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The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



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The Source of Law: Where Do Principles of Criminal Law and Procedure Come From?

By Timothy A. Baughman, Chief, Research Training and Appeals, Wayne County Prosecutor's Office

Introduction

It is a good thing whenever a court, pressed to create a particular rule or pass on a particular question, begins its inquiry by asking itself the source of its authority, if any, to do so. After all, the source of all political power and authority in this country is quickly established in the preamble to the Constitution: “We *the people* of the United States...do ordain and establish this Constitution for the United States of America.” Sovereignty in the United States is located not in the government, but in the People, who stand above the government, the Constitution being a durable expression of their will as the Supreme Law of the Land, both enabling and limiting government as their servant.¹ So also with state government; the Preamble to the 1963 Constitution ordains and establishes the Constitution in the name of “the people of the State of Michigan,” and Article 1, § 1 provides that “All political power is inherent in the people.” The judicial branch, then, is not to exercise political power, but must certainly exercise that power — the judicial power — that it does have, fully and fairly.

The Judicial Power and Substantive Criminal Law

The Michigan Constitution of 1963 provides in Article 6, § 1 that “The *judicial power* of the state is vested exclusively in one court of justice....” The constitution also provide that one department of government shall not exercise the powers of another.² Guidance concerning the reach of the judicial power can be found in the very case establishing judicial review of statutes with regard to their constitutionality — *Marbury v Madison*.³ Chief Justice Marshall observed that the “whole judicial power of the United States” is vested in the Supreme Court and in those inferior courts that Congress sees fit to establish. If, held the Court, an act of the legislature is repugnant to the constitution it is void, and if it is void, it cannot bind the courts and oblige them to give it effect, for “It is emphatically the province and duty of the judicial department to say what the law *is*.”⁴ The province of the judicial department, then, is to “say what the law *is*”; the “judicial power” does not encompass *law-making*. The creation of substantive law is not within the rightful authority of the judiciary. Michigan has always been very clear on the point that the powers of the departments of government are separate, and that no department or branch shall exercise power granted to another. While separation of powers is a structural concept implicit in the federal constitution, it is *explicit* in the Michigan constitution. An exercise of legislative authority by the judicial branch is

thus beyond the scope of the judicial power, and at once a violation of the principle of separation of powers.

The understanding of the proper role of the judiciary has deep roots in our jurisprudence. In 1859 one of the greats of Michigan jurisprudence, Justice Campbell, stated that “By the judicial power of courts is generally understood the power to *hear and determine controversies between adverse parties, and questions in litigation*.”⁵ The court has also said that “the exercise of judicial power in its legal sense can be conferred only upon courts named in the Constitution. The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.”⁶ Some seven decades later the Court reiterated that “The power given to a court is judicial power.... ‘to declare what the law is and to determine the rights of parties conformably thereto’.... ‘to hear and decide controversies, and to make binding orders and judgments respecting them.’”⁷

The preeminent figure in Michigan jurisprudence, Justice Cooley, made the same observations. Quoting Chief Justice Marshall from *Wayman v Southard*,⁸ Justice Cooley observed that “‘The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law.’” Further, “to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to *construe and apply the laws*, is the peculiar province of the judicial department.” Distinguishing the construction of positive law from its creation, Justice Cooley wrote that

...those inquiries, deliberations, orders, and decrees, which are peculiar to such a department (the judicial department), must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former *decide upon the legality of claims and conduct*, and the latter *make rules* upon which, in connection with the constitution, *those decisions should be found*. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, --to compare the claims of parties with the law of the land before established, --is

in its nature a judicial act. But to do the last--to pass new rules for the regulation of new controversies--is in itself a legislative act....⁹

The task, then, of the judiciary with regard to substantive criminal law is not one of creation, but *discovery* and elucidation. This is so because the power to define crimes and ordain punishments is a legislative function — a clear exercise of political authority — and all crimes in Michigan are statutory.¹⁰ As Justice Campbell stated long ago, “[w]hatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation.”¹¹ It is not surprising that quite often penal legislation employs terminology with a common-law meaning¹² without elaboration or further definition, and when this occurs it confers to creative authority on the judiciary, for it has always been the law that where the legislature employs a term with an established common-law meaning, then the “legislature intended no alteration or innovation of the common law not specifically expressed.”¹³ In this circumstance, once the common-law definition of a term has been determined, then where “the legislature [shows] no disposition to depart from the common-law definition,... it remains,”¹⁴ for the use of a common-law term without alteration is as much an enactment of the meaning of that term into statutory law as if the legislature had spelled out the common-law meaning chapter and verse in the statute.¹⁵ Indeed, if the legislature were to enact a statute defining a crime as “whatever the term meant at the common law, and however the judiciary decides to alter that common-law meaning in the future” the statute would be unconstitutional, as an improper delegation of legislative power to the judiciary. And yet this is precisely what some litigants and some commentators urge on the court, asking it to modify statutes by rejecting the common-law understanding of the term at the time the statute was enacted.¹⁶ Our present Michigan Supreme Court rejects entreaties to alter the meaning of penal statutes, understanding that its role is one of discovery, not creation; the recent case of *People v Riddle*,¹⁷ where the court took great pains to determine the common-law understanding of the reach of the “no retreat within the dwelling” self-defense rule, enacted into the murder statute by the legislature by use of the common-law term “murder” without alteration.¹⁸

The Judicial Power and Criminal Procedure

It cannot seriously be argued that the role of the judiciary with regard to criminal procedure is any different than that with regard to criminal law; that is, that with regard to criminal procedure the judiciary has the authority to “invent” it apart from discovering meaning in either statutes or the constitution concerning criminal procedure. For ex-

ample, the preliminary examination is a creature of statute, not required by the constitution. If the legislature determined to abolish it, could an argument that the judiciary could simply impose it possibly pass the laugh test? While it may be that constitutional provisions and protections are more difficult to construe than most statutes, the court is still engaged in a process of construction not amendment; to do otherwise is to place the court above the People, who are sovereign in our system of government. The judiciary has no authority to impose its view of the best policy or moral philosophy upon the citizenry. As Professor Ely famously put it while questioning the reliance of some courts and commentators on theories of moral philosophy in identifying rights that “ought” to be protected, and therefore found somehow, somewhere, in the constitution: “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”¹⁹ The Supreme Court in our state also possesses authority over “practice and procedure,” but of *courts*, not the other units of government. The constitutional convention history makes clear that it was the intent of the drafters, that “practice and procedure” include an authority in the Michigan Supreme Court to promulgate “procedural” or “adjudicative” rules, with the power to promulgate “substantive” rules to remain with the legislature.²⁰ Where the line is close, of course, the court must settle on which side of the line a statute or rule falls.

Conclusion

When that great American, Benjamin Franklin, emerged from the Constitutional Convention after approval of the Constitution by the delegates, he remarked that the drafters had given the Nation “a republic, if you can keep it.”²¹ In a constitutional democracy, with the People sovereign, the judiciary is not to exercise political power, imposing its will on questions of public policy rather than its judgment on cases brought before it. Sometimes questions are close, but when a court undertakes the enterprise of judging a particular matter with one eye on its authority to act, we are more likely to keep the republic we brought into being over 200 years ago than when the court believes that its authority is limited only by its own sense of what is good and just and best.

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Judicial Institute, the State Bar of Michigan, the National College of District Attorneys, and for prosecuting attorneys associations of various states throughout the country.

Endnotes

- 1 Repeatedly during the ratification debate on the Constitution the image of the People as the “fountain of all power” was employed. See e.g. In letter by Timothy Pickering of December 24, 1787 to Charles Tillinghast, refuting the pamphlet “Letters From the Federal Farmer,” observed that under the Constitution both Congress and the state legislatures would be the servants of the people, because the people are the “*fountain of all power.*” Bernard Bailyn, I *The Debate On The Constitution*, p. 301
- 2 Const 1963, Article 3, § 2.
- 3 *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60 (1803).
- 4 2 L Ed at 73. See also *American Trucking Assns v Smith*, 496 US 167, 110 L Ed 2d 148, 110 S Ct 2323 (1990), separate concurring opinion of Justice Scalia, and dissenting opinion of Justice Stevens; and *James Beam Distilling Co v Georgia*, 501 US 529, 111 S Ct 2439, 115 L Ed 2d 481 (1991), separate concurring opinion of Justice Blackmun, joined by Justices Marshall and Scalia, and separate concurring opinion of Justice Scalia, joined by Justices Blackmun and Marshall.
- 5 *Daniels v People*, 2 Mich 380, 388 (1859) (emphasis added), citing *Story on the Constitution*, sec. 1640. Justice Campbell said much the same thing several years later in *Underwood v McDuffee*, 15 Mich 361 (1867).
- 6 *Risser v Hoyt*, 53 Mich 185,193 (1884)
- 7 *Johnson v Kramer Freight Lines*, 357 Mich 254, 258 (1959) (emphasis supplied).
- 8 *Wayman v Southard*, 10 Wheat 46 (1824).
- 9 Cooley, p. 91-92 (emphasis added, final two instances of emphasis in the original).
- 10 As stated by Justice Campbell in *In re Lamphere*, 61 Mich 105, 108 (1886): “While we have kept in our statute-books a general statute resorting to the common law for all nonenumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. *There is no crime whatever punishable by our laws except by virtue of a statutory provision*” (emphasis added).
- 11 61 Mich at 109-110. For a discussion of this entire area see Baughman, “Michigan’s ‘Uncommon Law’ of Homicide,” 7 Cooley L Rev 1 (1990).
- 12 Such as murder, or manslaughter.
- 13 *Wales v Lyon*, 2 Mich 276, 283 (1851).
- 14 *People v Schmitt*, 275 Mich 575 (1936). See also *People v Utter*, 217 Mich 74 (1921); *People v Potter*, 5 Mich 1 (1858); *Pitcher v People*, 16 Mich 42 (1867).
- 15 See also *People v Couch*, 436 Mich 414 (1990), where the Court noted that in enacting the murder statute with no alteration of the common-law definition the legislature had “adopt(ed) and “embrace(d)” the common-law definition, making it at least “debatable whether this Court still has the authority to change those definitions.” 436 Mich at 420.
- 16 And the Michigan Supreme Court has been seduced by these entreaties from time to time. In *People v Aaron*, 409 Mich 672 (1980) the court recognized that a common-law felony-murder rule existed, and simply abrogated it, thereby modifying the murder statute, and in *People v Stevenson*, 416 Mich 383 (1982) the court recognized the existence of a common-law year-and-a-day rule for homicide, and abrogated that rule, also modifying the murder statute. There is no reason to overrule these decisions, and one might reasonably applaud the result of both, but there is no reason to perpetuate the error of the court in failing to understand the limits of its authority in those cases.
- 17 *People v Riddle*, 467 Mich 116 (2002).
- 18 What might be termed “defenses” to homicide charges are encompassed within the definition of murder because of the complex meaning of the term malice, including not only alternative states of mind (intend to kill, or do great bodily harm, or wanton and wilful disregard), but also, where present in the case, the lack of justification or excuse.
- 19 See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 58 (Harv. U. Press 1980).
- 20 See Convention Record, 1289-1292.
- 21 See 11 Am Hist Rev 618 (1906)(recorded in the diary of James McHenry).

Notes