No Quarter; Just Flapjacks

BY STEVEN M. SILVA, ESQ.

Nevada's strong tradition of property rights makes it little surprise that we are home to one of the few widely available substantive decisions concerning the Third Amendment. Nevada also has several locations of the International House of Pancakes—commonly called IHOP. But what do property and pancakes have to do with one another?

The Third Amendment states: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[1]

In *Mitchell v. City of Henderson*, U.S. District Judge Andrew Gordon considered a claim that the word "soldier" in the Third Amendment could mean "police officer," as the plaintiff in that case contended that the occupation of a house by police officers for a period of about nine hours qualified as "quartering."[2] Judge Gordon noted that the history of the Third Amendment was a response to the Quartering Acts imposed by Parliament on colonial America, and that the Third Amendment was designed to protect against military incursion. Relying on prior case law and examining the history and original purpose of the Third Amendment, Judge Gordon concluded that municipal police officers were not "soldiers," because a police officer is not understood to be part of the military.

This was a wise approach. With an increase in textualist and originalist analyses used by various courts,[3] and an emergence of combining those approaches with inquiries into history and tradition,[4] it is increasingly important to pay attention to the historic meaning of words. Lawyers are generally not trained as linguists, historians, or historical linguists. It can be difficult to know how words were actually used in 1789, 1791, 1864, 1868, or even the mid-1900s. The use of corpus linguistics—large databases collecting historic uses of words—has provided one approach to the issue. Old dictionaries can be another source. But, as with Judge Gordon's approach in *Mitchell*, historical context can be as important as any lexicon.

When considering the text of the Third Amendment, history is exceedingly important. Interestingly, the issue of quartering was actually a hot topic in English jurisprudence throughout the 1700s. In the English Bill of Rights of 1689, a grievance was laid against King James II that he had quartered soldiers outside the confines of law.[5] In colonial America, Parliament repeated

James' trespass and authorized quartering soldiers through two Quartering Acts. The Third Amendment is not a recital of some abstract right or common good. It is rather a blunt response to a particular grievance actually suffered by the founders.

Consequently, the text of the Quartering Acts is foundational in analyzing the Third Amendment. Many of the American cases analyzing the Third Amendment have conflated the concept of "house" with the concept of "home," as in *Engblom v. Carey*, 677 F.2d 957 (2nd Cir. 1982). There, the court assessed a claim for Third Amendment protection over quarters in a prison and concluded that the residents of those quarters "enjoyed significant privacy due to their right to exclude others from what were functionally *their homes*." *Id.* at 964 (emphasis added). The concurrence reiterated this interpretation, stating, "Although a man's home is his castle under the Third Amendment, it is not the case, as Gertrude Stein might say, that a house is a house is a house." *Id.* at 968 (J. Kaufman, concurring in part).

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But the word "homes" does not appear in either Quartering Act (or in the Third Amendment). Rather, the Third Amendment offers protection to "houses" in response to the Quartering Acts' text, which specified a wide variety of houses suitable for quartering. The Quartering Acts did not typically result in a home-invasion by a platoon. Rather, in the absence of sufficient barracks, the Quartering Act of 1765 authorized the invasion and use of a number of structures, authorizing them "to quarter and billet the residue of such officers and soldiers for whom there shall not be room in such barracks, inns, livery stables, ale-houses, victualling-houses, and the houses of sellers of wine by retail to be drank in their own houses or places thereunto belonging, and all houses of persons selling of rum, brandy, strong water, cyder or metheglin, by retail, to be drank in houses; and in case there shall not be sufficient room for the officers and soldiers in such barracks, inns, victualling and other publick ale-houses … uninhabited houses, outhouses, barns, or other buildings, as shall be necessary. …" 5 Geo. III, c. 33.

When the Third Amendment word "house" is viewed through this lens, it becomes apparent that how we use "house" today is not quite the same as was used by Parliament or the constitutional framers.[6]

Further evidence of this use appears in American and British treatises concerning public houses. As Britain never broke away from Britain, it never had a written Constitution with our Bill of Rights. This means that British treatises can be very informative from an alternative history point of view. My favorite here is *The Whole Law Relating to Innkeepers, Licensed Victuallers, and Other License Holders*, published in London by Charles H.M. Wharton, which describes the obligation of British innkeepers to "billet" (i.e., quarter) soldiers and marines.[7] Even American treatises can be useful. The seminal work, *The Law of Inns, Hotels and Boarding Houses*, by Samuel H. Wandell, contains a fair analysis of the sorts of public houses. Likewise, *The Law of Innkeepers and Hotels: Including Other Public Houses, Theatres, Sleeping Cars*, by Joseph Henry Beale, Jr., traces the development of inns from private houses, and admonishes that an understanding of English history is critical in this field.

With that historic framework in place, it is clear that what we now call a "house" is merely a subset of a larger category of things all called "house." This is an example of words narrowing over time, where one subset of a larger class takes over the meaning of a word. "House" is not the only word to undergo such a shift.

Consider corn. Corn, that all-American food, native to the Americas and not introduced into European cuisine until the 15th century, and beloved by all. So beloved, that in 1215, King John put his John Hancock on the Magna Carta, which at Article 28 provided: "No constable or other bailiff of ours shall take the corn or other chattels of any one except he straightway give money for them, or can be allowed a respite in that regard by the will of the seller." But does the reference to corn contain a kernel of a time paradox? No. The Magna Carta was not some prophetic document protecting the pride of Nebraska. Rather, what we call "corn" is "maize." And the word "corn" in the 1200s was a catchall term for crops.

As with corn, so too with houses. What we popularly call a "house" is

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only one type of house. And the Third Amendment's ambit is not so narrow as to be limited to a modern single-family residential home. Rather, when understood in light of the text of the Quartering Acts, and the history and tradition of protecting both homes and other privately owned structures, it is clear that the Third Amendment's reference to "house" broadly includes private homes, hotels, inns, and includes a victualling house, or as we might say today, a restaurant. Which, in turn, means that the Third Amendment provides protection to the "flapjacky" wonder of the International House of Pancakes.

All of which is, hopefully, an amusing reminder to mind the text.

When dealing with old law, especially in an originalist method, it is critically important to understand what words meant when a particular law was adopted. This work can mean ridding yourself of preconceived notions of what words mean. For common words, this research can be incredibly challenging. Most of us receive basic-level knowledge of the world around us at an early age, and it can be challenging to even consider that something we all know and use might have once meant something different, broader or narrower. But we must competently learn to assess and analyze old words. For in high-stakes litigation over the meaning of law, there is too often no quarter given.

ENDNOTES:

1. Pancakes, meanwhile, are delicious.
2. *Mitchell v. City of Henderson*, No. 2:13-cv-01154-APG-CWH, 2015 WL 427835 (D. Nev. Feb. 2, 2015).
3. "[W]e are all originalists." Justice Elena Kagan.
4. *See Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, dissenting).
5. The Third Amendment is not the only part of the American Bill of Rights grounded in the 1689 English Bill of Rights. *See District of Columbia v. Heller,* 554 U.S. 570 (2008).
6. A fun note: the Quartering Acts allowed quartering of soldiers *and* officers. The Third Amendment only restricts quartering of soldiers. Does this distinction carry forth today?
7. The requirement to billet soldiers in inns was imposed by the various Annual Mutiny Acts. Wharton, *supra*, at 85.

STEVEN M. SILVA is a partner at the firm of Nossaman LLP, and practices in the area of eminent domain, government law, and appeals. He is available for consultation on any pressing Third Amendment concerns you may have.