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PUBLIC AND PRIVATE IN THE THIRD AMENDMENT

ROBERT A. GROSS**

Back in September, as I was pondering my comments for Valparaiso University's colloquium on the Bill of Rights, I turned on my radio, tuned in to National Public Radio's "Weekend Edition," and to my surprise heard Professor Morton Horwitz on the air, giving a concise account of natural law and natural rights in the American Constitutional tradition. His scholarship served splendidly to illuminate the long background to then-Supreme Court nominee Clarence Thomas's legal thinking and to demonstrate the relevance of history to comprehending our present moment.

By contrast, Professor Horwitz now ingeniously reverses course. His treatment of the Third Amendment is cleverly framed as a case study in "constitutional obsolescence."¹ Once of vital importance to Americans in the Revolutionary generation, today the ban on quartering soldiers in private homes protects us from a danger that no longer exists. Forgotten by scholars until they are invited to speak at bicentennial celebrations, the Amendment is enshrined in the Bill of Rights like the fossil of some creature from the paleolithic age that became extinct in the course of evolution. It is a relic of a world we have lost, the physical and mental world of Revolutionary America, for it was born of circumstances that have been left behind by time and will never again be resurrected. Unlike the heritage of natural law, the story behind the Third Amendment, in Horwitz's telling, has little bearing on our own lives. For once, the past is truly dead.

It is, indeed, hard to imagine why any government ever contemplated putting its troops in private homes. The practice seems quite extraordinary today, when military bases constitute vast complexes, housing tens of thousands of soldiers and their families on more than 700 sites in this country and others around the globe, an apparatus of state so vital to the health of local economies that the effort to eliminate some of these installations caused a breakdown in Congressional governance. The Great Lakes Naval Training Center, to name one example not far from Valparaiso, is a little city in itself, employing about

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1. See generally Morton Horowitz, *Is the Third Amendment Obsolete?*, 26 VAL. U. L. REV. 209 (1991).

25,000 people (including 3,500 civilians) and offering not only housing to military personnel but also day-care centers, schools, medical clinics, banks, stores, movies, bowling alleys, and a gym. The base brings together more people on a daily basis than inhabited any American town, even Philadelphia, on the eve of the Revolution.²

If quartering troops in private houses appears quaint today, it was entirely appropriate to the scale of life in the early modern world. On both sides of the Atlantic, the domestic household served as the basic unit of society, carrying on a wide array of activities we would find utterly unacceptable. It was, at once, a dwelling place for a family and a site of production -- a farm, a shop, or a store. In an "age of homespun," it was also a textile factory, where women spun and wove the family's clothes. It educated the young, carried on religious worship, and performed diverse services for the state. In New England, local governments commonly contracted with private families to care for orphans, the elderly and the poor. Occasionally, even criminals were sentenced to family discipline. Virtually everybody, in fact, lived under the roof of a home, subject to the authority of the male patriarch -- the "master," as he was known -- who would legally use corporal punishment to keep all his dependents, including wife, children and servants, in line. Appropriately, the household was dubbed "a little Church, and a little commonwealth," a training ground where men and women learned to exercise authority and to submit.³

In such a world, where families unhesitatingly operated as extensions of the state, it was entirely fitting for government to billet its troops in private homes. It could also be quite profitable for the individuals concerned. The business of feeding and housing troops provided extra income for a good many people in England and America throughout the colonial period. It is even said that on the Isle of Wight in the 1620s, nobody bothered to complain about the massive quartering of troops by Charles I until the beleaguered king, deprived of Parliamentary funds, fell behind in his reimbursements.⁴ But the ties between

2. DIRECTORY OF MILITARY BASES IN THE UNITED STATES 64 (William R. Evinger ed., 1991).

3. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 6-10 (1988); JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 182-185 (1970).

4. JOHN SHY, TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION 172 (1965) [hereinafter SHY]; DOUGLAS EDWARD LEACH, ROOTS OF CONFLICT: BRITISH ARMED FORCES AND COLONIAL AMERICANS, 1677-1763, at 98-99 (1986) [hereinafter LEACH]; LOIS G. SCHWOERER, NO STANDING ARMIES! THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 20-21 (1974) [hereinafter SCHWOERER]. To be sure, when soldiers were billeted upon private houses, they could impose severe hardships upon the owners. During the Seven Years' War, a widow in Perth Amboy, New Jersey, was obliged to turn her home into a hospital for soldiers ailing from smallpox. Not surprisingly, the widow's tenant fled. But the troops showed no appreciation for the woman's troubles; during their stay, they wrecked her house and garden. For this and numerous other incidents, see SHY, *supra* at 65-66 and LEACH, at

the household and the state could go beyond economics. Within the tradition of civic humanism that inspired the republicanism of many American patriots, the household represented a fortress of virtue, safeguarding the liberty of the state; its head became the commander of a company, ever vigilant for the common good. The ideal citizen was thus a soldier and his home an armed camp.⁵

If quartering troops in private homes could be a routine event, in keeping with both ideology and everyday life, it was hardly a good way to run an army. The practice had developed in response to necessity and not from any careful plan. Unlike France under Louis XIV, England was slow to raise a standing army. For its own defense, the island nation preferred to rely upon the county militia, a fighting force that required no special accommodations. In consequence, when Charles I brought his soldiers home from the European wars, he was obliged to billet them in private homes -- to the outrage of his subjects. The Stuart King was denounced as a tyrant, but he would have gladly paid for the services. The trouble was that Parliament refused to give him any money or to supply alternative quarters. Owing to what we might call his problem of "cash flow," the Petition of Right in 1628 included forced billeting in its list of grievances against the Crown.⁶

Charles I gave quartering the stigma of tyranny, and his descendant James II only deepened the association. In the wake of Stuart excesses, Parliament laid down the fundamental principle we celebrate today: it banned quartering in private homes without the owner's consent. But until the legislature allowed the construction of barracks for troops, no British government could avoid the practice. That solution was adopted in the early eighteenth century, but only in England itself. Even then, the British declined to imitate the continental powers and erect great barracks, "concentrating troops in their own military world." In the eighteenth century, Tommy Atkins commonly slept in a village tavern, surrounded by tipplers in a roistering atmosphere that was hardly conducive to military discipline.⁷

But in the sprawling rural society of colonial America, taverns and other "public houses" were too few and too small to accommodate the large number of British Regulars stationed on the continent from 1755 on. In the search for shelter, desperate commanders sometimes ignored English law and imposed their

98.

5. JOHN GREVILLE AGARD POCOCK, *THE MACHIAVELLIAN MOMENT* 89-90, 200-203 (1975); LINDA K. KERBER, "HISTORY WILL DO IT NO JUSTICE": WOMEN'S LIVES IN REVOLUTIONARY AMERICA 22-24 (1987).

6. SCHWOERER, *supra* note 4, at 10-15, 19-23.

7. CORRELLI BARNETT, *BRITAIN AND HER ARMY 1509-1970*, at 142-43, 176 (1970); LEACH, *supra* note 4, at 87-89.

troops on the inhabitants, justifying themselves by necessity. Lord Loudon, Supreme Commander of British forces in North America during the Seven Years' War, conceded that in normal times, troops were to be billeted in public houses. But war changed things. "The Practice," he explained, "has always been . . . that no house has been exempt from quartering the Troops [that] the General thought proper . . . and from this rule the People of the first fashion in England have not been exempted."⁸

Loudon's resort to quartering was an emergency act. More often, British officers used the threat of billeting as a political weapon, in order to force colonial assemblies to furnish food and shelter for the troops. The gambit invariably worked. But it kept the issue of quartering alive in the American colonies long after it had died in the mother country. Before 1763, most British troops stayed in remote, frontier forts; even later, when the army moved into New York and Boston to maintain law and order, the soldiers lodged mainly in barracks. Still, the public controversies revived memories of Stuart tyranny, and when Parliament, in its determination to suppress the rebels in Massachusetts, passed the Quartering Act of 1775, allowing for billeting in private homes, it insured that the practice would be among the grievances Thomas Jefferson set forth in the Declaration of Independence. An anachronism in England itself, quartering gained a brief new life across the ocean, only to disappear after independence and the ratification of the Bill of Rights. In an Andy Warhol version of eighteenth-century constitutional history, the quartering issue got its fifteen minutes of fame in American life.⁹

Yet, there may be a greater significance to the Third Amendment than Professor Horwitz suggests. Why, we may ask, should quartering have aroused such alarm, when it was so seldom imposed and when the practice of placing soldiers in private homes could be so congenial and so profitable to republican householders? One answer is that the American colonists resented any imposition by government without their consent. Quartering was, in this view, just another tax -- a levy on property, extracted not from all subjects of the King, but only from those unfortunate householders who happened to live along the army's line of march. But then why should this form of taxation be singled out in a Constitutional amendment? The special status of quartering is all the more anomalous, when we consider that eighteenth-century Americans and their descendants have tolerated other, equally serious intrusions into the home during times of war. During the Revolutionary War, the Continental Army traveled on its stomach as ruthlessly as any force of European mercenaries, commandeering supplies from the countryside and offering only suspect I.O.U.'s in payment.

8. LEACH, *supra* note 4, at 89-91.

9. SHY, *supra* note 4, at 163-90.

Nor did the new state governments have any compunctions about conscription: if a man could not buy a substitute, he would be compelled to risk his life for the public good. In this perspective, the Constitutional ban on quartering appears but a symbolic gesture, *not* a firm guarantee of individual rights. At a time of war, the government can deprive a household of its means of subsistence -- the livestock, wagons, grain and hay in the barns -- and send the male head and his sons to die in battle. It is surely slight compensation that a grieving widow and her starving children can live securely behind the doors of their desolate home.¹⁰

To treat the Third Amendment as a symbolic statement does not diminish its significance, but does just the opposite. It suggests, I want to argue, *contra* Professor Horwitz, the contemporary relevance of the Bill. The ban on quartering draws a sharp line between the public and private spheres, in the first of many such distinctions that run through our Constitutional history and social life. This is a surprising innovation, given the public character of the household in the preindustrial age. All sorts of strangers -- apprentices, servants, orphans, the elderly, the poor, the insane, the traveler -- were welcome in American homes, but *not* the soldier. He was anathema for a simple reason: unlike the other inmates, the soldier was not subject to family discipline; he answered to a very different chain of command, outside the bounds of neighborhood and community. He thereby upset the rules of patriarchy and the master's power over his home. It is perhaps for this reason that American propaganda against quartering harps on the "licentiousness" of the troops. In 1765, the New York Assembly infuriated members of Parliament when it declined to provide for royal troops in public buildings. But faced with the threat of troops quartered in private homes, the legislature soon gave in. "People . . . had rather part with their Money," noted one New Yorker, "tho' rather unconstitutionally, than to have a parcel of Military Masters put by Act of Parliament abed to their Wives and Daughters."¹¹ Similarly, during the British occupation of Boston in 1768, the Boston Whigs circulated the following story:

Two women the other evening, to avoid the *solicitations* and *insults* of a soldier, took refuge in a house, at the south end of town; the soldier was so audacious, as to enter with them: The cries of distress,

10. CHARLES K. BOLTON, *THE PRIVATE SOLDIER UNDER WASHINGTON* 208-9 (1902); E. WAYNE CARP, *TO STARVE THE ARMY AT PLEASURE* 77-98 (1984); ROBERT A. GROSS, *THE MINUTEMEN AND THEIR WORLD* 147-148 (1976). As Carp demonstrates, civilians were not without protection against the Continental Army's practice of impressment. Public authorities used the law with great skill to defend their constituents and, in the process, hampered the efficient conduct of the war.

11. B. CARMON HARDY, *A Free People's Insolent Grievance: The Quartering of Troops and the Third Amendment*, in *THE BILL OF RIGHTS* 76 (Jon Kukla ed., 1987).

brought the master of the family into the entry with a candle; and before he could know the occasion of the noise, he received a stroke from the soldier with his cutlass, which brought him to the ground, where he lay senseless for some time, and suffered the loss of a quart of his blood.¹²

The incident may well have occurred. But the image of the fallen "master," unable to protect his home, bespeaks the anxieties of patriarchs over the security of their domain.¹³

To shore up that authority, the fathers of the new republic began the long, ideological process of redefining the home as a private realm. The household could be a school, a church, an asylum, a prison -- but not a military base. Thanks to the ban on quartering, the common soldier would lodge in a crowded, miserable barracks, isolated from the newly privatized home.¹⁴ A small exclusion perhaps, but in the long perspective of history, it was a crucial first step. In its wake would follow the removal of one public function after another from the domestic sphere to the state. The little log huts in which George Washington's Continentals shivered and suffered during the hard winter at Valley Forge were the advance-guard of the Great Lakes Naval Training Center today -- at once the tribute professional soldiers must pay to the integrity of the household and a critical contribution to the rise of the modern state.

The Third Amendment thus carved out a sharp distinction between public and private that is the hallmark of the modern capitalist, middle-class, social order. It symbolized an emergent sense of privacy among the Revolutionary generation.¹⁵ That consciousness was readily apparent to Justice Joseph Story, when he appraised the Third Amendment in his *Commentaries on the*

12. BOSTON UNDER MILITARY RULE 1768-1769 AS REVEALED IN A JOURNAL OF THE TIMES 71 (Oliver M. Dickerson comp., 1936).

13. The Antifederalist representative from South Carolina, Thomas Sumter, surely revealed the worries of a patriarch in his opposition to quartering under any circumstances whatsoever. The presence of soldiers in a household, Sumter told the First Congress during its debate over the Third Amendment, "would be a hardship indeed . . . property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of a family." CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 185 (Helen E. Veit et al. eds., 1991).

14. BOLTON, *supra* note 10, at 74-76.

15. David Flaherty argues that colonial New Englanders cherished a right of privacy "that was both traditional and customary." As I read his evidence, this right was designed to protect households and families from public intrusion, far more than to insure the immunity of individuals from communal regulation. In this light, eighteenth-century New Englanders readily invoked the maxim that "a man's home is his castle" in their resistance to provincial tax-collectors and royal customs house officers. DAVID FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 85-87, 248 (1972).

Constitution a half century after its ratification. "This provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."¹⁶ Precisely for this reason, it is of enormous relevance today. Justice Douglas grasped the point when in *Griswold v. Connecticut*¹⁷ he discerned in the Third Amendment, as well as in the First, Fourth, Fifth, and Ninth, the foundation for a right of privacy guaranteed by the Constitution. "The specific guarantees in the Bill of Rights," he wrote in the Supreme Court decision that overturned the Connecticut ban on the distribution of birth control devices, "have penumbras, formed by emanations from those guarantees that help give them life and substance."¹⁸ Upon such reasoning, the Supreme Court would later ground its decision in *Roe v. Wade*¹⁹ and establish a woman's right to abortion. That right has a very precarious existence today, hinging in all likelihood on the undeclared views of Justice Souter and the just-confirmed Clarence Thomas.

If Justice Thomas listened to Professor Horwitz on public radio, he may have grasped the contradictions in the Republican bid to combine strict construction and natural law. But if he turns to history rather than philosophy, he may want to respect the "original intent" behind the Third Amendment. In its time, the article turned opposition to an anachronistic military practice into a statement of general principle -- a claim to a right of domestic privacy -- that reverberates down to our own.

16. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747-48 (1833).

17. 381 U.S. 479 (1965).

18. *Id.* at 484.

19. 410 U.S. 113 (1973).

