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NOTES

“Comity” Revisited: The Continuing Struggle Over Rulemaking Authority Between the Kentucky Supreme Court and General Assembly

BY AMY JO HARWOOD*

INTRODUCTION

Before the adoption of the Rules of Civil Procedure in 1952¹ and the Rules of Criminal Procedure in 1962,² Kentucky relied on its legislature to enact and modify practice codes governing all areas of law, including rules of procedure.³ Realizing the difficulty of maintaining these rules through the legislative process, the Kentucky General Assembly created the civil rules and left their future amendment to Kentucky’s highest appellate court.⁴ By changing the format for rulemaking in the Commonwealth, the legislative branch sought concurrent authority with the judicial branch.⁵ Until the Judicial Article⁶ was adopted

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¹ Act effective July 1, 1953, ch. 84, 1952 KY. ACTS 214-42; see John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 KY. L.J. 265 n.334 (1994-95) (discussing generally the adoption of the Kentucky Rules of Civil Procedure).

² Act approved Mar. 22, 1962, ch. 234, 1962 KY. ACTS 788-847

³ See Gillig, *supra* note 1, at 334.

⁴ *Id.*

⁵ See Douglas L. McSwain, *Judicial v. Legislative Power in Kentucky: A “Comity” of Errors*, 71 KY. L.J. 829, 843 (1983). McSwain discusses the Kentucky Supreme Court’s “unsuccessful attempts” to resolve conflicts between legislative enactments and court rules and policy. These attempts, according to McSwain, have been driven by “comity.” *Id.* at 830.

⁶ See *id.* at 829. The Judicial Article was a series of amendments to Kentucky’s

in 1975, the Court of Appeals of Kentucky exercised rulemaking power.⁷ The Judicial Article created the Supreme Court of Kentucky, which now possesses the ultimate authority to “prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice.”⁸

The Kentucky Constitution contains a separation-of-powers clause⁹ dividing government into executive, legislative, and judicial branches, each with supposedly equal power.¹⁰ This division of authority has two purposes: “first, to prevent the aggregation of the basic powers of government in the hands of a single individual, group or entity,”¹¹ and second, to divide authority “among three, theoretically equal branches” in order to “facilitate the operation of government. . .”¹² The General Assembly hoped the Judicial Article would lessen conflicts between the judicial and legislative branches based on the separation-of-powers doctrine.¹³ As the Kentucky Supreme Court observed, a potential advantage of approaching rulemaking authority as a power held concurrently by the court and the legislature is that constitutional confrontations between the two branches would be deemphasized.¹⁴ Unfortunately, the hopes of the Kentucky General Assembly and Supreme Court have not been realized. Some commentators have observed that vesting rulemaking in the same body that interprets those rules creates a potential for abuse.¹⁵ The alternative, separate bodies for rulemaking and interpretation, yields inefficient and unwieldy

Constitution passed by voters in 1975 and enacted Jan. 1, 1976. The adoption of the 1975 Judicial Article completely overhauled the Kentucky judicial system.

⁷ *See id.*

⁸ *Id.* at 829 n.6 (citing KY. CONST. § 116).

⁹ KY. CONST. § 27 Section 27 provides that “the powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments [t]hose which are legislative, to one; those which are executive, to another; and those which are judicial, to another.” *Id.*

¹⁰ *See* Richard M. Frank, *The Scorpions’ Dance: Judicially Mandated Attorney’s Fees – The Legislative Response and Separation-of-Powers Implications*, 1 EMERGING ISSUES ST. CONST. L. 73, 74-75 (1988).

¹¹ *Id.*

¹² *Id.*

¹³ *See id.*

¹⁴ *See* Commonwealth v Reneer, 734 S.W.2d 794 (Ky. 1987) (holding that while the truth-in-sentencing statute violated Kentucky’s separation-of-powers provision, the doctrine was acceptable under the principle of comity); *see generally* McSwain, *supra* note 5.

¹⁵ *See* McSwain, *supra* note 5, at 850.

procedures for promulgating rules of court. This Note revisits the comity issue by examining the supreme court's current policy for reviewing rules of procedure under the doctrine of comity and suggests deviating from that doctrine in the future to promote efficiency in rulemaking.¹⁶

Part I introduces the concept of comity and describes the historical underpinnings that led the court, in 1978, to adopt the principle in *Ex parte Farley*.¹⁷ Part II reviews the landmark case *Commonwealth v. Reneer*,¹⁸ in which the court confronted and upheld the truth-in-sentencing statute.¹⁹ Although the statute clearly violated the separation-of-powers doctrine as set forth in the Kentucky Constitution, the court nevertheless upheld the law as a reasonable intrusion on its rulemaking authority. Part III examines three cases that further eroded the court's rulemaking authority: *Huff v. Commonwealth*,²⁰ *Commonwealth v. Hubbard*,²¹ and *Boone v. Commonwealth*.²² Part IV reviews the decisions in *Drumm v. Commonwealth*,²³ *Hall v. Commonwealth*,²⁴ and *O'Bryan v. Hedgespeth*.²⁵ Finally, Part V looks at the legacy left by Justice Charles M. Leibson concerning the court's erosion, in the name of comity, of its own authority to promulgate rules of practice and procedure and offers an opinion on possible paths the court might take to reverse the tide.

I. INTRODUCTION TO THE CONCEPT OF "COMITY"

Although Kentucky's supreme court has the explicit authority to prescribe rules of practice and procedure in the courts of the Common-

¹⁶ This subject was originally addressed in McSwain, *supra* note 5.

¹⁷ *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978).

¹⁸ *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987).

¹⁹ *See id.* at 798.

²⁰ *Huff v. Commonwealth*, 763 S.W.2d 106 (Ky. 1989); *see infra* notes 98, 99, 102, 106, 107, 121, 136.

²¹ *Commonwealth v. Hubbard*, 777 S.W.2d 882 (Ky. 1989); *see infra* notes 108-14, 121, 136.

²² *Boone v. Commonwealth*, 780 S.W.2d 615 (Ky. 1989); *see infra* notes 96, 97, 115-27, 130-36.

²³ *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990); *see infra* notes 111, 142, 145-53.

²⁴ *Hall v. Commonwealth*, 817 S.W.2d 228 (Ky. 1991), *overruled by Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996); *see infra* notes 155-59.

²⁵ *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995); *see infra* notes 162-69, 172.

wealth,²⁶ it has long embraced the concept of "comity." Comity is defined as "judicial adoption of a rule unconstitutionally enacted by the legislature 'not as a matter of obligation, but out of deference and respect.'"²⁷ The Kentucky Supreme Court first established and announced its reliance on the concept of comity as the ground for permitting legislative action on matters of judicial concern in *Ex parte Farley*.²⁸

Farley involved a request by the Office of Public Advocacy, made pursuant to section 532.075(6) of the Kentucky Revised Statutes ("K.R.S."), to periodically inspect and copy records kept by the Administrative Office of the Courts ("AOC") in death penalty cases.²⁹ The supreme court held that the "Open Records Law," K.R.S. § 61.870 - .884, did not apply to records in the AOC's hands until after the court had reviewed and examined them.³⁰ The court in *Farley* stated, "[W]e respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters

³¹ Comity is, by nature, a purely discretionary action by the court. The court has never felt the need to nullify all legislation that infringes upon its rulemaking authority,³² but has engaged in an ex post facto analysis each time the General Assembly speaks in the rulemaking arena.

There never has been a definitive line between the powers of the legislative and judiciary branches of government.³³ Therefore, any standard used to determine if a legislative enactment is an unconstitutional violation of the separation-of-powers doctrine must be subjective. The supreme court has adopted such a subjective standard with its declaration that comity should be applied when an exercise of "the legislative function" unreasonably interferes with "the functioning of the courts."³⁴

²⁶ See KY. CONST. § 116; *supra* text accompanying note 8.

²⁷ *O'Bryan*, 892 S.W.2d at 577 (quoting BLACK'S LAW DICTIONARY 242 (5th ed. 1979)).

²⁸ *Ex parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978).

²⁹ See *id.* at 620-21.

³⁰ See *id.* at 627.

³¹ *Id.* at 624.

³² See *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987).

³³ See *Frank*, *supra* note 10, at 76 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977) (noting that "[t]he Framers of the [Kentucky] Constitution indicated that the three branches of government 'were not intended to operate with absolute independence'")) (footnotes omitted).

³⁴ *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 688 (Ky. 1980). See also *Craig L. Farrish, Restoration of the Collateral Source Rule in Kentucky: A Review of O'Bryan v. Hedgespeth*, 23 N. KY. L. REV. 357, 363-69 (1996).

This standard has been used since the *Farley* decision in 1978.³⁵ It frequently has been attacked as hypocritical, particularly by the late Justice Leibson. For example, in his dissent in *Commonwealth v. Reneer*, Justice Leibson asserted that K.R.S. § 532.055, the truth-in-sentencing statute,³⁶ blatantly violated the separation-of-powers doctrine.³⁷ For Justice Leibson, the comity that supported the statute was " 'A Comity of Errors.' "³⁸ Justice Leibson viewed comity as a way to appease the legislature. In his view, the court grasped for ways to avoid striking down legislation infringing upon the judiciary's rulemaking authority, usually by invoking the comity doctrine.³⁹ Unfortunately, this worked to erode the very authority the judiciary was attempting to assert.

II. *COMMONWEALTH V RENEER*: INTO THE ABYSS

The case of *Commonwealth v. Reneer*, in which the Kentucky Supreme Court upheld the recently enacted truth-in-sentencing statute, provided a clear test of the boundaries of legislative infringement on the court's rulemaking authority.⁴⁰ The statute dictated a new procedure for criminal sentencing by which the jury would determine the sentence as well as the guilt or innocence of the defendant.⁴¹ The statute also set out evidentiary guidelines for the prosecution and allowed the defendant to offer evidence in mitigation.⁴² Although the defendant in *Reneer* was found not guilty of the charges against him, the court granted the Commonwealth's motion for certification of the law.⁴³

While the court reiterated its authority to prescribe rules of practice and procedure in Kentucky's courts and found the statute to be a per se violation of the separation-of-powers doctrine, it nevertheless held that the statute was not an unreasonable intrusion into the court's jurisdiction.⁴⁴ The majority held the statute was procedural in nature, not dealing with the

³⁵ See McSwain, *supra* note 5, at 832.

³⁶ KY. REV. STAT. ANN. § 532.055 (Michie 1990); see *infra* note 41.

³⁷ See *Reneer*, 734 S.W.2d at 799 (Leibson, J., dissenting).

³⁸ *Id.* (Leibson, J., dissenting).

³⁹ See *id.* at 798-805 (Leibson, J., dissenting).

⁴⁰ See *id.* at 794.

⁴¹ See KY. REV. STAT. ANN. § 532.055(1)-(2) (Michie 1990) ("In all felony cases, the jury will make a determination of [guilt or innocence]" and "the jury will determine the punishment to be imposed. ").

⁴² See *id.* § 532.055(2)(a)-(b).

⁴³ See *Reneer*, 734 S.W.2d at 798.

⁴⁴ See *id.* at 797

elements necessary to meet the substantive standard of proof of the crime but merely setting forth sentencing guidelines.⁴⁵ In a blistering dissent,⁴⁶ Justice Leibson said the court had committed a major blunder. He asserted that the "Court [had] elected to grant comity to a new law that effects substantial changes in judicial procedure."⁴⁷ Justice Leibson felt these changes were "poorly conceived and constitutionally flawed."⁴⁸ He placed responsibility for future problems squarely on the court's shoulders:

The new Judicial Article enacted in 1975 entrusted the Supreme Court, not the General Assembly, with exclusive power to prescribe "rules of practice and procedure for the Court of Justice" With the power to act goes full responsibility for the action taken. It is our Court, not the General Assembly, that has made KRS 532.055 the law of this Commonwealth. In doing so we have disregarded the carefully thought-out policies and practices that our Court usually follows before adopting any major change in the Rules of Criminal Procedure, including study by a select committee of the bench and bar, and public hearing before the Kentucky Bar Association. We have bypassed the safeguards that would have been provided by study of these new procedures by professionals, and embraced in their stead the very forces of precipitous change that the new Judicial Article was designed to defuse.⁴⁹

The majority analyzed provisions of K.R.S. § 532.055 to determine if the statute constituted an "unreasonable encroachment" on the judiciary's prerogatives.⁵⁰ Subsections (1) and (2) require separate phases for a jury's determination of guilt or innocence and for the penalty assessment.⁵¹ Since this type of bifurcation had already been adopted for death penalty cases, the majority believed that it was a reasonable method to reduce the time involved in completing the trial process in other cases.⁵² It made the

⁴⁵ *See id.* at 796.

⁴⁶ Justice Joseph Lambert joined in the dissent.

⁴⁷ *Id.* at 799 (Leibson, J., dissenting).

⁴⁸ *Id.* (Leibson, J., dissenting).

⁴⁹ *Id.* (Leibson, J., dissenting) (quoting the 1975 Judicial Article).

⁵⁰ *Id.* at 797

⁵¹ *See id.* Subsection (2) provides:

Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury in the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law.

KY. REV. STAT. ANN. § 532.055(2) (Michie 1990).

⁵² *See Reneer*, 734 S.W.2d at 797

sweeping assessment that the jury's new-found power to decide whether sentences would be served concurrently or consecutively was merely a tool to give the jury a more complete picture of the crime, the defendant, and the punitive goals behind sentencing before a sentence was rendered.⁵³ Similarly, the statute's guidelines for introduction of evidence relevant to sentencing by the prosecution and defendant were also seen as an enabling mechanism for the jury.⁵⁴ The majority completely glossed over the fact that major changes in evidentiary procedures were made that should have been within the court's own confines to amend. All of this was done in the name of expediency.

Justice Leibson did not make the same mistake. In his assessment, the concurrent/consecutive sentences determination directly conflicted with existing procedures.⁵⁵ Under K.R.S. § 532.110⁵⁶ and Kentucky Rule of Criminal Procedure 11.04,⁵⁷ this determination was vested solely with the judge.⁵⁸ The rationale behind this rule was simple: to prevent disparate sentencing based on individual juries' passions.⁵⁹ According to Justice Leibson, the majority's opinion failed to consider the effect this change would have on prison overcrowding, an effect that is exacerbated by K.R.S. § 439.3401,⁶⁰ which prescribed a minimum parole eligibility requirement of fifty percent of the sentence imposed.⁶¹

Second, Justice Leibson found the introduction of evidence regarding minimum parole eligibility, which the statute authorized, to be unworkable. This was because "at the point where a convicted offender is turned over to the Department of Corrections, the power to determine the period of

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* at 799 (Leibson, J., dissenting).

⁵⁶ KY. REV. STAT. ANN. § 532.110(1) (Michie 1990) ("The multiple sentences shall run concurrently or consecutively as the court shall determine.").

⁵⁷ KY. R. CRIM. P. 11.04 ("The judgment shall state whether [the sentences] are to be served concurrently or consecutively. The judgment shall be signed by the judge.").

⁵⁸ See *Reneer*, 734 S.W.2d at 799 (Leibson, J., dissenting).

⁵⁹ See *id.* (Leibson, J., dissenting).

⁶⁰ KY. REV. STAT. ANN. § 439.3401(3) (Michie 1990). This subsection of the statute provides:

A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on parole until he has served at least fifty percent (50%) of the sentence imposed.

⁶¹ See *Reneer*, 734 S.W.2d at 800 (Leibson, J., dissenting).

incarceration passes completely to the Parole Board.⁶² Justice Leibson felt that attempting to inform juries about the myriad parole eligibility options would be futile.⁶³

Third, Justice Leibson disagreed with the statute's provision permitting the prosecution to introduce, during the sentencing phase, evidence of prior felony and misdemeanor convictions.⁶⁴ There is no time limitation on admissibility of prior offenses.⁶⁵ Justice Leibson asserted that "[t]his piling up of prior convictions serves no purpose except to provide evidence that will be utilized by the jury to enhance the sentence. It will exacerbate the problems regarding extended warehousing of criminals. . . ."⁶⁶

Fourth, Justice Leibson foresaw the possibility of running afoul of due process by allowing the prosecution to offer evidence concerning the nature of prior offenses.⁶⁷ The statute allows prosecutors to introduce evidence of the nature of prior offenses⁶⁸ and allows the defendant the chance to offer controverting evidence.⁶⁹ Justice Leibson's concern was that the statute established a post-conviction review mechanism:

Evidence of the "nature" of a prior offense calls for reconsideration of the evidence from the previous case. We can expect nothing less than complete review because of subsection 2(b) which permits the defendant to introduce "evidence which negates any evidence introduced by the Commonwealth." Thus, both sides will be indulged at length on the "nature" of a prior offense.⁷⁰

Because the jury is allowed to engage in extensive post-conviction review, it is likely that much extrinsic evidence will be presented, evidence

⁶² *Id.* (Leibson, J., dissenting).

⁶³ *See id.* (Leibson, J., dissenting).

⁶⁴ *See id.* (Leibson, J., dissenting).

⁶⁵ *See id.* (Leibson, J., dissenting).

⁶⁶ *Id.* at 801 (Leibson, J., dissenting).

⁶⁷ *See id.* (Leibson, J., dissenting).

⁶⁸ *See* KY. REV. STAT. ANN. § 532.055(2)(a)(2) (Michie 1990) ("Evidence may be offered by the Commonwealth relevant to sentencing including the nature of prior offenses for which [the defendant] was convicted.").

⁶⁹ *See id.* § 532.055(2)(b) ("The defendant may introduce evidence in mitigation. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency.").

⁷⁰ *Renner*, 734 S.W.2d at 801 (Leibson, J., dissenting).

that was not admissible at the trial level.⁷¹ Also, any limitations on the presentation of such evidence will be subject to due process scrutiny. Justice Leibson asserted that "unlike a [persistent felony offender] proceeding, wherein no evidence is introduced regarding the 'nature' of the offense, in the expanded circumstances now presented any effort to limit the defendant's presentation of negating evidence, direct or indirect, has serious Due Process implications."⁷²

Fifth, the statute allows the Commonwealth to introduce evidence about the possibility of parole.⁷³ This procedure is in direct conflict with judicial precedent.⁷⁴ The court had long held that the introduction of any evidence concerning the possibility of parole was prejudicial error, whether in the guilt or innocence phase or the punishment phase.⁷⁵ Justice Leibson was appalled at the majority's dispensing with precedent so easily: "With a single hastily conceived stroke of the pen we will discard our previous jurisprudence to invite speculation about the possibility of parole as a central factor in the jury's yardstick to use in deciding an appropriate punishment."⁷⁶

Finally, Justice Leibson took issue with the statute's mandate for combined sentencing and Persistent Felony Offender ("PFO") hearings.⁷⁷ The PFO hearing has a completely different set of evidentiary rules than those articulated by the truth-in-sentencing statute. The rules for PFO

⁷¹ See *id.* (Leibson, J., dissenting).

⁷² *Id.* (Leibson, J., dissenting).

⁷³ See § 532.055(2)(a)(4) ("Evidence may be offered by the Commonwealth relevant to sentencing including [t]he maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses.").

⁷⁴ See *Payne v. Commonwealth*, 623 S.W.2d 867, 870 (Ky. 1981) (stating that "[t]he consideration of future consequences such as parole [has] no place in the jury's finding of fact and may serve to distort it"); *Broyles v. Commonwealth*, 267 S.W.2d 73, 77 (Ky. 1954) (stating that "the parole of prisoners falls within another department of government, and a discussion of the subject has no place in an argument to a jury"); *Boyle v. Commonwealth*, 694 S.W.2d 711, 712 (Ky. Ct. App. 1985) (stating that "the long-recognized rule in this jurisdiction has been that neither the court nor prosecutor should mention to a jury that a defendant could be paroled").

⁷⁵ See *Boyle*, 694 S.W.2d at 712.

⁷⁶ *Reneer*, 734 S.W.2d at 802 (Leibson, J., dissenting).

⁷⁷ See § 532.055(3) ("All hearings held pursuant to this section shall be combined with any hearing provided for by KRS 532.080. This section shall not apply to sentencing hearings provided for in KRS 532.025.").

hearings are: (1) The nature of the prior conviction is not admissible in a PFO proceeding; (2) Evidence regarding parole is not permissible in a PFO proceeding; (3) The PFO statute requires a finding of fact by the jury that the proof is sufficient to establish the previous conviction(s); (4) The PFO statute contemplates that a sentence must first be set for the underlying offense before any evidence is received regarding prior offenses; and (5) When a jury finds an accused guilty as a PFO but is unable to agree on the proper punishment, the judge may not impose the punishment.⁷⁸

Although the majority had no trouble with the idea of separating the determination-of-guilt phase from the sentencing phase, Justice Leibson argued that there was no way to prevent prejudice in such a proceeding, even with comprehensive instructions to the jury

There is no practical way that the jury can compartmentalize this information so as to avoid prejudice in all three decisions: the penalty for the underlying offense, the determination of guilt as a PFO, and the enhanced penalty. . . The multiple enhancement of the suggested hearing is so fraught with prejudice that it should be considered fundamentally offensive to the concept of justice.⁷⁹

The system in place called for a PFO hearing only after the jury set a punishment for the crime.⁸⁰ During the hearing, the jury would examine a Presentence Report prepared by a probation officer, which would contain information on the "defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, personal habits, and any other matters that the court directs to be included."⁸¹ Justice Leibson expressed confusion about whether the legislature intended the truth-in-sentencing statute to replace the existing procedures.⁸² If so, then much of the information contained in the Presentence Report would be unavailable to the jury because it was not permitted by the current rules of evidence.⁸³ If not, then there would be serious potential to prejudice the defendant's due process rights if he was not allowed to present evidence to contradict the information contained in the Presentence Report.⁸⁴ Even if mitigating evidence

⁷⁸ See *Commonwealth v. Crooks*, 655 S.W.2d 475, 476-77 (Ky. 1983).

⁷⁹ *Reneer*, 734 S.W.2d at 803 (Leibson, J., dissenting).

⁸⁰ See *id.* (Leibson, J., dissenting).

⁸¹ KY. REV. STAT. ANN. § 532.050(2) (Michie 1990).

⁸² See *Reneer*, 734 S.W.2d at 803 (Leibson, J., dissenting).

⁸³ See *id.* (Leibson, J., dissenting).

⁸⁴ See *id.* (Leibson, J., dissenting).

were allowed, the proceeding could become so unwieldy as to "destroy the [sentencing] system."⁸⁵ Justice Leibson thought these were serious concerns that should have been more thoroughly addressed by the majority before the statute was upheld under the principle of comity.⁸⁶

Justice Leibson further bolstered his argument by finding that the statute's provisions ran afoul of the Bill of Rights⁸⁷ in the Kentucky Constitution.⁸⁸ In section 2, Kentucky's Constitution protects its citizens from deprivation of their right to due process, and states that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."⁸⁹ Justice Leibson felt that a statute demanding that juries engage in speculation and post hoc review, and commingling separate and distinct proceedings, was "an obvious and flagrant violation of our Bill of Rights, § 2."⁹⁰ Ultimately, he saw the truth-in-sentencing statute as "an exercise of arbitrary power and a denial of due process [that] should have been struck down as such" rather than "enacted into law by our grant of comity when the General Assembly is admittedly powerless to mandate such judicial procedures."⁹¹

With *Reneer*, Justice Leibson established himself as the voice of restraint when it came to allowing the legislature to engage in rulemaking. The court, in its haste to grant comity to legislative encroachments into its exclusive territory, opened the door to further legislation setting out rules of procedure.⁹²

III. FOUR STEPS DOWN THE PATH: POST-RENEER DEVELOPMENTS

"[T]his court has the power to preempt the statute by the promulgation of different rules of procedure at any time we determine it necessary"⁹³ This statement, although a forceful assertion of jurisdiction, has had little

⁸⁵ *Id.* (Leibson, J., dissenting). Justice Leibson believed that if this type of evidence was allowed into the sentencing phase, the proceedings would become long and complicated. *See id.* (Leibson, J., dissenting).

⁸⁶ *See id.* (Leibson, J., dissenting).

⁸⁷ KY. CONST. §§ 1-26.

⁸⁸ *See Reneer*, 734 S.W.2d at 804 (Leibson, J., dissenting).

⁸⁹ KY. CONST. § 2.

⁹⁰ *Reneer*, 734 S.W.2d at 804 (Leibson, J., dissenting).

⁹¹ *Id.* (Leibson, J., dissenting).

⁹² *See id.* at 799 (Leibson, J., dissenting).

⁹³ *Id.* at 798.

practical effect in the post-*Reneer* era.⁹⁴ Various legislative enactments that changed the jury's function in sentencing procedures and altered evidentiary standards have been upheld based on the principle of comity. The result has been a steady erosion of the judiciary's rulemaking authority, particularly in establishing sentencing procedures.⁹⁵

Reneer was the first step down this path. As Justice Leibson wrote in his dissent in *Boone v. Commonwealth*:⁹⁶

In Chapter I of our judicial consideration of this new "Truth-in-Sentencing" legislation, we held that KRS 532.055 is unconstitutional, an "encroachment by the General Assembly upon the prerogatives of the Judiciary." Then we made a fundamental mistake misapplying the "principle of comity" to adopt these far reaching procedural changes, despite the statute's unconstitutionality, as a substitute for our existing procedure covering the same subject matter. Thus, with a stroke of a pen we threw out our own sentencing procedure, painstaking[ly] developed in the Rules of Criminal Procedure and case precedent.⁹⁷

*Huff v. Commonwealth*⁹⁸ was the second step towards an erosion of judicial rulemaking authority. In *Huff*, the sentencing procedure under K.R.S. § 532.055, in which evidence of minimum parole eligibility can be shown to the jury, was attacked as an unconstitutional infringement of due process.⁹⁹ Kentucky courts had long barred discussion of parole eligibility in the sentencing phase. The 1917 case of *Postell v. Commonwealth*¹⁰⁰ articulated the fundamental principle behind this prohibition: "The jury's verdict [on sentencing] should not be influenced by what another department of the state government might or might not do, or had authority to do. It is to be guided only by the facts pertaining to the guilt or innocence of the accused, and the law applicable thereto."¹⁰¹

Justice Leibson argued in *Huff* that the introduction of minimum parole eligibility evidence was in direct conflict with longstanding precedent and should not be allowed because it was speculative by nature and concerned

⁹⁴ See *id.* at 794.

⁹⁵ See *infra* notes 97-135 and accompanying text.

⁹⁶ *Boone v. Commonwealth*, 780 S.W.2d 615 (Ky. 1989).

⁹⁷ *Id.* at 617 (quoting *Reneer*, 734 S.W.2d at 797-98).

⁹⁸ *Huff v. Commonwealth*, 763 S.W.2d 106 (Ky. 1989).

⁹⁹ See *id.* at 106.

¹⁰⁰ *Postell v. Commonwealth*, 192 S.W. 39 (Ky. 1917), *overruled in part by Powell v. Commonwealth*, 123 S.W.2d 279 (Ky. 1938).

¹⁰¹ *Id.* at 44, *quoted in Huff*, 763 S.W.2d at 111 (Leibson, J., dissenting).

"a matter which is inherently vague and unknowable, and subject to subsequent change."¹⁰² The majority had used the United States Supreme Court's decision in *California v. Ramos*¹⁰³ to justify its position.¹⁰⁴ In *Ramos*, the court instructed the jury on the differences between death, life imprisonment without parole, and life imprisonment with the possibility of parole.¹⁰⁵ Justice Leibson dismissed the majority's reasoning because it dealt with a much narrower issue.¹⁰⁶ He observed that a "jury required to choose between the death penalty and a sentence to life without possibility of parole or a sentence where parole is possible, is necessarily told that parole is a prospect."¹⁰⁷

The third step toward erosion of judicial rulemaking authority was *Commonwealth v. Hubbard*,¹⁰⁸ which posited the question of whether making a judge the ultimate authority in case of jury gridlock, as the truth-in-sentencing statute did, was a violation of the due process clause of the United States Constitution.¹⁰⁹ The majority held that allowing the judge to fix the penalty was constitutional, although it was a departure from Kentucky Rule of Criminal Procedure 9.84,¹¹⁰ which mandates jury sentencing.¹¹¹ Justice Leibson again dissented, construing the exception to jury sentencing in Kentucky Rule of Criminal Procedure 9.84¹¹² as not applicable to "an unconstitutional statute that only has the force of 'law' after we [chose] to give it 'comity'"¹¹³ Again, Justice Leibson urged the court to stop "adhering blindly to a rule created by an unconstitutional legislative incursion into the judicial rule-making process" and overturn the truth-in-sentencing statute.¹¹⁴

¹⁰² *Huff*, 763 S.W.2d at 111 (Leibson, J., dissenting).

¹⁰³ *California v. Ramos*, 463 U.S. 992 (1983).

¹⁰⁴ See *Huff*, 763 S.W.2d at 107

¹⁰⁵ See *Ramos*, 463 U.S. at 992.

¹⁰⁶ See *Huff*, 763 S.W.2d at 112.

¹⁰⁷ *Id.*

¹⁰⁸ *Commonwealth v. Hubbard*, 777 S.W.2d 882 (Ky. 1989).

¹⁰⁹ See *id.* at 883.

¹¹⁰ KY. R. CRIM. P. 9.84(1) ("When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty except that the court may fix the penalty (a) in cases where the penalty is fixed by law and (b) in cases where the court is otherwise authorized by law to fix the penalty.").

¹¹¹ See *Hubbard*, 777 S.W.2d at 884.

¹¹² KY. R. CRIM. P. 9.84(1).

¹¹³ *Hubbard*, 777 S.W.2d at 887 (Leibson, J., dissenting) (quoting KY. R. CRIM. P. 9.84).

¹¹⁴ *Id.*

Justice Leibson's prediction of problems involving due process considerations was actualized in *Boone v. Commonwealth*.¹¹⁵ The question for the court was the admissibility of a defendant's evidence concerning minimum parole eligibility.¹¹⁶ After the defendant was convicted on sodomy and sexual abuse charges, but before the sentencing phase, the Commonwealth declined to offer evidence of minimum parole eligibility.¹¹⁷ The defendant sought to introduce evidence showing that "[u]nder KRS 439.3401, [h]e would be considered a violent offender and thus required to serve a minimum of 50% of his sentence."¹¹⁸ The supreme court agreed with Boone "that to place this phase of the [jury's] enlightenment solely in the hands of the prosecutor is a denial of due process to [him] or any other defendant."¹¹⁹

Justice Leibson, although agreeing with the majority that this was a due process violation, wanted to take it a step further and invalidate the entire statute,¹²⁰ as he had sought to do in *Reneer, Huff, and Hubbard*.¹²¹ He took exception to the majority's "'ad hoc procedural rule-making'" and proposed a return to the court's former practices, complete with "'elaborate safeguards'".¹²²

Instead of responding by rejecting a rule which is patently unacceptable, we elect to write a new rule in this Opinion that both sides may now introduce evidence regarding minimum parole eligibility. [T]he new rule is a fatal injury to the rulemaking processes developed by our Court to insure appropriate and orderly changes in the Rules of Criminal Procedure, processes essential to insure both quality and legitimacy.¹²³

To Justice Leibson, the *Boone* holding was the last straw. The court had construed the statute even more broadly than in the past.¹²⁴ By reading the statute to give both sides the ability to introduce evidence regarding

¹¹⁵ *Boone v. Commonwealth*, 780 S.W.2d 615 (Ky. 1989).

¹¹⁶ *See id.* at 616.

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.* at 619 (Leibson, J., dissenting).

¹²¹ *See Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987); *supra* notes 47-48, 54-92 and accompanying text; *Huff v. Commonwealth*, 763 S.W.2d 106 (Ky. 1989); *supra* notes 98-107 and accompanying text; *Commonwealth v. Hubbard*, 777 S.W.2d 882 (Ky. 1989); *supra* notes 111-14 and accompanying text.

¹²² *Boone*, 780 S.W.2d at 618 (Leibson, J., dissenting) (quoting *Hubbard*, 777 S.W.2d at 887 (Leibson, J., dissenting)).

¹²³ *Id.* (Leibson, J., dissenting).

¹²⁴ *See id.* at 618 (Leibson, J., dissenting).

sentencing, the court was engaging in rulemaking without the procedural safeguards of the past.¹²⁵ This inference was justified, in the majority's opinion, on the ground that "the inconvenience of a bifurcated trial is a small price to pay for a better informed sentencing process."¹²⁶

Even more disturbing was the majority's recognition that "[m]uch of the trouble which arises in the sentencing procedure would be eliminated by judicial sentencing."¹²⁷ Certainly if the court believed this, it had every right to change Kentucky Rule of Criminal Procedure 9.84,¹²⁸ which provides for jury sentencing, under its exclusive right to "prescribe . . . rules of practice and procedure."¹²⁹

Justice Leibson was further appalled by the majority's willingness to so readily extend the statute's reach:

This is a giant step beyond *Reneer* and *Huff* where we adopt the General Assembly's sentencing procedure in place of our own 'under the principles of comity' because the present rule change does *not* adopt the statute. On the contrary, the rule change mandated in this Opinion adds to and conflicts with the statute In sum, we are rending the fabric of our judicial process in an unprecedented manner to the save a bad rule by extending it. The damage to our rulemaking process from this precedent may be irreparable.¹³⁰

Justice Leibson also took exception to the majority's comment that judicial sentencing would solve "the trouble which arises in [this] sentencing procedure."¹³¹ He chastised the majority for its "ill-advised and unnecessary" remark and reasoned that there was "no more justification for a judge to consider the vagaries and uncertainties of parole eligibility in fixing an appropriate sentence than there is reason for a jury to do so."¹³² There should be no consideration, according to Justice Leibson, of whether, and if so when, a defendant will be granted parole.¹³³ Rather, he thought it was time "for our General Assembly to deal with the problems created by

¹²⁵ See *id.* (Leibson, J., dissenting).

¹²⁶ *Id.* at 616 (quoting *Reneer*, 734 S.W.2d at 797).

¹²⁷ *Id.*

¹²⁸ KY. R. CRIM. P. 9.84(1); see *supra* note 110.

¹²⁹ KY. CONST. § 116.

¹³⁰ *Boone*, 780 S.W.2d at 618 (Leibson, J., dissenting) (citation omitted) (emphasis added) (quoting *Reneer*, 734 S.W.2d at 797).

¹³¹ *Id.* at 616.

¹³² *Id.* at 618 (Leibson, J., dissenting).

¹³³ See *id.* at 619 (Leibson, J., dissenting).

'our present unwieldy and unworkable parole system that has destroyed credibility and public confidence in criminal sentencing.'"134 In his opinion, the majority's holding, which sought to combine the executive function of parole consideration with the judicial function of sentencing, "[made] matters worse."135

Throughout the course of the 1988-89 term of the Kentucky Supreme Court, Justice Leibson sought in vain to demonstrate to the other members of the court how they had weakened their own rulemaking authority, possibly irreparably.¹³⁶ Although his pleas fell on deaf ears, he did not give up the fight. Future cases provided him with other forums in which to reiterate his views and try to stop the rulemaking process from sliding into chaos.¹³⁷

IV. *DRUMM, HALL, AND O'BRYAN*: COMITY EXTENDED

In 1990, the Supreme Court of Kentucky decided *Drumm v. Commonwealth*¹³⁸ adopting Federal Rule of Evidence 803(4),¹³⁹ which provides a hearsay exception for statements made by a patient to a physician for the purpose of medical diagnosis or history.¹⁴⁰ In so doing, it found K.R.S. § 421.355, which makes "a child victim's out-of-court statements regarding physical or sexual abuse admissible in any criminal or civil proceeding,"¹⁴¹ to be "an unconstitutional exercise of judicial rule-making power by the General Assembly"¹⁴²

¹³⁴ *Id.* (Leibson, J., dissenting) (quoting *Renner*, 734 S.W.2d at 800).

¹³⁵ *Id.* (Leibson, J., dissenting).

¹³⁶ See *Commonwealth v. Hubbard*, 777 S.W.2d 882 (Ky. 1989); *supra* note 111 and accompanying text; *Huff v. Commonwealth*, 763 S.W.2d 106 (Ky. 1988); *supra* notes 98-107 and accompanying text; *Boone v. Commonwealth*, 780 S.W.2d 615 (1989); *supra* notes 96, 115-35 and accompanying text.

¹³⁷ See notes 112-50, 155-72 and accompanying text.

¹³⁸ *Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990).

¹³⁹ FED. R. EVID. 803(4) The rule provides:

The following are not excluded by the hearsay rules, even though the declarant is available as a witness: statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

¹⁴⁰ See *Drumm*, 783 S.W.2d at 380.

¹⁴¹ KY. REV. STAT. ANN. § 421.355(1) (Baldwin 1986).

¹⁴² *Drumm*, 783 S.W.2d at 382.

This was a victory for Justice Leibson in that three other justices, William M. Gant, Joseph Lambert, and Donald C. Wintersheimer, joined in his opinion.¹⁴³ Drawing on the court's opinion in *Gaines v. Commonwealth*,¹⁴⁴ Leibson found that "the present statute transgress[es] established procedure relating to the competency of children to testify as witnesses, usurp[s] the power of the judiciary to control procedure, and violate[s] Sections 27 and 28 of the Constitution of Kentucky."¹⁴⁵ The court declined to extend comity to the statute "because it fail[s] the test of a 'statutorily acceptable' substitute for current judicially mandated procedures."¹⁴⁶ Justice Leibson found that the statute, although it adopted the philosophy of Federal Rule of Evidence 803(4),¹⁴⁷ nonetheless overstepped the boundaries of legislative rulemaking because the Kentucky Rules of Evidence did not include a similar hearsay exception.¹⁴⁸ The court's method of adopting the federal rule into the state rule necessarily made the statute constitutional.¹⁴⁹ The case was reversed and remanded so the trial court could evaluate the evidence consistently with the court's opinion.¹⁵⁰

Interestingly, Justice Roy N. Vance dissented, citing reasons reminiscent of Justice Leibson's thoughts in *Reneer, Huff, Hubbard, and Boone*.¹⁵¹ Justice Vance believed Federal Rule of Evidence 803(4)¹⁵² was too hastily adopted. He asserted:

We have not heard argument on the question, and the adoption of a new rule of evidence in this manner flies squarely in the face of our announced policy submitting the proposed adoption of rules to a discussion by the members of the Kentucky Bar Association before they are adopted.¹⁵³

¹⁴³ See *id.* at 386.

¹⁴⁴ *Gaines v. Commonwealth*, 728 S.W.2d 525 (Ky. 1987) (declaring K.R.S. § 421.350 unconstitutional as an infringement on the inherent powers of the judiciary because it allowed a child who had not been found competent to testify).

¹⁴⁵ *Drumm*, 783 S.W.2d at 382.

¹⁴⁶ *Id.* (quoting *Gaines v. Commonwealth*, 728 S.W.2d 525, 527 (Ky. 1987)).

¹⁴⁷ FED. R. EVID. 803(4); see *supra* note 139.

¹⁴⁸ See *Drumm*, 783 S.W.2d at 382.

¹⁴⁹ See *id.* at 384; see also FED. R. EVID. 803(4) and *supra* note 139 (KY. R. EVID. 803(4) and FED. R. EVID. 803(4) are identical).

¹⁵⁰ See *Drumm*, 783 S.W.2d at 385-86.

¹⁵¹ See *supra* notes 121, 96, 98, 115-35 and accompanying text.

¹⁵² See *supra* notes 139-40 and accompanying text.

¹⁵³ *Drumm*, 783 S.W.2d at 386 (Vance, J., dissenting).

Chief Justice Robert F. Stephens and Justice Dan Jack Combs joined in this dissent.¹⁵⁴

In 1991, the court decided *Hall v. Commonwealth*,¹⁵⁵ once again evaluating provisions of K.R.S. § 532.055, the Truth-in-Sentencing statute. The question in *Hall* was whether evidence offered by the Commonwealth during the sentencing phase must meet Kentucky Rules of Evidence requirements for competency.¹⁵⁶ The majority found that backward evidence utilized in the sentencing phase essentially was not subject to the requirements of the Kentucky Rules of Evidence.¹⁵⁷ However, Justice Leibson believed that this type of evidence was “full of hearsay, rumor, speculation and opinion” and was inadmissible in any phase of a jury trial.¹⁵⁸ He wanted to apply the “competent evidence” standard¹⁵⁹ set forth in *Commonwealth v. Willis*¹⁶⁰ and *Hobbs v. Commonwealth*.¹⁶¹

Finally, in *O’Bryan v. Hedgespeth*,¹⁶² the court struck down K.R.S. § 411.188 as unconstitutional. This statute allowed parties who held subrogation rights to plaintiffs’ awards to be notified of collateral source payments made to those plaintiffs, and allowed evidence of collateral payments to be admissible in civil trials. (Before the statute was enacted, collateral payments were deemed irrelevant.¹⁶³) Writing the opinion for a unanimous court, Justice Leibson asserted that “[r]esponsibility for deciding when evidence is relevant to an issue of fact which must be judicially determined falls squarely within the parameters of ‘practice and procedure’ assigned to the judicial branch.”¹⁶⁴ The court was concerned that information regarding collateral payments was not “relevant

¹⁵⁴ *See id.*

¹⁵⁵ *Hall v. Commonwealth*, 817 S.W.2d 228 (Ky. 1991), *overruled by Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996).

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* at 229-30.

¹⁵⁸ *Id.* at 231 (Leibson, J., dissenting).

¹⁵⁹ *See id.*

¹⁶⁰ *Commonwealth v. Willis*, 719 S.W.2d 440 (Ky. 1986) (holding that a certified copy of a driving history record was not sufficient to prove a prior conviction for DUI because the best evidence of prior convictions is the judgment setting out the conviction).

¹⁶¹ *Hobbs v. Commonwealth*, 655 S.W.2d 472 (Ky. 1983) (holding that a certified copy of a judgment of conviction is necessary to prove the date or fact of previous offenses in PFO hearings).

¹⁶² *O’Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995).

¹⁶³ *See id.* at 573, 576.

¹⁶⁴ *Id.* at 576 (quoting KY. CONST. § 116).

evidence" (as defined in Kentucky Rule of Evidence 401¹⁶⁵) with respect to determining a plaintiff's right to recover for injury.¹⁶⁶ It declined to extend comity to the statute because the provision did "nothing to enhance the jury's fact-finding function,"¹⁶⁷ thus failing to meet the standard articulated in *Reneer*.¹⁶⁸

Further, the court found that the statute "functions to confuse the jury regarding the factual issue rather than to assist the jury in deciding the damages incurred."¹⁶⁹ The court overruled the Court of Appeals' decision in *Edwards v. Land*,¹⁷⁰ which found K.R.S. § 411.188¹⁷¹ to be constitutional based on comity.¹⁷²

V THE LEGACY OF JUSTICE LEIBSON'S VIEWS ON RULEMAKING AUTHORITY

The case law after *Reneer* has been a scattering of opinions on the constitutionality of the General Assembly's forays into procedural rulemaking.¹⁷³ There are no clear-cut guidelines for determining which statutes will be found constitutional, which will be held unconstitutional but granted comity, and which will be found unconstitutional and overturned. As previously noted, the court upheld, in *Reneer*, the General Assembly's complete revamping of the Commonwealth's sentencing procedures, but, in *O'Bryan*, struck down a statute that would have allowed collateral source payments to be revealed to those holding subrogation

¹⁶⁵ KY. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

¹⁶⁶ See *O'Bryan*, 892 S.W.2d at 576.

¹⁶⁷ *Id.* at 577

¹⁶⁸ *Commonwealth v. Reneer*, 734 S.W.2d 794, 798 (Ky. 1987). Under *Reneer*, a legislatively prescribed procedure is permissible if it facilitates rather than impairs judicial functions. See *supra* notes 40-92 and accompanying text.

¹⁶⁹ *O'Bryan*, 892 S.W.2d at 578.

¹⁷⁰ *Edwards v. Land*, 851 S.W.2d 484 (Ky. Ct. App. 1992) (holding that although K.R.S. § 411.188 may encroach upon the powers of the judiciary, it does not interfere unreasonably with the functioning of the courts), *overruled by O'Bryan*, 892 S.W.2d at 578.

¹⁷¹ KY. REV. STAT. ANN. § 411.188 (Michie 1990).

¹⁷² See *Farrish*, *supra* note 34, for a discussion of *O'Bryan*.

¹⁷³ See *supra* notes 98-172 and accompanying text.

rights.¹⁷⁴ Although both decisions pertained to changes in evidentiary rules, the court came down on opposite sides of the fence regarding their legitimacy. Decisions like these, with no apparent rhyme or reason, provide fodder for the legislature to continually tweak the rules of practice and procedure. Without Justice Leibson (who died in 1995) as a bulwark against these infringements on the judiciary's rulemaking authority, it is uncertain what avenues the General Assembly will pursue in the future. It is conceivable that even more daring incursions will be attempted.

Justice Lambert, who joined in many of Justice Leibson's dissents, most notably in the *Reneer*¹⁷⁵ decision, may possibly take up the mantle of protecting judicial authority, although his views are still unclear. He joined in the dissent in *Huff*¹⁷⁶ but voted with the majority in *Hubbard*¹⁷⁷ and concurred in the result only in *Boone*.¹⁷⁸ He also joined Justice Leibson and the majority in *O'Bryan*.¹⁷⁹ From these opinions, it is difficult to divine what philosophy he will follow in future decisions.

The death of Justice Leibson has left a significant void in the court, a void that hopefully will be filled by another strong voice in support of the judiciary's exclusive right to promulgate rules of practice and procedure for the Commonwealth. Until such time as the court embraces that philosophy, the legacy of *Reneer* will be further attempts by the General Assembly at ad hoc rulemaking and confusion in the lower courts regarding the Supreme Court's actions each time a statute is challenged.

For these reasons, the Supreme Court should scale back its application of comity and restore the judiciary's exclusive rulemaking authority. Anything less will demean the efforts of the Supreme Court and Kentucky Bar Association to engage in thoughtful, careful modification or enhancement of the Rules of Civil and Criminal Procedure, as well as the Rules of Evidence. Leaving rulemaking to the political whims of the legislative branch will continue to wreak havoc on our system of justice and will seriously undermine the doctrines of equal protection and due process. This Note has attempted to provoke discussion on the merits of exclusive judicial rulemaking authority.

¹⁷⁴ See *supra* notes 40-45, 162-72 and accompanying text.

¹⁷⁵ *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987).

¹⁷⁶ *Huff v. Commonwealth*, 763 S.W.2d 106 (Ky. 1988).

¹⁷⁷ *Commonwealth v. Hubbard*, 777 S.W.2d 882 (Ky. 1989).

¹⁷⁸ *Boone v. Commonwealth*, 780 S.W.2d 615 (Ky. 1989).

¹⁷⁹ *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995).

Access Denied: The Prison Litigation Reform Act

BY SIMONE SCHONENBERGER*

I. INTRODUCTION

Prisoners constitute a relatively small portion of the United States population.¹ Yet, the prison population generates between fifteen percent and twenty-three percent of all civil lawsuits filed in the federal courts.² As a consequence, the nation spends a disproportionate amount of judicial and financial resources dealing with such cases.³ Many of these claims are frivolous.⁴ And since most prisoners are indigent, taxpayers fund the majority of their claims from the initial filing to the final adjudication. Taxpayers are understandably frustrated by this significant financial burden.⁵

In a legislative attempt to remedy the high profile problem of prisoner lawsuits,⁶ Congress enacted the Prison Litigation Reform Act⁷ ("PLRA")

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¹ In 1996, 1,182,169 prisoners were in federal or state prisons in the United States. U.S. Department of Justice, Bureau of Justice Statistics, *Prison Statistics* (last modified Aug. 7, 1997) <<http://www.ojp.usdoj.gov/bjs/prisons.htm>>

² See Gail L. Bakaitis DeWolf, Note, *Protecting the Courts from the Barrage of Frivolous Prisoner Litigation: A Look at Judicial Remedies and Ohio's Proposed Legislative Remedy*, 57 OHIO ST. L.J. 257 (1996); *Curbing Prison Litigation*, WASH. POST, May 13, 1996, at A16.

³ According to the National Association of Attorneys General, states spend approximately \$81 million a year on prisoner lawsuits. *Review and Outlook*, WALL ST. J., June 10, 1996, at A18.

⁴ See DeWolf, *supra* note 2, at 257

⁵ "Each case can represent thousands of taxpayer dollars wasted" *Testimony of Sarah Vandenbraak, Former Lead Counsel for the Philadelphia District Attorney, Before the Judiciary Comm. of the U.S. Senate* [hereinafter *Testimony of Sarah Vandenbraak*], F.D.C.H., available in WESTLAW, 1996 WL 556529 (Sept. 25, 1996).

⁶ See, e.g., *Review and Outlook*, *supra* note 3, at A18 (expressing the "public's wish to lock up criminals and throw away the key").

⁷ Prison Litigation Reform Act, PL 104-134, 110 Stat. 1321-73 (codified as

in April, 1996. While decreasing the number of frivolous lawsuits may be a laudable goal, significantly limiting prisoners' access to the courts risks infringement of their constitutional rights. The constitutionality of some of the provisions included in the PLRA is questionable.⁸ Despite the real financial burden caused by prisoner litigation, "the cost of protecting a constitutional right cannot justify its total denial."⁹ Ultimately, no public good is served by subordinating the constitutional rights of certain individuals, even unsympathetic ones, to an otherwise laudable goal.

The purpose of this Note is to analyze the constitutionality of the PLRA reforms of the in forma pauperis statute¹⁰ with regard to terms of access to the courts.¹¹ The in forma pauperis statute enables indigent individuals to file petitions with the court despite their inability to pay the filing fee.¹² The statute was "designed to ensure that indigent persons would have meaningful access to federal courts."¹³ Before the enactment of the PLRA, the filing fee was waived for prisoners who demonstrated their indigent status.¹⁴ There was no limit to the number of times a single prisoner could take advantage of the waiver. The current version of the in forma pauperis statute replaces the waiver system with an affordable repayment plan for indigent prisoners. In addition, it numerically limits prisoners' use of the statute.¹⁵

Part II of this Note will trace the historical development of a prisoner's right of access to the courts. Part III will introduce the in forma pauperis statute. Next, Part IV will evaluate the constitutionality of the PLRA's changes regarding the payment of filing fees by indigent prisoners. Part V

amended at 28 U.S.C. § 1915 (1996)).

⁸ Criticism of the Act is not limited to its questionable constitutionality. Groups such as the National Prison Project of the American Civil Liberties Union are also concerned with the PLRA's effect on the humane treatment of prisoners. The group worries that the PLRA will "interfer[e] with the federal courts' power to address truly horrifying conditions." *Prison Suits Address Horrifying Conditions*, WALL ST. J., July 12, 1996, at A13.

⁹ *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

¹⁰ 28 U.S.C. § 1915 (1994).

¹¹ Although the PLRA reformed many aspects of the prison litigation process, this Note will evaluate only the constitutionality of the modifications to the in forma pauperis statute.

¹² 28 U.S.C.A. § 1915(a)(1) (West Supp. 1997).

¹³ Jody L. Sturtz, Comment, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May it be Numerically Restricted?*, 1995 DET. C.L. MICH. ST. U. L. REV. 1349, 1358.

¹⁴ 28 U.S.C. § 1915(a) (1994).

¹⁵ See *id.* § 1915(g).

will focus on the constitutionality of the PLRA's bar on a prisoner's right to file in forma pauperis after having previously filed three frivolous lawsuits while incarcerated.¹⁶ Finally, this Note will conclude that whereas the former modification passes constitutional muster, the latter revision does not.

II. HISTORICAL BACKGROUND

Three major United States Supreme Court cases have contributed to the establishment and extension of the prisoner's right of access to the courts.¹⁷ *Ex parte Hull*,¹⁸ *Johnson v. Avery*,¹⁹ and *Bounds v. Smith*.²⁰ Initially, a prisoner's right to access was defined in terms of physical access to the courts only. In *Hull*, a prison regulation required that prisoners' habeas corpus petitions must be approved by prison authorities before they could be filed with the court.²¹ In other words, prison officials could and did physically bar specific prisoner petitions from being filed. The Supreme Court struck down this regulation because "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."²²

This physical right of access was extended in 1968 by *Johnson*.²³ The prison regulation at issue prohibited prisoners from assisting fellow inmates in the drafting of their legal documents.²⁴ Thus, the regulation was unlike the *Hull* regulation because it did not physically bar any specific petition from being filed. Nonetheless, the *Johnson* Court focused on the actual effect of the regulation and struck it down as an unconstitutional denial of a prisoner's right of access to the courts.²⁵ The Court concentrated on the regulation's impact on illiterate and non-English-speaking prisoners. Since they were incapable of drafting petitions without the aid of a jail house lawyer, the rule effectively "forb[ade] illiterate or poorly educated prisoners" from filing habeas corpus petitions.²⁶ By basing its ruling on the

¹⁶ *See id.*

¹⁷ *See Sturtz, supra* note 13, at 1353.

¹⁸ *Ex parte Hull*, 312 U.S. 546 (1941).

¹⁹ *Johnson v. Avery*, 393 U.S. 483 (1969).

²⁰ *Bounds v. Smith*, 430 U.S. 817 (1977).

²¹ *See Hull*, 312 U.S. at 548-49.

²² *Id.* at 549.

²³ *See Sturtz, supra* note 13, at 1355.

²⁴ *See Johnson*, 393 U.S. at 484.

²⁵ *See id.* at 485.

²⁶ *Id.* at 487

prohibitive effect of the regulation, the Court extended a prisoner's right of access beyond the mere physical right to file a petition with the court. The Constitution prohibits effective denial of the right of access as well as actual denial of access.²⁷

The final significant extension of prisoners' right of access to the courts occurred in 1976 with *Bounds*.²⁸ Unlike the *Hull* and *Johnson* cases, at issue in *Bounds* was not what the prison had done, but rather what it had failed to do. The prisoners alleged a denial of right of access because the prison did not provide adequate legal research facilities.²⁹ Analyzing the issue in terms of the right to a "reasonably adequate opportunity" to present petitions to the court,³⁰ the Court agreed with the prisoners and held that failure to provide prisoners with adequate legal libraries resulted in a denial of their "fundamental constitutional right of access to the courts."³¹

Recently, in *Lewis v. Casey*,³² the Supreme Court retreated from some minor aspects of *Bounds*.³³ It invalidated a district court order, which was based on alleged *Bounds* violations involving Arizona prison libraries, primarily due to insufficient actual injury suffered by the complainants,³⁴ and refuted the idea that prisoners have a constitutional right to adequate prison libraries, per se. Rather, libraries are a means to an end – court access – and not an end in themselves.³⁵ In its lengthy analysis, however, the Court reaffirmed the essence of *Bounds* as a guarantee of "the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts."³⁶ Prisoners' right of access, therefore, survives this recent challenge.

Although some constitutional rights of prisoners are restricted as a consequence of their incarceration, the right of access to the courts is not

²⁷ See *id.* at 485 ("[I]t is fundamental that access of prisoners may not be denied or obstructed.").

²⁸ See Sturtz, *supra* note 13, at 1356.

²⁹ See *Bounds v. Smith*, 430 U.S. 817, 818 (1977).

³⁰ *Id.* at 825.

³¹ *Id.* at 828.

³² *Lewis v. Casey*, 116 S. Ct. 2174 (1996).

³³ The Supreme Court disclaimed the suggestion in the *Bounds* decision that "the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court." *Id.* at 2181.

³⁴ Other reasons for the reversal stated by the Court include (1) failure to adequately defer to the judgment of prison authorities; (2) the incredible intrusiveness of the injunction; and (3) failure to take into account the views of prison authorities. See *id.* at 2184-85.

³⁵ See *id.* at 2180.

³⁶ *Id.* at 2182.

deemed conditional on an individual's freedom from imprisonment.³⁷ The basis of the right is debatable.³⁸ It has been identified as stemming from either the First Amendment³⁹ or the Due Process Clause.⁴⁰ Nevertheless, the Supreme Court has "established beyond doubt that prisoners have a constitutional right of access to the courts."⁴¹

III. THE IN FORMA PAUPERIS STATUTE

The in forma pauperis statute provides indigents access to the courts by allowing the poor to bypass the court filing fee based on their lack of financial resources.⁴² While the Constitution does not specifically guarantee an individual the right to file in forma pauperis, the Court has "established that prisoners have a constitutional right of access to the courts."⁴³ Thus, the State has an affirmative duty to ensure that prisoners have a "reasonably adequate opportunity" to present their grievances to the court.⁴⁴ Since the current filing fee of \$120 for civil actions is beyond the reach of many prisoners,⁴⁵ an indigent prisoner has no "reasonably adequate opportunity" to file with the court if he⁴⁶ is denied financial assistance.⁴⁷ Without the Statute, the poor prisoner would be effectively, if not physically, barred from filing a petition with the court. "Since a vast majority of inmates are indigent, the constitutional right to access would

³⁷ See *Bounds v. Smith*, 430 U.S. 817, 821 (1977).

³⁸ See *Arguments Before the Court, Prisons and Jails*, 64 U.S.L.W. 3407, at 3409 (Dec. 12, 1995).

³⁹ See *Turner v. Safley*, 482 U.S. 78 (1987) (identifying the First Amendment to the United States Constitution as the source of the right of access). The First Amendment prohibits Congress from "abridging the right of the people to petition the Government for a redress of grievances." U.S. CONST. amend. I.

⁴⁰ See U.S. CONST. amends. V, XIV; see *Sturtz, supra* note 13, at 1376.

⁴¹ See *Bounds*, 430 U.S. at 821. The validity of *Bounds* has recently come under criticism by Justice Clarence Thomas. In his concurring opinion in *Lewis*, Justice Thomas questioned the validity of the foundation of *Bounds*. "*Bounds* forged a right with no basis in precedent or constitutional text" *Lewis*, 116 S. Ct. at 2194-95.

⁴² See *Sturtz, supra* note 13, at 1351.

⁴³ *Id.* at 1349-50.

⁴⁴ *Bounds*, 430 U.S. at 825.

⁴⁵ See *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1437 (S.D. Iowa 1996), *appeal dismissed*, No. 96-3752, 1997 WL 638238 (8th Cir. Oct. 17, 1997).

⁴⁶ For the sake of convenience, in this Note the masculine pronoun refers both to the masculine and the feminine.

⁴⁷ *Bounds*, 430 U.S. at 825.

be meaningless without the *in forma pauperis* statute.⁴⁸ Therefore, although *in forma pauperis* filings are not specifically authorized by the Constitution, they nonetheless are necessitated by prisoners' constitutional right of access to the courts.

Additionally, according to the Court in *Burns v. Ohio*,⁴⁹ an indigent prisoner's constitutional right to proceed *in forma pauperis* may also be based on an equal protection claim.⁵⁰ Since the right of access to the courts is arguably based on the equal protection component of the Due Process Clause,⁵¹ a prisoner may not be denied access to the courts based on his lack of financial resources.⁵² In *Burns v. Ohio*, the defendant was convicted of burglary in Ohio. After the appellate court affirmed his life sentence, he unsuccessfully attempted to file an appeal with the Ohio Supreme Court.⁵³ Although that court recognized Burns' legitimate indigent status, it rejected his request for *in forma pauperis* status because it had a policy of requiring full payment of the fee regardless of the financial resources of the person filing.⁵⁴ The United States Supreme Court held for the indigent inmate and required that *in forma pauperis* status be granted. Since "[t]here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants[,] [i]ndigents must, therefore, have the same opportunities to invoke the discretions of the Supreme Court of Ohio."⁵⁵

Nonetheless, the Constitution does not expressly contemplate *in forma pauperis* filings. Therefore, any program modification that continues to "assure the indigent [prisoner] an adequate opportunity to present his claims fairly"⁵⁶ would satisfy the constitutional demands met by the original *in forma pauperis* statute. Thus, "[e]ven though the *in forma pauperis* statute affects a prisoner's right to access, which is a constitutional right, Congress may limit prisoner use of the statute without completely denying such persons this constitutional right."⁵⁷

Before the 1996 PLRA modification, the *in forma pauperis* statute provided for a waiver of the filing fee for qualifying indigent prisoners.⁵⁸

⁴⁸ Sturtz, *supra* note 13, at 1351.

⁴⁹ *Burns v. Ohio*, 360 U.S. 252 (1959).

⁵⁰ *See id.* at 252.

⁵¹ *See supra* notes 38-40 and accompanying text.

⁵² *See Burns*, 360 U.S. at 252.

⁵³ *See id.*

⁵⁴ *See id.* at 254.

⁵⁵ *Id.* at 257-58.

⁵⁶ *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

⁵⁷ Sturtz, *supra* note 13, at 1361.

⁵⁸ 28 U.S.C. § 1915 (1994).

No repayment provision existed, and indigent status was the only factor considered in granting the waiver.⁵⁹ The most recent revision of the payment system of the *in forma pauperis* statute modifies the mechanics of the statute, but its application does not effectively deny prisoners their constitutionally mandated opportunity to petition the courts. However, the addition of the three strikes-provision,⁶⁰ which denies a prisoner *in forma pauperis* status if he previously has made three frivolous *in forma pauperis* filings, does effectively deny prisoners access to the courts.⁶¹

IV THE ABOLITION OF THE FILING FEE WAIVER

The PLRA does not abolish *in forma pauperis* filings. However, the Act does significantly transform the federal *in forma pauperis* program. Previously, the *in forma pauperis* statute resembled a generous waiver of the filing fee for indigent prisoners. After enactment of the PLRA, what remains of the *in forma pauperis* statute more closely resembles a strictly enforced installment loan agreement.⁶²

The revised statute demands more proof of a prisoner's indigent status than was previously required. Specifically, the statute requires submission of "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal"⁶³ By itself this additional paperwork is an obstacle too small to be considered an effective barrier to access. More significantly, the revision also puts most prisoners on an installment plan to pay the filing fee. Specifically, the statute now requires:

[I]f a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of the filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of - (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's

⁵⁹ *See id.*

⁶⁰ *See id.* § 1915(g) (preventing a prisoner from bringing a civil action or appeal if he has had three or more claims dismissed as "frivolous, malicious or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury").

⁶¹ *See id.*

⁶² *See id.* § 1915.

⁶³ *Id.* § 1915(a)(2).

account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.⁶⁴

In effect, this newly enacted repayment plan makes true prison in forma pauperis filings a thing of the past. Under the current rule, virtually every prisoner will eventually pay for the filing fee out of his own pocket.⁶⁵

By eliminating state funding for prisoner's claims and by complicating the process through which prisoners must proceed, Congress clearly has attempted to limit the number of prisoner lawsuits.⁶⁶ In fact, since the enactment of the PLRA, the courts have experienced an actual decrease in the number of prisoner filings.⁶⁷ However, the Constitution is not necessarily violated simply because the approach of the revised program may have contributed to a decline in prisoner lawsuits. Providing an effective disincentive to prisoner filings does not automatically qualify as an unconstitutional restriction on a prisoner's right of access.

Since the right to file in forma pauperis is not itself constitutionally based, reformation of the statute, or even its complete elimination, is not unconstitutional unless the resulting reformation or elimination effectuates a denial of actual or meaningful access to the courts. Although filing a claim is more difficult now, the process does not rise to the level of either an actual or effective bar to access.

The PLRA modifications to the in forma pauperis payment system do not constitute a physical bar on a poor prisoner's right of access to the courts because an alternative, affordable payment schedule is made

⁶⁴ *Id.* § 1915(b)(1).

⁶⁵ For example, "a prisoner earning say \$20 a month would pay \$4 a month for 30 months to pay the \$120 filing fee." Paul Wright, *Prison Litigation Reform Act Passed*, PRISON LEGAL NEWS, July 1996, at 4.

⁶⁶ *See id.* ("PLN has already received copies of orders from federal courts in California, less than three weeks after passage of the PLRA, informing prisoner litigants of the new fee requirements and asking the prisoners if they want to voluntarily dismiss the action or continue to pay the fee. The wording of the order makes it clear that the court would prefer the action be withdrawn.").

⁶⁷ *See Testimony of Sarah Vandenbraak, supra* note 5:

Although it is too early to make definitive predictions, national statistics from the Administrative Office of the United States Courts suggest a promising reduction in prisoner lawsuits. From 1991 through 1995 prisoners lawsuits increased 47%, representing an average growth rate of more than 10% per year. For the first four months in 1996, this growth rate continued. In June of 1996, the first full month where the courts consistently applied the PLRA, there was a 10% decrease in prisoner civil cases.

available in lieu of the previous payment waiver. Even if the prisoner does not have the requisite minimum in his prison account, the inmate may still proceed with the claim.⁶⁸ The payment will simply be withdrawn once the prisoner's account reaches the requisite level. Additionally, the statute specifically stipulates that no prisoner shall be prevented from filing a suit based on lack of financial resources.⁶⁹ Therefore, these PLRA revisions of *in forma pauperis* filings cannot qualify as an absolute bar to physical access to the courts as described in *Hull*. In *Hull*, once the prison officials removed a prisoner's petition from consideration, the prisoner was powerless to ensure that his petition would reach the court.⁷⁰ The PLRA modifications do not render an inmate powerless to ensure his petition will reach the court. Action by the inmate, namely selecting the repayment plan schedule, guarantees that his claim will reach the courts. Therefore, the current reform does not deny prisoners access; it only requires them to pay for it like everyone else.

On the other hand, the PLRA's effect on *meaningful* access is less clear. *Bounds* requires that a prisoner have not only physical access but also "a reasonably adequate opportunity to present" his petitions to the court.⁷¹ Without a legal research library, a prisoner is denied effective access because he is without the means to draft his petitions.⁷² Similarly, without financial assistance, an indigent prisoner is denied effective access because, although not barred from filing, he is without the means to pay the filing fee. Therefore, if indigent prisoners were required to pay an unaffordable filing fee up front, they would be denied a reasonable opportunity to petition the court because the fee, and therefore access, would be beyond their reach. The PLRA purports to give the indigent prisoner a viable means by which to pay the fee by breaking the fee down into smaller monthly payments. However, since many prisoners are indigent and earn low wages,⁷³ filing under the terms of the new *in forma pauperis* system still imposes a substantial barrier.

Court-imposed barriers on *in forma pauperis* filings are not at all uncommon. Unlike the PLRA, however, such restrictions are usually developed in response to specific, especially prolific petition-filing

⁶⁸ See 28 U.S.C. § 1915(b)(4) (1996).

⁶⁹ See *id.* ("In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.")

⁷⁰ See *Ex parte Hull*, 312 U.S. 546, 548 (1941).

⁷¹ *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

⁷² See *id.*

⁷³ See Sturtz, *supra* note 13, at 1351.

prisoners and applied only to those prisoners. Since the actual effect of the limitation on the individual's right of access is determinative, overly restrictive orders, such as absolute bans on any future *in forma pauperis* filing, have not survived the test of constitutionality.⁷⁴ However, other court-administered restrictions, such as limiting the number of *in forma pauperis* filings a specific prisoner may make per month, have survived constitutional review.⁷⁵

The PLRA is a congressionally imposed rather than a judicially imposed restriction. It targets all indigent prisoners, rather than targeting only especially litigious ones. Nonetheless, comparison of the PLRA to the court-ordered restrictions provides guidance in evaluating the constitutionality of these statutorily mandated changes to the PLRA. The PLRA's abolition of the fee waiver more closely resembles the constitutionally valid forms of court-imposed restrictions limiting indigent filings than it does the unconstitutional forms.

This federal reform is unlike the overly restrictive order deemed unconstitutional by the court in *In re Green*.⁷⁶ That order denied an indigent prisoner, Clovis Green, meaningful access to the courts.⁷⁷ It was aimed solely and specifically at Clovis Green, a prisoner who had filed over 600 complaints in federal and state courts during his decade of incarceration.⁷⁸ In response to Green's abuse of the *in forma pauperis* statute, the district court absolutely denied Green the option of filing *in forma pauperis* in the future.⁷⁹ Not only did the court require Green to pay the filing fee up front, but it also demanded Green pay an additional "\$100 cash deposit as security for costs" for each new petition he wanted to file with the court.⁸⁰

The circuit court acknowledged the incredible financial burden Green had placed on the local courts, both recently and in the past, even sympathizing with the lower court's plight.⁸¹ Nonetheless, the order was

⁷⁴ See, e.g., *In re Green*, 669 F.2d 779 (D.C. Cir. 1981) (amending a district court order prohibiting Green from filing any new actions unless all fees had been paid and a \$100 security deposit had been made).

⁷⁵ See, e.g., *In re Davis*, 878 F.2d 211 (7th Cir. 1989) (upholding an injunction requiring Davis to obtain prior review of a complaint before it could be filed); *In re Tyler*, 677 F. Supp. 1410 (D. Neb. 1987) (limiting Tyler to one *in forma pauperis* filing per month).

⁷⁶ See *Green*, 669 F.2d at 786.

⁷⁷ See *id.*

⁷⁸ See *id.* at 781.

⁷⁹ See *id.*

⁸⁰ *Id.*

⁸¹ See *id.* at 786 ("We sympathize with the frustration experienced by the district court here as well as by other district courts deluged with Green's parade

struck down as unconstitutional.⁸² Financial burden on the court was not the focus of a claim of denial of access. Instead, the circuit court focused on “the nature of the indigent litigant’s claim and the extent to which the challenged restriction or barrier (financial or otherwise) deprived that litigant of ‘meaningful access’ to the courts.”⁸³ Similarly, the PLRA modification must not be evaluated in terms of resultant financial gains to the judicial system. The order provided Green no alternative to filing at his own expense. Due to his indigence, he would be unable to pay the fee.⁸⁴ Therefore, although he was not physically barred from filing, for all practical purposes, future filings were out of his reach. Since the order was unlimited in scope, it effectuated a “total barrier.”⁸⁵ Therefore, it infringed on Green’s constitutionally protected right to meaningful access.

In contrast, the *in forma pauperis* revisions to the waiver system included in the PLRA do not result in an across-the-board, total barrier against meaningful access by indigent prisoners.⁸⁶ The process has been purposely complicated to discourage the filing of prisoner petitions, with more paperwork to prove a prisoner’s indigent status and ultimate payment of the filing fee being required. Nevertheless, indigent prisoners may still qualify for *in forma pauperis* status. Yet, even the court in *In re Green* recognized that “a court may impose conditions upon a litigant – even onerous conditions – so long as they are, taken together, not so burdensome as to deny the litigant meaningful access to the courts.”⁸⁷ The statute specifically states that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”⁸⁸ The PLRA provides a feasible alternative to paying the full cost of the filing fee up front, the crucial element missing from the court’s order in *In re Green*.

The Supreme Court has never defined meaningful access to mean free and unlimited access. Rather it means access which, for all practical purposes, is within a prisoner’s grasp.⁸⁹ The PLRA reform to the *in forma*

of pleadings, petitions, and other papers.”).

⁸² *See id.*

⁸³ *Id.* at 785.

⁸⁴ *See id.* at 786.

⁸⁵ *Id.* at 785.

⁸⁶ For discussion of the three strikes provision which does deny IFP status to especially litigious prisoners, *see infra* notes 97-103 and accompanying text.

⁸⁷ *Green*, 669 F.2d at 786.

⁸⁸ 28 U.S.C.A. § 1915(b)(4) (West Supp. 1997).

⁸⁹ *See, e.g.,* *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 116 S. Ct.

pauperis filing fee schedule provides indigent prisoners with a method for circumventing the standard requirement of up-front payment of the otherwise unaffordable fee. Thus, unlike the *In re Green* court order,⁹⁰ this PLRA reform utilizes a case-by-case evaluation of the individual's financial capabilities, and in itself does not deny filing due to insufficient funds. Although it may be unlikely that a prisoner will be able to file a complaint without depleting his prison bank account, the extended period over which the fee will be withdrawn allows even those prisoners with very limited funds to finance the filing fee in small, affordable installments.⁹¹ Admittedly, whether to file or not may now be a difficult decision for many prisoners. Yet that decision, whether to make the sacrifice and pay for the filing, is still in the hands of the individual, not the State. So too, then, is the power to access the courts. To the contrary, however, the three-strikes provision of the PLRA unconstitutionally strips prisoners of their power to access the courts.

V. THE THREE STRIKES PROVISION

The boy who cried wolf lost credibility after crying wolf one too many times. After many false alarms, the town disbelieved the boy's last warning, although that time it was legitimate. Similarly, many prisoners have, in effect, been crying wolf for years by flooding the courts with frivolous litigation usually filed in forma pauperis. For example, inmates have filed "charges of cruel and unusual punishment for allowing a prisoner's ice cream to melt, and similar charges for receiving creamy peanut butter instead of crunchy."⁹² Understandably, Congress and the public are concerned about wasting precious judicial resources on such claims. However, the abundance of frivolous claims does not negate the reality that some claims are legitimate and indeed serious.⁹³ Even if a single

2174 (1996).

⁹⁰ See *Green*, 669 F.2d at 786 ("First, the order does not purport to be and in fact is not geared to discerning whether each claim presents a new nonfrivolous issue.").

⁹¹ See 28 U.S.C. § 1915 (1994).

⁹² DeWolf, *supra* note 2, at 257-58.

⁹³ According to Donald Specter, director of the Prison Law Office at San Quentin, "[t]he high dismissal rate of prisoner lawsuits is not solely due to frivolous filings, but to potentially valid claims that are thrown out for minute procedural or technical reasons." Greg Moran, *Cruel and Unusual: Where Does Punishment End and Cruelty Begin?*, SAN DIEGO UNION-TRIB., Aug. 9, 1996, at A1.

prisoner generates hundreds of frivolous claims, the possibility exists that he will file a legitimate claim sometime in the future. In other words, sometimes when prisoners cry wolf, there really is a wolf.

Although the Constitution as interpreted by the Court in *Bounds* grants all individuals meaningful access to the courts,⁹⁴ this right is perhaps most crucial to prisoners, for the Constitution often acts as the only check on inhumane prison conditions.⁹⁵ Undeniably, ““over the years, civil rights suits have become a powerful method to force improvements in prisoner medical care, legal access and inmate treatment, ””⁹⁶ the necessity of which otherwise would have gone unnoticed. A bar specifically aimed at frivolous claims can be justified. However, any reform that even occasionally also bars a legitimate inmate claim from reaching the court should not be tolerated simply because it targets illegitimate complaints most of the time.

The PLRA’s most controversial reform to the in forma pauperis statute attempts to stem the tide of frivolous lawsuits by limiting successive suits by especially prolific inmates who proceed in forma pauperis. The reform provides that:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.⁹⁷

Unlike the modification to the in forma pauperis fee repayment provision,⁹⁸ this provision simply goes too far. It effectively, if not physically, denies prisoners their right of access to the courts as established by the Supreme Court in *Bounds*.⁹⁹

⁹⁴ See *Bounds*, 430 U.S. at 821.

⁹⁵ Elizabeth Alexander, Acting Director of the National Prisoner Project of the ACLU, describes some horror stories that were addressed through the court system, including the sexual assault of female prisoners and the abuse of children in a training school. See generally *Prison Suits Address Horrifying Conditions*, *supra* note 8.

⁹⁶ DeWolf, *supra* note 2, at 271, quoted in Lee Fischer, *Fighting Frivolous Inmate Legislation*, LAW & FACT, July/Aug., 1994, at A6.

⁹⁷ 28 U.S.C. § 1915(g) (1994).

⁹⁸ See *supra* notes 64-65 and accompanying text.

⁹⁹ *Bounds*, 430 U.S. at 817

The right of access to the courts does not include the right to file frivolous lawsuits.¹⁰⁰ "As a general matter, the Supreme Court has interpreted the First Amendment right to petition to preclude government imposed bars to the courts except in 'sham' situations."¹⁰¹ Thus, a statute could constitutionally erect obstacles intended to bar frivolous lawsuits from ever being filed or heard in court.

However, the PLRA does not solely implicate frivolous lawsuits. Rather, the statute indiscriminately bars both meritless and meritorious in forma pauperis filings based on a prisoner's previous filing of three lawsuits deemed frivolous by the courts. In other words, according to the PLRA, if a prisoner files three lawsuits that are correctly dismissed as frivolous, his fourth lawsuit would be barred without regard to the basis of that fourth claim unless that prisoner were in danger of imminent serious physical harm.¹⁰² Since the PLRA rejects that fourth claim without review as to its merits, the Act may bar non-frivolous law suits as well as frivolous ones during the remainder of a prisoner's incarceration. Therefore, the Act's constitutionality must not be analyzed under the special and unprotected category of frivolous lawsuits. Rather, it must be evaluated in terms of a possible infringement of the constitutional right of access to the courts as set forth in *Ex parte Hull*, *Avery*, and *Bounds*.¹⁰³

Defenders of the PLRA correctly point out that targeted inmates are not banned from filing claims, only from filing claims in forma pauperis. Indeed, the PLRA does not deny inmates physical access to the courts. However, despite the assertion that "there is no reason to believe that all prisoners cannot afford the fee,"¹⁰⁴ denial of in forma pauperis status effectively, if not physically, denies many indigent prisoners access to the courts. Although the Constitution does not specifically provide a right to file in forma pauperis, the *Bounds* guarantee of effective access necessitates

¹⁰⁰ See *Phillips v. Carey*, 638 F.2d 207, 208 (10th Cir. 1981).

¹⁰¹ DeWolf, *supra* note 2, at 280. "This notion has been articulated through a series of cases, establishing what has been called the "Noerr-Pennington" doctrine." *Id.*, see, e.g., *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

¹⁰² See 28 U.S.C. § 1915(g).

¹⁰³ *Ex parte Hull*, 312 U.S. 546 (1941); *Johnson v. Avery*, 393 U.S. 483 (1969); *Bounds*, 430 U.S. at 817; see *supra* Part II.

¹⁰⁴ *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1437 (S.D. Iowa 1996), *appeal dismissed*, No. 96-3752, 1997 WL 638238 (8th Cir. Oct. 17, 1997).

a system of financial aid for the indigent.¹⁰⁵ Just as “prison law libraries and legal assistance programs are not ends in themselves,” so too is in forma pauperis status not an end in itself, “but only the means for ensuring ‘a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.’”¹⁰⁶

Some court-imposed numerical restrictions on a prisoner’s in forma pauperis status, and consequently on that prisoner’s access to the courts, have withstood constitutional scrutiny.¹⁰⁷ For example, in *In re Tyler*,¹⁰⁸ the court limited Tyler to a single in forma pauperis lawsuit per month.¹⁰⁹ Tyler was an especially prolific and creative petitioner.¹¹⁰ The court therefore considered, but ultimately rejected, completely barring Tyler from future in forma pauperis filings.¹¹¹ Like most prisoners he was indigent and therefore “if he were to be prohibited from proceeding in forma pauperis in any case, his access to this court would be totally denied.”¹¹²

On the other hand, the court concluded that limiting Tyler to one in forma pauperis filing per month would curb the number of petitions he could file while still allowing him his constitutionally protected access to the courts. The *Tyler* restriction is not an unconstitutional denial of access because “in the event Mr. Tyler has serious claims to assert, he may still assert them, albeit with some delay.”¹¹³ Moreover, “the most urgent of his claims can still be presented to this court, at the rate of one in forma pauperis filing per month.”¹¹⁴

The existence of *Tyler*-type restrictions on in forma pauperis filings supports the idea that there is no “unconditional right to proceed [in forma pauperis].”¹¹⁵ Yet the PLRA attack on the in forma pauperis filings of

¹⁰⁵ See *Bounds*, 430 U.S. at 821-22. “[I]n order to prevent ‘effectively foreclosed access,’ indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees.” *Id.* at 822 (quoting *Burns v. Ohio*, 360 U.S. 252, 257 (1959)).

¹⁰⁶ *Lewis v. Casey*, 116 S. Ct. 2174, 2180 (1996) (quoting *Bounds*, 430 U.S. at 825).

¹⁰⁷ See *Sturtz*, *supra* note 13, at 1364-67.

¹⁰⁸ *In re Tyler*, 677 F. Supp. 1410 (D. Neb. 1987).

¹⁰⁹ See *id.*

¹¹⁰ See *id.* (noting that Tyler filed 113 lawsuits between January 1, 1986 and August 25, 1987).

¹¹¹ See *id.* at 1413.

¹¹² *Id.*

¹¹³ *Id.* at 1414.

¹¹⁴ *Id.*

¹¹⁵ *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996), *appeal dismissed*, No. 96-3752, 1997 WL 638238 (8th Cir. Oct. 17, 1997).

prolific prisoners is not, as suggested by PLRA supporters, "similar to the federal courts' inherent power to limit inmates' abuse of the courts."¹¹⁶ *Tyler's* limitation and other similar court-ordered restrictions survive constitutional scrutiny in part because they are individual responses to a particular litigant.¹¹⁷ On the other hand, the PLRA provision burdens access to an entire class of prisoners, the indigent, without respect to the particular circumstances involved.¹¹⁸

Additionally, the one-per-month limit ensures that *Tyler* will never be at risk for losing his claim permanently. However, since many prisoners are indigent and simply cannot afford the filing fee, under the PLRA reform prisoners will conceivably lose their legitimate claims forever due to the statute of limitations. In her Comment, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May it be Numerically Restricted*, Jody L. Sturtz proposed limiting in forma pauperis filings to three per year.¹¹⁹ Although there is no magic number that maximizes society's interest in curbing abusive litigation while still protecting a prisoner's constitutional rights, both Sturtz's three-per-year limit and *Tyler's* more liberal one-per-month limit avoid the constitutional difficulties that plague the PLRA. The *Tyler* and Sturtz solutions "will almost never bar a prisoner from bringing a legitimate civil rights claim [because] the statute of limitations allows a prisoner many years to commence a claim before the claim is barred."¹²⁰

The statute of limitations problem, which Sturtz avoided by proposing a limit of three claims per year, is not avoided in Congress's PLRA. The PLRA denies prisoners the opportunity to proceed in forma pauperis after having made three frivolous claims. Since some prisoners are incarcerated for long periods of time, the ban may well result in the loss of potentially legitimate claims forever. As Sturtz noted, not all states toll the statute of limitations until an inmate is released from prison.¹²¹ Therefore, the PLRA's change results in an unconstitutional denial of physical access to

¹¹⁶ *Id.*

¹¹⁷ *See id.* ("The difference between § 1915(g) and the power of federal courts to limit abusive litigation is that a federal court limits abuse in response to the actions of an individual litigant based on particular circumstances.").

¹¹⁸ *See id.*

¹¹⁹ *See Sturtz, supra* note 13, at 1368.

¹²⁰ *Id.* at 1371 ("The statute of limitations for a § 1983 claim is the most analogous statute of limitations under the law of the state where the action is brought. In Michigan, the statute of limitations for § 1983 causes of actions is three years. Many states toll the statute of limitations during the term of imprisonment of the plaintiff.").

¹²¹ *See id.* at 1375-76.

the courts similar to the denial in *Ex parte Hull*.¹²² Prisoner petitions will be barred forever from reaching the courts if the statute of limitations runs before the prisoner is released.

Proponents of the PLRA point out that the federal courts are not the sole outlets for prisoner grievances.¹²³ The prison grievance system is specifically intended to deal with prisoner complaints without the costly intervention of the judiciary.¹²⁴ However this system "is not a substitute for the courts in resolving constitutional claims."¹²⁵ Access to the court system, not the resolution of grievances per se, is the core of the *Bounds* guarantee. Thus, despite the availability of extra-judicial alternatives, court restrictions that have survived constitutional challenges noticeably have not relied on prisoner grievance systems to satisfy the *Bounds* constitutional command.

Another solution to overzealous litigants was approved by the Seventh Circuit in the case of *In re Davis*,¹²⁶ in which an injunction was ordered against Davis, who had filed at least thirty-one cases within forty months. Many of these petitions were repetitive, because Davis either misunderstood or simply rejected the doctrine of res judicata.¹²⁷ The court ordered that "[t]he Executive Committee examine any documents proffered by Mr. Davis and determine whether or not they should be filed and, if Mr. Davis seeks leave to proceed *in forma pauperis*, whether such leave should be granted."¹²⁸

The *Davis* injunction is constitutional because it "does not preclude or even unduly burden Davis from submitting a new, nonfrivolous complaint or nonfrivolous filings."¹²⁹ The injunction acts as an absolute bar to Davis' future frivolous claims only. But, since there is no right to file frivolous claims,¹³⁰ such a bar is valid. The PLRA is significantly flawed in that it does not discriminate between frivolous and non-frivolous claims; it lumps the two together and bars them as a group. Therefore, since it cannot simply be assumed that a prisoner who files three frivolous claims will

¹²² *Ex parte Hull*, 312 U.S. 546 (1941).

¹²³ *See Lyon*, 940 F. Supp. at 1437

¹²⁴ The PLRA prohibits any prisoner from bringing an action under 42 U.S.C. § 1983 "until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a) (West Supp. 1997).

¹²⁵ *Lyon*, 940 F. Supp. at 1437

¹²⁶ *In re Davis*, 878 F.2d 211 (7th Cir. 1989).

¹²⁷ *See id.* at 211.

¹²⁸ *Id.* at 212.

¹²⁹ *Id.* at 213.

¹³⁰ *See supra* notes 100-02 and accompanying text.

never file a meritorious claim, the PLRA indeed denies access in violation of the Constitution.

The PLRA three-strikes provision more closely resembles the restriction in *In re Green* than it does other constitutionally valid restrictions.¹³¹ The absolute ban on Green prohibited him from ever filing in forma pauperis again. Since he would not be able to afford the \$120 filing fee plus the additional cash deposit, the order effectively denied Green all access to the court. In contrast to the injunction imposed in *In re Davis*, and the one-filing-per-month limitation imposed in *In re Tyler*, *Green* does not provide the litigant with any "reasonable and adequate opportunity" to file with the court.¹³² The *Green* court agreed that petitioner had "flagrantly abused the judicial process,"¹³³ however, this type of injunction conclusively presumes that anything Green submits to the district court will be duplicative, frivolous, or malicious.¹³⁴ "While methods that other courts have employed to deter Green from continuing to harass them amount in effect to *rebuttable* presumptions that Green is submitting papers in bad faith, those orders have left the courthouse door ajar, if only slightly."¹³⁵

The PLRA falls into the same trap as the district court did in *Green*. Like the *Green* restriction, the ban after three frivolous filings also presumes that anything that the prisoner "submits to the district court will be duplicative, frivolous or malicious."¹³⁶ Yet, defenders of the PLRA reject the notion that this reform denies prisoners access to the courts.¹³⁷ By documenting instances under the PLRA in which access is not denied, they contend access is never denied.¹³⁸

Faced with one of the first constitutional challenges to the three-strikes provision of the PLRA, the district court in *Lyon v. Vaude Krol* rejected the argument that since complete access was not denied, effective access likewise was not denied.¹³⁹ After enactment of the PLRA, the prisoner-plaintiff, Lyon, attempted to proceed in forma pauperis with a 42 U.S.C. § 1983 claim.¹⁴⁰ Lyon alleged prison officials denied him participation in

¹³¹ See *In re Green*, 669 F.2d 779, 785-86 (D.C. Cir. 1981).

¹³² *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

¹³³ *In re Green*, 669 F.2d at 785.

¹³⁴ See *id.*

¹³⁵ *Id.* at 785-86.

¹³⁶ *Id.* at 785.

¹³⁷ See *Lyon v. Vaude Krol*, 940 F. Supp. 1433, 1437-38 (S.D. Iowa 1996), appeal dismissed, No. 96-3752, 1997 WL 638238 (8th Cir. Oct. 17, 1997).

¹³⁸ See *id.*

¹³⁹ See *id.* at 1438.

¹⁴⁰ See *id.* at 1435; 42 U.S.C. § 1983 (1994).

Jewish services and other religious practices.¹⁴¹ Initially, the court followed the PLRA's three-strikes provision and dismissed Lyon's complaint due to his previous filing of three frivolous suits.¹⁴² However, on subsequent rehearing, it struck down the statute, holding that the provision "places a substantial restriction on these inmates' ability to bring a new civil action and constitutes a substantial burden on their fundamental right of access to the courts."¹⁴³

The proponents of the PLRA contend that access is not denied across the board to every inmate regarding every type of claim.¹⁴⁴ This assertion is correct. Filings by wealthy prisoners, for example, clearly are not affected, and consequently, neither is their access. Similarly, access remains available to indigent prisoners threatened with imminent and serious physical harm.¹⁴⁵ However, the existence of access for some inmates does not mean all inmates are similarly situated. Rather, it "simply narrows the class affected."¹⁴⁶ "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."¹⁴⁷ To the prisoners affected, the courthouse door is not left ajar, but rather is sealed shut. The Constitution demands that the door remain open.

CONCLUSION

The PLRA addresses a serious and high profile problem. The goal of decreasing frivolous prisoner litigation is laudable. Although replacing the waiver of filing fees with a payment program may discourage some legitimate prisoner suits, it does not deny indigent prisoners access to the courts. On the other hand, by including the three-strikes provision, the PLRA subverts the Constitution to achieve a decrease in prisoner lawsuits. A prisoner's history of frivolous litigation should not result in the subsequent denial of his constitutional right of access to the courts.

¹⁴¹ See *Lyon*, 940 F Supp. at 1435.

¹⁴² See *id.* at 1438-39.

¹⁴³ *Id.* at 1438.

¹⁴⁴ See *id.* at 1437-38.

¹⁴⁵ See 28 U.S.C. § 1915 (1994).

¹⁴⁶ *Lyon*, 940 F Supp. at 1437

¹⁴⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1992).

