CRIMINAL LAW—HOMICIDE—NEW JERSEY ABROGATES COMMON LAW "YEAR AND A DAY" RULE; DECISION NOT GIVEN RETROACTIVE EFFECT—DEFENDANT'S MURDER CONVICTION OVERTURNED—*State v. Young*, 77 N.J. 245, 390 A.2d 556 (1978).

On September 17, 1972, when Roosevelt Young entered the home he had previously shared with his estranged wife, he found her in the company of one Samuel Story.[1] An argument ensued between Young and Story during which Young drew a gun and shot Story.[2] The victim was removed to a local hospital[3] where an evaluation of his condition disclosed that one of the bullets had entered his neck causing severe damage to his spinal cord.[4] As a result, Samuel Story was left completely paralyzed from the neck down.[5] Subsequently, a grand jury indicted the defendant on two counts—assault with intent to kill and assault with an offensive weapon.[6]

Exactly one year and sixty-three days later, on November 17, 1973, Story died[7] from the complications from the wounds inflicted by Roosevelt Young.[8] Shortly thereafter, Young was additionally in-

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[1] State v. Young, 148 N.J. Super. 405, 407, 372 A.2d 1117, 1118 (App. Div. 1977), *rev'd and remanded per curiam*, 77 N.J. 245, 390 A.2d 556 (1978). Roosevelt and Patricia Young had been married approximately five years and resided together at the scene of the incident until about one month prior to the date these events transpired. Brief on Behalf of the State of New Jersey at 5, State v. Young, 148 N.J. Super. 405, 372 A.2d 1117 (App. Div. 1977), *rev'd and remanded per curiam*, 77 N.J. 245, 390 A.2d 556 (1978) [hereinafter cited as Brief for State].

Defendant was aware Patricia was "seeing" Story and had spoken to him on several occasions. He also had instructed Patricia not to permit any men in the house for the sake of the children. Brief for State, *supra*, at 4.5.

[2] State v. Young, 148 N.J. Super. at 407, 372 A.2d at 1118; Brief for State, *supra* note 1, at 3-4. Defendant drew a gun; Story attempted to flee from the dining room to the kitchen. Young fired five shots, three of which hit Story.

Defendant testified at trial that he had acquired the weapon the week before for protection in his job as a night watchman. Brief and Appendix on Behalf of Defendant-Appellant at 8-9, State v. Young, 148 N.J. Super. 405, 372 A.2d 1117 (App. Div. 1977), *rev'd and remanded per curiam*, 77 N.J. 245, 390 A.2d 556 (1978) [hereinafter cited as Brief for Defendant-Appellant]. He denied being aware that the gun was in his jacket when he entered the house and that he intended to shoot Story. Brief for Defendant-Appellant, *supra*.

[3] State v. Young, 148 N.J. Super. at 407, 372 A.2d at 1118.

[4] *Id.* at 408, 372 A.2d at 1118.

[5] *Id.*

[6] *Id.* Defendant was indicted pursuant to Monmouth County Indictment No. 1216-72, filed on July 3, 1973, for assault with an offensive weapon and assault with intent to kill in violation of N.J. STAT. ANN. §§ 2A:90-2, -3 (West 1952).

[7] State v. Young, 148 N.J. Super. at 408, 372 A.2d at 1118.

[8] *Id.* at 408, 372 A.2d at 1119. The testimony of the medical examiner who performed the autopsy on Story established the cause of death as "pneumonia secondary to a state of quadriplegia due to the gunshot wounds." *Id.*

dicted for murder.[9] The defendant moved to dismiss the murder indictment as barred by the common law "year and a day" rule.[10] The judge denied the motion[11] and the trial proceeded. Young was convicted by the jury on the murder charge and the lesser offenses.[12]

Based on a contention that the trial judge erred in failing to dismiss the murder indictment as barred by the "year and a day" rule,[13] defendant appealed.[14] Although the appellate division conceded that the rule was part of the state's jurisprudence at the time of the crime,[15] the court affirmed Young's murder conviction.[16] This anomalous result was a product of the court's decision to abolish the rule and to give the decision retroactive effect, thereby depriving Young the use of the defense.[17] The Supreme Court of New Jersey granted certification in the matter.[18]

In *State v. Young*[19] the supreme court reversed the appellate division as to defendant's murder conviction.[20] The per curiam opinion reiterated the lower court's position that the year and a day rule was the prevailing common law[21] but stated it should now be

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[9] *Id.* On January 25, 1974, after the death of Story, Monmouth County Indictment No. 546-73 charged defendant with murder in violation of N.J. STAT. ANN. § 2A:113-2 (West 1952). The pertinent statute reads:

> 2A:113-2. Degrees of murder; designation in verdict
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> Murder which is perpetrated by . . . any . . . kind of wilful, deliberate and premeditated killing, . . . is murder in the first degree.

N.J. STAT. ANN. § 2A:113-2 (West 1952).

[10] 148 N.J. Super. at 408, 372 A.2d at 1119.

[11] *Id.*

[12] *Id.*

Roosevelt Young was convicted of second degree murder and the assault counts. *Id.* He was sentenced to a term of 15 to 25 years for the murder and concurrent terms of 5 to 7 years on each of the other two convictions. *Id.*

[13] *Id.*

[14] *Id.* Roosevelt Young filed a Notice of Appeal *pro se* on June 5, 1975. Brief for Defendant-Appellant, *supra* note 2, at 1. The Office of the Public Defender filed a Notice of Appeal on June 17, 1975. *Id.*

[15] 148 N.J. Super. at 409, 372 A.2d at 1119.

[16] *Id.* at 414, 372 A.2d at 1122.

[17] *Id.*

[18] State v. Young, 75 N.J. 540, 384 A.2d 519 (1977).

[19] 77 N.J. 245, 390 A.2d 556 (1978).

[20] *Id.* at 248, 390 A.2d at 557. The action of the New Jersey supreme court in reversing the judgment of the appellate division also resulted in a remand to the trial court with directions to dismiss the indictment for murder and to reinstate the conviction and sentence for assault with intent to kill. *Id.*

Further, the court held that the conviction for assault with an offensive weapon merged into that for assault with intent to kill. *Id.*; *see* State v. Best, 70 N.J. 56, 61-62, 356 A.2d 385, 388 (1976); State v. Jamison, 64 N.J. 363, 380, 316 A.2d 439, 448 (1974).

[21] 77 N.J. at 252, 390 A.2d at 559. The court concluded that the year and a day rule existed as the law during and after the critical events in this case. *Id.*

abolished. The difference in the defendant's fate resulted from the court's refusal to apply its decision retroactively.[22] The members of the bench were unable to come to a uniform view on the matter of either retention, abolition or modification of the rule or to the effect of any such determination upon the judgment on appeal.[23] Hence, it was left for the concurrences and dissent to assess the court's doubts as to the means by which this departure from the common law was to be effected and the scope of its application.[24]

The year and a day rule, which Young sought to invoke to bar his indictment for murder, is generally recognized as a principle of common law jurisprudence.[25] The rule sets forth the requirement that death from an inflicted blow follow within a year and a day in order for the blow to be considered the legal cause of death.[26] Commentaries on the rationale behind its creation admit to diverse historical underpinnings.[27] The debate as to its actual basis figures prominently in the assessment of its viability.[28]

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[22] *Id.* at 248, 390 A.2d at 557. *Contra*, 77 N.J. at 261, 390 A.2d at 564 (Pashman, J., dissenting).

[23] *Id.* at 245, 390 A.2d at 556 (1978). The *per curiam* opinion was accompanied by three concurring opinions and a dissent. *Id.*

[24] *Id.* A concurring opinion signed by Judge Conford agreed with the *per curiam* opinion to the extent that he would not apply the rule retroactively. *Id.* at 257, 390 A.2d at 562 (Conford, J., concurring). Judge Conford differed in that he favored expansion of the year and a day rule to a period of three years thereby leaving extant some time limit during which a defendant may be prosecuted. *Id.*

The concurrence of Justice Schreiber to which Justice Sullivan subscribed, supported the *per curiam* opinion as to its conclusion that the rule had been the prevailing law but suggested that setting any limits on causation was properly within the domain of the legislature. *Id.* at 259, 390 A.2d at 563 (Schreiber, J., concurring).

Justice Clifford's concurring opinion, in which Chief Justice Hughes and Justice Handler joined, supported the essence of Justice Conford's concurrence but did not share his fear of the effect of an unlimited time period during which prosecution may be commenced. The Clifford concurrence deferred to the legislature's judgment and trusted that they would see fit to remove all bounds on causation. *Id.* at 261, 390 A.2d at 564 (Clifford, J., concurring).

Justice Pashman, the lone dissenter, subscribed fully to the opinion rendered by the appellate division. *Id.* at 262, 390 A.2d at 564 (Pashman, J., dissenting).

[25] *See id.* at 247, 390 A.2d at 557. *See generally* I.W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 185–86 (7th ed. 1795); R. PERKINS, CRIMINAL LAW 28 (2d. ed. 1969); 19 CHI-KENT L. REV. 181, 182 (1941); 40 N.C. L. REV. 327, 332 (1962).

[26] Elliott v. Mills, 335 P.2d 1104, 1106 (Okla. Crim. App. 1959); I W. HAWKINS, *supra* note 25, at 185–86; R. PERKINS, *supra* note 25, at 28; 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 8 (1883). *But see* 3 E. COKE, INSTITUTES 47 (1817).

[27] 65 DICK. L. REV. 166, 167 (1961); 40 N.C. L. REV., *supra* note 25, at 330; *see* text accompanying notes 28–58 *infra*.

[28] *Compare* Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960) *with* People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934). The *Ladd* court concluded that the rule was basically evidentiary and accordingly abrogated it as no longer useful. 402 Pa. at 169, 166 A.2d at 507. In *Brengard*, the court admitted to the debate but abolished the rule on its determination that the New York Penal Code preempted the issue. 265 N.Y. at 107, 191 N.E. at 853.

The Statute of Gloucester (1278) represents the first written embodiment of the year and a day rule.[29] As drafted, the statute codified the principle's function as a limitation on an individual's private right to avenge the murder of his next of kin.[30] At this point in England's juristic development, the King's court had not yet assumed its position as the setting for the vindication of the rights of the people.[31] Criminal matters were viewed as private affairs[32] rather than breaches of the King's peace. Accordingly, the nearest male blood relative was granted a private right which he could prosecute before the community to obtain vengeance through a trial by battle.[33] The year and a day rule limited the period during which this personal right, the "appeal of homicide," could be exercised.[34] While the rule possessed the effect of a statute of limitations,[35] the rule did not impact upon the state's prosecution for the homicide.[36]

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[29] Elliott v. Mills, 335 P.2d at 1107. Statute of Gloucester, 1278, 6 Edw. 1, c.9; 65 DICK. L. REV. 166, 167 (1961). The statute is in fact a legislative enactment of the "year and a day" rule. Generally, the principle is treated as a judicially enunciated rule rather than a codified statement of the law.

[30] Statute of Gloucester, 1278, 6 Edw. 1, c.9. The law stated:

> An Appeal for Murder
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> The King Commandeth that no Writ shall be granted out of the Chancery for the death of a Man to enquire whether a Man did kill another by Misfortune, or in his own Defence, or in other Manner without Felony; but he shall be put in Prison until the coming of the Justices in Eyre, or Justices assigned to the Goal-delivery, and shall put himself upon the Country before them for Good and Evil: In case it be found by the Country, that he did it in his Defence, or by Misfortune, then by the Report of the Justices to the King, the King shall take him to his Grace, if it please him. It is provided also, that no Appeal shall be abated so soon as they have been heretofore; but if the Appellor declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, the Appeal shall stand in effect, and shall not be abated for Default or fresh Suit, if the Party shall sue within the Year and the Day after the Deed done.

Id.

[31] W. HOLDSWORTH, HISTORY OF ENGLISH LAW 256–57 (3d ed. 1923); H. POTTER, AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 344 (3d ed. 1948); 19 CHI-KENT L. REV. *supra* note 25, at 183.

[32] 19 CHI-KENT L. REV., *supra* note 25, at 183.

[33] F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 62–63 (1915). This private right is what at various times has been denominated an "appeal". *See* note 30 *supra*. The authors illustrate the "appeal" process in a reference to Abraham Thornton's case. When the brother of the victim chose not to exercise his right to avenge his sister's death, Parliament had no recourse but to let the defendant go. F. MAITLAND & F. MONTAGUE, *supra*, at 63.

[34] 4 W. BLACKSTONE COMMENTARIES 312 (4th ed. 1938); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 315 (4th ed. 1939); 19 CHI-KENT L. REV. 182, 183 (1941); 65 DICK. L. REV., *supra* note 26, at 167; 40 N.C. L. REV., *supra* note 25, at 328.

[35] 40 N.C. L. REV., *supra* note 25, at 328–29.

[36] *Id.* As noted by the *Brown* court, the first day of the "year and a day" period used to measure the time during which the appeal action could be brought did not coincide with the

With the rise of the concept of criminal transgressions as violative of the social order,[37] public enforcement of penal sanctions replaced private retribution and gradually, this "appeal of homicide" fell into disuse.[38] Although common law courts continued to apply it, they construed the purpose of the rule as a restriction on criminal liability.[39] Specifically, it was viewed as a method of preventing a blow inflicted more than a year and a day before the victim's demise from being considered the legal cause of death, rather than a limitation on the private right of action.[40] This interpretation of the rule as an arbitrary[41] but necessary limit on causation was attributable to the primitive state of medical technology at the time.[42] At a time

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initial day from which the statute for prosecution of the murder would toll. State v. Brown, 21 Md. App. 91, 93, 318 A.2d 257, 259 (Ct. Spec. App. 1974). "Day one" for purposes of the application of the "year and a day" rule is the day on which the blow is inflicted. 2 F. SCHLOSSER, CRIMINAL LAWS OF NEW JERSEY § 1382, at 656 (1953), 65 DICK. L. REV., *supra* note 26, at 167; *see* R. PERKINS, *supra* note 25, at 28–29; 3 J. STEPHEN, *supra* note 26, at 8.

Murder is generally considered the type of offense which should not be subject to a statutory limit on prosecution. State v. Zarinsky, 143 N.J. Super. 35, 50–51, 362 A.2d 611, 619 (App. Div. 1976). Quite recently a New Jersey court affirmed the murder conviction of a defendant who was indicted for murder five and a half years after the offense. *Id.* at 60, 362 A.2d at 624. The *Zarinsky* court cited strong public support for the "relentless prosecution" of murderers as a factor in their holding. *Id.* at 51, 362 A.2d at 619.

Accord, State v. Brown, 21 Md. App. 91, 93, 318 A.2d 257, 259 (Ct. Spec. App. 1974).

[37] 19 CHI-KENT L. REV., *supra* note 25, at 183; 40 N.C. L. REV., *supra* note 25, at 329.

[38] 19 CHI-KENT L. REV., *supra* note 25, at 183. *See generally* State v. Dailey, 191 Ind. 678, 681, 134 N.E. 481, 481 (1922); State v. Moore, 196 La. 617, 620, 199 So. 661, 662 (1940); Elliott v. Mills, 335 P.2d at 1106–09. The appeal was finally abolished in England by statute in 1819. 19 CHI-KENT L. REV., *supra* note 25, at 183 n.17.

[39] 3 J. STEPHEN, *supra* note 26, at 8. The common law was concerned with the possibility that one could be held liable for a death caused by an event remote in time. *Id.*

[40] Elliott v. Mills, 335 P.2d at 1112. 10 HALSBURY, THE LAWS OF ENGLAND § 1352 at 706 (3d ed. 1955); R. PERKINS, *supra* note 25, at 28. The rule has also been characterized as creating an irrebutable presumption. 10 HALSBURY, *supra*, § 1352 at 706. "If death does not ensue until after the expiration of a year and a day from the date when the injury was inflicted, it is an irrebuttable presumption of law that the death is attributable to some other cause . . . ." *Id.*

At least one commentator has questioned the effect the creation of a presumption has on the prosecutor's case, since the existence of such a presumption implies the defendant's conduct was a contributing cause in the decedent's death. 65 DICK. L. REV., *supra* note 26, at 172 n.30.

For a discussion of the "private right of action" aspect of the rule, see text accompanying notes 29–36 *supra*.

[41] R. PERKINS, *supra* note 25, at 28. Because the courts persisted in the application of the rule for several centuries, the characterization of the rule as "arbitrary" seems not to have prejudiced the rule. 3 J. STEPHEN, *supra* note 26, at 8; *see also* State v. Brown, 21 Md. App. at 93, 318 A.2d at 259; Elliott v. Mills, 335 P.2d at 1107.

In abrogating the rule, courts have recognized the anomalous outcomes that inhere in the application of an "arbitrary" rule. Commonwealth v. Ladd, 402 Pa. 164, 181, 166 A.2d 501, 510–11 (1960); *see* 65 DICK. L. REV., *supra* note 26, at 172.

[42] 14 ALA. L. REV. 447, 448 (1962); 4 BROOKLYN L. REV. 86, 87 (1934); 40 N.C. L. REV., *supra* note 25, at 329.

when the precursor of the modern autopsy was embryonic at best, the law lacked a method to conclude with any precision that a wound inflicted well in advance of the actual moment of death was its proximate cause.[43] The year and a day rule thus served to remedy the impreciseness of medical science in establising direct causation.[44]

Related to the principle's role as a response to the problems that inhered in the primitive stages of medical technology, was its function as a solution to the limitations placed upon the law of evidence at the time.[45] In contrast with the modern jury's ability to make factual findings based on their reliance upon expert testimony, common law rules of evidence required that the triers of fact return a verdict based solely on their own knowledge.[46] In light of this,[47] the year and a day rule was transformed in usage to create an irrebutable presumption that a blow inflicted more than a year and a day before a victim's death could not have legally been its cause.[48]

Inasmuch as the principle had insinuated itself into the body of common law jurisprudence developing around the crime of homicide,[49] in certain instances the rule has been given effect as a substantive element of the crime.[50] Although today the law of crimes is statutory,[51] the rule as a substantive element of the defini-

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[43] Conscious of their responsibility to definitively determine the guilt of the accused, the courts resorted to the "year and a day" rule to inject the requisite "certainty" into their determinations. *See* 3 E. COKE, *supra* note 26, at 53. In discussing the possibility that the intervention of other causes may supersede the blow inflicted as the cause of death, the common law recognized that "in case of life, a rule of law ought to be certain." *Id.*

[44] State v. Brown, 21 Md. App. at 93, 318 A.2d at 260; CLARK & MARSHALL, LAW OF CRIMES § 10.00 (7th ed. 1967); C. KENNY, OUTLINES OF CRIMINAL LAW 140 (4th ed. 1909); R. PERKINS, *supra* note 25, at 29; 4 BROOKLYN L. REV., *supra* note 42, at 87.

[45] *See generally* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1898).

[46] *See generally* S. GARD, 4 JONES ON EVIDENCE (6th ed. 1972); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 10–13 (2d ed. 1972). The requirement that the verdict of the triers of fact be based on their own knowledge pre-dated the expansive use of expert testimony in modern-day practice. *Id.*

[47] *See* text accompanying notes 42–44 *supra*.

[48] R. PERKINS, *supra* note 25, at 605. The author in discussing the "year and a day" rule said: "Unless death occurs within this (the year and a day) period after the wound . . . the law *conclusively presumes* that the loss of life was due entirely to other causes and will not hear evidence to the contrary." *Id.* (emphasis added); *see* 3 J. STEPHEN, *supra* note 26, at 8; 14 ALA. L. REV., *supra* note 42, at 448; 40 N.C. L. REV., *supra* note 25, at 330.

[49] Elliott v. Mills, 335 P.2d at 1108–09.

[50] State v. Moore, 196 La. at 662, 199 So. at 662; Chapman v. People, 39 Mich. 357, 360 (1878); State v. Spadoni, 137 Wash. 684, 687–88, 243 P. 854, 856 (1926).

[51] 1 C. BURDICK, THE LAW OF CRIME § 83, at 83 (1946). *Accord, Young*, 77 N.J. at 250, 390 A.2d at 558. The New Jersey statutory definition of murder is contained in N.J. STAT. ANN. §§ 2A:113-1 and -2 (West 1952). For the text of the statute, see note 8 *supra*. The *Young* court

tion of murder can arise in two ways. Some jurisdictions continue to employ common law principles as an aid to interpreting their statutory schemes.[52] Other jurisdictions dismiss as defective, indictments not alleging that death ensued within a year and a day.[53] The latter position thus affords the rule substantive effect.

American courts have long recognized the existence of the doctrine[54] yet their opinions evidence the diversity of rationales capable of justifying its application. The Supreme Court of the United States addressed the doctrine in *Louisville, Evansville & St. Louis Railroad v. Clarke*.[55] The court refused to bar the claimant's action despite the fact that death occurred one year, two months and twenty-eight days[56] after the injury was sustained. This failure to apply the rule was distinguished by the context in which the suit arose.[57] *Louisville* was a civil wrongful death action and although the court accorded

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concluded the rule was "a constituent element of the crime of murder." *Id.* at 252, 390 A.2d at 559. This determination followed from their premise that the common law was part of the state's jurisprudence and that the "year and a day" rule was integral to the common law offense of homicide. *Id.*

[52] 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 50.01-.05 (4th ed. 1973). The discussion of the use of common law principles to interpret statutory enactments, contained therein, makes note of the fact that the antecedent common law of the subject matter of an enactment comprises part of its legal history. *Id.* § 50.01, at 268. This recognition that it is the common law that is the key to what the statutes are defining is appropriately applicable to the mater *sub judice* where the court considered the applicability of the common law "year and a day" concept to the murder enactment. *See* 77 N.J. at 250, 390 A.2d at 558.

The *Elliott* case, in examining the propriety of using common law principles, cites the policy of their legislature in respect to the continued force and effect of such principles. Elliott v. Mills, 335 P.2d at 1111.

[53] Head v. State, 68 Ga. App. 759, 760, 24 S.E.2d 145, 148 (1943); State v. Dailey, 191 Ind. at 682, 134 N.E. at 481 (indictments dismissed as insufficient).

The occurrence of this result has virtually been eliminated by modern practices in criminal procedure under which indictments need not contain the allegation that death transpired within a "year and a day" from the initial infliction. 19 CHI-KENT L. REV., *supra* note 25, at 185–86.

[54] 19 CHI-KENT L. REV., *supra* note 25, at 184.

[55] 152 U.S. 230 (1894). In *Louisville*, the executor of the estate of Augustine Clarke brought an action against the Louisville, Evansville and St. Louis Railroad Company. *Id.* at 234. The plaintiff alleged that decedent's death was a consequence of the railroad's negligence. *Id.* at 235. Plaintiff's decedent sustained his ultimately fatal injuries on November 25, 1886; he did not die until February 23, 1888. *Id.* The action was initiated under the State of Indiana's wrongful death statute. *Id.* The railroad defended on the basis that since the death occurred more than a year and a day after the infliction of the injuries, they could not be legally responsible for plaintiff's testator's death and hence the cause of action was barred. *Id.* The court refused to accept this defense. *See* notes 57–59 *infra* and accompanying text.

[56] 152 U.S. at 235.

[57] *Id.* The nature of the action was not a criminal prosecution for murder, the typical setting for the application of the year and a day rule, but a wrongful death suit instituted by the executor of the decedent's estate under the pertinent statute. *Id.* at 230.

support for the viability of the rule under the criminal law,[58] it chose not to extend the application of the principle to actions outside of the criminal law.[59] *Louisville* remains the only United States Supreme Court pronouncement on the matter.[60]

The courts of the individual jurisdictions similarly have had little occasion to pass upon the rule,[61] apparently because the factual situation which would warrant the invocation of the year and a day defense is not commonplace. In the decisions that do exist, the discussion of the rule arises in a context incidental to the issue before the court, hence their statements do not rise above the level of dictum.[62] The states that have considered the present viability of the rule have not been unanimous in their conclusions.[63]

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[58] *Id.* at 230. "The reasons upon which the rule of a year and a day were applied in the above mentioned cases (criminal proceedings) at common law do not apply with the same force in purely civil proceedings that involve no element of punishment, but only provide compensation to certain relatives of the decedent who have been deprived of his assistance and aid." *Id.* at 242.

[59] *Id.* This determination by the court removed plaintiff's bar to recovering under the wrongful death statute. *Id.* at 242.

[60] Actually, the Court has mentioned the year and a day rule in a criminal proceeding. Ball v. United States, 140 U.S. 118 (1891). *Ball* dealt with the sufficiency of an indictment for murder. On appeal, error was taken to the fact that the indictment under which the defendants were charged did not allege the place and time of death. *Id.* at 126. The Court in deciding this issue made reference to the fact that in order for a court to have jurisdiction over the offense at common law, it was necessary that the time and place of death appear on the indictment. *Id.* at 133.

The *Ball* case does not affect *Louisville's* status as the only Supreme Court statement on the year and a day rule because in *Ball* the victim died instantaneously. *Id.* at 122. The facts did not present the case of a victim who had languished for a "year and a day" as *Louisville* had. 152 U.S. at 230.

[61] 14 ALA. L. REV., *supra* note 48, at 448.

[62] United States v. Hewecker, 79 F. 59, 61 (C.C.S.D.N.Y. 1896); Howard v. State, 24 Ala. App. 512, 515, 137 So. 532, 534, *cert. denied*, 223 Ala. 529, 137 So. 535 (1931); Roberts v. State, 17 Ariz. 159, 161, 149 P. 380, 380–81 (1915); Kee v. State, 28 Ark. 155, (1873); People v. Steventon, 9 Cal. 274, 276 (1858); State v. Bantley, 44 Conn. 537, 540, 26 Am. Rep. 486, 489 (1877); Commonwealth v. Parker, 19 Mass. (2 Pick.) 550, 558 (1824); Commonwealth v. Macloon, 101 Mass. 1, 6 (1869); Martin v. Capiah County, 71 Miss. 407, 408, 15 So. 73, 74 (1894); Debney v. State, 45 Neb. 856, 860, 64 N.W. 446, 449 (1895); Clark v. Commonwealth, 90 Va. 360, 363, 18 S.E. 440, 441 (1893); 19 CHI-KENT L. REV., *supra* note 25, at 184.

[63] Only ten reported American decisions (in addition to the principal case) have dealt with the rule in the precise factual context that precipitates its application, *i.e.*, where the victim died more than a year and a day subsequent to the fatal assault. Of these states, five applied the rule to preclude prosecution for murder. Head v. State, 68 Ga. App. 759, 760, 24 S.E.2d 145, 148 (Ct. App. 1943); State v. Dailey, 191 Ind. at 682, 134 N.E. at 482; State v. Moore, 196 La. at 622, 199 So. at 662; State v. Brown, 21 Md. App. at 99, 318 A.2d at 262; Elliott v. Mills, 355 P.2d at 1113. One state avoided upgrading a charge from assault with a dangerous weapon to murder when the victim died, on the basis of the rule. Commonwealth v. Pinnick, 354 Mass. 13, 15, 234 N.E.2d 756, 757 (1968).

In *People v. Brengard*,[64] the New York Court of Appeals was presented with a situation in which the victim lingered three years, eleven months and twenty-one days prior to his death.[65] The court declined to apply the rule to bar the homicide prosecution.[66] While the opinion reflected the debate as to the genesis of the rule,[67] the judiciary's resolution of the matter was not based upon any of the traditional rationales. Instead, the court held that the absence of a reference to the year and a day rule in the codified definition of homicide contained in New York's Penal Code[68] evidenced a legislative determination to abolish the rule.[69]

The remaining four courts have declined to apply the rule to bar homicide prosecutions. People v. Snipe, 25 Cal. App. 3d 742, 747–48, 102 Cal. Rptr. 6, 8–9 (Ct. App. 1972); People v. Legeri, 239 App. Div. 47, 48, 266 N.Y.S. 86, 88 (Sup. Ct. 1933); People v. Brengard, 265 N.Y. 100, 106, 191 N.E. 850, 852 (1934); Commonwealth v. Ladd, 402 Pa. 164, 173, 166 A.2d 501, 506 (1960).

[64] 265 N.Y. 100, 191 N.E. 850 (1934).

[65] *Id.* at 102. The situation in *Brengard* is similar to that in *Young*. *Compare Brengard*, 265 N.Y. at 102–05, 191 N.E. at 850–52, *with Young*, 77 N.J. at 277–78, 390 A.2d at 557. In *Brengard*, a police officer was shot by an assailant while investigating an unattended automobile. 265 N.Y. at 102, 191 N.E. at 850. The bullet struck the officer's spinal column resulting in paralysis of his extremities and the loss of control of bodily functions. *Id.* at 103–05, 191 N.E. at 851–52. A physician attending the patrolman stated "[t]he minute that bullet struck his back he started to die then and that is just the last thing that happened." 265 N.Y. at 104, 191 N.E. at 851. The incapacitated officer died in July, 1932. *Id.* at 105, 191 N.E. at 852. Similarly in *Young*, Samuel Story was injured by a bullet with much the same physical consequences. 148 N.J. Super. at 407–08, 372 A.2d at 118–19. There, the medical examiner also concluded that the victim's death was "directly related to the gunshot wounds." *Id.*

[66] 265 N.Y. at 105, 191 N.E. at 852; *accord*, State v. Brown, 21 Md. App. 91, 98, 318 A.2d 257, 262 (Ct. Spec. App. 1974); People v. Snipe, 25 Cal. App. 3d 742, 748, 102 Cal. Rptr. 6, 9 (Ct. App. 1972).

[67] 265 N.Y. at 105–07, 191 N.E. at 852–53. The court's difficulty in deciding the defendant's fate was based on its attempt to resolve the inconsistency between the common law principle and an earlier lower court decision. 265 N.Y. at 105–07, 191 N.E. at 852; People v. Legeri, 239 App. Div. 47, 266 N.Y.S. 86 (1933). As previously discussed, the year and a day rule would bar the indictment but reliance on the lower court's opinion, which held that New York's penal statute abrogated the common law principle, would allow the action to commence. 265 N.Y. at 105–07, 191 N.E. at 853.

[68] The statutory definition of homicide reads as follows:

> Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.

N.Y. PENAL LAW § 125.00 (McKinney 1975). This version of the definition replaced the one that existed at the time of the *Legeri* decision. *Id.* The absence of the year and a day requirement from the enactment is readily apparent. *Id.*

[69] 265 N.Y. at 105, 191 N.E. at 852; *cf.* State v. Brown, 21 Md. App. at 98, 318 A.2d at 262 (while Maryland did not have enactment abrogating the rule, court suggested that such legislative declaration would be necessary before it would act).

Confronted with a similar factual situation in *State v. Brown*,[70] the Court of Special Appeals of Maryland applied the rule.[71] The court's opinion traced the prior history of the principle[72] but did not place reliance on any singular theory to support its conclusion that the rule was in effect in its jurisdiction.[73] Nor did the court analyze whether the rule should continue to apply.[74] The court did suggest, however, that any contemplated change of the rule should be accomplished by legislative enactment.[75]

Prior to New Jersey, the only jurisdiction to judicially abrogate the rule was Pennsylvania in *Commonwealth v. Ladd*.[76] The Pennsylvania supreme court's conception of the rule as an evidentiary requirement[77] provided the basis for its decision to judicially effect the principle's demise in *Ladd*. The court had no reservations about its power to abolish an evidentiary rule without invading the legislature's domain. It explicitly stated that it is within the power of the court to change "a common law rule of evidence without being guilty of judicial legislation."[78] The Pennsylvania court thus became the only jurisdiction to agree[79] on a historical basis for the rule and proceeded to assess its viability in that function.[80]

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[70] 21 Md. App. 91, 318 A.2d 257 (Ct. Spec. App. 1974). Defendant had injured the victim on November 14, 1970; she died September 13, 1972. *Id.* at 98, 318 A.2d at 262. Defendant sought to have the murder indictment dismissed because the death occurred more than a year and a day after the wound. *Id.* at 98, 318 A.2d at 262. In holding that the rule governed until abrogated, the *Brown* court granted defendant's motion. *Id.* at 98, 318 A.2d at 262.

[71] *Id.* at 98, 318 A.2d at 262.

[72] *Id.* at 91–96, 318 A.2d at 258–260.

[73] *Id.* at 97, 318 A.2d at 261; *accord*, State v. Young, 77 N.J. 245, 390 A.2d 556 (1978).

[74] 21 Md. App. at 97, 318 A.2d at 261. The court was content to establish the existence of the rule in its jurisdiction. The opinion contains no effort to assess the rule's continued viability under any theory. *Id.* at 97, 318 A.2d at 261.

[75] *Id.* at 98, 318 A.2d at 262. Elliott v. Mills, 335 P.2d 1104, 1116 (Okla. Crim. App. 1959) (Brett, J., concurring) (citing court's deference to legislative action).

[76] 402 Pa. 165, 164 A.2d 501 (1960).

[77] *Id.* at 174–75, 166 A.2d at 507. *Contra*, State v. Young, 77 N.J. at 252, 390 A.2d at 559. The majority in *Ladd* were in accord that the rule is evidentiary in nature. 402 Pa. at 174–75, 166 A.2d at 507. The dissent in *Young* lauds the *Ladd* conclusion. 77 N.J. at 263, 390 A.2d at 565 (Pashman, J., dissenting). A vigorous dissent by Justice Musmanno challenged the majority approach that the mere evidentiary status of the rule qualified it as a matter for judicial abrogration. 402 Pa. at 185, 166 A.2d at 512 (Musmanno, J., dissenting). Justice Musmanno viewed legislative action as the proper method to effect the demise of the rule. *Id.* at 200, 166 A.2d at 520. His impressions are accorded support in the concurrences of Judge Conford, 77 N.J. at 255–57, 390 A.2d at 561–62, and Justices Schreiber, *id.* at 257–59, 390 A.2d at 562–63, and Clifford, *id.* at 259–61, 390 A.2d at 563–64, in the principal case. *See* notes 98–112 *infra*.

[78] 402 Pa. at 169, 166 A.2d at 507.

[79] *See* note 77 *supra*.

[80] 402 Pa. at 173, 166 A.2d at 506.

The *Brengard, Brown* and *Ladd* decisions represent differing approaches to the issue of whether the year and a day rule should continue to exist.[81] While illustrative of judicial thought, their value as precedent is limited to their respective jurisdictions. The issue remained untested in New Jersey until *State v. Young*[82] presented the courts with their first opportunity to consider the rule and its diverse background. The per curiam opinion issued by the supreme court in *State v. Young* states its conclusions in respect to the year and a day rule. The court's decision necessarily involved a determination of three issues: whether the common law rule was presently the law in New Jersey; whether it should be abolished or modified; and, if abolition is in order, whether the action should be given retroactive effect.[83] In turn, the court's responses to those queries resulted in its reversal of the appellate division.[84]

The court had no difficulty in affirming the principle's presence at English common law.[85] Once the existence of the rule at common law was verified, the court was then able to confirm its place as part of the state's body of jurisprudence.[86] The New Jersey State Constitution of 1947 and its predecessors[87] all contain clauses which effectively "incorporate" the common law of England into the state's body of laws.[88] The court used this mechanism to establish the year and a day rule in this jurisdiction. In so doing, it rejected the state's argument that the principle under discussion had not survived the most recent constitution.[89] The court adjudged the state's position as more properly an attack upon whether the rule should continue to apply.[90]

Similarly, the court was unswayed by the state's argument that since the New Jersey statutory provisions concerning murder omitted

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[81] *See* text accompanying notes 64–80 *supra*.

[82] 77 N.J. 245, 390 A.2d 556 (1978).

[83] *Id.* at 247, 390 A.2d at 557.

[84] *Id.* at 248, 390 A.2d at 557.

[85] *Id.* at 249, 390 A.2d at 557.

[86] *Id.* The court cites Justice Heher's dissent in Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 48–49, 141 A.2d 276, 287–88 (1958) (Heher, J., dissenting), as a concise analysis of the manner in which principles of English common law became part of New Jersey's jural heritage. 77 N.J. at 249, 390 A.2d at 557.

[87] 77 N.J. at 249, 390 A.2d at 557. The predecessor constitutions are chronicled in the quote from *Collopy*: they are the state constitutions of 1776 and 1844. *Id.*

[88] *See* note 91 *supra*.

[89] 77 N.J. at 250, 390 A.2d at 558.

[90] *Id.*

reference to the rule,[91] the rule was implicitly abrogated.[92] The court based the rejection of this proposition on the legislative history of the penal enactments and a recognition of the continued role of common law principles in interpreting statutory crimes.[93] Hence, the bench unhesitatingly found the year and a day rule to be part of New Jersey's present-day law.[94]

The above determination being in the affirmative, the court was constrained to assess the second matter on appeal—whether the rule should be altered or abolished judicially.[95] The differing views of the individual justices with respect to this issue are evidenced in the dissent and concurrences. Four members, Chief Justice Hughes and Justices Clifford, Handler and Pashman supported elimination of the rule.[96] Justices Schreiber and Sullivan sought to retain it.[97] A seventh member, Judge Conford,[98] suggested the rule be retained but that the length of the period be modified.[99] Although a majority of the court favored either abolition or modification of the rule,[100] the per curiam opinion does not confront the dilemma of the justices' role as judicial law-makers.[101] The only considerations of the propriety of judicial action in altering a common law rule arises in the court's analysis of whether its decision to abolish the rule should be accorded

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[91] N.J. STAT. ANN. §§ 2A:113-1 to -2 (West 1952). 77 N.J. at 250, 390 A.2d at 558.

[92] 77 N.J. at 250, 390 A.2d at 559.

[93] *Id.* at 251–52, 390 A.2d at 559.

[94] *Id.* at 252, 390 A.2d at 559.

[95] *Id.* at 252, 390 A.2d at 558.

[96] *Id.* at 259, 261, 390 A.2d at 563, 564 (Clifford, J., concurring, joined by Handler, J., & Hughes, C.J.). Justice Clifford, Chief Justice Hughes and Justice Handler expressed their support for the abrogation of the rule in a concurrence to the per curiam opinion authored by Justice Clifford. *Id.* at 261, 390 A.2d at 564. Justice Pashman arrived at the same conclusion, but because he differed with the majority as to the effect of the abrogation of the rule, his support of the abrogation issue was voiced in his dissent. *Id.* at 262, 390 A.2d at 564 (Pashman, J., dissenting).

[97] *Id.* at 259, 390 A.2d at 563 (Schreiber, J., concurring, joined by Sullivan, J.).

[98] Judge Conford, a member of the superior court, appellate division, was temporarily assigned to the supreme court because of an existing vacancy.

[99] *Id.* at 255, 390 A.2d at 561. The legislature in California utilized such an approach in enacting the statute applied in People v. Snipe, 25 Cal. App. 3d 742, 745, 102 Cal. Rptr. 6, 7 (Ct. App. 1972). That statute, CAL. PENAL CODE § 194 (West 1969), lengthened the period of time after which it could no longer be presumed that a particular blow was the proximate cause of death, from a year and a day to three years. 25 Cal. App. 3d at 745, 102 Cal. Rptr. at 7.

[100] *See* note 23 *supra*.

[101] 77 N.J. at 247–55, 390 A.2d at 557–61. The bench did not engage in a discussion of the propriety of "judicially-legislating" the elimination of the rule within this opinion. *Id.*

retroactive effect.[102] Similarly, Justice Pashman, in dissent, faced this problem of "judge-made" law only when he determined the "retrospective-prospective" issue.[103] Justices Pashman, Handler, Clifford and Chief Justice Hughes concluded that abolition of the rule does not raise the specter of judicial legislation.[104] Justices Schreiber and Sullivan did express difficulties with such judicial initiative.[105] Their concurrence noted the current activity of the legislature in revising and codifying New Jersey's criminal laws.[106] In view of that body's action in the area, Justices Schreiber and Sullivan preferred to defer to the legislature.[107]

Judge Conford's concurrence discussed one of the traditional rationales for the rule, that of a limit on legal causation, before concluding that the rule should be modified.[108] His difference with the per curiam approach stemmed from his view on the continued viability of imposing a limit on causation.[109] Judge Conford suggested that the time period used as the limitation should be lengthened to reflect modern medical realities.[110] Accordingly, he proposed New Jersey

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[102] *Id.* at 253, 390 A.2d at 560.

[103] *Id.* at 262, 390 A.2d at 564.

[104] *Id.* at 261–66, 390 A.2d at 564–66 (Pashman, J., dissenting); *id.* at 259–61, 390 A.2d at 563–64 (Clifford, J., concurring, joined by Handler, J. and Hughes, C.J.).

[105] *Id.* at 257, 390 A.2d at 562 (Schreiber, J., concurring, joined by Sullivan, J.). These justices recognize the traditional commitment under the constitution of changes in such matters to the legislature. *Id.*

[106] *Id.* at 258, 390 A.2d at 562 (Schreiber, J., concurring, joined by Sullivan, J.). The long-awaited codification of New Jersey's criminal laws was finalized with the passage of P.L. 1978, ch. 95 in August, 1978.

[107] 77 N.J. at 258, 390 A.2d at 562 (Schreiber, J., concurring, joined by Sullivan, J.).

[108] 77 N.J. at 255–57, 390 A.2d at 561–62 (Conford, J., concurring). Judge Conford's approach takes notice of the advances in medical technology since common law. *Id.* (Conford, J., concurring). Although he concluded these advances necessitated an expansion of the period beyond a year and a day, he feared the "sword of Damocles" effect that an absence of any limitation on prosecution would create. *Id.* at 255–57, 390 A.2d at 561–62 (Conford, J., concurring). He premised his conclusion on policy considerations. *Id.* at 256, 390 A.2d at 561 (Conford, J., concurring).

[109] *Id.* at 256, 390 A.2d at 561 (Conford, J., concurring). The consensus of the bench supported the abrogation of the rule, implicitly, because advances in technology have rendered it no longer viable. *Id.* at 255–57, 390 A.2d at 561–62 (Conford, J., concurring). The Conford approach does not equate the current inadequacy of the "year and a day" period with a total prohibition as a means for limiting legal causation. *Id.* at 256, 390 A.2d at 561 (Conford, J., concurring). Judge Conford's inability to support a complete withdrawal of any limitation on legal causation was based on the "Damoclesian" problem. *See* note 108 *supra*.

[110] 77 N.J. at 256, 390 A.2d at 561 (Conford, J., concurring).

adopt the "California solution"[111] and extend the period to three years and a day.[112]

This court's resolution of the first two issues on appeal essentially mirrors the lower appellate division opinion.[113] The third issue, which considers the scope of the decision to abrogate, *i.e.* whether it should be accorded retrospective or prospective effect, is resolved by the supreme court in a manner contrary to that advocated by the appellate division.[114] The supreme court would not permit its decision to abrogate the rule, to subject the defendant to prosecution.[115] The court recognized that such an application would have the same effect as an *ex post facto* statute.[116] The *Young* court refused to rule,

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[111] *Id.* at 257, 390 A.2d at 562 (Conford, J., concurring). The solution is so denominated because the three-year time period was first codified by the California legislature, CAL. PENAL CODE § 194 (West 1969). 77 N.J. at 257 n.1, 390 A.2d at 562 n.1. (Conford, J., concurring). The legislative provision modifying the period from a year and a day to three years and a day has been accepted by the California courts as made in recognition of the changes in medical science since the original common law rule was implemented. People v. Snipe, 25 Cal. App. 3d at 747, 102 Cal. Rptr. at 9.

In *Snipe*, the act of the legislature in extending the period occurred after the defendant engaged in his criminal conduct, was held not to violate the ex post facto prohibition of the constitution. *Id.* at 747, 102 Cal. Rptr. at 9. In concluding that the lengthening of the period did not contravene the constitutional proscription, the court couched their analysis in terms of whether the extension deprived the defendant of a "vested defense" and determined that it did not. *Id.*

[112] *See* note 111 *supra*. The judge acknowledged the theoretical "idealness" of the legislature's acting on the matter, but concluded that the court ultimately has the responsibility for adapting the common law to reflect current realities. 77 N.J. at 256, 390 A.2d at 562 (Conford, J., concurring).

[113] 77 N.J. at 248, 390 A.2d at 557. The appellate division had previously held: (1) that the "year and a day" rule was part of New Jersey's jurisprudence, and (2) that the principle should be abrogated. 148 N.J. Super. at 409, 413, 372 A.2d at 1119, 1121.

[114] 77 N.J. at 248, 390 A.2d at 557.

[115] *Id.* at 255, 390 A.2d at 560. Accordingly, the murder indictment against Roosevelt Young was dismissed. *Id.* The appellate division in applying their decision retroactively dismissed as unconvincing the very same arguments that the current bench found decisive in limiting the effect of their action to future occurrences. *Id.* at 254, 390 A.2d at 560. The supreme court did not accept the appellate division's position that the ex post facto prohibition did not apply because the defendant had not "actually relied" on the year and a day rule when he engaged in his criminal act. *Id.* For a further discussion of the "actual reliance" analysis, see text accompanying notes 127–38 *infra*.

[116] 77 N.J. at 253, 390 A.2d at 560. "An ex post facto law is a retrospective law applying to offenses committed before its enactment which by its necessary operation and in its relation to the offense, or its consequences, changes the situation of the defendant to his detriment." Thompson v. Utah, 170 U.S. 343, 351–52 (1898). The United States Constitution and the New Jersey Constitution prohibit the enactment of *ex post facto* laws. U.S. CONST. art. I, § 9, cl. 3 and art. I § 10, cl. 1; N.J. CONST. art. IV, § 7, para. 3 (1947). The due process clause forbids the same result from being achieved through judicial construction by a state supreme court. 77 N.J. at 253, 390 A.2d at 560. The *Young* court cited Bouie v. Columbia, 378 U.S. 347 (1964), as support for the proposition that judicial construction of a statute can similarly achieve a denial of

as the appellate division had, that a criminal defendant must have shown actual reliance[117] on the state of the law, before the *ex post facto* prohibition would be invoked.[118] The court instead investigated the due process guarantee and concluded that principles premised on fair warning should govern regardless of the presence of actual reliance.[119]

The majority's decision to abrogate the year and a day rule prospectively in New Jersey closes a chapter on a principle that has obtained for centuries at common law. In their failure to trace the historical development of the rule as its functions evolved and paralleled each other, the justices lost a mechanism that had the potential to support a clearer decision.[120] Had they engaged in a more penetrating analysis of the rule, the bench would inevitably have focused on one of its rationales as supplying its *raison d'etre* in this jurisdiction.[121]

A conclusion that the rule was merely evidentiary, as the *Ladd* court had reached,[122] would necessitate that its abolition be handled in a manner consistent with that used for implementing other changes in evidentiary mechanisms. The failure of the *Young* court to come to an agreement on the resolution of that point anticipated its split on the issue of whether the rule should be abrogated retrospectively or prospectively.

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due process. The import of the *Bouie* decision is that judicial construction may not be used to circumvent the constitutional requirement that a defendant have notice of what his conduct violates. 378 U.S. at 352. The problem of an overruling decision which contravenes the *ex post facto* prohibition has received scholarly recognition. *See generally* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); 28 HARV. L. REV. 8082 (1915).

[117] 77 N.J. at 254, 390 A.2d at 560–61. The court differed from the appellate division on this point. *Id.*

[118] *Id.*

[119] *Id.* at 254–55, 390 A.2d at 560–61.

[120] *See Ladd*, 402 Pa. at 170–72, 166 A.2d at 504–05. The *Ladd* bench's focus on the evidentiary aspect of the rule paved the way for their decision to abrogate. *Id.* at 169–70, 166 A.2d at 504–05.

[121] The accompanying opinions at least make an attempt at such an analysis. 77 N.J. at 255–56, 390 A.2d at 561–62 (Conford, J., concurring). Judge Conford referred to the rule's earlier function as a limitation on legal responsibility for the death after the year and a day period. *Id.* (Conford, J., concurring). He dismissed the continued need for such a limitation after taking notice of the progress made in medical science since that time. *Id.* (Conford, J., concurring).

A recognition of this history of the rule is also evidenced in the concurrence written by Justice Clifford. 77 N.J. at 259–61, 390 A.2d at 563–64 (Clifford, J., concurring, joined by Handler, J. & Hughes, C.J.). Similarly, the dissent mentioned that traditional rationale. 77 N.J. at 263–64, 390 A.2d at 565 (Pashman, J., dissenting).

[122] 402 Pa. at 174–75, 166 A.2d at 507; *accord*, State v. Young, 77 N.J. at 263, 390 A.2d at 565 (Pashman, J., dissenting).

The same reason that prompted the members of the court to express reservations about judicially abrogating a common law rule, namely, a fear of exceeding its constitutionally-delegated powers,[123] influenced their decision as to the scope that the abrogation was to be accorded. A perceived problem of this court in concluding that the decision to abrogate could not be applied retroactively,[124] was that such action would violate the constitutional prohibition against *ex post facto* laws.[125] In view of the principle that the prohibition is not limited to actual legislative passage of a bill, but encompasses judicial construction of existing laws, for the court to eliminate the rule retrospectively would, in its express opinion, contravene the *ex post facto* prohibition.[126]

A realistic appraisal of the nature of criminal behavior would render their reservation unwarranted. The *ex post facto* prohibition is concerned with the injustice that inheres in rendering an act criminal (or more criminal) after the fact.[127] The court found it would "be fundamentally unfair"[128] to subject the defendant to prosecution for a crime for which he had become immune to prosecution at a prior date.[129] This analysis did not resort to the "actual reliance" inquiry conducted by other courts.[130] Those courts queried whether the defendant actually relied on the state of the law at the time he committed the criminal act.[131] If it is found that he did, the *ex post facto*

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[123] 77 N.J. at 254–55, 390 A.2d at 560–61.

[124] *Id.* at 248, 390 A.2d at 557.

[125] *Id.*

[126] *Id.* at 254, 390 A.2d at 560.

[127] Dobbert v. Florida, 432 U.S. 282, 292, *rehearing denied*, 434 U.S. 882 (1977). The prohibition has traditionally been directed against legislative acts and not judicial decisions. *In re* Smigelski, 30 N.J. 513, 526, 154 A.2d 1, 8 (1959).

[128] 77 N.J. at 254, 390 A.2d at 560.

[129] *Id.*

[130] *Id.* The court did not avail itself of the "actual reliance" analysis: "Actual reliance by a defendant on the preexisting state of the criminal law is not a prerequisite to invocation of the principle [the year and a day rule] under consideration." *Id.* The appellate division, in contrast to the supreme court, considered "actual reliance" by the defendant on the state of the criminal law at the time he committed the act, necessary before they would extend the "benefits" of the prohibition to that defendant. 148 N.J. Super. at 413, 372 A.2d at 1121.

[131] State v. Koonce, 89 N.J. Super. 169, 185, 214 A.2d 428, 436–37 (App. Div. 1965). The application of the actual reliance formula is implicit. *Id.* For example, the court in *Koonce* stated: "It must be remembered that when the inculpated conduct occurred it was undoubtedly the general understanding that the common-law . . . applied in this State." *Id.*

The lower court in *Young* cited *Koonce* as authority for their decision to apply the abrogation restrospectively. 148 N.J. Super. at 413, 372 A.2d at 1121. The notion that the defendant actually relied on the existence of the "year and a day" rule was "preposterous" to the appellate division. *Id.*

prohibition shields him from prosecution.[132] While this approach also seeks to avoid fundamental unfairness to the defendant, it does, at least, inquire whether there was in fact a belief on defendant's part that he was circumscribing his behavior to fall within the known limits of the law. Both approaches ignore the reality of this particular factual context. In shooting the victim, the defendant acted, at the least, with a reckless disregard for human life which is constructive intent.[133] The context in which the crime occurred was not accidental.[134] Defendant's conduct was a deliberate offensive assault with a dangerous weapon.[135] He acted with the knowledge that the victim's death was a foreseeable result. The law should not protect him because of the "mere fortuity" that at the time he so acted a year and a day rule was in effect.[136] Failure to accord the abolition of the rule retrospective effect creates the peculiar situation that the abrogation does not obtain uniformity in this jurisdiction until every lingering victim of a defendant's blow survives for three hundred sixty-six days.[137] In effect, the supreme court's decision bestows an "extra" defense upon current defendants.[138] The appellate division's ap-

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Despite the appellate division's refusal to engage in the actual reliance analysis, that test has been utilized by other courts. Marks v. United States, 430 U.S. 188, 195 (1977); State v. Hatch, 64 N.J. 179, 188, 313 A.2d 797, 801–02 (1973); State v. Saulnier, 63 N.J. 199, 208, 306 A.2d 67, 69 (1973); Johnson v. State, 18 N.J. 422, 428, 114 A.2d 1, 4 (1955); State v. Koonce, 89 N.J. Super. at 185, 214 A.2d at 436–37 (App. Div. 1965).

[132] 77 N.J. at 253–55, 390 A.2d at 559–61. Although the reliance aspect has been considered with reference to the *ex post facto* prohibition, *see* 89 N.J. Super. 169, 185, 214 A.2d 423, 436–37 (App. Div. 1965), there is no reliance element present in the *ex post facto* clauses of either the federal or state constitutions. U.S. CONST. art. I, § 9, cl. 3 and art. I, § 10, cl. 1; N.J. CONST. art. IV, § VII, para. 3 (1947).

[133] MODEL PENAL CODE § 210.1 (Proposed Official Draft 1962). "A person is guilty of criminal homicide if he purposely, knowingly, *recklessly* or negligently causes the death of another human being." *Id.* (emphasis added).

[134] *See* 148 N.J. Super. at 407–08, 372 A.2d at 1118.

[135] *Id.*

[136] 77 N.J. at 261, 390 A.2d at 564 (Pashman, J., dissenting). Justice Pashman's dissent is particularly concerned with the injustice that inheres in the "mere fortuity" of a victim lingering beyond the year and a day period. *Id.* (Pashman, J., dissenting).

[137] Since the year and a day defense is available to all criminal defendants whose victims had not yet died at the date of the decision in *State v. Young*, the point in time at which the abrogation takes uniform effect conceivably may be well into the future. For example, a defendant who assaults an individual on the day before the decision, has the right to invoke the defense at his trial and subsquent appeals even though his indictment for the act is not handed down until many years after the fatal blow was inflicted.

[138] By its decision not to apply the abrogation of the rule retroactively, Roosevelt Young and every other defendant whose victim had not yet died by the date of the decision in *State v. Young* is absolved from liability for prosecution, hence an extra defense has been afforded these individuals. *See* 77 N.J. at 248, 390 A.2d at 557.

proach, which applied an actual reliance test,[139] avoids this anomaly.

The actual impact of the decision in *State v. Young* abrogating the rule will necessarily be minimal because the factual situation that suggests its use occurs infrequently. Deaths usually occur more or less contemporaneously with the blow inflicted. The decision exists for its acknowledgment that developments in technology need affect the law. The abrogation of the year and a day rule in this jurisdiction demonstrates the continued willingness of the courts to take judicial notice of technological reality.

Dolores J. Ostaszewski

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[139] 148 N.J. Super. at 414, 372 A.2d at 1122.