

# MICHIGAN CRIMINAL LAW

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The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

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# Our Supreme Court's Abdication of Law Making Authority over Criminal Procedure and Substantive Criminal Law

By Alan Saltzman

## Introduction

The Michigan Constitution contains three provisions that can be read to grant law-making power to the Supreme Court. Article 6, §1, provides: "The judicial power of the state is vested in one court of justice." Article. 6, § 5 provides: "The Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." And article 3, § 7, provides that "the common law . . . shall remain in force until . . . changed . . . ."

At one time the Michigan Supreme Court read these to grant it wide authority to develop the criminal law, both as to procedure and substance. In *People v Glass* (2001) it greatly narrowed its responsibility to develop the law of criminal procedure. In *People v Riddle*, 467 Mich. 116 (2002), it seems to have denied itself power to develop substantive criminal law.

## The Michigan Supreme Court's Authority over Criminal Procedure

The court has found broader rights in the Michigan Constitution than what is required by the U.S. Constitution. For example, a criminal jury verdict must be unanimous although not required by the Sixth Amendment<sup>1</sup>, the ban on double jeopardy is broader than the Fifth Amendment<sup>2</sup>, and some confessions not banned by *Miranda* are inadmissible under Michigan law.<sup>3</sup>

An early exercise of the Supreme Court's power was *People v Marxhausen*, 204 Mich. 559 (1919). Five years after *Weeks v U.S.*<sup>4</sup> imposed the 4<sup>th</sup> Amendment exclusionary rule on the federal courts, *Marxhausen* held that Michigan law contained the same rule. In 1990, our Supreme Court found a sobriety checkpoint to be an unreasonable seizure under the Michigan Constitution after the U.S. Supreme Court found it not to violate the U.S. Constitution.<sup>5</sup>

Pursuant to its constitutional power to make rules of practice and procedure it has promulgated a comprehensive set of rules to govern criminal procedure, including protections not found in the U.S. Constitution.<sup>6</sup>

It has also used case law in exercising its power to make rules of procedure. Thus, it held that evidence of a line-up in the absence of counsel is inadmissible, even if it occurred before the defendant's U.S. 6<sup>th</sup> Amendment right to counsel had attached. The court did not base that decision on the right to counsel under the Michigan Constitution, instead saying it was done "in the exercise of our con-

stitutional power to establish rules of evidence . . . and to preserve best evidence eyewitness testimony . . . ."<sup>7</sup>

More recently however, our court gave an amazingly broad meaning to the inevitable discovery doctrine, thereby narrowing the reach of the exclusionary rule.<sup>8</sup> Furthermore, it has taken the position that the Michigan Constitution is linked to whatever the current U.S. Supreme Court interpretation of the Fourth Amendment happens to be, in the absence of a compelling reason to depart from that view.<sup>9</sup>

In 1972, *People v Duncan*, 388 Mich 489, using, "the inherent power of this court to deal with the situation as a matter of criminal procedure," held that a defendant indicted by a grand jury had a right to a preliminary examination before being required to stand trial. In, *People v Glass*, 464 Mich 266 (2001) however, the court declared: "The establishment of the right to a preliminary examination is more than a matter of procedure." It said that to do so was, "beyond the powers vested in the Court by Const. 1963, art. 6, § 5." Accordingly, it overruled *Duncan* and found invalid. MCR 6.112(B), a rule it had promulgated.

The court did not say why the right to a preliminary examination "is more than a matter of procedure." Clearly, it would have been free to say that it was a matter of procedure, but that requiring a preliminary examination following a grand jury indictment is unnecessary and not a good idea. For that reason it might have overrule its previous decision. Instead, it chose to deny that it ever had the power to require it.

It seems strange to me, where the state constitution specifically gives the court authority over practice and procedure, that the court would shrink the boundaries of that authority. I would say it was ignoring its obligation. I would also say that linking Michigan's constitutional search and seizure provisions to what the U.S. Supreme Court says the U.S. Constitution means, is an abandonment of its responsibility to interpret the Michigan Constitution.

No less strange and no less wrong is what the Michigan Supreme Court has done with its authority over substantive criminal law.

## The Michigan Supreme Court's Authority over Substantive Criminal Law

Our Supreme Court has construed Michigan's constitutional ban on cruel or unusual punishment to bar a sentence that the Eighth Amendment did not.<sup>10</sup> Otherwise however, it has said little about Constitutional limits on criminal punishment.

There is no question that aside from U.S. and Michigan Constitutions, the Court is entirely subordinate to the Legislature in defining what constitutes an offense. However, because of the sketchy way in which many offenses are defined, the Legislature has left huge areas for the court to fill in defining offenses. As to defenses, there is only the insanity defense statute, first enacted in 1974. No other statute speaks to what defenses there might be once the prosecution has proved each element in the definition of the offense.<sup>11</sup>

### Definitions of Offenses

Many statutes do not fully define the crime they create. Until recently, the Michigan Supreme Court considered itself free to exercise its own judgment as to what rule it is wise to adopt, both in expanding and in contracting criminal statutory categories.

The murder statutes make any “murder” that is not first degree, second degree murder. They also make any “murder” together with one of three sets of requirements, first degree murder. But there is *no statutory definition of “murder.”*

*Maher v. People*, 10 Mich 210 (1862), rejected the traditional position that a spouse’s infidelity could be a sufficient provocation (that might reduce murder to manslaughter) only if the defendant personally witnessed the act. Speaking through Justice Christiancy, the court took a much broader, and very modern position.<sup>12</sup> It held that an adequate or reasonable provocation was, “anything” that had the natural tendency to obscure reason to an extent that would render an ordinary person liable to act rashly and from passion rather than judgment.

*People v. Aaron*, 409 Mich. 672 (1980) completely eliminated one category of murder — a killing in the perpetration of a felony (the “felony murder rule”). That case entirely “abrogated” that rule on the ground that it was contrary to the fundamental principle that “criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.”

As to its power to do so, the *Aaron* court stated, “In Michigan, the general rule is that the common law prevails except as abrogated by the Constitution, the Legislature or this Court,”<sup>13</sup> adding that “it is for this Court to decide whether a common law rule shall be retained unless the Legislature states a rule that is inconsistent with or precludes a change in the common law rule.”

Two years later, *People v. Stevenson*<sup>14</sup> expanded a category of crime beyond that authorized by the common law, stating, “We hold, in the exercise of our Constitutional authority to shape and advance the common law, that the year and a day rule has outlived its usefulness and is therefore abolished.”<sup>15</sup>

The same year the court was asked to develop an intelligible replacement for the rule that voluntary intoxication is a “defense” to “specific intent crimes” and not “general intent crimes.” It considered itself free to promulgate a new

rule, and found the old rule unsatisfactory<sup>16</sup>, but declined to develop a new rule the nature of the issue made it “more appropriate for the Legislature to fashion reform in this area....”<sup>17</sup>

In 1994, *People v. Kevorkian*, 447 Mich 43, held that assisting a suicide was not murder unless the death, “was the direct and natural result of a defendant’s act.” It held that murder requires that the defendant would have to do something more than knowingly supplying the means of suicide, overruling *People v. Roberts*, 211 Mich 187 (1920) which held that simply supplying the means was sufficient.

### Defenses

The only statute that creates any general defense is MCL 768.21a, Legal Insanity, a statute first enacted in 1975. Until then, the legislature had not spoken at all as to what might constitute a defense. Thus the courts assumed the responsibility for developing defenses.

Insanity is one example. Our courts followed the *M’Naghten* rule (announced by the English House of Lords in 1843, which focuses solely on whether defendant had a mental disease that prevented him from knowing right from wrong. However, *People v. Durfee*, 62 Mich. 487, 29 N.W. 109 (1886) added a volitional component. It held there is also a defense when defendant’s mental disease prevented him from controlling his actions. This second component is commonly referred to as the “irresistible impulse” test. As noted, the Legislature subsequently enacted MCL 768.21a which replace this case law.

Another example is entrapment. The common law did not recognize any entrapment defense, but in 1878 our Supreme Court decided what some say is the first case anywhere recognizing the defense.<sup>18</sup> The current defense of entrapment was developed by case law over a number of years.<sup>19</sup>

*People v. Couch*, 436 Mich 414 (1990), presented the issue: can deadly force be used by a citizen to apprehend a fleeing felon? There, an opinion expressing the views of three justices stated:

[W]e decline the opportunity to change the common-law fleeing felon rule with respect to criminal liability. . . . Not only does this Court . . . arguably lack the authority to do so . . . [but] given the Legislature’s adoption of and acquiescence in that rule, we must resist the temptation to do so.<sup>20</sup>

Two other Justices were “persuaded that this Court should decline, as a matter of judicial restraint, to exercise whatever authority it may have to modify the criminal law.”<sup>21</sup> The two remaining Justices would have changed the common law rule prospectively. They explained the court’s authority to do so as follows: “We would merely amend the common law, as the Court is authorized to do by the Michigan Constitution.”<sup>22</sup>

## **People v Riddle, 467 Mich. 116 (2002).**

*Riddle* dealt with the right to stand one's ground and not retreat, even when a safe retreat was available, and even though retreating would avoid the need for deadly force. It recognized that right to apply within the dwelling and its outbuildings, but held it did not apply in the open spaces within the curtilage.

That holding is not necessarily remarkable. It may make good sense to say that if you are in your side yard and you can avoid a threat to yourself of deadly force by either retreating or by using deadly force against another person, that you *should* retreat. The facts of *Riddle* also make the result no surprise, sine defendant shot the victim in the legs eleven times. (Also, at trial he withdrew his request for an instruction that he had no duty to retreat.)

The remarkable thing is the "Generally Applicable Rule" which the court announced as the basis for its conclusion:

Because Michigan's homicide statutes proscribe "murder" without providing a particularized definition of the elements of that offense or its recognized defenses, we are required to look to the common law at the time of codification for guidance. See Const. 1963, art. 3, § 7; *People v Couch*, \* \* \* . Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions. See *Couch, supra* at 419 \* \* \* .

The criminal law, as defined at common law and codified by legislation, "should not be tampered with except by legislation," and this rule applies with equal force to common-law terms encompassed in the defenses to common-law crimes. *In Re Lamphere*, 61 Mich. 105, 109, 27 N.W. 882 (1886). **Therefore, because our Legislature has not acted to change the law of self-defense since it enacted the first Penal Code in 1846, we are proscribed from expanding or contracting the defense as it existed at common law.** \* \* \* (Emphasis added.)

*Riddle* seems to be a severe change in Michigan substantive criminal law. For example, *Stevenson*, *Aaron*, and *Maher* all developed the law of homicide, changing the common law of Michigan. Apparently they should no longer be followed.

But that is just the beginning. For example, *People v Joeseype Johnson*<sup>23</sup> held the definition of assault in the criminal law should include both an attempted battery (the common law crime of assault) and intentionally putting another in immediate apprehension of a battery (the common law tort of assault). Presumably this ruling will now be an unauthorized expansion of criminal liability.

And there are many more issues regarding the definitions of offenses and the definitions of defenses that can be added to the list— at least once we figure out what the common law was in 1846 on each point.

## **Conclusion**

As with the right to a preliminary examination following indictment, why should the court want to retreat from the tradition of its decisions that attempt to develop Michigan law by case law? Why not decide the questions on the merits?

*Aaron* said it was abrogating the felony murder rule because it violated a basic principle that if the punishment was for causing a death, there should be some culpable mental state in respect to that result. *Maher* held that provocation that might reduce murder to manslaughter should not turn on fixed categories. The *Stevenson* court thought that barring homicide liability for deaths that occurred more than a year and a day after defendant's acts did not make sense in light of current medicine. *Kevorkian* decided that supplying the means for a suicide should not be murder.

Some readers may think that some of these changes were not good policy. But *Riddle* says the Court lacks the authority to decide these issues on the merits — the common law decided them long ago and that is the end of the matter; the rest is up to the Legislature.

But all our Legislature has ever done is create new crimes. It never helps in defining the old ones. And, aside from insanity, it has not defined any defenses. This year it did add an anti -voluntary intoxication defense statute and what it means is not at all clear.<sup>24</sup>

The Legislature may have the authority to define crimes and defenses, but it has never done it alone (or well). I submit, it is the court's job to continue developing the boundaries of offenses and defenses.

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## **Endnotes**

- 1 *People v Burden*, 395 Mich 462 (1970).
- 2 *People v White*, 390 Mich. 245, 255-258, (1973) adopted the "same transaction" in contrast to the U.S. Constitution. *People v Cooper*, 398 Mich. 450 (1976) rejected the "separate sovereignty" doctrine followed under the U.S. Constitution.
- 3 *People v Bender*. 452 Mich 594 (1996).
- 4 323 U.S. 383 (1914).
- 5 *Sitz v Dep't of State Police*, 443 Mich 744 (1993), decided after *Michigan v Sitz*, 496 U.S. 444 (1990) had rejected the same claim under the 4th Amendment.

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## Our Supreme Court's Abdication ...

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- 6 For example, under MCR 6.005(D) there is a right to appointed counsel in circuit court cases regardless of whether incarceration is imposed and, under MCR 6.005(F), the right to appointed counsel also includes the right to counsel separate from a codefendant, regardless of potential conflict of interest.
- 7 *People v Jackson* 391 Mich 323, 338. See also, *People v Franklin Anderson*, 389 Mich 155 (1973).
- 8 *People v Stevens*, 460 Mich. 626 (1999). (drugs seized following entry too soon after knocking, admissible under inevitable discovery doctrine).
- 9 See e.g., *People v. Levine*, 461 Mich. 172, 178 (1999).
- 10 *People v. Bullock*, 440 Mich. 15 (1992), held that mandatory life without parole for possessing more than 650 grams of cocaine violated art 1, § 16, after *Harmelin v. Michigan*, 501 U.S. 957 (1991) held it not to violate the 8th Amendment.
- 11 M.C.L. §768.21b requires notice of the defense of duress when breaking prison is charged and says what evidence may be considered, but it does not prescribe the requirements of the defense. The latter is by caselaw. See e.g., *People v Hocquart*, 64 Mich.App. 331,(1975).
- 12 One hundred years later, the Model Penal Code § 210.3(1)(d) (Proposed Official Draft 1962) adopted a standard similar to *Maher's* in that no particular type of provoking event was required.
- 13 409 Mich. at 722, citing MICH. CONST. 1963, art. 3, § 7, quoted in the Introduction, *supra*).
- 14 416 Mich. 383,(1982).
- 15 *Id.* at 384, 331 N.W.2d at 143.
- 16 the majority said that “the general intent specific intent dichotomy [is] an unsatisfactory concept” and “strongly recommended” legislative reform, but refused to alter or abolish the doctrine.<sup>16</sup>
- 17 *People v. Langworthy*, 416 Mich. 630, 653, (1982). See *infra*, footnote 24 for the Legislature’s “solution.”
- 18 *Saunders v People*, 38 Mich. 218, (1878).
- 19 See *People v Johnson*, 466 Mich. 491, 485 (2002), which cited *People v Juillet*, 439 Mich 34 (1991) for the following:  
Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding , person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated.
- 20 *Id.* at 417. Note 8 of the opinion also criticized *People v. Stevenson, supra*.
- 21 *Id.* at 424 (opinion by Justice Levin, in which Justice Griffin concurred).
- 22 Citing the Constitution, art 3, §2, the separation of powers provision, and art 6, §1, “The judicial power of the state is vested in one court of justice . . . .” (Justice Archer, joined by Justice Cavanagh.)
- 23 407 Mich 196 (1979).
- 24 M.C.L. §768.37 provides in part:  
. . . it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound . . . .  
Suppose a statute requires proof that a defendant knows a certain fact, e.g. for larceny the property taken is owned by another. Does mean that defendant cannot raise a reasonable doubt as to that element by showing that he thought, because he was drunk, that the property was his own? Did the Legislature intend to thus change the definition of larceny?

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## Guide to Anti-Terrorism Laws

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### Endnotes

- 1 Pub.L. 107-56, 115 Stat. 272, reproduced in 2002 *U.S. Code Cong. & Admin. News*.
- 2 18 U.S.C. 2705(2).
- 3 (See 18 USC section 2331 (international terrorism), 18 USC section 2332b (terrorism that transcends national borders under 18 USC section 2332(b)(g)(5)(B)).
- 4 SB 936, 939, both tie-barred to SB 930.
- 5 18 USC ‘1030.
- 6 2002 P.A. 113.
- 7 PA 131 of 2002.
- 8 PA 113 of 2002.
- 9 PA 112 of 2002, PA 120 of 2002, PA 130 of 2002.
- 10 PA 113, 114, and 115 of 2002.
- 11 PA 116, PA 140 of 2002.
- 12 PA 117, PA 116 of 2002.
- 13 PA 118; PA 126 of 2002.
- 14 PA 137, PA 119, SB PA 120, PA 122 of 2002; PA 117; PA 124, PA 113 (tie-barred to PA 135 of 2002); PA 127 of 2002; PA 141, 142 of 2002.

# Notes