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Our Rights Slipping Away

Two recent cases in the United States Court of Appeals for the Third Circuit demonstrate just how quickly our rights are slipping away. These are rights we take for granted, and which the Founders of this Republic thought were immutable.

The United States Court of Appeals is the second highest court in the land, along with her sister Courts of Appeals sitting just beneath the United States Supreme Court. It is the United States Court of Appeals for the Third Circuit which houses Sam Alito, the most recent Bush appointee to the United States Supreme Court, yet to be examined by the Senate.

Both cases involve the right to be secure in one's own home, person and possessions.

The Founders of this nation thought it was so important to have a Bill of Rights that the Federalist Papers guarantee those rights in exchange for the states' agreeing to participate in the union known as the United States of America. The Fourth Amendment guaranteed that there would be no search and seizure without probable cause. The clear objective of the lawyers who created the Declaration of Independence, the Constitution and the Bill of Rights was to make sure that this new government would not overreach and intrude into the privacy of individuals, even if those people were accused of crimes. In this new land, all people would be presumed innocent until proven guilty. Never again would the hated British, or anyone else for that matter, break into a person's private spaces on less than probable cause. Of course, probable cause does not mean that a person needs to be guilty beyond a reasonable doubt. Probable cause is not very difficult to prove, but is nevertheless too much for those who seek to deconstruct the intention of the Founding Fathers.

In *Harvey v. Plains Township Police Department*, a police officer and a landlord became involved in a private repossession of rental premises. The Court held that the police officer actively involved in such a repossession may be engaged in state action, in violation of the Fourth Amendment. The landlord was held not to be a state actor, however.

Under the law as it is developed in the last few years, in order to find the police officer responsible for his improper conduct, the question is not whether he had probable cause as defined by the Fourth Amendment, but rather whether his mistaken belief was reasonable. While this may not seem like great slippage, it undermines the constitutional structure to a significant degree. It is easy to find that conduct was mistaken yet reasonable. The police would be held to a higher standard if they needed probable cause to help a private person with an eviction of a tenant.

Shuman v. Penn Manor School District was an opinion written by former Pennsylvania Attorney General Fisher. *Shuman* claimed that a violation of his due process rights under the Fourth and Fourteenth Amendments and his right to equal protection under the Fourteenth Amendment during the course of an investigation into an incident of sexual misconduct between Shuman and a female classmate. Lawyers like to say that "bad facts make bad law," and this opinion is a good example of that.

The Court, while acknowledging that the Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures, takes away with the one hand what it has given with the other. The Court

acknowledged that Mr. Shuman was seized and held, his liberty having been curtailed. The court grudgingly nodded in the direction of the Founding Fathers, who demanded that probable cause accompany a search and seizure. However, in the context of schools, the Court believed that the constitutional protection should be abandoned and instead a "reasonableness standard" should apply. If that is not a conservative rewrite of the Constitution, one could not think of anything which is.

Our Circuit Court joined those Courts of Appeals which found that seizures in the public school context are governed by a reasonableness standard rather than by probable cause "giving special consideration to the goals and responsibilities of our public schools." If the public schools could justify throwing away the constitutional rights for which we have fought and died, why should the criminal legal system be any different? Why is any search, investigatory or otherwise, more important that the search in the school context? The court believes that the reasonableness standard is consistent with the "reduced liberty interest afforded students in the public school setting." This intriguing observation is based upon the concept that there are compulsory attendance laws which "automatically inhibit the liberty interest afforded public school students, as the law compels students to attend school in the first place." Maybe our kids are right after all for believing that school is essentially a jail.

Detentions based upon anything less than probable cause where there is not an absolute public emergency represent an erosion of our fundamental rights and liberties unheard of in prior generations.

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