

Northern Illinois University Law Review

Volume 36 | Issue 1

Article 7

8-1-2015

Vol. 36, no. 1, Fall 2015: Table of Contents

Northern Illinois University Law Review

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Recommended Citation

Northern Illinois University Law Review (2015) "Vol. 36, no. 1, Fall 2015: Table of Contents," *Northern Illinois University Law Review*. Vol. 36: Iss. 1, Article 7.

Available at: <https://huskiecommons.lib.niu.edu/niulr/vol36/iss1/7>

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Northern Illinois University Law Review

Volume 36

Fall 2015

Number 1

ARTICLES

“U Can’t Touch This” Fog Line: the Improper Use of a Fog Line Violation as a Pretext for Initiating an Unlawful Fourth Amendment Search and Seizure

Harvey Gee 1

Fog line litigation is happening all across the country. For years, law enforcement officers across the country have been initiating traffic stops of cars on our roadways, based on allegations that the drivers crossed onto a fog line in violation of a state ordinance prohibiting such conduct. A fog line is the white line that divides the shoulder from the road. While the legislative history and language of these fog line statutes reflect their public safety purpose, the police are relying on statutes as an excuse to pull over cars which may have only momentarily crossed the fog line and where the drivers have done nothing else unlawful. This common practice affords police tremendous leeway to conduct pretextual stops, unreasonably detain suspects, and unlawfully search vehicles. More often than not, in fog line cases, even if the court holds that the defendant did not violate a state traffic law, the government will nevertheless argue that the traffic stop was valid because the officer’s mistake of law was reasonable, and there was reasonable suspicion or probable cause to initiate the traffic stop. This Essay explores the mistakes of law committed by police officers during traffic stops, and argues that the police should not be allowed to use alleged fog line violations as a pretext for initiating a traffic stop if it cannot be supported by reasonable suspicion or probable cause. Such an unreasonable stop violates the Fourth Amendment to the U.S. Constitution.

Illinois Lawyer Investigations of Current Client Concerns

Jeffrey A. Parness 32

This Article examines the various issues surrounding attorney-client communication privileges, with a focus on intra law firm communication protections and how current trends in case law will impact Illinois law.

Just Because You Can, Doesn't Mean You Should: Equal Protection, Free Speech, and Religious Worship

Timothy J. Tracey..... 58

Surveys suggest that about twelve percent of Evangelical Christian churches assemble for worship each week in local school buildings. Most of these churches meet Sunday after Sunday without trouble. However, in the last five years, a handful of school districts have banned Christian churches from using their facilities for worship services. Most notoriously, New York City school officials adopted a policy denying access to anyone seeking to use school space as a "house of worship." Some of the churches faced with these bans have responded with legal action. They and their attorneys maintain that these worship bans violate the First Amendment doctrine of equal access—the notion that once the government opens its facilities, it must extend access to religious and nonreligious groups alike.

But this argument is shortsighted. Equal access is rooted in a principle of equal protection—that the speech proposed by the religious group is "similarly situated" to the nonreligious speech already permitted by the government. That means for churches to leverage equal access they must analogize their weekly worship services to secular speech activities, like pep rallies and political speeches. Churches certainly can stretch religious worship to make these comparisons, but, in the process, they strip worship of its distinct spiritual character. The Swiss theologian, Karl Barth, described Christian worship as "the most momentous, the most urgent, the most glorious action that can take place in human life." No matter how exciting the football game or how compelling the political candidate, secular expression will never rise to the level of "momentous," "urgent," and "glorious." For churches to argue otherwise degrades religious worship.

A far better solution is for churches to challenge worship bans under the Free Exercise Clause. The Free Exercise Clause, by its very nature, recognizes religious worship as special—a sui generis form of expression. The clause, thus, imposes no requirement on churches to equate worship with any other type of expression. Churches can seek to vindicate their rights while at the same time preserving the unique character of worship.

"That Justice Shall Be Done"—Constitutional Requirements, Ethical Rules, and the Professional Ideal of Federal Prosecution

Charles R. Wilson..... 111

*Seventy-five years ago, then-Attorney General and subsequent Supreme Court Justice Robert H. Jackson delivered a speech entitled *The Federal Prosecutor*. This Article revisits Jackson's speech to extract a few insights about ethics and professional responsibility, specifically with regard to prosecutorial discretion. Beyond the constitutional and ethical obligations involved in representing the United States in court, federal prosecutors must continually aspire to a professional ideal derived from their duty to seek and serve justice. This Article submits that this professional ideal—as envisioned by Jackson and alluded to by the Supreme Court—is also applicable to every lawyer as he or she exercises discretion in the day-to-day practice of law.*

NOTE AND COMMENT

Wrestling With the Ecclesiastical Abstention Doctrine: How *Puskar v. Krco* Further Complicated the Heavily Litigated History of the Serbian Orthodox Church in America

Dan Knudsen 139

The ecclesiastical abstention doctrine is a long-held constitutional principle that prohibits a court from resolving a dispute that is inherently religious in nature. The ecclesiastical abstention doctrine's practical application requires a court to either abstain from fact-finding issues that are based on religious doctrine or church governance, or defer to the decisions handed down by the church leadership or a hierarchical authority. An implicit concept within the ecclesiastical abstention doctrine is the necessity for there to be an interchurch dispute—namely, one that is confined to a local church body or a hierarchically structured religious organization. Since not every dispute within a church is fundamentally religious, courts are not precluded from resolving certain church disputes using neutral principles of law. A neutral property or contract issue may not necessarily impermissibly intrude on the First Amendment.

*This Note examines the Illinois Second District Appellate Court's confrontation with the ecclesiastical abstention doctrine in the insightful case of *Puskar v. Krco*. The majority and dissenting opinions in *Puskar* represent the difficulty of adjudicating disagreements when it is unclear whether a religious question is inescapably intertwined or merely peripheral. *Puskar* would have been legally insignificant if the outcome turned solely on whether an appointed Serbian Orthodox Church bishop owed a duty of loyalty to the higher appointing authority or the local diocese. However, before duty of loyalty could be decided, the local diocese, a former affiliate of the Serbian Church, contested that it had officially reunited with the hierarchical Serbian Orthodox Church to become re-affiliated. Reunification was contested because the local diocese and the Serbian Orthodox Church disagreed whether a contract they had enacted to guide their transition to reunify remained in effect. Nearly lost in the conflict was the bishop whom the local diocese had allowed the Serbian Orthodox Church to appoint over them, even though he was a focal point of the lawsuit. The bishop had been appointed in accordance with a provision contained in the transitional contract, and the local diocese did not dispute the legitimacy of the appointment, even though the appointment occurred at a time it would later conclude must have fallen after the transitional contract had expired.*

*The majority in *Puskar* held that the ecclesiastical abstention doctrine did not apply because the transitional contract had expired, and thus the former affiliate and the Serbian Orthodox Church were separate and distinct organizations. The dissent in *Puskar* would have applied the ecclesiastical abstention doctrine due to the inherently religious questions the court faced. The dissent disagreed with the majority's matter of fact holding that the*

transitional contract had expired, and instead focused on what appeared to be sufficient evidence that the former affiliate and the Serbian Orthodox Church had either reunified or remained under the transitional contract. This Note analyzes Puskar in comparison to other Illinois appellate court cases, and concludes that Puskar’s dissenting position was more correct to reach its determination.

Gone Fishing: Angling for an Answer to Asian Carp Migration After the Seventh Circuit’s Refusal to Allow Hydrological Separation

Matthew A. Kratky.....177

Asian carp are the latest addition to an extensive list of invasive species that pollutes American waterways. But unlike other prominent invasive species, Asian carp were intentionally brought into the United States to control algae growth in Southern aquaculture ponds. Torrential flooding provided an avenue for these fish to escape into the Mississippi River, and since then, the Asian Carp have migrated northward into the Illinois River and the Chicago Area Waterway System. Along the way, their incessant hunger and prolific breeding habits have enabled Asian carp to monopolize food sources to the detriment of native fish populations. Asian carp have now reached the doorsteps of Lake Michigan, and while methods such as electric fences and the application of poison have temporarily kept the fish out of Lake Michigan, the expense and unreliable nature of these measures will prevent their prolonged success. Once Asian carp breach Lake Michigan, these fish will have a limitless conduit to enter the rest of the Great Lakes.

This Comment discusses the judicial and legislative actions taken in response to the looming threat Asian carp pose to the Great Lakes. Specifically, this Comment addresses how the recent or proposed actions taken to stop the Asian carp migration are either infeasible or ineffective. This Comment argues that the most advocated solution, hydrological separation, which involves permanently separating Lake Michigan from the Chicago Area Waterway System and the Chicago Sanitary and Ship Canal, would impose too great a burden on commercial navigability to be a viable option. Despite the Seventh Circuit’s refusal to grant a permanent injunction requiring hydrological separation in Michigan v. U.S. Army Corps of Engineers, state and federal agencies tasked with devising solutions to keep Asian carp out of the Great Lakes remain fixated on hydrological separation. Furthermore, this Comment will argue that besides from being impractical, hydrological separation conflicts with the U.S. Army Corps of Engineers’ statutory duties to maintain navigable waterways, and without legislative action, these waterways cannot be separated. This Comment argues that the recently enacted Asian Carp Prevention and Control Act, as is, fails to either prevent or control Asian carp from infesting Lake Michigan. This Comment then proposes adopting a program currently used to combat another invasive species, the pike minnow, in which fishermen are nominally paid for catching

and removing Asian carp before they have an opportunity to enter Lake Michigan.