Exclusive Judicial Power to Regulate Appellate Practice and Procedure - People v. Cox

William D. Kelly

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol30/iss4/9

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
EXCLUSIVE JUDICIAL POWER TO REGULATE
APPELLATE PRACTICE AND PROCEDURE—

PEOPLE V. COX

Due to the lack of uniformity in criminal sentences, the indeterminate sentencing process had been considered flawed by both courts and commentators. In a total revision of its Unified Code of Corrections, the Illinois

1. In Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958), Judge Stewart noted:
   Every year numerous appeals come before this court which accentuate a seriously urgent problem—the disparity of sentences in federal criminal cases. The present appeal is illustrative. Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. Whether a sentence is fair cannot, of course, be gauged simply by comparing it with the punishment imposed upon others for similar offenses. But that test, though imperfect, is hardly irrelevant. It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every stage of the proceedings against him should have so neglected this most important dimension of fundamental justice.


2. See M. FRANKEL, CRIMINAL SENTENCES 86-102 (1972) [hereinafter cited as FRANKEL]; J. KRESS, PRESCRIPTION FOR JUSTICE 1-8 (1980) [hereinafter cited as KRESS]. Frankel is especially critical in his discussion of the indeterminate sentencing system.

   The case for the indeterminate sentence rests, initially, upon a laudable concern for each unique individual, coupled with a frequently baseless assumption that we are able effectively to understand and uniquely to “treat” the individual. The offender is “sick,” runs the humane thought, and/or dangerous. He needs to be helped and “cured.” Nobody, certainly not the sentencing judge, can know when he will be well and no more dangerous than the masses of us who are lucky enough not to have been convicted. Hence, those charged with “treatment” must be left to decide the time for release.

   This “rehabilitative ideal,” . . . is genetically flawed and malformed. Its first dubious is the fallacious—or, at least, far too broad—assumption that criminals are “sick” in some way that calls for “treatment.” Of course, if you say blandly that nobody commits a serious crime unless he is “sick,” the proposition is a useless tautology.

FRANKEL, supra, at 89.

3. ILL. REV. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (1979). The purposes of the Illinois Unified Code of Corrections are to:

   (a) prescribe sanctions proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders;
   (b) forbid and prevent the commission of offenses;
   (c) prevent arbitrary or oppressive treatment of persons adjudicated offenders or delinquents; and
   (d) restore offenders to useful citizenship.

Id. § 1001-1-2.
General Assembly adopted determinate sentencing\(^4\) in 1977.\(^5\) The abolition of indeterminate sentencing\(^6\) reflected a significant change in sentencing philosophy\(^7\) designed to end sentencing disparity.\(^6\)

4. Under a determinate sentencing procedure, the sentencing judge incarcerates the defendant for a specific number of years within a prescribed statutory range. The time of the defendant's release is not determined by a parole board; instead, prisoners must serve their full sentences, which can be reduced only by accumulation of good conduct. See Bagley, Why Illinois Adopted Determinate Sentencing, 62 JUDICATURE 390, 393 (1979) [hereinafter cited as Bagley]. For discussion of California's determinate sentencing code, see Cassou & Taugher, Determinate Sentencing in California: The New Numbers Game, 9 PAC. L.J. 5 (1978) [hereinafter cited as Cassou & Taugher]. A comparison of determinate sentencing laws in Illinois, Maine, California, and Indiana is contained in Lagoy, Hussey & Kramer, A Comparative Assessment of Determinate Sentencing in the Four Pioneer States, 24 CRIME & DELINQ. 385 (1978).


6. Under an indeterminate sentencing procedure, the trial judge normally is given wide discretion in the imposition of sentences. Typically, a judge imposes a minimum and a maximum sentence, and then a parole board determines when the prisoner is ready to be released. See Dershowitz, Indeterminate Confinement: Letting the Therapy Fit the Harm, 123 U. PA. L. REV. 297, 298-99 (1974) [hereinafter cited as Dershowitz]. See generally Cassou & Taugher, supra note 4, at 6-9; Lindsey, Historical Sketch of the Indeterminate Sentence and Parole Board, 16 J. AM. CRIM. L. & CRIMINOLOGY 9 (1925).

7. Commentators generally identify four purposes for imposing sanctions upon the criminally convicted: rehabilitation, deterrence, incapacitation, and punishment. See generally McKay, It's Time to Rehabilitate the Sentencing Process, 60 JUDICATURE 223, 225-26 (1976); Orland, From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 HOFSTRA L. REV. 29, 30-35 (1978). The 1971 Illinois Code of Corrections and its indeterminate sentencing provisions reflected the philosophy that correctional facilities should strive to rehabilitate the criminal. A subcommittee of the Illinois House Judiciary II Committee, however, concluded that under indeterminate sentencing, rehabilitation superseded the other three sentencing purposes. The subcommittee concluded that a determinate sentencing system would bring the four purposes into a more acceptable balance. See Bagley, supra note 4, at 391-92.

The indeterminate sentencing system has been attacked as unconstitutional in a number of courts. Most of these challenges have been rejected. See, e.g., Ughbanks v. Armstrong, 208 U.S. 481 (1908) (Michigan indeterminate sentencing law did not violate sixth, eighth, and fourteenth amendments to the United States Constitution); Dreyer v. Illinois, 187 U.S. 71 (1902) (United States Constitution not violated by state's decision to allocate sentencing authority to parole board); People v. Wade, 266 Cal. App. 2d 918, 72 Cal. Rptr. 538 (1968) (indeterminate sentence not cruel and unusual punishment due to its uncertainty), cert. denied, 395 U.S. 913 (1969); State v. Peters, 43 Ohio St. 629, 4 N.E. 81 (1885) (legislative sentencing act granting governor power to pardon not a violation of separation of powers). But see In re Lee, 177 Cal. 690, 171 P. 958 (1918) (indeterminate sentencing system constitutional but was ex post facto as applied to defendant).

For discussion of these constitutional attacks and other assaults upon indeterminate sentences, see Frankel, supra note 2, at 86-102; S. Rubin, THE LAW OF CRIMINAL CORRECTION 157-69 (2d ed. 1973); Dershowitz, supra note 6, at 319-39. Illinois' 1977 revision of its Code of Corrections was a result of this criticism of indeterminate sentences and the shift from rehabilitation as the primary goal of corrections. The new Code represents a "move towards a more punitive and deterrent-oriented sentencing philosophy." Bagley, supra note 4, at 391.

8. Disparity in sentences is generally examined by comparing the different jurisdictions' average length of prison sentences. The average federal sentence in 1974 was 42.2 months. In the Southern District of Georgia the average sentence was 18.4 months, while in the Western
To promote uniformity in sentencing, the General Assembly deemed it necessary to broaden the authority of appellate courts to review the new determinate sentences. Section 1005-5-4.1 of the revised Code of Corrections states that there is a rebuttable presumption of the propriety of a sentence imposed by a trial judge. If the appellate court should determine that the sentence is improper, however, that section authorizes an appellate court to enter any sentence that the trial judge could have entered. The legislature intended that the appellate decisions forthcoming under this section would guide trial judges to ensure that like offenders would be given similar sentences.

Recently, however, the Illinois Supreme Court foreclosed the legislature's attempt to reduce sentence disparity. In People v. Cox, the court invalidated section 1005-5-4.1 holding that the section directly conflicted with decisions interpreting one of the court's rules governing appellate review. Because the doctrine of separation of powers provides the supreme court with "exclusive" power to regulate matters of appellate practice and procedure, the court deemed section 1005-5-4.1 "null and void."

This Note discusses Cox in relation to Illinois' experience with judicial rules and the extent of the court's authority to adopt such rules. Apart from

---

9. See Bagley, supra note 4, at 397.
10. ILL. REV. STAT. ch. 38, § 1005-5-4.1 (1979), states:
   Appeal—Modification of Sentence. The defendant has the right of appeal in all cases from sentences entered on conviction of murder or any other Class of felony, however, in all such appeals there is a rebuttable presumption that the sentence imposed by the trial judge is proper. The court to which such appeal is properly taken is authorized to modify the sentence and enter any sentence that the trial judge could have entered, including increasing or decreasing the sentence or entering an alternative sentence to a prison term. However, the appellate court may increase a sentence only in instances where a defendant has filed a notice of appeal and raises the issue of the sentence on appeal.

Id. (emphasis added).
11. Id.
12. 82 Ill. 2d 268, 412 N.E.2d 541 (1980).
13. Id. at 275, 412 N.E.2d at 545. The rule involved was Supreme Court Rule 615(b)(4) which provides that the reviewing court may reduce the punishment imposed by the trial court.
14. The Illinois Constitution states that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1.
15. 82 Ill. 2d at 276, 412 N.E.2d at 545.
the Cox decision, alternative methods to limit the court's broad authority to regulate judicial procedure are explored. Finally, the decision's impact is analyzed in light of the supreme court's unwillingness to abandon previously adopted judicial rules.

**BACKGROUND**

***Sources of Judicial Rule-Making Authority***

Although court-adopted rules were common in England," the control over all but the administrative aspects of court procedure was usually a legislative function in the United States." Legislative control over procedure was the settled norm. A number of commentators, however, have criticized the legislature's performance in this role as ineffective. After Congress granted rule-making authority to the courts through the Federal Rules of Civil Procedure in 1938 a number of state statutes specifically delegated rule-making


17. See, e.g., In re Florida State Bar Ass'n, 145 Fla. 223, 199 So. 57 (1940) (administration of the bar); In re Day, 181 Ill. 73, 54 N.E. 646 (1899) (administration of the bar); Little v. State, 90 Ind. 338 (1883) (matters of contempt); Brown v. Mossop, 139 Ohio St. 24, 37 N.E.2d 598 (1941) (regulation of court business).


19. It is generally agreed that procedural rules were under the immediate supervision of state legislatures during the nineteenth century. See Kay, The Rule-Making Authority and Separation of Powers in Connecticut, 8 Conn. L. Rev. 1, 27 (1975) [hereinafter cited as Kay]. There has been some disagreement as to the balance of power between the judicial and legislative branches. Compare Sunderland, The Exercise of the Rule-Making Power, 12 A.B.A. J. 548, 549 (1926) with Pound, supra note 16, at 600.

20. The legislatures were criticized for lacking knowledge and expertise, allowing outside political interests to interfere, and constructing complicated codes which were difficult to amend. Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule-Making, 55 Mich. L. Rev. 623 (1957) [hereinafter cited as Joiner & Miller]. See Pound, supra note 16, at 601-02; Pound, Regulation of Judicial Procedure by Rules of Court, 10 Ill. L. Rev. 163 (1916); Editorial Notes, All Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 Ill. L. Rev. 276 (1928).


The measure of success of the Federal Rules of Civil Procedure was expressed by Chief Judge Clark of the United States Court of Appeals for the Second Circuit.

The measure of success which court rule-making has thus achieved is attested by the general satisfaction of judges, practitioners, and scholars with the federal system and its increasing adoption in the states. But perhaps the truest indication of all are in the attitude of Congress. Prior to the rules, the difficulties of the Conformity Act and the constant amendments of procedure by the legislature were all too well known; they were perhaps the most prominent argument for reform. Since the advent of the rules the result has been quite phenomenal. Notwithstanding many proposals, Con-
authority to the courts. Because of the doubtful validity of delegating this
traditional legislative function to the courts, some states provided for judi-
cial rule-making authority in their constitutions.

In contrast, development of the judicial rule-making authority in Illinois
has not been as well defined. Neither a statute nor any constitutional provi-
sion specifically granted such power to the judiciary. Despite the absence of
a specific grant of authority, the Illinois Supreme Court, on two occasions in
1859, recognized that every court of record has an inherent power to estab-
lish rules of practice. The principle of separation of powers served as the
basis for the court’s role in regulating procedure. Recognizing this concept,
the supreme court frequently upheld its inherent judicial rule-making au-
thority.

The court’s control over its procedure, however, was not deemed exclu-
sive, but merely concurrent with legislative authority. If a statute and a
judicial rule related to identical procedural matters, the statute was upheld

gress has withstood all attempts to obtain passage of procedural statutes of any
consequences.

Clark, Two Decades of the Federal Civil Rules, 58 Colum. L. Rev. 435, 443 (1958) (footnotes
omitted).


23. See State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) (statute indicated legislative attempt
to relinquish rule-making power to court); In re Constitutionality of Statute Empowering
Supreme Court to Promulgate Rules Regulating Pleading, Practice, and Procedure in Judicial
Proceedings, 204 Wis. 501, 236 N.W. 717 (1931) (no constitutional objection to legislature’s
delegation of power to regulate judicial procedure to courts).

24. See, e.g., Alaska Const. art. IV, § 15; Fla. Const. art. V, § 3; Md. Const. art. IV,
§ 18; Mo. Const. art. V, § 5; Mont. Const. art. VII, § 2 (3); S.C. Const. art. V, § 4; S.D.

25. In 1933, the Illinois legislature granted to the supreme court the authority to enact rules
version at Ill. Rev. Stat. ch. 110, § 2 (1979)). The supreme court, however, when examining its
authority to enact rules of procedure, usually describes it as an inherent power. See, e.g., Biggs v.
Spader, 411 Ill. 42, 44, 103 N.E.2d 104, 106 (court has inherent and statutory power to
prescribe rules of procedure), cert. denied. 343 U.S. 956 (1952); People v. Cowdrey, 360 Ill. 633,
634, 196 N.E. 838, 839 (1935) (court has inherent power to enact rules of procedure independent
of statutory authority).

26. See Owens v. Ranstead, 22 Ill. 161, 173 (1859); Holloway v. Freeman, 22 Ill. 197, 201
(1859). In Owens, the court stated that “every court has an inherent power to prescribe [rules],
being only limited to their reasonableness, and conformity to constitutional or legislative enact-
ments. Without this power it would be impossible to dispatch business—delays would be
interminable, and that is quite frequently, the object of one of the parties.” 22 Ill. at 173.

903, 907-08.

28. See, e.g., Feldott v. Featherstone, 290 Ill. 485, 125 N.E. 361 (1919) (rule requiring two
day notice of any motion to opposite party upheld); Illinois Cent. R.R. v. Haskins, 115 Ill. 300, 2
N.E. 654 (1885) (rule requiring jury instruction to be presented by commencement of plaintiff’s
closing argument recognized); Wallbaum v. Haskin, 49 Ill. 313 (1868) (rule permitting plaintiff
to bring case to trial out of order is within power of court to adopt).
and the rule struck down. Such decisions were not unusual in Illinois because the legislature had been regulating practice and procedure since the state's admission to the union.

The strongest judicial support for legislative supremacy over practice and procedure was embodied in People v. Kelly, which identified a constitutional grant of authority over procedure to the legislature. Citing section 22 of article IV and section 29 of article V of the Constitution of 1870, the Kelly court reasoned that the constitution implicitly provided a legislative power to regulate procedure.

Two years after Kelly, however, the Illinois Supreme Court diluted this authority. In People v. Callopy, the court concluded that because the power to regulate practice and procedure was a judicial function at common law, the constitution, by reference, must have granted that power to the...
The Callopy opinion has been said to intimate "that the power to regulate procedure more closely approaches one which is 'peculiarly and intrinsically' judicial rather than one which is 'essentially' judicial." Although Callopy did not declare an exclusive judicial power over procedure, it represented a shift in the court's attitude concerning the rule-making authority.

In 1952 the supreme court more explicitly expanded the separation of powers doctrine beyond the limitations of concurrent authority. In Agran v. Checker Taxi Co. the court struck down a statute that restricted the power of courts to dismiss an ex parte action for lack of prosecution. The legislature was expressly prohibited from exercising any power that was judicial in nature. Thus, because the power to render a judgment is a judicial act, the statute purporting to limit that authority was declared unconstitutional. Though recognizing that the constitution does not define "judicial powers," the Agran court concluded that its duty was "to protect its judicial powers from encroachment by legislative enactments" in order to "preserve an independent judicial department."  

Essentially, the Agran court reasoned that the separation of powers doctrine conferred upon the judiciary exclusive power over those areas which are "inherently judicial" without ever defining "judicial powers." Although no court rule was involved in Agran, the decision provided the basis for the subsequent determination that judicial rules supersede legislative enactments on identical procedural points. Implicitly, Agran marked a complete departure from those cases maintaining that statutes regulating procedures supersede judicial rules. The supreme court has applied the Agran decision to invalidate any legislation it considered to be an encroachment upon its judicial powers.

---

37. Id. at 20-22, 192 N.E. at 638-39.
40. Id. at 150, 105 N.E.2d at 715.
41. Id.
42. Id. at 149, 105 N.E.2d at 715.
43. See Restraint, supra note 38, at 389.
44. See note 29 and accompanying text supra.
45. See, e.g., People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977) (statute regulating voir dire examination of jurors held void); People ex rel. Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 495 (1968) (statute regulating admission to bail pending appeal held unconstitutional). But see Strukoff v. Strukoff, 76 Ill. 2d 53, 389 N.E.2d 1170 (1979) (statutory procedure in dissolution of marriage proceedings was within legislative power); People ex rel. County Collector v. Jeri, Ltd., 40 Ill. 2d 293, 239 N.E.2d 777 (1968) (statutory procedure relating to the issuance of tax deeds did not infringe upon power of judiciary).
Limitation upon Judicial Rule-Making

The source of the judicial rule-making power has been grounded in constitutions, statutes, and the inherent powers of courts. Regardless of their sources, these powers have been subject to one major limitation. Court rules derived from the common law, a constitution, or a statute must further, rather than contravene, substantive law. Consequently, a rule that conflicts with substantive law is void.

46. See note 24 supra.
47. See note 22 supra.
48. E.g., Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952) (statute restricting court to render judgment of dismissal held invalid as infringing upon inherent power to render decisions); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972) (inherent power of court to provide for an exception to one of its rules); Newell v. State, 308 So. 2d 71 (Miss. 1975) (inherent power of court to promulgate rules of procedure emanates from constitutional separation of powers); State v. Fields, 85 Wash. 2d 126, 530 P.2d 284 (1975) (supreme court has inherent power to govern court procedure apart from statutory authority).
49. Three other limitations are beyond the scope of this Note. First, cases holding that the court rules must be subordinate to rules of a superior court. See, e.g., Los Angeles Brush Corp. v. James, 272 U.S. 701 (1927) (court could issue writ of mandamus if it appeared that lower court adopted a procedure at variance with their rules); In re Nuotila, 360 Mich. 256, 103 N.W.2d 638 (1960) (rule of probate court held invalid as inconsistent with rule of state supreme court).
Second, cases indicating that rules of court can neither extend nor abridge court jurisdiction. See, e.g., United States v. Sherwood, 312 U.S. 584 (1941) (authority to prescribe rules of practice does not bestow authority to enlarge or diminish jurisdiction of federal courts); Helbush v. Helbush, 209 Cal. 758, 290 P. 18 (1930) (violation of a rule does not affect jurisdiction of the court to enter final decree); People v. Graber, 397 Ill. 522, 74 N.E.2d 865 (1947) (order requiring out-of-state party to submit to deposition was invalid because court lacked jurisdiction over party); Bay Jewelry Co. v. Darling, 251 Mich. 157, 231 N.W. 101 (1930) (rule requiring that copy of written instrument sued upon be served upon defendant does not affect jurisdiction over that defendant).
Third, cases holding that rules must be reasonable and reasonably enforced. See, e.g., Eley v. Gamble, 75 F.2d 171 (4th Cir. 1935) (voiding a rule establishing unreasonable departure from state practice); People v. Jennings, 312 Ill. 606, 144 N.E. 316 (1924) (rule so strictly enforced that it prejudiced defendant); Anderson v. Industrial Comm’n, 135 Ohio St. 77, 19 N.E.2d 509 (1939) (rule requiring appellate briefs to be filed within 50 days held reasonable).
50. See, e.g., Wyker v. Willingham, 55 F. Supp. 105 (N.D. Ala. 1944) (court rule could not modify or enlarge statutory right to bring suit for refund of estate taxes); Porter v. State, 234 Ala. 11, 174 So. 311 (1937) (statutory rule of procedure regarding written criminal charges could not be altered by rule of court); Rozier v. Williams, 92 Ill. 187 (1879) (court rule cannot alter the time prescribed by statute to file an appeal bond); Schratt v. Accurate Instrument Co., 314 Ill. App. 96, 40 N.E.2d 823 (1st Dist. 1942) (court rules must be in furtherance and not in contravention of the law recognized); Kohr v. State, 40 Md. App. 92, 385 A.2d 1242 (1978) (court rule-making power must be exercised within confines of federal and state constitutions); Adcox v. Southern Ry., 182 Tenn. 6, 184 S.W.2d 37 (1944) (federal court rule concerning involuntary dismissal cannot abrogate or modify statutory right of litigant to bring a new action).
51. See, e.g., Mulhens v. Higgins, 55 F. Supp. 42 (S.D.N.Y. 1943) (court rule cannot authorize maintenance of suit against United States in contravention of statute); State ex rel. Conway v. Superior Ct., 60 Ariz. 69, 131 P.2d 983 (1942) (legislative requirement for execution of death sentence upheld over conflicting court rule); Danoff v. Larson, 368 Ill. 519, 15 N.E.2d 290 (1938) (court may only regulate service of summons within guidelines provided for by statute); Babcock v. Kurlandsky, 308 Ill. App. 297, 31 N.E.2d 318 (1st Dist. 1941) (rights of...
The Illinois Supreme Court expressed its approval of such a limitation in *Diversey Liquidating Corp. v. Nuenkirchen*. The *Nuenkirchen* court invalidated a local circuit rule that allowed a trial court to grant summary judgment upon a plaintiff's claim that the defense was not made in good faith. The court reasoned that the rule violated the defendant's right to a trial by jury because it is the jury's function to decide disputed issues of fact.

The supreme court, however, has been reluctant to apply the *Nuenkirchen* rationale to strike down one of its own rules. In *People v. Lobb*, for example, the court upheld one of its rules providing that the trial judge conduct the voir dire examination of jurors. The defendant argued that the rule violated his right to a jury trial as guaranteed by the Illinois Constitution. The *Lobb* court rejected this argument and concluded that the empanelling of juries is within the control of the courts, subject only to the requirement that the court secure an impartial jury.

Since the *Agran* decision, the Illinois Supreme Court has consistently struck down procedural statutes whenever they conflict with a court rule. While recognizing that the legislature retains some authority over judicial procedure, the court has not clearly identified the extent of this overlapping authority over procedural matters. This issue of concurrent authority con-

---

parts granted by law cannot be infringed by court rule); Shannon v. Ottawa Circuit Judge, 245 Mich. 220, 222 N.W. 168 (1928) (court rule depriving litigant's substantive right to make contingent fee contract held invalid).

52. 370 Ill. 523, 19 N.E.2d 363 (1939).

53. In *Nuenkirchen*, a contract case, the defendant had set up a defense of fraud and alteration, verified by affidavit. The plaintiff filed affidavits alleging that the defense had not been made in good faith. Pursuant to a court rule, the trial court granted summary judgment based upon plaintiff's affidavits. *Id.* at 525, 19 N.E.2d at 364.

54. *Id.* at 530, 19 N.E.2d at 365.

55. 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

56. *Id.* at 302-03, 161 N.E.2d at 334.

57. Illinois Supreme Court Rule 24-1 provided:

The judge shall initiate the voir dire examination of jurors in civil and criminal causes by identifying the parties and their respective counsel and he shall briefly outline the nature of the case. The judge shall then put to the jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the case on trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination, but shall not directly or indirectly examine jurors concerning matters of law or instructions.


58. 17 Ill. 2d at 298, 161 N.E.2d at 331. The Illinois Constitution of 1870 provided that "[t]he right of trial by jury as heretofore enjoyed, shall remain inviolate." ILL. CONST. OF 1870 art. II, § 5.

59. 17 Ill. 2d at 301, 161 N.E.2d at 333.

60. See note 45 and accompanying text supra.

61. The Illinois Supreme Court has observed that the General Assembly "has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary." *People v. Callopy*, 358 Ill. 11, 15, 192 N.E. 634, 636 (1934) (emphasis added).

62. The court does not explicitly state when it has exclusive power over procedure or when its authority is concurrent with that of the legislature. See notes 29-45 and accompanying text supra.
fronted the supreme court in *People v. Cox* which involved a conflicting statute and court rule. The court's shallow discussion of the coexisting judicial and legislative authority over judicial procedure evidences the need for reform.

**THE COX DECISION**

Craig Lee Cox and Sharon L. Stevens were both sentenced to two-year prison terms. Cox had been convicted in a bench trial of reckless homicide. Stevens, on the other hand, pled guilty to possession of a controlled substance pursuant to a plea agreement. When Cox and Stevens appealed their sentences, the Illinois Appellate Court for the Fourth District consolidated their cases, ultimately reducing their sentences to terms of probation.

As authority for the sentence reduction, the appellate court applied section 1005-5.3 of the Unified Code of Corrections. The former standard was embodied in Illinois Supreme Court Rule 615(b)(4), which grants appellate courts the authority to review sentences, and *People v. Perruquet*, which

---

63. 82 Ill. 2d at 270-71, 412 N.E.2d at 543. The trial took place in the Circuit Court of Macon County. *Id.* at 271, 412 N.E.2d at 543.

64. ILL. REV. STAT. ch. 38, § 9-3 (1979). While driving around in a parking lot, Cox struck a group of children. One child died as a result of injuries received from the accident. 82 Ill. 2d at 276, 412 N.E.2d at 546.

65. ILL. REV. STAT. ch. 56 1/2, § 1402(b) (1979). Stevens had in her possession a drug called phendimetrazine. 82 Ill. 2d at 271, 412 N.E.2d at 543.

66. Defendant Stevens was charged both with possession of a controlled substance under ILL. REV. STAT. ch. 56 1/2, § 1402(b) (1979), and with deceptive practices under ILL. REV. STAT. ch. 38, § 17-1 (1979). The grounds for the latter charge was that she had issued a check for $28.75 knowing that insufficient funds were in her account. She pled guilty to the charge of possession of a controlled substance and as a result of the plea agreement the deceptive practice charge was dismissed. 82 Ill. 2d at 271, 412 N.E.2d at 543.


68. Cox's sentence was reduced to 30 months probation with a conditional three-month imprisonment term. *Id.* at 71, 396 N.E.2d at 69. Stevens, on the other hand, was given a two-year term of probation by the appellate court. *Id.* at 74, 396 N.E.2d at 71.

69. See note 10 supra.

70. See note 13 supra.

71. 68 Ill. 2d 149, 368 N.E.2d 882 (1977). In *Perruquet*, the defendant was convicted of burglary and sentenced to a minimum of one and a maximum of 20 years imprisonment. The appellate court reduced the defendant's sentence to a minimum of one and a maximum of five years. *People v. Perruquet*, 41 Ill. App. 3d 543, 355 N.E.2d 112 (5th Dist. 1976). In reversing the judgment of the appellate court, the Illinois Supreme Court stated:

[T]he trial court, after consideration of the proper factors and full compliance with statutory requirements, reached a reasoned decision that a sentence of from 1 to 20 years would serve the best interests of the defendant in providing an opportunity and incentive for rehabilitation, and would also protect the public should attempted rehabilitation of the defendant once again fail. . . . It is not our function to serve as a sentencing court, and we will not substitute our judgment for that of the trial court merely because we feel that we would have imposed a different sentence had that function been delegated to us. In light of the defendant's history of criminal activity,
interpreted Rule 615(b)(4) to permit sentence alteration only upon a showing of an abuse of judicial discretion.\textsuperscript{72} The appellate court, however, reasoned that section 1005-5-4.1 represented a legislative effort to expand the scope of appellate review, observing that the section did not contain the abuse of discretion language but rather characterized the scope of review as a rebuttable presumption.\textsuperscript{73} Applying this section, the court concluded that because the General Assembly broadened the contents of pre-sentence reports,\textsuperscript{74} enumerated specific criteria for the allotment of punishment,\textsuperscript{75} and required the sentencing judge to explain the reasons for his or her sentencing decision,\textsuperscript{76} the legislature clearly wanted to reduce the amount of judicial discretion in the sentencing process.\textsuperscript{77} Dissatisfied with the appellate court’s decision, the State obtained leave to appeal to the Illinois Supreme Court.\textsuperscript{78}

The supreme court agreed with the appellate court’s conclusion that the legislature had intended to expand the scope of appellate review beyond the abuse of discretion standard articulated in \textit{Perruquet}.\textsuperscript{79} Nonetheless, the court held that under the separation of powers doctrine, the General Assembly lacked the authority to enact section 1005-5-4.1.\textsuperscript{80} Thus, the court vacated the appellate court’s decision.

The \textit{Cox} court relied on the principle that the separation of powers doctrine prohibits the legislature from exercising any power that is judicial in character.\textsuperscript{81} Although the constitution does not specifically define “judicial powers,” the court declared that under the authority of \textit{People ex rel. Stamos v. Jones}\textsuperscript{82} the judiciary possessed an “exclusive” power to regulate by rule the sentence imposed by the trial court in the instant case.

---

\textsuperscript{72} I11. 2d at 156, 368 N.E.2d at 885 (emphasis added).
\textsuperscript{73} Id. at 153, 368 N.E.2d at 883.
\textsuperscript{74} The effect of a rebuttable presumption standard of review would be to establish a prima facie case that the sentence was correct. Upon an affirmative showing by the defendant that the sentence imposed by the trial court was erroneous, the appellate court would be authorized to reduce it. \textit{People v. Choate}, 71 I11. App. 3d 267, 274, 389 N.E.2d 670, 676 (5th Dist. 1979) (interpreting § 5-5-4.1).
\textsuperscript{75} I.D. at 153, 386 N.E.2d at 883.
\textsuperscript{76} Id. § 1005-3-2 (1979).
\textsuperscript{77} Id. § 1005-3.1 (factors in mitigation); § 1005-5-3.2 (factors in aggravation).
\textsuperscript{78} Id. § 1005-4-1.
\textsuperscript{79} Id. at 275, 412 N.E.2d at 543.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.

The controversy in \textit{Stamos} arose because a statute conflicted with a court rule on the same procedural matter. The defendant in \textit{Stamos}, the Honorable Sidney A. Jones, had found one McNeal guilty of two charges of aggravated battery and sentenced him to imprisonment. Judge Jones admitted McNeal to bail. This admittance was contradictory to a statute. The statute, in part, provided:

\textbf{If an appeal is taken from a judgment or order on an offense other than a “forcible felony,” and the defendant is admitted to bail, the sentence of imprisonment shall be stayed by the trial court. If an appeal is taken from a judgment or order on an offense defined as a “forcible felony” the defendant shall not be entitled to a continuation of his bail and the sentence of imprisonment shall not be stayed by the trial court.}
matters of appellate practice and procedure. Because the decisions construing Rule 615(b)(4) had settled upon abuse of discretion as the proper standard for sentence review, the court concluded that section 1005-5-4.1 was clearly inconsistent with the rule. Under these circumstances Rule 615(b)(4) prevailed.

CRITICISM AND IMPACT

The Cox decision is particularly notable for its reinforcement of the notion that Illinois courts possess inherent power to regulate judicial practice and procedure. Although some judicial control over practice and procedure is admittedly beneficial, Cox illustrates that a potential for abuse exists when such control is exercised without restraint.

The doctrine of separation of powers, so heavily relied upon by the court, was established to maintain a balance among the executive, legislative, and judicial branches. It evolved because the authors of the federal Constitution feared that one branch of the government "might grow too bold and by overreaching, threaten liberty and the balance of the system." To prevent this threat of tyranny, a system of checks and balances was designed.

ILL. REV. STAT. ch. 38, § 121-6(b) (1967). Under Supreme Court Rule 609, however, the admission to bail was subject to the discretion of the trial judge. The rule stated that "[i]f an appeal is taken from a judgment following which the defendant is sentenced to imprisonment . . . the defendant may be admitted to bail and the sentence or the condition of confinement stayed by a judge of the trial or reviewing court." ILL. REV. STAT. ch. 110A, § 609(b) (1967).

The Illinois Supreme Court ultimately concluded that the constitution vested responsibility for rules governing appeals in the supreme court and not in the legislature. The statute purporting to govern appeals was therefore ruled unconstitutional. 40 Ill. 2d at 66, 237 N.E.2d at 498.

The court focused upon § 1 of article VI of the Illinois Constitution, which states that "the judicial power is vested in a Supreme Court, an Appellate Court, and Circuit Courts." ILL. CONST. art. VI, § 1. Because § 5-5-4.1 infringed upon this exclusive judicial power to regulate appellate practice and procedure, the court was compelled to invalidate it. 82 Ill. 2d at 274-75, 412 N.E.2d at 544-45.

86. See Levi, Some Aspects of Separation of Powers, 76 COLUM. L. REV. 371, 391 (1976). Levi discusses the recurrent debate over the "respective powers, limitations and responsibilities of the executive, legislative and judicial branches." Id. at 371. He points out that some commentators suggest that "the system has gone out of balance and that the imbalance can best be overcome by a reassertion of power by the Congress, which, as the branch of government said to be most democratic . . . should have primacy. Congressional supremacy is said to be at the heart of the American tradition. . . ." Id. at 371-72.

The court’s claim of an exclusive right to regulate practice, however, posits the potential for unchecked power in the Illinois Supreme Court because substantive rights can often be couched in terms of procedural rules. Courts and commentators agree that efforts to distinguish between substance and procedure are frequently superficial and dissatisfying. A failure to

89. See Curd, Substance and Procedure in Rule Making, 51 W. Va. L.Q. 34 (1948). In discussing the importance of the distinction between substance and procedure, Curd states:

Many of our statutes and laws which on their face would seem to be procedural would also seem clearly to involve substantive rights. We find many procedural statutes that appear to have rights in the procedure itself or expressions of policy of the legislation involved. If the statute or law gives a right or a privilege which on its face may be a benefit to one person over another, or takes away an advantage that may affect one over another in a suit, nevertheless, although the statute may primarily involve procedure, there may be a substantive right involved. In many of these twilight zone cases the distinction or difference is always there, at times plainly in view. At other times, it is not so plain but indefinite, and still again, in such a small degree that it can be recognized only by intuition if at all, but the difference is still there.

Id. at 43. See also Grooms, Substantive or Procedural?, 27 Ala. L. 5 (1966). But see Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 Yale L.J. 333 (1933) (distinction between substance and procedure is clear).

90. The U.S. Supreme Court has stated:

Matters of “substance” and matters of “procedure” are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, “substance” and “procedure” are the same keywords to very different problems. Neither “substance” nor “procedure” represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. . . . And the different problems are only distantly related at best . . . .

Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945). In Guaranty Trust, the Court put aside the substantive-procedural distinction. It set up an “outcome-determinative test” in federal diversity cases. “[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court.” Id. at 109 (emphasis added). See also Hanna v. Plumer, 380 U.S. 460 (1965) (service of process is a procedural matter); Sibbach v. Wilson & Co., 312 U.S. 1 (1940) (upheld rules requiring physical or mental examinations of a party); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961) (admissibility of evidence is procedural); RKO Radio Pictures v. Sheridan, 195 F.2d 167 (9th Cir. 1952) (parol evidence rule is a matter of substantive law).


In establishing the standard within which the court may prescribe rules of evidence under the rule making power, we should not become slaves to the terms “substantive law” and “procedural law.” We recognize the fact that the distinction was made originally in a written opinion of a court, and later adopted in subsequent cases where it no longer was used to express a precise meaning. The result has been that because of carelessness in the use of the terms, or ignorance of the philosophical basis for the distinction, or the necessity of deciding cases swiftly, it is now impossible to determine what is meant by the terms “substantive law” and “procedural law.” We therefore do not hesitate to abandon these terms.

Reidl, supra, at 604.
note this important distinction when a court rule conflicts with a statute could, in effect, give the court the power of a superlegislature. Such power would leave the Illinois General Assembly impotent to legislate in areas where the court has made a ruling regarding judicial practice and procedure.

In Cox, for example, the court failed to consider whether the standard of appellate review for sentences merely regulates practice and procedure or whether it actually involves a substantive right. Because substantive rights are often affected by procedural rules, such a distinction is crucial because it determines whether the judiciary or the legislature may regulate or decide an issue. Conversely, if it is a purely procedural matter, the standard of appellate review is a judicial concern.

Substantive law "creates or defines the rights and duties which give rise to a cause of action," whereas, the procedural law "provides the litigant with the means or methods by which [those] rights [and] duties . . . are enforced." Definite procedural matters such as the form and issuance of a summons, the form of the pleadings, and the order of the trial proceeding can easily be categorized as judicial functions. The standard of appellate review, however, does not easily fit into a "procedural" category. Rather, it may arguably concern a matter of substantive law.

According to the Illinois Constitution, "[a]ppeals from final judgments of a Circuit Court are a matter of right to the Appellate Court." The Illinois Supreme Court has recognized this right and its legislative function. The Cox court, however, ignored this constitutional provision, relying instead upon People ex rel. Stamos v. Jones to determine that the court possesses an "exclusive" right to regulate appellate procedure. The court's reliance upon Stamos, however, may be unfounded. The court rule at issue in Stamos permitted bail pending appeal. The court upheld that rule because the conflicting statutory approach would "inevitably make appeals in criminal cases more cumbersome, delay them, and increase their cost." Signifi-
cantly, the Stamos rule did not involve the defendant's constitutional right to appeal, rather it concerned only the manner in which he would await his appeal. The process of awaiting an appeal is similar to areas distinctly procedural, whereas, the standard of appellate review more closely affects the substance of defendant's appeal.

The Cox court, therefore, should have scrutinized more closely the constitutional right to appeal and the legislature's role in the enforcement of that right. If the legislature deems the abuse of discretion standard for appellate review as an inadequate safeguard of the constitutional right to appeal, then it should be accorded the authority to implement a more protective standard. Because the supreme court does not have the authority to enact rules which touch upon substantive rights, Rule 615(b)(4) may be invalid as effectively denying the defendant's right to appeal.

Unfortunately, in upholding the abuse of discretion standard for appellate review, the Cox decision supports the arbitrary sentencing determinations which flourished under that standard. One purpose of the legislature's adoption of determinate sentencing in the new Code was to reduce disparities in sentencing by limiting the discretion of the trial judge. By striking down section 1005-5-4.1, the court has sanctioned broad judicial discretion, totally disregarding this important legislative purpose. Without the Code's

---

106. For example, commentators suggest that due process and equal protection should be taken into consideration in the sentencing process. See Kress, supra note 2, at 59-69; H. Way, Criminal Justice and the American Constitution 449-53 (1980). Although it has been recognized that the sentencing process must satisfy the requirements of the due process clause, Gardner v. Florida, 430 U.S. 349, 358 (1977), it has not been determined what process is due. Kress suggests that "disparate sentencing denies to the criminal defendant the equal protection of the law." Kress, supra note 2, at 60. Because the legislatures are in a better position to protect the rights of individuals, Kaplan & Greene, The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury, 65 Harv. L. Rev. 234, 252-53 (1951), it is submitted that the Illinois legislature should be able to protect the right of appeal by establishing sentencing guidelines.

107. It is not contended that a defendant's appeal is denied by Rule 615(b)(4). This Note merely contends that the rule's standard of review substantially effects the result of defendant's appeal. Whether the court would ultimately determine that defendant's right to appeal is effectively denied under the abuse of discretion standard of review is beyond the scope of this Note. It is, however, an essential point that was overlooked by the court.

108. See Bagley, supra note 4, at 391-92. For cases applying the abuse of discretion standard of review see People v. Rege, 64 Ill. 2d 473, 356 N.E.2d 537 (1976) (reversed appellate court decision to reduce sentence for possession of more than 500 grams of cannabis substance from one to three years in penitentiary to probation); People v. Bolyard, 61 Ill. 2d 583, 338 N.E.2d 168 (1975) (trial judge abused his discretion by imposing a six to 18 year sentence upon defendant convicted of indecent liberties with a child); People v. Campbell, 65 Ill. App. 3d 317, 382 N.E.2d 640 (1st Dist. 1978) (sentence of 100 to 300 years imposed on an 18-year-old convicted of armed robbery and murder not an abuse of discretion); People v. Kish, 58 Ill. App. 3d 215, 374 N.E.2d 10 (3d Dist. 1978) (sentence of six to 18 years for defendant convicted of unlawful possession of cannabis, barbituates, and LSD was abuse of discretion).

109. See Bagley, supra note 4, at 391.
stricter standard of appellate review, sentence disparity will continue to be a disturbing problem.\footnote{110}

Application of an abuse of discretion standard of review may also allow sentencing judges to circumvent the Code’s specific sentencing criteria. Section 1005-4-1 of the Code,\footnote{111} for example, requires a sentencing hearing and a written record of that hearing. A crucial benefit of such a record is that it expressly articulates the sentencing judge’s rationale for the imposition of a particular sentence.\footnote{112} If the appellate court, after reviewing the record were to determine that the factors considered in mitigation\footnote{113} or aggravation\footnote{114} of a particular sentence were improperly balanced, it could increase or decrease that sentence with justification. After Cox, the record will have little or no value since effective appellate review of the aggravating or mitigating circumstances is diluted when the standard employed is abuse of discretion. Subject only to this abuse of discretion standard, a trial judge is all too likely to publish a facile statement which only purports to consider the surrounding circumstances.\footnote{115} In effect, the judge will continue to apply the same abstract criteria in determinate sentences as he or she did under indeterminate sentencing.\footnote{116}

**A Suggested Alternative**

The potential for the Illinois judiciary to overstep its powers is exacerbated because the Illinois Supreme Court is the final arbiter as to which rules are procedural and which are substantive. The court may enact a rule, characterizing it as procedural, when in fact the rule may affect a substantive right.

\footnote{110} “If appellate courts continue to defer to the discretion of trial courts whenever a sentence [is] within a statutory range without regard to whether or not it was appropriate under all the facts and circumstances, then the purpose of the new [code will] be defeated.” People v. Choate, 71 Ill. App. 3d 267, 273, 389 N.E.2d 670, 675 (5th Dist. 1979).

\footnote{111} ILL. REV. STAT. ch. 38, § 1005-4-1 (1979).

\footnote{112} See Bagley, supra note 4, at 397.

\footnote{113} ILL. REV. STAT. ch. 38, § 1005-5-3.1 (1979).

\footnote{114} Id. § 1005-5-3.2.

\footnote{115} Without the new Code’s standard of sentence review, [s]entencing equality would not be promoted, judicial discretion would not be curtailed, and the penalty would not be fashioned to the particular offender as well as to the offense. The mere fact that the trial judge cites compliance with the statutory criteria is not a guarantee against sentencing error. He may merely apply the factors in a mechanical fashion, without considering whether one outweighs another in a particular situation. People v. Choate, 71 Ill. App. 3d 267, 273, 389 N.E.2d 670, 675 (5th Dist. 1979) (emphasis added). See also Dorszynski v. United States, 418 U.S. 424, 455-60 (1974) (Marshall, J., concurring) (analyzes purposes that are served by a statement of reasons).

\footnote{116} One commentator who presents a good analysis of the arbitrary and bias sentencing practices of some judges states that “[t]he evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergencies are explainable only by variations among the judges, not by material differences in the defendants or their crimes.” Frankel, supra note 2, at 21.
Recognizing this danger at the federal level, Congress has reserved the power to examine proposed judicial rules before they become effective and the United States Supreme Court has acknowledged this power. Similarly, some states have established a legislative check over judicially adopted rules.

**The Safeguards in Other States**

In some states, judicial restraints are included in the state constitutions. The Missouri Constitution, for example, provides that “rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.” Though the constitution further provides that “any rule may be annulled or amended by a law limited to the purpose,” it appears that a rule would prevail if it is in direct conflict with a previously adopted statute.

In California, a Judicial Council of eleven judges is vested with the power to “adopt or amend rules of practice and procedure.” These rules, however, cannot be inconsistent with laws already in effect or laws which are later adopted. This constitutional provision has been interpreted as granting the legislature the superior right to adopt rules of practice and procedure. In effect, the Council serves as an advisory panel which submits recommendations to the legislature.

The Alaskan Constitution implements a direct program of legislative review over judicially adopted rules. Judicial rules may be revised by a two-thirds vote of both houses of the legislature. The Alaska Supreme Court has

---

   
   The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions.

   Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

   Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

   Id. (emphasis added).

118. See Sibbach v. Wilson, 312 U.S. 1, 15 (1941).

119. See note 24 supra.

120. Mo. Const. art. V, § 5.

121. Id.


123. Cal. Const. art. VI, § 1a(5).

124. Id.


126. The Judicial Council is to “submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure.” Cal. Const. art. VI, § 1a(5).

127. Alaska Const. art. IV, § 15.
construed this section literally, permitting the legislature to amend or modify rules of procedure, but not to adopt them.\textsuperscript{128}

In other states, such as Iowa\textsuperscript{129} and Wisconsin\textsuperscript{130} where the authority for judicial rule-making derives from legislative enactment, rules apparently are kept in check by the potential revocation of the court's power.\textsuperscript{131} Even though the highest court may ultimately uphold the validity of its rule, statutory provisions encourage those courts to accord more careful scrutiny to judicially made rules.\textsuperscript{132}

\textbf{A Suggested Approach for Illinois}

While the Illinois Supreme Court does possess an inherent power to regulate procedural matters under the separation of powers doctrine,\textsuperscript{133} no adequate check against abuse of those judicial powers exists.\textsuperscript{134} To maintain the proper balance of power between the court and the legislature, judges should follow the traditional approach of exercising restraint when deciding questions involving their own authority.\textsuperscript{135} Such a solution could be easily implemented because it requires no constitutional amendment. Unfortunately, the decision of the Illinois Supreme Court in \textit{Cox} demonstrates a failure to follow this traditional method.

A preferable alternative would be the adoption of a constitutional amendment explicitly defining the powers of the judiciary and creating a veto power in the legislature. Such an amendment could establish a significant check on the judicial power over procedure. Ideally, the amendment would place initial rule-making authority in the supreme court by allowing it to govern the administration and procedure of all courts in the state. It has also been suggested that the legislature could be given the power to repeal, amend, or supplement, by statute judicially made rules by a two-thirds vote.

\begin{flushleft}
\textsuperscript{131} See, e.g., \textit{Ex parte Loth Nat'l Bank}, 251 Ala. 498, 38 So. 2d 1 (1948) (when statute authorizes rule-making by supreme court and provides for superior effect of those rules, they become in substance of legislative origin); Dawson v. Hensley, 423 S.W.2d 911 (Ky. 1968) (statute setting forth judicial review controlled rather than rule); American Sodium Co. v. Shelley, 51 Nev. 26, 267 P. 497 (1928) (rule of court is binding unless it conflicts with some statute).
\textsuperscript{132} See Kay, \textit{supra} note 19, at 28.
\textsuperscript{133} Other courts have suggested an inherent power as the basis of their rule-making authority. See, e.g., State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972); Newell v. State, 308 So. 2d 71 (Miss. 1975); State v. Fields, 85 Wash. 2d 126, 530 P.2d 284 (1975).
\textsuperscript{134} See notes 89-94 and accompanying text \textit{supra}.
\textsuperscript{135} See Kay, \textit{supra} note 19, at 43.
\end{flushleft}
of both houses. Finally, whenever any such bill is being considered the Chief Justice of the Illinois Supreme Court could be given an opportunity to be heard at committee hearings to insure equal input from both branches.136

Regardless of the particular vote requirements employed, any such amendment must meet one basic minimum. Because the supreme court would be the final arbiter of any such amendment and subsequent statute, both would need to be carefully drafted137 so that they could not be even remotely construed as affecting a judicial procedure issue. If drafted as such, the separation of powers doctrine would preclude the court from invalidating the rule as an infringement of the judicial rule-making authority. The amendment must state in detail the process and effect of a procedural statute. Only then could it serve as a meaningful check upon judicial power.

CONCLUSION

Historically, the role of the judiciary in the regulation of practice and procedure was not independent of the legislature. The authority to prescribe rules of procedure was clearly legislative, while the constitutionality of delegating such power to the judiciary was questioned.

In Illinois, however, the supreme court has continually expanded and strengthened its power to invoke rules of procedure. The Cox decision is a

136. Two scholars proposed a model amendment which provides:
1. The supreme court shall make rules governing the administration, practice and procedure, including evidence, of all courts in the state.
2. Such rules, or any statute enacted under this paragraph, may be repealed, amended or supplemented by the legislature by two-thirds vote of the members elected to each house, and any such enactment shall have the force and effect of statute during the six years next following the date of its taking effect and shall thereafter have effect as rule of court until repealed or amended by the supreme court or by the legislature.
3. In consideration of any bill proposing an enactment under this section, the chief justice of the state shall be given opportunity to be heard.

Levin & Amsterdam, supra note 91, at 42.

137. That the amendment must be carefully drafted is evidenced by the New Jersey experience. That state’s constitution directed that the “Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts.” N.J. Const. art. VI, § 2, ¶ 3 (emphasis added). The Supreme Court of New Jersey, however, stated:

[T]he phrase “subject to law” cannot be taken to mean subject to legislation.

The only interpretation of “subject to law” that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice.

We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such.

disturbing expression of the supreme court’s continuing intention to expand its rule-making powers. The decision exemplifies that no sanction exists if the court violates the fundamental rule that judicial authority to adopt procedural rules should not modify or impair the power of the legislature to create rights and duties. Cox, in fact, effectively permits such legislative impairment.

The court, in summarily upholding a rule of questionable validity and value, has effectively defeated the laudable goals of the modified Unified Code of Corrections. In its desire to protect its rule-making powers, the court unwisely has chosen to ignore the importance of curbing the virtually unrestricted discretion of a trial court in its imposition of criminal sentences. In the absence of a self-imposed restraint or a constitutional amendment, the Illinois Supreme Court’s rule-making power over practice and procedure is unlimited. Because the supreme court is apparently unwilling to restrain itself, the Illinois General Assembly should adopt a constitutional amendment defining and limiting the appropriate scope of the court’s powers.

William D. Kelly