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ESCAPE FROM FREEDOM: WHY “LIMITED LOCKSTEP” BETRAYS OUR SYSTEM OF FEDERALISM

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This Symposium celebrates the significance of the Illinois Constitution. Yet the Illinois Supreme Court has ironically chosen to make the Illinois Constitution completely insignificant in several areas of constitutional law. It has accomplished this through “the limited lockstep doctrine.” This approach is used to interpret cognate provisions of the U.S. and Illinois Constitutions. The Illinois Supreme Court describes the doctrine in this way:

[W]hen the language of the provisions within our state and federal constitutions is nearly identical, departure from the United States Supreme Court’s construction of the provision will generally be warranted only if we find ‘in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution, after which they are patterned.’¹

The Illinois Supreme Court has applied this to a number of state constitutional provisions.²

Two excellent new articles by James K. Leven³ and the

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1. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 47 (quoting *People v. Tisler*, 103 Ill.2d 226, 245 (1984)).

2. *See Hope Clinic*, 2013 IL 112673 at ¶¶ 50, 92 (applying the limited lockstep doctrine to due process and equal protection, respectively); *see also* *People v. Caballes*, 221 Ill.2d 282, 297 (2006) (applying the limited lockstep doctrine to issues arising under the Fourth Amendment); *see additionally* *People v. Levin*, 157 Ill.2d 138, 160 (1993) (holding that the Illinois Constitution offers no broader protection than the Federal Constitution with respect to double jeopardy); *People v. Perry*, 147 Ill.2d 430, 436 (1992) (adopting the U.S. Supreme Court’s interpretation of the Fifth Amendment privilege against self-incrimination as coextensive with that guaranteed by the Illinois Constitution).

3. James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63 (2012).

Honorable John Christopher Anderson⁴ critique “limited lockstep” from multiple angles. This Essay, however, approaches the subject from only one relatively narrow perspective: what makes this odd doctrine so attractive to the Illinois Supreme Court? In answering this question, it contends that the use of lockstep flouts basic principles central to the effective running of the federal system.

Limited lockstep can be characterized as a type of legal formalism. Richard Posner, in his recent book *Reflections on Judging*, notes that “[t]he character of legal formalism can be captured in such slogans as ‘the law made me do it.’”⁵ The legal formalist sees law as largely a “compendium of texts”—e.g., statutes, constitutions, regulations—and rules.⁶ The text and rules drive the answer—and there is only one right answer.⁷ The rule-driven legal formalist judge can effectively disown personal responsibility for a legal decision.⁸

According to Posner, formalism’s appeal lies in the fact that judges “usually are happy to hand off responsibility for deciding to another adjudicator.”⁹ Formalism’s somber invocation of “higher-level rules” masks an approach in which judges can defer to decisions already made by lower-court judges, juries, legislatures, and administrative agencies.¹⁰

With limited lockstep, the decision comes ready-made from the U.S. Supreme Court. Using lockstep requires no thinking from state court judges. This has a deleterious effect. Because the formalist judge “minimizes the occasions on which he has to base a decision on his own notions of a sensible resolution of the case,”¹¹ his ability to consider the consequences of his decisions atrophies. In Posner’s words, “[j]udges’ belief that they don’t make law dulls their critical faculties.”¹²

People v. Fitzpatrick is an example of how the Illinois courts use the formalist doctrine of lockstep to avoid having to consider whether its decision is fair or even desirable.¹³ In *Fitzpatrick*, Officer Kehrli observed the defendant walking down the middle of a street in Zion.¹⁴ State law makes it an offense to walk on a

4. Hon. John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44. LOY. U. CHI. L.J. 965 (2013).

5. RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 4 (2013).

6. *Id.*

7. *Id.* at 106.

8. *See id.* (stating “[j]udges] like to say they just apply the law—given to them, not created by them—to the facts.”)

9. *Id.* at 124–25.

10. *Id.* at 111.

11. *Id.*

12. *Id.* at 122.

13. *People v. Fitzpatrick*, 2013 IL 113449, ¶ 29, *aff’g* *People v. Fitzpatrick*, 2011 IL App (2d) 100463.

14. *People v. Fitzpatrick*, 2011 IL App (2d) 100463 at ¶ 2.

roadway where a sidewalk is available.¹⁵ This violation is characterized as a petty offense.¹⁶ For unexplained reasons, Kehrli decided to arrest Fitzpatrick.¹⁷ A brief pat-down at the scene revealed no weapons.¹⁸ Later at the police station, another officer conducted a more extensive search and cocaine was discovered in Fitzpatrick’s sock.¹⁹ Fitzpatrick was charged and found guilty of possession of a controlled substance.²⁰ On appeal, he argued that a custodial arrest for a petty offense was unconstitutional and the cocaine should have been suppressed.²¹ The Second District Appellate Court rejected this argument, and the Illinois Supreme Court affirmed.²²

The opinions in *Fitzpatrick* are devoid of any reason why Officer Kehrli decided that an arrest, rather than a citation, was appropriate to resolve this petty matter of walking in the street. Kehrli testified that Fitzpatrick was not engaged in threatening behavior, nor did it appear that he was armed.²³ There was no evidence of the traffic conditions or the time of day. Additionally, there was no evidence of whether Fitzpatrick was a member of a minority and, if so, whether this may have affected Kehrli’s decision to arrest.²⁴

Fitzpatrick conceded that the U.S. Supreme Court has held that a custodial arrest for a petty offense is proper under the Fourth Amendment.²⁵ Nonetheless, he contended that Illinois courts should find that this practice violates the Illinois Constitution’s prohibition against unreasonable searches and seizures.²⁶

The Second District disagreed.²⁷ It noted that Illinois follows a “limited lockstep” approach in the area of search and seizure.²⁸ Therefore, Illinois courts defer to the U.S. Supreme Court’s interpretation of the Fourth Amendment unless “a specific criterion—for example, unique state history or state experience—

15. 625 ILL. COMP. STAT. ANN. 5/11-1007 (2010).

16. 625 ILL. COMP. STAT. ANN. 5/11-202 (2010).

17. *Fitzpatrick*, 2011 IL App (2d) 100463 at ¶ 2.

18. *Id.*

19. *Id.*

20. *Id.* at ¶ 1.

21. *Id.*

22. *Fitzpatrick*, 2013 IL 113449 at ¶ 29.

23. *Id.* at ¶ 4.

24. See *Whren v. United States*, 517 U.S. 806, 806 (1996) (holding that even if an arrest had been racially motivated, this would not affect its constitutionality under the Fourth Amendment).

25. *Atwater v. City of Lago Vista*, 532 U.S. 318, 322 (2001).

26. ILL. CONST. OF 1970, art. I, § 6.

27. *Fitzpatrick*, 2011 IL App (2d) 100463 at ¶ 8.

28. *Id.* (citing *Caballes*, 221 Ill.2d at 313).

justifies departure.”²⁹ Finding none, the Second District followed lockstep and the U.S. Supreme Court’s decision in *Atwater*.³⁰

The most interesting part of the Second District’s opinion was its response to Fitzpatrick’s contention that *Atwater* should be rejected simply because it results in bad policy. Not only is an arrest a draconian response to a minor offense, but the policy allows for police to engage in racial profiling in deciding whom to arrest. In fact, several states have relied on their own constitutions to reject *Atwater* for these reasons,³¹ and Fitzpatrick asked the Illinois courts to do the same.³²

The Second District’s response is nothing short of astonishing, holding that it was *irrelevant* whether *Atwater* made sense or not. “[T]he lockstep doctrine would be largely meaningless if Illinois courts interpreting state constitutional provisions followed only those United States Supreme Court decisions with which they agreed.”³³ It concluded by noting that “[t]he [Illinois Supreme Court] did not suggest that a ‘flawed federal analysis’ would ordinarily be a valid basis for departing from United States Supreme Court precedent. Accordingly, we will *not conduct an independent analysis* of the question settled in *Atwater*.”³⁴

Recall Posner’s characterization of legal formalism as insisting that “the law made me do it.”³⁵ Here, an Illinois court is *actually refusing to consider the fairness* of a decision because a self-imposed “rule” says it cannot. In the court’s view, it would not be a “real rule” if we only accepted its fair and just results. The only way to apply a “real rule” is to unquestioningly accept its unjust and unfair results, too.

In Homer’s *Odyssey*, Odysseus asked his crew to tie him to the mast to prevent him from giving into the temptation of the Sirens’ songs designed to make him run his ship aground.³⁶

29. *Caballes*, 221 Ill.2d at 309 (quoting Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 104 (2000)).

30. *Fitzpatrick*, 2011 IL App (2d) 100463 at ¶ 12.

31. *See, e.g.*, *State v. Brown*, 2003-Ohio-3931, ¶ 7 (holding that the Ohio Constitution provides broader protection than the Fourth Amendment under OHIO CONST., art. 1, § 14); *State v. Bayard*, 119 Nev. 241, 247 (2003) (holding that the Nevada Constitution affords its citizens broader protection under NEV. CONST., art. 1, § 18); *State v. Bricker*, 2006-NMCA-052, ¶ 24 (finding that the New Mexico Constitution provides its citizens greater protection than the Federal Constitution under N.M. CONST., art. 2, § 10).

32. *Fitzpatrick*, 2011 IL App (2d) 100463 at ¶ 3.

33. *Id.* at ¶ 12.

34. *Id.* (emphasis added).

35. REFLECTIONS ON JUDGING, *supra* note 5, at 4.

36. Homer, *The Odyssey*, in 22 THE HARVARD CLASSICS BK. XII 170–74 (Charles W. Eliot LLD ed., S.H. Butcher & A Lang trans., P.F. Colier & Son Co. 1909) (circa 700 BCE). “Friends, forasmuch as in sorrow we are not all unlearned, truly this is no greater woe than upon us . . . yet even thence we

Bizarrely, Illinois courts use the self-imposed restraints of the “lockstep doctrine” to prevent themselves from giving into the temptation to issue the best decision possible.

Voluntarily locking yourself into a position with the purpose of preventing a fair and just result turns deference to the U.S. Supreme Court into judicial theater of the absurd. To understand why, first review the legal principles involved. As the U.S. Supreme Court recently stated, “[t]he federal system rests on what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’”³⁷ In the federal system, criminal justice is a realm that has traditionally been exercised at the state level.³⁸ Historically, the Court had little to do with state issues of criminal justice until the Warren Court began to “selectively incorporate” the governmental restrictions of the federal Bill of Rights in the 1960s.³⁹ The Court’s decisions regarding the Fourth Amendment are relevant in state courts only to the extent that they set a “constitutional floor,” i.e., guarantee that no state grants fewer rights to its citizens than the basic minimum required under the U.S. Constitution.⁴⁰ Although the Court lays the floor, each individual state is free to decide how high the “constitutional ceiling” is in that state, i.e., how many more rights it decides to grant to its citizens under its own law.⁴¹ This is the genius of the federal system. Justice Antonin Scalia recently reminded us that “[t]he Constitution . . . is not an all-purpose tool for judicial construction of a perfect world.”⁴² The federal Bill of Rights merely establishes a constitutional minimum; each state is then free to go beyond that minimum to create a system that it considers perfect for itself.⁴³

The problem with “limited lockstep” is that the Illinois courts erroneously view a Fourth Amendment decision from the U.S. Supreme Court as providing *the only correct answer*, when it is merely providing a constitutional minimum.⁴⁴ It is true that when the Court issues a pro-defense Fourth Amendment decision, it is setting common restrictions on the power of both state and federal

made escape by my manfulness, even by my counsel and my wit, and some day I think that this adventure too we shall remember.” *Id.* at 174.

37. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)).

38. YALE KAMISAR, ET AL., *MODERN CRIMINAL PROCEDURE* 18 (12th ed. 2008). States account for roughly 96% of all felony prosecutions and 99% of all misdemeanor prosecutions. *Id.*

39. WAYNE R. LAFAVE ET AL., 1 *CRIM. PRO.* § 2.6(c) (3d ed.).

40. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997).

41. See *Florida v. Riggertink*, 559 U.S. 965 (2010) (Stevens, J., dissenting) (arguing that the Court improperly vacated the judgment, because the case could have been adequately decided on state law).

42. *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting).

43. *Bracy*, 520 U.S. at 904.

44. *Florida v. Powell*, 559 U.S. 50, 59 (2010).

government. It is also true that the Supremacy Clause forbids any state from removing any of these restrictions no matter how flawed it may consider the decision.⁴⁵

But when the U.S. Supreme Court issues a pro-prosecution Fourth Amendment decision, it is not telling a state what it *must* do. The Court is merely telling a state what it is *not compelled* to do.⁴⁶ This is another way of saying that our federal system always permits a state to provide more rights to its people, i.e., place more restrictions on itself, through state law than the minimum required under the Fourth Amendment.⁴⁷ What a state cannot do is provide fewer rights to its people, i.e., place fewer restrictions on itself, than the minimum required under the Fourth Amendment.⁴⁸

In this sense, the *Fitzpatrick* court was half-right. True, it is compelled to accept even what it considers a flawed decision from the U.S. Supreme Court to the extent that Illinois is not free to grant fewer rights than provided. However, a state is *always* free to reject what it considers a flawed U.S. Supreme Court decision that does not grant as many rights to its people as its own state law does.⁴⁹

There is nothing controversial about any of this. It all comes from first-year law school. But even apart from “lockstep,” Illinois courts can seem unclear on what they “must” and “need not” do under the federal system.

Consider the 2008 case from the Fourth District, *People v. Loewenstein*.⁵⁰ The police went to the home of a convicted felon and violated *Miranda v. Arizona* by interrogating him without proper warnings.⁵¹ The defendant made incriminating statements about possession of a handgun.⁵² The next day they interrogated him at the police station.⁵³ After proper *Miranda* warnings and a waiver, he made more incriminating statements.⁵⁴

The defense, viewing this as one continuous incident, moved to suppress both sets of statements.⁵⁵ However, the prosecution cited *Oregon v. Elstad*,⁵⁶ a U.S. Supreme Court case holding that

45. U.S. CONST. art. VI, cl. 2.

46. *Powell*, 559 U.S. at 59.

47. *Id.*

48. *Id.*

49. *Id.*

50. *People v. Loewenstein*, 378 Ill. App. 3d 984 (4th Dist. 2008).

51. *Id.* at 987.

52. *Id.* at 986.

53. *Id.* at 987.

54. *Id.* at 988.

55. *Id.* at 985–86.

56. *See id.* at 989–90 (citing *Oregon v. Elstad*, 470 U.S. 298 (1985) for the proposition that an initial confession obtained in violation of *Miranda* does not necessarily invalidate a legitimate confession obtained after a valid set of warnings).

the two interrogations could be bifurcated and the statements at the police station should be admitted. In deciding this issue, the Fourth District Appellate Court simply held, “we find the facts in this case *require* us to follow *Elstad*.”⁵⁷

This is wrong. An Illinois court is never “required” to follow a pro-prosecution decision of the U.S. Supreme Court.⁵⁸ What is frustrating is that by insisting it has to follow *Elstad*, the court refused to even discuss the crucial question: does it believe this is a fair and just result? The Fourth District never says. This brings to mind Judge Posner’s comment that the formalist judge’s critical capacities atrophy when he sees his job as merely applying other judges’ decisions.⁵⁹

This fetish for insisting that the U.S. Constitution provides the one true answer to an issue has deeper cultural roots. Garrett Epps argues that the way Americans read the Constitution reflects how some Americans read the Bible.⁶⁰

Epps notes that historically there was no single way of interpreting the Bible.⁶¹ The so-called “higher criticism” analyzed the Bible as a human work of literature.⁶² Higher critics studied Bible stories the way they studied non-Christian myths, and refused to accept them as literal truth.⁶³

But Epps notes that a change occurred five centuries ago. “The idea of a single, literal, intended meaning [of the Bible] gained primacy only during the Reformation.”⁶⁴ For Americans, this “general Protestant notion of ‘original intent’” was strengthened when the movement we call “Fundamentalism” adopted the concept that what the Bible says is literally true.⁶⁵ Epps contends, “[s]o influential has Fundamentalism been in this country that these attitudes are now cultural, rather than specifically religious, values. Many Americans profoundly believe that the Framers in Philadelphia made no mistakes or omissions.”⁶⁶

This interpretational rigidity can morph into the “lockstep” view that the U.S. Supreme Court’s understanding of the

57. *Id.* at 993 (emphasis added).

58. See *California v. Ramos*, 463 U.S. 992, 1013–14 (1983) (reasoning that “[i]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires”).

59. REFLECTIONS ON JUDGING, *supra* note 5, at 111.

60. GARRETT EPPS, *AMERICAN EPIC: READING THE U.S. CONSTITUTION* (2013).

61. *Id.* at xiv.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at xv. See also, JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004) (comparing and contrasting interpretations of these documents).

Constitution should conclusively determine state law as well as federal law. Yet a federal system sees no virtue in uniformity *per se*. The U.S. Supreme Court recently addressed this point by noting that the interest in uniformity:

[D]oes not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees. The fundamental interest in federalism that allows individual states to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways—so long as they do not violate the Federal Constitution—is not otherwise limited by any general, undefined federal interest in uniformity. Nonuniformity is, in fact, an unavoidable reality in a federal system of government.⁶⁷

“Lockstep” provides for mindless, formalist uniformity. When a state uses “lockstep” it is actually abdicating its role in our federal system. Lawyers are familiar with Justice Louis Brandeis’s characterization of a state as a “laboratory” in which the government may “try novel social and economic experiments without risk to the rest of the country.”⁶⁸ Interestingly, Timothy Ferris has recently argued that using such as “experiment” and “laboratory” to describe the workings of American government is more than just rough metaphor.⁶⁹

Ferris asserts that there is a symbiotic relationship between science and democracy: “the freedoms protected by liberal democracies are essential to facilitating scientific inquiry, and that democracy itself is an experimental system.”⁷⁰ He quotes the late physicist Richard Feynman on the continuing importance of experimentation in our federal system of democracy:

The government of the United States was developed under the idea that nobody knew how to make a government, or how to govern. The result is to invent a system to govern when you don’t know how. And the way to arrange it is to permit a system, like we have, wherein new ideas can be developed and tried out and thrown away.⁷¹

67. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

68. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

69. TIMOTHY FERRIS, *THE SCIENCE OF LIBERTY* 2–3 (2010).

70. *Id.* at 2.

71. *Id.* at 104–05.

“Lockstep” effectively short-circuits the entire system by accepting a provisional answer from the U.S. Supreme Court as being “Truth” with a capital T. Experiments require thought and energy and imagination. “Lockstep” is an intellectually lazy path pretending no more work is necessary because the “Truth” has already been conclusively established by the United States Supreme Court.

The Federalist Papers abound with references to political science terms. Yet it is significant that the word “experiment” is used 45 times.⁷² When the Illinois Supreme Court allows the U.S. Supreme Court to almost always⁷³ have the final say on search and seizure issues, it is not doing its job. Every time it applies “lockstep,” it turns its back on the legal experimentation the Constitution’s framers expected states to perform in a federal system.

In 1941, Erich Fromm wrote a book contending that people do not see freedom as an unalloyed good⁷⁴ because freedom comes with responsibilities that can seem overwhelming.⁷⁵ Unfortunately, faced with this angst, people may find authoritarianism to be an attractive alternative.⁷⁶ The book is titled *Escape from Freedom*.⁷⁷

On a different level, the dual sovereignty found in our federal system provides state courts with freedom to formulate their own answers to issues such as what is an unreasonable search and seizure, what offends due process, and what violates equal protection. But with freedom comes responsibility. And responsibility can seem overwhelming. One way to deal with this is to refuse to make difficult choices and to rely on ready-made interpretations from the U.S. Supreme Court. But this is not the

72. THE FEDERALISTS NOS. 12, 22, 23, 24, 29, 34, 35, 36, 60, 61, 67, 79, 85 (Alexander Hamilton), 2 (John Jay), 14, 37, 38, 39, 40, 43, 46 (James Madison), 18, 19, 20 (Alexander Hamilton and James Madison), 49, 50, 57, 63 (Alexander Hamilton or James Madison).

73. See *People v. Krueger*, 175 Ill.2d 60, 74–75 (1996) (refusing to adopt the U.S. Supreme Court’s analysis in *Illinois v. Krull*, 480 U.S. 340 (1987) on the Fourth Amendment Exclusionary rule because the Illinois Exclusionary rule goes back to *People v. Brocamp*, 307 Ill. 448 (1923), which predated the adoption of the current Illinois Constitution in 1970).

74. See ERICH FROMM, *ESCAPE FROM FREEDOM* 103 (1st ed. 1941) (finding that “freedom *from* the traditional bonds of medieval society, though giving the individual a new feeling of independence, at the same time made him feel alone and isolated, filled with doubt and anxiety, and drove him into new submission and into a compulsive and irrational activity.” (Emphasis in original)).

75. See *id.* at 141 (stating that “the tendency is to give up the independence of one’s own individual self and to fuse one’s self with somebody or something outside of oneself [sic] in order to acquire strength which the individual self is lacking”).

76. *Id.*

77. *Id.*

way the federal system was intended to work. State courts must resist the temptation to “escape from freedom.” The ongoing American experiment in federalism deserves nothing less.