serious consideration by the courts. Part III details the only time in the provision’s history that a court meaningfully assessed any aspect of the Third Amendment’s proscriptions on actions by authoritative entities. Part IV introduces a case currently awaiting litigation that has the potential,

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<sup>1</sup> Morton J. Horowitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209, 209 (1991).

<sup>2</sup> U.S. CONST. amend. III.

<sup>3</sup> GEORGE ANASTAPLO, *THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY* 65 (1995).

if the court is willing to view it as a serious claim, to make the Third Amendment important once again to the daily lives of American citizens. Part V explores arguments made both in favor and against extending the Third Amendment proscriptions to cover the actions alleged in Part IV, as well as the constitutional interpretations supporting those arguments. Part VI discusses additional protections established by the courts that, even if Third Amendment violations were found based on the claims in Part IV, may still preclude the plaintiffs from recovering any damages. Part VII analyzes all the foregoing information in an attempt to predict the possibility that the plaintiffs discussed in Part IV will be successful, resulting in a finding that Third Amendment proscriptions extend to actions of state police officers. Finally, Part VIII offers a potential judicial test that, if adopted by the courts, would better define the proscriptions of the Third Amendment and alleviate the difficulties suffered by those asserting claims of violation of this provision.

#### I. HISTORICAL BACKGROUND OF THE CREATION OF THE THIRD AMENDMENT

Though many scholars have questioned whether the Third Amendment is largely “obsolete,”<sup>4</sup> in regard to modern-day concerns, a great deal of information exists about the historical background of this provision’s enactment. Ironically, many scholars assert that the Framers, as well as the majority of everyday citizens, felt that the inclusion of this Amendment was of paramount importance to the formation of the new Republic.<sup>5</sup> Though I do not wish to belabor a point already made many times over, an understanding of the historical events surrounding the development of the Third Amendment is necessary to understand any attempt to apply it to modern-day events.

Without delving too deep into the past, suffice it to say that the quartering of troops was not an English invention reserved only for their American colonies.<sup>6</sup> Quartering became a problem for British citizens after the Norman Conquest in 1066.<sup>7</sup> Legal prohibitions of “forced billeting”—quartering—appeared in the charters of English towns and boroughs as early as 1131.<sup>8</sup>

Though not discussed to anywhere near the same extent, forced quartering in the colonies existed long before the Revolutionary War.<sup>9</sup> “[E]ach time the British government launched a significant military operation in North America, it brought along quartering problems.”<sup>10</sup> In fact, “[c]ivilians in Massachusetts and Connecticut complained

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<sup>4</sup> See generally, e.g., Horwitz, *supra* note 1.

<sup>5</sup> See Thomas G. Sprankling, Note, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 COLUM. L. REV. 112, 127 (2012).

<sup>6</sup> Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 118, 120 (1993).

<sup>7</sup> *Id.* at 119.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 125.

<sup>10</sup> *Id.*

about the quartering of soldiers in private homes as early as King Philip's War (1675–1676).<sup>11</sup> The first legal protection against quartering in the colonies appeared shortly thereafter in the “Charter of Liberties and Priviledges” enacted by the New York Assembly in 1683.<sup>12</sup> The French and Indian War marked the turning point where quartering of troops became a “major problem” for the colonists.<sup>13</sup>

The British eventually began to seek out ways to place the “financial burden of defending the western frontier onto the colonies.”<sup>14</sup> It did so through the passage of the Quartering Act of 1765.<sup>15</sup> This Act required that:

[C]onstables, tithingmen, magistrates, and other civil officers . . . are hereby required to quarter and billet the officers and soldiers in his Majesty's service, in the barracks provided by the colonies; and if there shall not be sufficient room in the said barracks for the officers and soldiers, then . . . in inns, livery stables, ale-houses, victualling houses, and the houses of sellers of wine . . . and all houses of persons selling of rum, brandy, strong water, cider, or metheglin, . . . and in case there shall not be sufficient room for the officers and soldiers in such barracks, inns, victualling and other public ale-houses, . . . it shall and may be lawful for any two or more of his Majesty's justices of the peace . . . to take, hire, and make fit . . . so many uninhabited houses, outhouses, barns, or other buildings, as shall be necessary, to quarter therein the residue of such officers and soldiers for whom there should not be room in such barracks and public houses as aforesaid . . .<sup>16</sup>

The British then enacted the Stamp Act of 1765 “to squeeze from the colonists the revenue required to satisfy the Quartering Act's demands.”<sup>17</sup> Thus, in addition to being required to provide barracks or other forms of shelter for British soldiers within their city walls, and in many instances, on their own property in “extra” buildings, the colonists also now had to pay for the pleasure of the constant presence of these soldiers they did not want in the first place. Tensions regarding forced quartering of troops intensified exponentially when, in response to the Boston Tea Party on December 16,

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<sup>11</sup> *Id.*; see also William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393, 414 (1991).

<sup>12</sup> See B. Carmon Hardy, *A Free People's Intolerable Grievance*, in THE BILL OF RIGHTS: A LIVELY HERITAGE 67, 74 (Jon Kukla ed., 1987).

<sup>13</sup> Bell, *supra* note 6, at 125.

<sup>14</sup> *Id.* at 126 (footnote omitted).

<sup>15</sup> *Id.*

<sup>16</sup> Quartering Act, 1765, 5 Geo. 3, c. 33, reprinted in ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776 656–57 (Merrill Jensen & David G. Douglas eds., 1953) [hereinafter ENGLISH HISTORICAL DOCUMENTS].

<sup>17</sup> Bell, *supra* note 6, at 126.

1773, the British Parliament passed the five “Intolerable Acts.”<sup>18</sup> One of these was the new Quartering Act of 1774,<sup>19</sup> which stated in pertinent part:

[I]f . . . officers or soldiers . . . shall remain within any of the said colonies without quarters for the space of twenty-four hours after such quarters shall have been demanded, it shall and may be lawful for the governor of the province to order and direct such and so many uninhabited houses, outhouses, barns, or other buildings, as he shall think necessary to be taken . . . and to put and quarter such officers and soldiers therein for such time as he shall think proper.<sup>20</sup>

This reaction on the part of Parliament to the growing unrest in the colonies sparked a series of “political statements” addressing some of the most egregious aspects of the quartering issue:<sup>21</sup> the “intrusions on the privacy of the home, abuses of persons and property, and restrictions of individual freedom.”<sup>22</sup> The Declaration of Acts and Resolves of 1774 drafted by the First Continental Congress called adamantly for a repeal of the Quartering Act enacted that same year.<sup>23</sup> When this was unsuccessful, the Declaration of the Causes and Necessity of Taking Up Arms of 1775 also emphasized as one of its main issues the “quartering [of] soldiers upon the colonists in time of profound peace.”<sup>24</sup> This strident dissention eventually came to a head in the creation of the Declaration of Independence in 1776.<sup>25</sup> In the Declaration of Independence, an explicit justification for “breaking the ‘political bands’”<sup>26</sup> that had kept the colonists bound to Britain was the “[q]uartering [of] large bodies of armed troops among [the colonists].”<sup>27</sup>

Out of the shared and widespread grievances resulting from forced “billeting” of troops developed the “popular consensus that the sanctity of the home should receive specific legal protection from the oppressive intrusion resulting from the involuntary quartering of soldiers.”<sup>28</sup> Thus, when the colonies were successful in

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<sup>18</sup> See generally, e.g., Seymour W. Wurfel, *Quartering of Troops: The Unlitigated Third Amendment*, 21 TENN. L. REV. 723, 726 (1951).

<sup>19</sup> See *id.*

<sup>20</sup> Quartering Act, 1774, 14 Geo. 3, c. §2 54, reprinted in ENGLISH HISTORICAL DOCUMENTS, *supra* note 16, at 785.

<sup>21</sup> Bell, *supra* note 6, at 126–27.

<sup>22</sup> William Sutton Fields, *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 202 (1989).

<sup>23</sup> Bell, *supra* note 6, at 126–27.

<sup>24</sup> *Id.* at 127.

<sup>25</sup> *Id.* at 126–27.

<sup>26</sup> *Id.* at 127.

<sup>27</sup> THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

<sup>28</sup> Fields, *supra* note 22, at 202.

separating themselves from England and King George III, the Founders sought to ensure that “this consensus would also find a distinct place in America’s organic law, in the form of the [T]hird [A]mendment.”<sup>29</sup> Interestingly, despite the pervasiveness of the forced quartering issue throughout the time leading up to the Revolutionary War, the members of the Philadelphia Convention of 1787 chose to reject Charles Pinckney’s proposal for a “constitutional prohibition on the quartering of soldiers,” and instead, no mention of this issue, or any protections against it, was present in the original United States Constitution.<sup>30</sup>

It is well known that, at the Constitution’s inception, “[o]pponents . . . seized upon the absence of a bill of rights to buttress their arguments against a strong central government.”<sup>31</sup> It did not go unnoticed by the Anti-Federalists that, due to the lack of mention of affirmative rights of the people, there was no protection against the despised forced quartering.<sup>32</sup> In addressing the drafters’ failure to mention quartering as part of their arguments against a powerful central government, Anti-Federalists posited that “[t]hough it is not to be presumed, that we are in any immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government.”<sup>33</sup>

Thus, though the Anti-Federalists were not successful—evidenced by the fact that we are still governed by the same document they sought to have thrown out—they did bring to light the “widespread concern” of the lack of affirmative rights held by the people.<sup>34</sup> Eight state ratifying conventions sent Congress propositions for a bill of rights, and in these proposals, only seven other types of provisions were submitted more often than those addressing quartering.<sup>35</sup> Needless to say, it was extremely apparent that, in the formation of the Bill of Rights, it was expected by “the people” that an anti-quartering amendment would hold prominence. And those presenting proposed bills of rights to Congress did not disappoint. Unlike most provisions, a form of the current Third Amendment was included in every version of the Bill of Rights contemplated by Congress.<sup>36</sup> Additionally, the Amendment’s final version “differed little from the way it was initially introduced in the first Congress in 1789.”<sup>37</sup> It emphasized the virtual unanimity among the states with regard to the necessity of this amendment protecting against forced quartering—except for in extreme circumstances—in the formation of the nation’s new government.

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<sup>29</sup> *Id.*

<sup>30</sup> Bell, *supra* note 6, at 128.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Letters from the Federal Farmer, reprinted in 2 THE COMPLETE ANTI-FEDERALIST* 329 (Herbert J. Storing ed., 1981).

<sup>34</sup> Bell, *supra* note 6, at 129.

<sup>35</sup> *Id.*

<sup>36</sup> Fields, *supra* note 22, at 203.

<sup>37</sup> *Id.* at 202.

II. THE PRESENCE, OR LACK THEREOF, OF THE  
THIRD AMENDMENT IN COURT DECISIONS

Despite the heightened significance of the protection from forced quartering of soldiers—except for in very specific circumstances<sup>38</sup>—at the time of the nation’s founding, it is reiterated time and again, in practically every scholarly analysis of the Third Amendment, that this provision is “the least litigated provision of the Bill of Rights.”<sup>39</sup> Instead, since its enactment, the Third Amendment has largely “rest[ed] in obscurity,” considered the “forgotten amendment,” “undoubtedly obsolete,” “an insignificant legal fossil,” and at best “an innocent bystander.”<sup>40</sup> The Supreme Court has neither decided a case that even remotely addressed the central concern of the Amendment—the quartering of soldiers in a private home<sup>41</sup>—nor determined whether it is incorporated under the Fourteenth Amendment against the states.<sup>42</sup> Instead, the Third Amendment has been used largely “to bolster claims for various property and privacy rights.”<sup>43</sup> The most famous of these instances was in Justice Douglas’s majority opinion in *Griswold v. Connecticut*.<sup>44</sup> However, the Court referenced this provision only to support a larger point, finding that:

[S]pecific 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 we have seen. *The Third Amendment in its*

<sup>38</sup> U.S. CONST. amend. III.

<sup>39</sup> See Bell, *supra* note 6, at 140.

<sup>40</sup> See James P. Rogers, *Third Amendment Protections in Domestic Disasters*, 17 CORNELL J.L. & PUB. POL’Y 747, 749 (2008) (footnotes omitted); see also John S. Baker, Jr., *The Effectiveness of Bills of Rights*, 15 HARV. J.L. & PUB. POL’Y 55, 59 (1992); Bell, *supra* note 6, at 117 (stating that “[t]he Third Amendment has especially suffered from a lack of serious and sustained legal analysis”).

<sup>41</sup> See, e.g., Fields, *supra* note 22, at 204 (“The United States Supreme Court has never had occasion to directly interpret the amendment, although several of its cases mention it in dicta as one facet of the right to privacy.”); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1029 (2011) (“The Supreme Court has never reviewed such a case.”).

<sup>42</sup> See, e.g., JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–1995* 303 (1996) (“The Third Amendment remains one of the few provisions of the Bill of Rights that the Supreme Court has not applied to the states via the due process clause of the Fourteenth Amendment.”); Rosenkranz, *supra* note 41, at 1062 (“The Court has not held that the Fourteenth Amendment incorporates the Third Amendment against the states . . .”).

<sup>43</sup> Rogers, *supra* note 40, at 754.

<sup>44</sup> 381 U.S. 479, 484 (1965) (holding that there is a constitutional right to privacy based upon the “penumbras” of various provision within the Bill of Rights).



*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.*<sup>45</sup>

Aside from using the Third Amendment to strengthen the holding that there is a constitutional right to privacy, the Supreme Court has found little use for this provision.<sup>46</sup> However, this lack of attention from the Court is not for lack of trying on behalf of litigants. Aside from using the Third Amendment to support claims for privacy rights, it has also been used to support claims of property rights and highlight constitutional checks placed on the military.<sup>47</sup> There have also been a number of Third Amendment claims that have been quickly dismissed by the courts as frivolous or unfounded.<sup>48</sup>

A brief discussion of *Jones v. United States Secretary of Defense*<sup>49</sup> provides one such example of a case bringing forth an “inapposite” claim of a violation of Third Amendment rights. Here, petitioners, members of the Army Ready Reserve, sought to enjoin the Secretary of Defense, the Secretary of the Army, and a number of commanding generals from ordering petitioners to march in a parade, as it coincided with a scheduled speech and appearance of Vice President Spiro T. Agnew and thus, “indirectly promote[d] his political candidacy.”<sup>50</sup> Petitioners argued, among other claims, that forcing them “to march in a parade supporting a political viewpoint with which [they were] not in sympathy” violated the Third Amendment.<sup>51</sup> How the petitioners concluded that being made to participate in a parade was the equivalent of taking possession of, and residence within, an individual’s private dwellings is not explained within the court’s opinion. Unsurprisingly, the district court easily, and with no discussion, held that, “[b]y no stretch of the imagination can it be said that the reservists in this action” had legitimate claims of a Third Amendment violation from the order that they participate in the parade.<sup>52</sup>

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<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> See JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* 177–93 (2011) (“The Third Amendment’s brief appearance in *Griswold*—as but one small part of an argument quickly abandoned by the Court as absurd—turns out to be the provision’s high point over the past two hundred years or so.”).

<sup>47</sup> Rogers, *supra* note 40, at 754–55.

<sup>48</sup> *Id.* at 755 (citing *Sec. Investor Prot. Corp. v. Exec. Sec. Corp.*, 433 F. Supp. 470, 473 n.2 (S.D.N.Y. 1977) (dismissing a frivolous claim that a subpoena violated the protections granted under the Third Amendment); *United States v. Valenzuela*, 95 F. Supp. 366 (S.D. Cal. 1951) (rejecting an unfounded claim that the House and Rent Act of 1947 violated the Third Amendment as an incubator for bureaucrats to be quartered upon the people)).

<sup>49</sup> 346 F. Supp. 97 (D. Minn. 1972).

<sup>50</sup> *Id.* at 98.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 100. For other examples of mistaken or frivolous claims of Third Amendment violations, see also *Custer Cnty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1028, 1043 (10th Cir. 2001) (finding petitioners’ claim regarding implementation of the Colorado Airspace



III. *ENGBLOM V. CAREY*: THE ONLY GUIDING LIGHT

Unlike virtually all other provisions of the Constitution, there has been only one instance of direct, serious litigation of the Third Amendment, and this was in the case of *Engblom v. Carey*.<sup>53</sup> “For the first time a federal court [was] asked to invalidate as violative of the Third Amendment the peacetime quartering of troops ‘in any house, without the consent of the Owner.’”<sup>54</sup> The central issue presented in *Engblom* was “whether New York State’s quartering of National Guardsmen . . . in the residences of striking correction officers at a correctional facility violated the officers’ third amendment rights.”<sup>55</sup> The appellants in this case worked for the Mid-Orange Correctional Facility in Warwick, New York.<sup>56</sup> Apartment-style housing located on the grounds was available to any correctional officer who worked at the facility; however, none of the officers were required to live there.<sup>57</sup> Two documents governed the housing relationship between the state and the officers,<sup>58</sup> throughout which the occupying officers were referred to as “tenants.”<sup>59</sup> In addition, the documents stipulated a monthly

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Initiative, which “proposed special use airspace changes to the National Airspace System” to assist in military training, violated the “property-based privacy interests” established in *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982), “border[ed] on frivolous,” stating instead, “[w]e simply do not believe the Framers intended the Third Amendment to be used to prevent the military from regulated, lawful use of airspace above private property without the property owners’ consent”); *Sec. Investor Prot. Corp. v. Exec. Sec. Corp.*, 433 F. Supp. 470, 473 n.2 (S.D.N.Y. 1977) (stating, in response to the defendant’s argument that his failure to respond to subpoenas ordering him to pay and respond to damages is justified due to the wide range of implicated constitutional privileges under several different amendments, that “it is difficult to understand how the subpoenas violate [Defendant’s] rights under the third amendment”); *United States v. Valenzuela*, 95 F. Supp. 363, 366 (S.D. Cal. 1951) (responding to defendant’s contention that “[t]he 1947 House and Rent Act as amended and extended is and always was the incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers upon the people in violation of the Amendment III of the United States Constitution,” by stating that this “has not been heretofore made or adjudged by any court” and found this argument to be “without merit”); *Marquette Cement Mining Co. v. Oglesby Coal Co.*, 253 F. 107, 108 (N.D. Ill. 1918) (indicating the citizenry’s relative unfamiliarity with the Third Amendment through the defendant’s position that a “suit for injunction cannot be maintained because the remedy at law is adequate, and it is therefore entitled to a trial of the facts by a jury, under the third amendment of the Constitution,” when the defendant actually meant to invoke the protections of the Seventh Amendment).

<sup>53</sup> 677 F.2d 957 (2d Cir. 1982).

<sup>54</sup> *Id.* at 959.

<sup>55</sup> Ann Marie C. Petrey, *The Third Amendment’s Protection Against Unwanted Military Intrusion*: *Engblom v. Carey*, 49 BROOK. L. REV. 857, 858 (1983) (citing *Engblom*, 677 F.2d at 964).

<sup>56</sup> *Engblom*, 677 F.2d at 958.

<sup>57</sup> *Id.* at 959.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 960.

deduction from the officers' payroll as "rental cost," listed rules that the occupants must abide by, and instructed the occupants that they were required to act "in accordance with normal landlord-tenant responsibilities and practices."<sup>60</sup>

A statewide correction officers strike commenced on April 19, 1979, in which most of the officers from the Mid-Orange Correctional Facility took part.<sup>61</sup> In response, approximately 260 National Guardsmen reported to the Mid-Orange facility.<sup>62</sup> Additionally, the superintendent of the facility issued an order banning all striking officers from the grounds unless they received his permission to enter.<sup>63</sup> This meant that striking officers living on the facility's grounds were unable to access their residences.<sup>64</sup> Six days after the beginning of the strike, officers were allowed to enter the grounds in order to remove and store any belongings, and the National Guardsmen were then moved into those residences while the strike continued.<sup>65</sup> The officers asserted that the housing of the National Guardsmen in the on-site housing violated their "third amendment rights to be secure in their homes without military intrusion."<sup>66</sup>

The United States District Court for the Southern District of New York determined that the National Guardsmen were "soldiers" within the meaning of the Third Amendment, but ultimately dismissed the correctional officers' claim because their "possessory interests in their residences were not sufficient" to be protected under this provision because the state, as the "owner," consented to the quartering.<sup>67</sup> Moreover, in taking part in the strike, the officers surrendered any rights they had in regard to their residences.<sup>68</sup> Finally, the district court also found that the National Guardsmen were state employees, and that the Third Amendment is a "fundamental right" that was incorporated by the Fourteenth Amendment, and thus was applicable to the states.<sup>69</sup> Despite finding that Third Amendment protections against quartering of soldiers without the consent of the owner applied to state authorities as well as the federal government, the district court ultimately found that, due to the correctional officers' lack

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<sup>60</sup> *Id.* (internal quotation marks omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Petrey, *supra* note 55, at 860.

<sup>67</sup> Engblom v. Carey, 522 F. Supp. 57, 67–68 (S.D.N.Y. 1981) (“[P]laintiffs’ occupancy was most analogous to possession incident to employment, which carries with it a somewhat lesser bundle of rights than does a tenancy.”).

<sup>68</sup> *Id.* at 69 (finding that “[i]n essence, [the correction officers] were not illegally evicted, but rather, by participating in the strike, discontinued their employment incident to which that housing was provided, at least for the duration of the strike”).

<sup>69</sup> *Id.* at 65 (“Under any of the theories extant, perhaps most likely as a right ‘so rooted in the tradition and conscience of our people as to be ranked as fundamental’ and thus ‘implicit in the concept of ordered liberty,’ the right not to have troops quartered in one’s home must be considered so incorporated.” (internal citations omitted)).

of property-based privacy rights in their residences, they were not subject to the protection of the Third Amendment.<sup>70</sup>

The United States Court of Appeals for the Second Circuit upheld the district court's determination that "the National Guardsmen were 'soldiers' within the meaning of the third amendment, that the Guardsmen were state employees . . . , and that the third amendment was applicable to the states through the fourteenth amendment."<sup>71</sup> However, the Court of Appeals did not agree with the district court's finding that the striking officers did not have sufficient property rights to be successful in a Third Amendment violation claim. Instead, the court found 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."<sup>72</sup> Because the documents governing the housing arrangement established a situation analogous to a "landlord-tenant" relationship between the state and the correctional officers, throughout the strike the officers maintained "a lawful interest in their living quarters sufficient to entitle them to exclude others."<sup>73</sup> Nevertheless, the Court of Appeals still affirmed the dismissal of the correctional officers' due process claims because state law provided "adequate post-deprivation procedures,"<sup>74</sup> which allowed the appellants to attempt to defend their claims through seeking "equitable or declaratory relief for 'wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property,'"<sup>75</sup> and, "therefore, there was not a due process violation."<sup>76</sup> Furthermore, on remand, the district court determined that the Governor of New York was protected from liability through qualified immunity because "it would be difficult to conclude that prior to the Second Circuit's decision, the [correction officers'] Third Amendment rights were 'clearly established . . . .'"<sup>77</sup> In other words, due to the "absence of any preexisting case law interpreting the third amendment, the district court concluded that the defendants could not have reasonably known that the quartering of soldiers in the facility residences, under the exigent circumstances caused by the strike, would violate the [correction officers'] constitutional rights."<sup>78</sup>

The decisions regarding this case have come under a fair amount of criticism. The reasoning provided within the court opinions makes it apparent that the litigants were

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<sup>70</sup> *Id.* at 68.

<sup>71</sup> Petrey, *supra* note 55, at 862 (footnotes omitted).

<sup>72</sup> *Engblom v. Carey*, 677 F.2d. 957, 962 (2d Cir. 1982).

<sup>73</sup> *Id.* at 963.

<sup>74</sup> Petrey, *supra* note 55, at 863.

<sup>75</sup> *Engblom*, 677 F.2d. at 965.

<sup>76</sup> Petrey, *supra* note 55, at 863 (footnote omitted).

<sup>77</sup> *Engblom v. Carey*, 572 F. Supp. 44, 47 (S.D.N.Y. 1983).

<sup>78</sup> Fields, *supra* note 22, at 210 (citing *Engblom*, 572 F. Supp. at 47).

unsuccessful in their case simply because “it was the first time in the two-hundred-year history of the Republic that someone had brought an arguably bona fide claim under the amendment.”<sup>79</sup> No prior case law existed to make individuals “reasonably” aware that certain actions would violate the Third Amendment, nor to guide the courts in determining whether in fact a Third Amendment violation had occurred. Furthermore, despite the Second Circuit’s acknowledgement that no test existed to help resolve these circumstances, it failed to provide guidance to the district court, leaving it helpless to “determine whether a third amendment violation had occurred,”<sup>80</sup> what an appropriate remedy would be for such a violation, and what would be an “appropriate measure of damages under such circumstances.”<sup>81</sup> Thus, the one case in which the Third Amendment has been specifically analyzed and litigated fails to provide more than a modicum of direction in assessing what would qualify as a “bona fide claim” invoking Third Amendment protections.

#### IV. A FAMILY’S ALLEGATIONS FOR EXTENSION OF THIRD AMENDMENT PROTECTIONS AGAINST STATE POLICE OFFICERS

The lack of success in the court system for plaintiffs alleging violations of their Third Amendment rights has not completely discouraged individuals from bringing forth claims in the hopes that their case will meet that illusive “bona fide claim” status. In fact, one such claim is awaiting litigation in federal district court as this Note goes to publication: *Mitchell v. City of Henderson*.<sup>82</sup> Anthony Mitchell and his parents, Michael and Linda, have sued the City of Henderson, Nevada, Police Chief Jutta Chambers, several Henderson Police Officers, the City of North Las Vegas, and Police Chief Joseph Chronister.<sup>83</sup> Among the claims asserted in their complaint, Anthony Mitchell and his parents contend violations of their Third Amendment rights stemming from a series of incidents that took place on July 10, 2011.<sup>84</sup>

Mitchell’s complaint states that the events began when Henderson police officers responded to a domestic violence report from a neighboring residence at 363 Evening Side in Henderson, Nevada.<sup>85</sup> The complaint goes on to relate that, at approximately 10:45 that same morning, Officer Christopher Worley from the Henderson Police Department called Mitchell and informed him that the police department would need to utilize Mitchell’s home to gain a “tactical advantage” against the neighbor whom the

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<sup>79</sup> ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION* 111 (1991).

<sup>80</sup> Petrey, *supra* note 55, at 868.

<sup>81</sup> Fields, *supra* note 22, at 210 (citing *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982)).

<sup>82</sup> Complaint, *Mitchell v. City of Henderson*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

<sup>83</sup> Megan Gallegos, *Police Commandeer Homes, Get Sued*, COURTHOUSE NEWS SERV. (July 3, 2013, 10:27 AM), <http://www.courthousenews.com/2013/07/03/59061.htm>.

<sup>84</sup> Complaint at 4, 11–12, *Mitchell*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

<sup>85</sup> Gallegos, *supra* note 83.

earlier domestic violence call regarded.<sup>86</sup> Mitchell responded that he did not want the police in his home and that he did not want to become involved in the situation.<sup>87</sup> Despite persistent insistence on behalf of Officer Worley that Mitchell should leave his residence so that police officers could occupy it, Mitchell's complaint states that he made it clear to Officer Worley that he would not leave his home nor allow officers to enter it and then the conversation ended.<sup>88</sup> Mitchell then asserts that several officers "conspired among themselves to force [him] out of his residence and to occupy his home for their own use."<sup>89</sup> To support this assertion, Mitchell's complaint quotes a police report created by Officer David Cawthorn, stating:

It was determined to move to 367 Evening Side [Anthony Mitchell's address] and attempt to contact Mitchell. If Mitchell answered the door he would be asked to leave. If he refused to leave he would be arrested for Obstructing a Police Officer. If Mitchell refused to answer the door, force entry would be made and Mitchell would be arrested.<sup>90</sup>

The complaint reports that, at approximately noon, officers "banged forcefully on the door and loudly commanded" that Mitchell open his door.<sup>91</sup> Mitchell claims that, seconds later, several officers "smashed open" his door using a "metal ram."<sup>92</sup> The officers then aimed their weapons at Mitchell, shouting a mix of obscenities and orders for him to lie on the floor.<sup>93</sup> Once he did so, Mitchell claims that several officers issued conflicting commands, and that he was so confused and frightened that he just continued to lay on the floor motionless with his hands over his face.<sup>94</sup> Despite this nonthreatening position, the complaint alleges that the officers "then fired multiple 'pepperball' rounds"—a "projectile containing a chemical irritant pepper spray, which is released upon impact"—at Mitchell.<sup>95</sup> He was then arrested for "Obstructing a Police Officer."<sup>96</sup> The complaint states that the officers proceeded to search the house "without permission or a warrant" and set up a place for a lookout.<sup>97</sup>

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<sup>86</sup> Complaint at 5, *Mitchell*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 6.

<sup>93</sup> Gallegos, *supra* note 83.

<sup>94</sup> Complaint at 6, *Mitchell*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

<sup>95</sup> *Id.*; Sarah Hurtubise, *Lawsuit: Police Seize Homes, Arrest Owners to Investigate Neighbor*, DAILY CALLER (July 5, 2013, 8:59 PM), <http://dailycaller.com/2013/07/05/lawsuit-police-seize-homes-arrest-owners-to-investigate-neighbor/> (describing a "pepperball").

<sup>96</sup> Complaint at 7, *Mitchell*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

<sup>97</sup> *Id.*

In addition to the claims brought by Anthony Mitchell on his own behalf, the complaint goes on to report that his parents, Michael and Linda Mitchell—who lived at 362 Evening Side and also neighbored the residence where the domestic violence call originated—were treated by police in a similar fashion.<sup>98</sup> Mitchell’s complaint asserts “[t]he officers asked Plaintiff Michael Mitchell if he would be willing to vacate his residence and accompany them to their ‘command center’ under the guise that the officers wanted Michael Mitchell’s assistance in negotiating the surrender of the neighboring suspect.”<sup>99</sup> Michael Mitchell hesitantly agreed to accompany the officers to the Henderson Police Department command center.<sup>100</sup> However, once at the command center, Michael was informed that there were no negotiations with the suspect and that he was not allowed to return home.<sup>101</sup> Realizing that the request that he come to the command center was merely a ruse to get him out of his home, Michael attempted to leave, at which time he was arrested, despite a lack of “reasonable grounds” to detain him or “probable cause to suspect him of committing any crime.”<sup>102</sup>

Officers returned to Michael Mitchell’s residence at approximately 1:45 p.m. and “banged on the back door,” demanding that Linda Mitchell, Michael’s wife, open the door.<sup>103</sup> The complaint states that she complied, but did not give the officers permission to enter her home without a warrant.<sup>104</sup> The complaint goes on to report that the officers entered the home despite Linda Mitchell’s lack of consent and that Linda was forcibly removed from the residence and taken to the command center.<sup>105</sup> Officers then proceeded to search and occupy Michael and Linda Mitchell’s home, evidenced by the fact that, when Linda returned, “cabinet and closet doors throughout the house had been left open and their contents moved about. Water had been consumed from their water dispenser. Even the refrigerator door had been left ajar, and mustard and mayonnaise had been left on their kitchen floor.”<sup>106</sup>

In order to have a chance at being successful, the Mitchells first have to overcome some very large obstacles: the fact that the officers involved in these events were members of a local branch of the state police force, not “soldiers” in the military. To have a “bona fide claim” for Third Amendment violations, the Mitchells need to convince the court that the protections of the Third Amendment are incorporated to the states, and then that they extend to actions of state police officers. Furthermore, even if the Mitchells were to be successful in thus convincing the court, they would then

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<sup>98</sup> *Id.* at 7–9.

<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 8–9.

<sup>104</sup> *Id.* at 9.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*



have to overcome the defense that, even if the police actions were violative of the Third Amendment, they are still protected from damages under the qualified immunity doctrine.<sup>107</sup>

#### V. CAN POLICE BE EQUATED TO “SOLDIERS” FOR THIRD AMENDMENT PURPOSES?

There is very little guidance within the Constitution to help courts interpret who qualifies as a “soldier” within the meaning of the Third Amendment.<sup>108</sup> The dictionary definition of a soldier is “one engaged in military service and [especially] in the army.”<sup>109</sup> Within this understanding of “soldier” is also included “a skilled warrior”<sup>110</sup> and “a militant leader, follower, or worker.”<sup>111</sup> The historical analysis of the issues surrounding the passage of this provision leads to the general acceptance of the position that the Third Amendment covers forced quartering of members of the federal military branches.<sup>112</sup> However, there is more contention over whether the Amendment’s exclusion also applies to state authorities, such as militias.<sup>113</sup> Though the Second Circuit in *Engblom* held that the Fourteenth Amendment Due Process Clause incorporated the Third Amendment, making it applicable to the states,<sup>114</sup> the Supreme Court has never voiced its opinion on the matter.<sup>115</sup>

Due to the fact that a finding that the Third Amendment is not incorporated would bring an abrupt end to this Note, I share Thomas Sprankling’s assessment that “the limited Third Amendment case law suggests either the provision has been implicitly incorporated or will be if the opportunity arises.”<sup>116</sup> Thus, the remainder of this analysis will proceed under the presumption that, were the Supreme Court to deign to speak on this issue, it would find the Third Amendment to be incorporated to the states, upholding the decision in *Engblom* that National Guardsmen qualify as “soldiers” for Third Amendment purposes.<sup>117</sup> However, the question remains whether state police officers are similar enough to organized groups such as the federal military branches or the individual states’ National Guard to be considered as “soldiers” under the meaning intended in the Third Amendment.

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<sup>107</sup> See *infra* Part VI (discussing modern jurisprudence on police qualified immunity).

<sup>108</sup> Rogers, *supra* note 40, at 764.

<sup>109</sup> Christopher J. Schmidt, *Could a CIA or FBI Agent be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 596 (2004) (citing WEBSTER’S NEW COLLEGIATE DICTIONARY 150TH ANNIVERSARY EDITION 1097 (1981)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 601, 604.

<sup>113</sup> Rogers, *supra* note 40, at 764–65.

<sup>114</sup> *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982).

<sup>115</sup> See, e.g., Rosenkranz, *supra* note 41, at 1062.

<sup>116</sup> Sprankling, *supra* note 5, at 149.

<sup>117</sup> *Engblom*, 677 F.2d at 961.



*A. Originalist Interpretation of the Third Amendment*

Upon examination of the actual language of the Third Amendment, it is blatantly apparent that sheriffs and constables, the precursors to modern-day police,<sup>118</sup> were omitted from the “literal scope of the Amendment’s protection.”<sup>119</sup> From an originalist perspective, this would unequivocally exclude state police from the proscriptions of the Third Amendment. This is because “[t]he critical originalist directive is that the Constitution should be interpreted according to the understandings made public at the time of the drafting and ratification.”<sup>120</sup> Accordingly “[t]he primary source of those understandings is the text of the Constitution itself, including both its wording and structure,”<sup>121</sup> and “[t]he guiding principle is that the judge should be seeking to make plain the ‘meaning understood at the time of the law’s enactment.’”<sup>122</sup> Thus, under this reading, a “soldier” is a member of the military controlled by the federal government.

Though now most read the Third Amendment as merely preventing soldiers from occupying private property without explicit permission from the owners or, in extreme circumstances, under governmental orders, this was not the ultimate intent of the Founders, even under an originalist interpretation. Instead, “the Founders used the word ‘quartering’ to expansively refer to a practical and substantial intrusion that threatened the legitimacy of government and the rule of law . . . soldiers being used to escort the ‘exciseman’ or the ‘Sheriff or Constable’ into homes to enforce the law.”<sup>123</sup> Therefore, the Third Amendment proscription was “a categorical ban on soldiers enforcing law against civilians in all areas in which private citizens may exclude others.”<sup>124</sup> This distinction is important because some have commented that the uselessness of the Third Amendment is the result of the amendment directly following it. It is true that the Fourth Amendment’s “ban on unreasonable searches and seizures” would “render the Third Amendment’s proscription redundant were it merely protecting individuals against having their homes seized by soldiers.”<sup>125</sup> Without going into too much depth, the historical background of the Fourth Amendment “indicates that it was meant to apply to only unreasonable searches and seizures conducted by civilian officials.”<sup>126</sup> Thus instead of being “redundant,” the Third Amendment serves as a complement to

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<sup>118</sup> See ERIC H. MONKKONEN, HISTORY OF URBAN POLICE, CRIME, AND JUSTICE 547, 549 (1992).

<sup>119</sup> Rogers, *supra* note 40, at 765.

<sup>120</sup> KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Josh Dugan, Note, *When Is a Search Not a Search? When It’s a Quarter: The Third Amendment, Originalism, and NSA Wiretapping*, 97 GEO. L.J. 555, 558 (2009).

<sup>124</sup> *Id.* at 559.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

the Fourth Amendment because its originally intended purpose was “protection against the military conducting [similar] activities” as those prohibited to “civilian officials.”<sup>127</sup>

Additionally, the current understanding of the term “quarter” is much narrower than that of the Founders. “The supposedly unambiguous and unquestionable problem of soldiers disrupting the tranquility of private homes, which the Third Amendment was allegedly written to alleviate, [was] simply not discussed in the founding debates.”<sup>128</sup> Instead, revolutionaries like Samuel Adams took “quartering” to mean a “method of governing [that] was dangerous because it threatened civilian government, self-rule, and a just legal system” and “it violated the fundamental tenet of social contract theory that the people should be ruled by consent instead of by the sword.”<sup>129</sup> James Madison agreed that “quartering should not be used to enforce the civil law against individuals; that role, he insist[ed], [was] for ‘the Sheriff or Constable,’ not the militia.”<sup>130</sup> Thus, to these founding revolutionaries, “the evil of quartering was soldiers [being used to enforce] the law on a civilian population.”<sup>131</sup> Justice Joseph Story, a near contemporary to the ratifying convention of the Bill of Rights stated that the Third Amendment’s “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.”<sup>132</sup> This idea supports Justice Douglas’s usage of the Third Amendment to support the position that there are “penumbras” of privacy within the Constitution,<sup>133</sup> because Justice Story is attempting to clarify that, though the actual words used may indicate a narrow reading, the intention behind the creation of the Third Amendment was meant to be a much broader interpretation.

Thus, even under an originalist viewpoint, the Third Amendment would have a more expansive meaning than that attributed to it by most Americans today. This provision does much more than merely prohibit the unwanted housing of soldiers in private homes absent extreme circumstances. Rather, “the Amendment prescribes practical rules for limiting the enforcement power of the most coercive and dangerous organ of government power: the military.”<sup>134</sup>

Notably, a reading of the Third Amendment under this viewpoint, though it encompasses more than many attribute to the provision, still draws a very clear distinction between members of the military and “civilian authorities” such as “Sheriffs and Constables.” Thus, in the event that the Supreme Court were to grant certiorari to the Mitchells’ case, if the Court chose to utilize an originalist analysis, then the answer to

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 566.

<sup>129</sup> *Id.* at 564.

<sup>130</sup> *Id.* at 569.

<sup>131</sup> *Id.* at 564.

<sup>132</sup> *Id.* at 572 (quoting JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (Fred B. Rothman ed., 1991)).

<sup>133</sup> See *supra* note 45 and accompanying text.

<sup>134</sup> Dugan, *supra* note 123, at 587.

whether the actions of the state police officers were unlawful under the proscriptions of the Third Amendment would be a quick and definitive “no.”

*B. “Living Constitutionalist” Interpretation of the Third Amendment*

Another method of interpretation exists which views the Constitution of the United States as a “living constitution,”<sup>135</sup> a document “that evolves, changes over time, and adapts to new circumstances, without being formally amended.”<sup>136</sup> Constitutional originalism urges a stricter adherence to the Framers’ meaning of the language within the Constitution interpreted from secondary sources and the historical situation surrounding its enactment.<sup>137</sup> In contrast, the idea promulgated by the “living constitution” interpretation is that “[t]he framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live.”<sup>138</sup> Thus, “[m]erely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct.”<sup>139</sup>

The “living constitution” method of interpretation leaves open the possibility that the changed circumstances from when the Framers first wrote the Constitution would allow modern courts to consider police as modern-day “soldiers” within the meaning of the Third Amendment. This is because “the drafters may not have necessarily anticipated the existence of the armed and uniformed peace-keeping corps that make up the law enforcement agencies of today.”<sup>140</sup> Some scholars argue that the overarching purpose of the Third Amendment was to “diffuse the potential for governmental oppression in the home”<sup>141</sup> and therefore, “by logical extension, Third Amendment prohibitions could apply to any armed government official wielding authority,”<sup>142</sup> because “the dissident English colonists who framed the United States Constitution would have seen this modern ‘police state’ as alien to their foremost principles.”<sup>143</sup> The original

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<sup>135</sup> See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>136</sup> *Id.* at 1.

<sup>137</sup> See WHITTINGTON, *supra* note 120, at 35 (“The text is supplemented by a variety of secondary sources of information . . . . Historical sources are to be used to elucidate the understanding of the terms involved and to indicate the principles that were supposed to be embodied in them.”).

<sup>138</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL’Y 401, 402 (2006).

<sup>139</sup> *Id.*

<sup>140</sup> Rogers, *supra* note 40, at 765–66.

<sup>141</sup> *Id.* at 766.

<sup>142</sup> *Id.*

<sup>143</sup> Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 687 (2001).

blueprint of the American legal system was that of “private justice.”<sup>144</sup> In other words, the courts were meant to be “a mere forum . . . for private persons to attain justice from a malefactor.”<sup>145</sup> Similarly, the meaning of the term “police” has changed significantly from the time of the Founding. At that time, the term “was generally used as a verb and meant to watch over or monitor the public health.”<sup>146</sup> While there is no question that modern police officers do in fact carry out these functions, it was not until the mid-nineteenth century that “the term ‘police’ beg[an] to take on the persona of a uniformed state law enforcer.”<sup>147</sup> Thus, from the Framers’ point of view, it was meant to be the job of individual citizens to “police” themselves, rather than having an organized group or force to “watch over or monitor the public health.”<sup>148</sup>

As discussed in Part I, the colonists’ desire to become independent was initiated in no small part by “the British Crown’s practice of using troops to police civilians in Boston and other cities” after the Boston Tea Party and the passage of the Quartering Act of 1774.<sup>149</sup> In fact, “[p]rofessional soldiers used in the same ways as modern police were among the primary grievances enunciated by [Thomas] Jefferson in the Declaration of Independence,”<sup>150</sup> as is evidenced by the assertion that “[George III] has kept among us . . . Standing Armies . . . ; He has affected to render the Military independent of and superior to the Civil power.”<sup>151</sup> These “standing troops,” which were a quasi-professional police force, were viewed “as an alien, continental device for maintaining a tyrannical form of government”<sup>152</sup> because their duties “were in no way military but involved the keeping of order and the suppression of crime.”<sup>153</sup>

In fact, Roger Roots asserts, “modern police defenders would have difficulty demonstrating a single material difference between the standing armies the Founders saw as so abhorrent and America’s modern police forces.”<sup>154</sup> It can be difficult in some instances to classify modern police forces and military troops as distinct entities because “in the wake of America’s modern crime war[,] [n]inety percent of American cities

<sup>144</sup> *Id.* at 697.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 693.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 692–93.

<sup>149</sup> *Id.* at 722–23. See generally JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION (1981) (discussing the stances of the British and the American whigs in the standing-army controversy).

<sup>150</sup> Roots, *supra* note 143, at 723.

<sup>151</sup> THE DECLARATION OF INDEPENDENCE paras. 13–14 (U.S. 1776).

<sup>152</sup> Roots, *supra* note 143, at 724 (quoting Ben C. Roberts, *On the Origins and Resolutions of English Working-Class Protest*, in NAT’L COMM’N ON THE CAUSES AND PREVENTION OF VIOLENCE, VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 197, 208 (Graham & Gurr, dirs. 1969)).

<sup>153</sup> Roots, *supra* note 143, at 723.

<sup>154</sup> *Id.* at 724.

now have active special weapons and tactics (SWAT) teams . . . [which] are often instructed by active and retired United States military personnel.”<sup>155</sup> Police units have even gone so far as to adopt a hierarchy similar to that utilized within the federal armed forces, complete with titles borrowed from the military.<sup>156</sup> Roots concludes that “[t]he advent of modern policing has greatly altered the balance of power between the citizen and the state in a way that would have been seen as constitutionally invalid by the Framers.”<sup>157</sup>

Those in favor of a “living constitution” argue that interpreting the Third Amendment to extend to the actions of state police is not that much of a stretch. On the contrary, this country “was founded without professional police” and “[i]ts earliest traditions and founding documents evidenced no contemplation that the power of the state would be implemented by omnipresent police forces.”<sup>158</sup> Instead, the Framers “expressed hostility and contempt” for the standing armed forces serving as law enforcement.<sup>159</sup> Thus, under the “living constitutionalist” viewpoint, “[t]he advent of modern policing has greatly altered the balance of power between the citizen and the state”<sup>160</sup> originally envisioned by the Framers to such an extent that it “should invite consideration by judges and legislators who concern themselves with constitutional questions.”<sup>161</sup> For the purposes of aiding the Supreme Court’s potential analysis of the Mitchells’ case, were they to use an interpretation following the recommendations posited by the “living constitutionalists,” then, based on the above arguments, it would not be too big of a stretch of the justices’ imaginations to assess the Nevada state police officers as potentially falling under the proscriptions of the Third Amendment.

## VI. QUALIFIED IMMUNITY PROTECTIONS FOR POLICE OFFICERS

Since potential Third Amendment offenses always involve the action of government authority figures, qualified immunity will continually play a part in a court’s determination of whether or not there was in fact a violation. Therefore, a brief introduction to qualified immunity is necessary to fully understand the analysis process that a bona fide Third Amendment violation claim must undergo.

In *Pierson v. Ray*,<sup>162</sup> the Supreme Court “recognized that police officers were entitled to some protection from liability for constitutional violations committed while

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<sup>155</sup> *Id.* at 724–25; see also William Booth, *Exploding Number of SWAT Teams Sets Off Alarms*, WASH. POST, June 17, 1997, at A1.

<sup>156</sup> RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES*, 29–30 (2013).

<sup>157</sup> Roots, *supra* note 143, at 757.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> 386 U.S. 547 (1967).

discharging their law enforcement duties.”<sup>163</sup> It stated, “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”<sup>164</sup> The Supreme Court formally established the defense of qualified immunity for police officers six years later in *Scheuer v. Rhodes*,<sup>165</sup> recognizing “a police officer as a position affording some immunity.”<sup>166</sup>

The foundation for affording a defense of qualified immunity to government authority officials such as police officers is “the recognition that officials will make errors, and must be afforded some protection or they will be afraid to take any action.”<sup>167</sup> This immunity was originally granted in situations where “the official had a reasonable belief the action taken was appropriate based on the circumstances as they appeared at the time, coupled with a good faith belief.”<sup>168</sup> However, under current law, a defendant official’s subjective beliefs are not part of the court’s analysis in determining whether a qualified immunity defense is warranted, leaving only an objective “reasonable person” standard by which to evaluate officials’ actions.<sup>169</sup> Several cases have explored when a defense of qualified immunity can be utilized to protect the actions of officials such as police officers from suits for damages. The court in *Williams v. Ozmint*<sup>170</sup> found that when determining whether qualified immunity is applicable “[a] court generally considers first, whether a constitutional violation occurred, and second, when the court finds such a violation, whether the right violated was ‘clearly established’ at the time of the official’s conduct.”<sup>171</sup> However, as *Engblom v. Carey*<sup>172</sup> made apparent, assessing whether a right is “clearly established” is not always an easy task. Cases such as *Scott v. Fischer*<sup>173</sup> have offered tests to evaluate these circumstances. Here, the court established a three-prong test to aid in resolving whether a right is “clearly established.” This test evaluates: “(1) whether the right was defined with reasonable specificity; (2) whether Supreme Court or court of appeals case law supports

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<sup>163</sup> 59 AM. JUR. 3D *Proof of Facts* 291, 306 (2000).

<sup>164</sup> *Pierson*, 386 U.S. at 555.

<sup>165</sup> 416 U.S. 232, 247 (1973).

<sup>166</sup> 59 AM. JUR. 3D *Proof of Facts* 291, 306 (2000).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (explaining the Supreme Court’s adoption of a “purely objective standard”).

<sup>170</sup> 716 F.3d 801 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1294 (2014).

<sup>171</sup> *Id.* at 806 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *see also* *Elkins v. District of Columbia*, 690 F.3d 554, 567–68 (D.C. Cir. 2012) (stating that “qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law” (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (internal quotation marks omitted))).

<sup>172</sup> 572 F. Supp 44 (S.D.N.Y. 1983), *aff’d*, 724 F.2d 28 (2d Cir. 1983).

<sup>173</sup> 616 F.3d 100 (2d Cir. 2010).



the existence of the right in question, and (3) whether under preexisting law a reasonable defendant would have understood that his or her acts were unlawful.”<sup>174</sup> In other words, “[w]hen determining whether a right [is] ‘clearly established,’ [as would preclude qualified immunity], the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>175</sup>

The requirement that a right be “clearly established” before a defense of qualified immunity can be overcome played a role in the ultimate outcome of *Engblom* through the district court’s holding that “it would be difficult to conclude that prior to the Second Circuit’s decision, the [correction officers’] Third Amendment rights were ‘clearly established.’”<sup>176</sup> This reasoning went into the ultimate conclusion that the plaintiffs could not recover for any Third Amendment violations.<sup>177</sup>

Even though the court in *Engblom* acknowledged that there was not sufficient case law to make officials reasonably aware that their actions would be violations of the Third Amendment, it did not offer to supplement this shortcoming in its decision, but only established that the problem existed.<sup>178</sup> Unfortunately, the lack of litigation on Third Amendment claims leaves courts in largely the same position that the *Engblom* court found itself—with little guidance aside from their own understanding and interpretation of the Constitution and the case facts. The role qualified immunity played in *Engblom* specifically, as well as other cases involving government official actions, casts a shadow on claims such as those submitted by the Mitchells, because “[h]istorically, courts have ruled favorably for soldiers who use their discretion to preserve order, even when the soldiers restrict civil liberties or confiscate private property.”<sup>179</sup> Thus, even if the court were to determine that the Nevada police officers’ actions constituted violations, and that they fall under the term “soldiers” within the proscriptions of the Third Amendment, case law would still favor finding the officers’ actions in this case protected by qualified immunity due to the sheer lack of litigation “clearly establishing” plaintiffs’ Third Amendment rights against these types of actions.<sup>180</sup>

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<sup>174</sup> *Id.* at 105 (citing *Schechter v. Comptroller of City of N.Y.*, 79 F.3d 265, 271 (2d Cir. 1996)).

<sup>175</sup> *Atherton v. D.C. Office of Mayor*, 567 F.3d 672 (D.C. Cir. 2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), *cert. denied*, 134 S. Ct. 478 (2013); *see also* *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (holding that law enforcement officers who mistakenly but reasonably conclude that probable cause is present are entitled to qualified immunity).

<sup>176</sup> *Engblom v. Carey*, 572 F. Supp. 44, 47 (S.D.N.Y. 1983).

<sup>177</sup> *Id.* at 49.

<sup>178</sup> *Id.* at 47–48.

<sup>179</sup> *Rogers*, *supra* note 40, at 777.

<sup>180</sup> *See Engblom v. Carey*, 677 F.2d 957, 962–63 (2d Cir. 1982) (discussing the lack of case law outlining Third Amendment rights in similar situations); *see also* *Rogers*, *supra* note 40, at 777 (noting “the lack of Third Amendment case law and scholarship coming out of situations in which violations likely occurred”).



## VII. SO WHAT ABOUT THE MITCHELLS?

With this knowledge, as discussed in Part IV, the Mitchells have several rather large obstacles to overcome to be successful in their claims against the police officers for Third Amendment violations. The first, and presumably the most troublesome, would be convincing the court that the officers' actions did in fact constitute infringement on the Mitchells' Third Amendment protections. As is established in Anthony Mitchell's complaint, the City of Henderson police officers wrongfully and without probable cause, arrested both Anthony and his father Michael.<sup>181</sup> Anthony and his mother Linda were both forcefully removed from their homes, while Michael Mitchell was lured out of his home under a ruse concocted by the officers.<sup>182</sup> It is alleged that, once the officers had removed the Mitchells from their private residences, they then proceeded to take up temporary station within these two homes in an effort to conduct surveillance on a neighbor implicated in a domestic disturbance.<sup>183</sup> Conceivably, when the police had completed whatever tasks they deemed necessary, Anthony and his father were released from jail, the charges against them dropped, and the Mitchells were allowed to return to their residences.<sup>184</sup> It was clear that the officers had made themselves at home since "cabinet and closet doors throughout the house had been left open and their contents moved about," "water had been consumed from their water dispenser," and the refrigerator door had been left open, with condiments left on the kitchen floor in front of it.<sup>185</sup> Based on the facts as presented within the complaint, it seems plain that there were some serious problems with the actions of the police.

In keeping with the main focus of this Note, the foregoing analysis centers on whether violations of Third Amendment rights could be found. This being said, there is certainly room for extensive evaluation of other potential rights violations under other constitutional provisions. Taking the allegations with a few grains of salt, as they were written by the complainants attempting to gain judicial relief, if even some of the alleged actions prove true, it is clear that these events should not be simply swept under the rug. However, determining that the actions taken by the officers were troublesome and deserving of some sort of judicial oversight and coming to the conclusion that there were Third Amendment violations are two extremely different things.

In their attempts to make the Nevada District Court amenable to their claims of Third Amendment violations on behalf of the police officers, the Mitchells would likely be more successful if they argued for a "living constitution" interpretation of the constitutional implications discussed in their case. Though an originalist analysis could

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<sup>181</sup> *See supra* Part IV.

<sup>182</sup> *See supra* Part IV.

<sup>183</sup> *See supra* Part IV.

<sup>184</sup> Complaint at 9, *Mitchell v. City of Henderson*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

<sup>185</sup> *Id.*

conceivably result in an interpretation of the term “quartering” in a much broader sense than the mere prevention of soldiers being able to take up residence in a private home without express permission of the homeowner, and instead find that it encompasses soldiers’ abilities to act in place of civilian law enforcement officials,<sup>186</sup> the ultimate outcome would be against the Mitchells. This is because, even with an understanding of the Framers’ original intent, under an originalist viewpoint, the court would still draw a well-defined line between what groups would qualify under the term “soldier” as used in the Third Amendment and what groups do not. As was discussed in Part V, Section A, this distinction would exclude civilian police officers from being categorized as “soldiers” for the purposes of Third Amendment protections.<sup>187</sup>

A “living constitution” interpretation would allow the court to take a more flexible approach to their case analysis because it accounts for situations that could not have been contemplated by the Framers at the time that they were creating the blueprints for the United States’ government. As there was no official police force at that time, let alone the vast network of law enforcement officials that exists in the present day,<sup>188</sup> it is not an incredible argument that some extrapolation of constitutional provisions should be allowed in regard to assessing potential violations perpetrated by modern-day police officers.

Convincing the district court to utilize a “living constitution” analysis is just the first hurdle. The Mitchells would then have to make the argument that it would be completely reasonable to consider civilian police officers in the states as sufficiently analogous to “soldiers” so that they are limited by the same Third Amendment proscriptions.<sup>189</sup> The arguments made are in some ways quite compelling, as the “civilian” law enforcement officials have in some ways come to resemble the disciplined ranks of military branches and receive similar training in certain aspects.<sup>190</sup> However, the lack of case precedent analyzing any form of similar situation will most likely make their position a tough sell to judges.

*Engblom v. Carey*<sup>191</sup> is all that other courts have to look to for guidance on how to possibly analyze a Third Amendment violation claim. This leads to some serious drawbacks for the Mitchells. The highest court to hear *Engblom* was the Second Circuit Court of Appeals, which means that the Mitchells could offer it or the court could look to it on its own, but the case would only be viewed as persuasive precedent.<sup>192</sup> Thus, the federal courts in Nevada are not bound in any way to follow the reasoning

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<sup>186</sup> See *supra* Part V.A.

<sup>187</sup> See *supra* Part V.A.

<sup>188</sup> See *supra* Part V.B.

<sup>189</sup> See *supra* Part V.B.

<sup>190</sup> See *supra* Part V.B.

<sup>191</sup> 677 F.2d 957 (2d Cir. 1982).

<sup>192</sup> See Barbara Bintliff, *Mandatory v. Persuasive Cases*, LSU LAW, [http://faculty.law.lsu.edu/toddbruno/mandatory\\_v\\_persuasive.htm](http://faculty.law.lsu.edu/toddbruno/mandatory_v_persuasive.htm) (discussing the difference between persuasive and mandatory authority) (last visited Dec. 1, 2014).

utilized by the Second Circuit, and thus are free to come to any conclusion that they deem appropriate based on their analysis of the facts and constitutional law. While the court in *Engblom* was willing to extend Third Amendment protections to apply to the states and thus to include National Guardsmen under the title of “soldiers,” the Nevada District Court will be free to disagree with the Second Circuit. Instead, there could be a finding that, because the Supreme Court has been silent on the issue, that the Third Amendment can only be applied to federal government actions, and thus cannot be utilized in an analysis of possible infractions of state authorities. Under this reasoning, the state police officers would be, by definition, incapable of violating the Mitchells’ Third Amendment rights.

Even if the Nevada District Court is willing to accept *Engblom* as a foundation for its evaluation of the Third Amendment violation claims put forward in the Mitchells’ complaint, it would still be a large leap for the court to determine that state police officers are similar enough to National Guardsmen to have their actions considered bound by the proscriptions of the Third Amendment. This is not to say that compelling arguments have not or cannot be made for this interpretation, but it will be an uphill battle, in large part because, were the Nevada courts to take this course, they would be moving in uncharted waters with no guiding compass.

If the Mitchells were to prove successful in convincing the court that the Third Amendment is elastic enough to stretch and cover the actions of state police officers, this still would not guarantee a finding that there were Third Amendment violations. Similar to the situation in *Engblom*, the Mitchells would also have to overcome the obstacle of persuading the court that the actions of the Nevada police officers do not come under the protection of the qualified immunity doctrine, which was the death knell for the plaintiffs in *Engblom*. Since it is not established that the actions of police officers can violate the Third Amendment, it would be difficult if not impossible for a court to hold that the Mitchells’ rights were “clearly established” such that a reasonable officer should have known that the actions taken would be violative of those rights.<sup>193</sup>

#### VIII. A UNIQUE OPPORTUNITY

Even though the most likely outcome for the Mitchells regarding their Third Amendment claims is a disappointing one,<sup>194</sup> the reviewing court would have the unique opportunity of aiding future Third Amendment litigation by doing what no other court has taken the time to do—create a test to help “clearly establish” what this provision protects and, conversely, what it prohibits.

Luckily, for judges, scholars, and readers of this Note alike, an endeavor to create a judicial test for Third Amendment violations means that the earlier extensive

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<sup>193</sup> See *supra* Part VI.

<sup>194</sup> See, e.g., Sandra Eismann-Harpen, Comment, *Rambo Cop: Is He a Soldier Under the Third Amendment?*, 41 N. KY. L. REV. 119, 120 (2014) (stating that, without more, the Mitchells’ claims do “not warrant national attention”).

evaluation of this provision's history was not for naught. Rather, this historical analysis can "provide persuasive material for how the amendment should be interpreted"<sup>195</sup> and "can help extract the doctrinal principles that the Third Amendment's text has infrequently initiated."<sup>196</sup> Based on our understanding of the circumstances surrounding and necessitating the provision's enactment, it appears that this "history shows a broad military quartering prohibition, which emphasizes the citizenry's right against compelled quartering as the thrust of the protection, not necessarily the type of person that is quartered."<sup>197</sup> In other words, the catalyst of the Third Amendment's popularity at the time of its creation was "a desire to protect the privacy of the home from prying government eyes, to say nothing of the annoyance of uninvited guests."<sup>198</sup>

It has been suggested by Christopher Schmidt that, in an effort to truly address the central concerns behind the formation of this constitutional provision, it be treated in a way that mirrors current treatment of a closely related, and much more recognized portion of the Bill of Rights—the Fourth Amendment, which protects citizens from "unreasonable search and seizure."<sup>199</sup> "The Fourth Amendment's protections only apply to searches [and seizures] by government agents. However, Fourth Amendment jurisprudence broadly defines government agents, thereby protecting citizens from an array of persons conducting unreasonable searches."<sup>200</sup> Schmidt contends that "the specific person or persons conducting a search or seizure is not determinative of whether the Fourth Amendment applies. Instead, the Amendment 'applies to a search whenever the government participates in any significant way in [the] total course of conduct.'"<sup>201</sup> He argues that the term "soldier" within the Third Amendment should be interpreted quite broadly, similar to that applied to government agents within the Fourth Amendment.<sup>202</sup> In this way, the focus of the Third Amendment's protections could be placed on the actions that it prohibits, rather than being curtailed by a dispute over the proper meaning of the term "soldier."<sup>203</sup>

The notion that it was ultimately the idea of forcing private homeowners to board anyone, especially government authority figures, in their own homes was objectionable and the paramount reason behind the Third Amendment's enactment can find support in the pittance of guidance provided in *Engblom v. Carey*. Thus, though that opinion is lacking in many ways, the court's decision provides a starting point for developing a judicial test for determining when violations of this provision occur. In its decision, the Second Circuit Court of Appeals found that "property-based privacy interests" are

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<sup>195</sup> Schmidt, *supra* note 109, at 645.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 646.

<sup>198</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 95 (1980).

<sup>199</sup> Schmidt, *supra* note 109, at 659–60.

<sup>200</sup> *Id.* at 659 (referencing *Sibron v. New York*, 392 U.S. 40, 65–66 (1968)).

<sup>201</sup> *Id.* at 662 (quoting *United States v. Davis*, 482 F.2d 893, 897 (9th Cir. 1973)).

<sup>202</sup> *Id.* at 663.

<sup>203</sup> *Id.*

essential in determining whether the invocation of a Third Amendment violation is proper.<sup>204</sup> The court went on to state that, when asserting a Third Amendment claim, a threshold issue is whether the plaintiff maintained “a lawful interest in [his or her] living quarters sufficient to entitle [him or her] to exclude others.”<sup>205</sup> Therefore, for future courts analyzing situations in which Third Amendment violations are claimed, it seems that the jumping off point would be to determine whether the complaining party had a property interest which society would respect and the law would find sufficient to “entitle [him or her] to exclude others” from entering that property.<sup>206</sup>

The Third Amendment’s history shows us that there was a great deal more at issue than merely having soldiers cross the threshold into private citizens’ homes without their permission. Thus, another part of the judicial test would be a more clear definition of “quartering.” Does quartering involve providing a mere roof over intruders’ heads? Does it include giving them food and a place to sleep? Does the “soldiers” unwelcome entrance immediately become quartering, and if not, how long do they have to stay in a private residence before it becomes quartering? In answering these questions, the court could look to history. Prior to the enactment of the Third Amendment, and they were purportedly present to provide defenses, especially on the western border.<sup>207</sup> Obviously, during that long period of time, the soldiers had to both eat and sleep, which were of course provided by—or taken from—the private citizens with whom they were quartering.<sup>208</sup>

However, history may not be able to provide enough guidance for modern-day courts simply because the circumstances are so dissimilar to those surrounding the adopting of the Third Amendment. In terms of time spent in a private residence, in *Engblom*, the National Guardsmen stayed in the correctional facilities’ on-site residences for seventeen days, and the police that invaded the Mitchells’ homes were there less than twenty-four hours.<sup>209</sup> Would these time periods be long enough to qualify their stay as “quartering?” Would the National Guardsmen’s stay be long enough, while the Nevada state police officers’ was merely an inconvenience not lasting long enough to fall under the purview of “quartering?” Additionally, the National Guardsmen had to eat while they were filling in for the striking correctional officers, though the case does not indicate where those provisions came from, and the officers within Linda Mitchell’s house appeared to have helped themselves to the contents of the refrigerator.<sup>210</sup> Luckily, modern-day America is very different than it was at the time of its founding. For example, the country is not currently forced to defend itself

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<sup>204</sup> *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982).

<sup>205</sup> *Id.* at 963.

<sup>206</sup> *Id.*

<sup>207</sup> *See supra* Part I.

<sup>208</sup> *See supra* Part I.

<sup>209</sup> *See supra* Parts III & IV.

<sup>210</sup> *See* Complaint at 9, *Mitchell v. City of Henderson*, No. 2:13-cv-01154 (D. Nev. July 1, 2013).

in our own territory. All fighting that the United States is engaged in is on foreign soil. Thus, there is no need for soldiers to be stationed in various communities to provide protection from military attacks from enemies. Also, though there are defensive entities within each community in the form of local police units, they usually are able to do their work from buildings specifically designated for that purpose—situations like that of the Mitchells excluded—and the individual officers have their own homes within the communities they defend. Though this current situation is certainly much preferable to the quasi-military rule in the colonial era, the severe differences in circumstances mean that, in creating its judicial test for Third Amendment violations, a court will have to use its own best judgment in answering questions about what exactly the definition of “quartering” encompasses. Probably the easiest and least subjective way for the court to delineate when quartering occurs is to classify it as the act of a “soldier” entering a private residence and then utilizing the home for his or her own purposes, without regard to any objection by the rightful owner.

Finally, the judicial test for Third Amendment violations will have to identify with specificity who exactly falls under the category of “soldier” for the purposes of this provision. The exploration of this issue in Part V demonstrates the various options available to the court as they analyze the true meaning of “soldier” for today’s society. Personally, in sticking with an analysis that focuses on the actions taken, the living constitutionalist argument is more persuasive, especially when coupled with the historical analysis. While yes, the use of the term “soldier” was clearly demarcated from constables and sheriffs at the time of the provision’s creation, this should not be the only determinative historical factor in the evaluation. More broadly, the Bill of Rights was written in response to the colonists’ fear of a too-powerful government, as evidenced by the fact that the first ten amendments are dedicated largely to telling the people what their rights are and, conversely, telling the government what it does not have the power to override or infringe upon.<sup>211</sup> Thus, the Bill of Rights protects the people from government action. With this understanding, a broad reading of the term “soldier” would best serve that purpose. Police officers have become very similar to the British soldiers quartered in the American colonies. They live within the societies that they protect.<sup>212</sup> They monitor activities within those communities on a daily basis.<sup>213</sup> They are usually organized into hierarchies similar to those of military rankings, and some of the titles are even borrowed from the military.<sup>214</sup> Their training for and responses to the breaking of law has become more and more militarized.<sup>215</sup> They use their authority and training to compel citizens to abide by established law, with force if necessary.<sup>216</sup> These actions mirror those of the British soldiers that became

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<sup>211</sup> See *supra* Part I.

<sup>212</sup> See *supra* Part V.B.

<sup>213</sup> See *supra* Part V.B.

<sup>214</sup> See *supra* Part V.B.

<sup>215</sup> See *supra* Part V.B.

<sup>216</sup> See *supra* Part V.B.



so abhorrent to the early American citizens. Thus, it seems only fitting that the judicial test would read “soldier” broadly as any authority figure entering and asserting authority within a private residence without the owner’s express permission, as this would encompass the protections of the people envisioned in the enactment of the Third Amendment.

Under this proposed test, the Nevada state police officers involved in the Mitchell case would fall under the definition of “soldier” for Third Amendment purposes. Consequently, this test would conclude that the actions taken by those officers would be in clear violation of the Third Amendment.<sup>217</sup>

### CONCLUSION

Though it had a promising beginning, the Third Amendment has largely been treated like the proverbial redheaded stepchild—no one really knows what to do with it, but it also cannot simply be abandoned. Despite the fact that the Mitchells will most likely have to suffer the arguable injustice of not having violations of their Third Amendment rights recognized by the Court, their claims bring important issues to light and have the potential of breathing new life into the Third Amendment. It can hardly be imagined that the atrocious actions of the Nevada state police officers alleged by the Mitchells are isolated incidents. Instead, it raises serious concerns about similar actions by other government authorities, be they state or federal. Also, an investigation into this family’s claims raises a severe shortcoming in jurisprudence regarding the Third Amendment, in that its current understanding and function is muddy at best, and non-existent at worst. The court system missed its chance in *Engblom* to establish a test to help determine when Third Amendment rights are violated, but claims such as the Mitchells’ gives the courts a second chance to fix that problem. Even though I believe the overarching purposes of the protections envisioned by writers of the Third Amendment would best be upheld through a test such as that proposed in Part VIII, which focuses more on punishing the wrongful actions of government authority and

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<sup>217</sup> See Eismann-Harpen, *supra* note 194, at 132 (concluding that “[b]ecause of the similarities between the police and the military, the definition of soldier under the Third Amendment should include federal, state, and local law enforcement. Furthermore, the judiciary should embrace the *Engblom* court’s approach to the Third Amendment and apply the Third Amendment to both federal and state action”). Notably, both Eismann-Harpen and this author come to similar overall conclusions, though through different avenues of analysis, which accentuates the varying possibilities open to the judicial system in its examination of this issue. However, while Eismann-Harpen simply states that the court should find that police officers are “soldiers,” this Note takes a different approach. It emphasizes the strong arguments on both sides of the debate and instead argues that whether the actual outcome aligns with the views of this author is not of ultimate importance. What is important is whether the court chooses to follow a test similar to the one described in this Note or another of its choosing, the time has come for the court to provide a definitive answer to the question of whether or not police officers fit the mold of a “soldier” as envisioned under the Third Amendment.



not so much on their identity, the Court is of course open to take an alternative route. Either way, it is clear that a determinative test of some sort is necessary. Otherwise, the Third Amendment will remain in its corner, all but invisible, unable to do much at all. This in turn could lead to increased violations of this provision. The saying “if you don’t use it, you lose it” comes to mind when thinking of the Third Amendment. It was important enough to be included in our nation’s founding documents, so the least the court could do would be to clearly define what it means to “quarter a soldier,” or else the Third Amendment could very well become completely obsolete.