

11-18-2012

The Murder Rule that Just Won't Die: The Abolished Year-And-A-Day Rule Continues to Haunt the Florida Courts

Emily S. Wilbanks

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THE MURDER RULE THAT JUST WON'T DIE: THE ABOLISHED
YEAR-AND-A-DAY RULE CONTINUES TO HAUNT THE
FLORIDA COURTS

*Emily S. Wilbanks**

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* J.D. 2008, University of Florida, Levin College of Law; B.A. 2003, University of Florida. I would like to thank my family for their love and support. My mom and dad, Bonnie and Billy Wilbanks, have been an invaluable source of encouragement and inspiration. I would especially like to recognize my soon-to-be husband, Matthew Sherlock. It takes a lot of love and understanding to remain supportive through three long years of law school and two years of extra hours dedicated to Law Review. I am forever grateful for his unwavering support. Finally, I would like to thank the members of the Florida Law Review. What an incredible group of people.

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I. INTRODUCTION

On October 21, 1986, a two-month-old baby girl was admitted to a hospital in Pasco County, Florida.¹ Baby Christina Ann Wells was unresponsive, was suffering from seizures, and needed assistance to breathe.² Doctors observed large bruises on Christina’s head,³ including thumbprints on her tiny face.⁴ She had broken ribs, and the soft spot on her skull was noticeably bulging.⁵ Doctors likened some of Christina’s injuries

1. Ronnie Blair, *Man Faces Murder Charge in 1986 Child Abuse Case*, TAMPA TRIB., Oct. 27, 2006, at Pasco 1; *see also* Laura Griffin, ‘No Contest’ Given in Child Abuse Case, ST. PETERSBURG TIMES, July 20, 1989, at Pasco Times 1.

2. Blair, *supra* note 1.

3. Laura Griffin, *Abusive Parents Receive Severe Sentences*, ST. PETERSBURG TIMES, Oct. 24, 1989, at Pasco Times 1.

4. Thomas Lake et al., *20 Years After Beating, Dad Charged in Girl’s Death*, ST. PETERSBURG TIMES, Oct. 27, 2006, at B1.

5. *Id.*

to those commonly seen in drowning victims.⁶ However, Christina had not drowned; doctors determined that Christina's bruises and the swelling on her brain were caused either by being shaken or by having her oxygen supply blocked.⁷ The injuries left baby Christina permanently blind, deaf, and brain damaged.⁸

Christina's parents admitted later that they spanked, slapped, and shook the baby when she would not stop crying.⁹ Christina's mother, Tina Marie Wells, admitted to placing her hand over her daughter's mouth,¹⁰ and Christina's father, Christopher Michael Wells, admitted to slapping and juggling the baby and to clasping his hand over her mouth to stop the crying.¹¹ Tina, only eighteen years old at the time of the offense, was charged with one count of aggravated child abuse and one count of negligent treatment of a child.¹² Christopher, nineteen years old at the time of the offense, was charged with two counts of aggravated child abuse and

6. *Id.*

7. Griffin, *supra* note 1.

8. Griffin, *supra* note 3.

9. *Id.*; see also Blair, *supra* note 1; Griffin, *supra* note 1.

10. Griffin, *supra* note 1; see also Griffin, *supra* note 3.

11. Lake et al., *supra* note 4. Unfortunately, the actions taken by Christina Wells's parents are not unique. A website intended to educate the public about Shaken Baby Syndrome (SBS) notes that a baby's inconsolable crying is the most common trigger causing a person to shake a baby. Don't Shake Jake, <http://www.dontshakejake.org/> (follow "Shaken Baby Syndrome Facts" hyperlink) (last visited May 2, 2008). The website indicates that "[a]pproximately 20% of [SBS] cases are fatal in the first few days after injury and the majority of the survivors are left with handicaps ranging from mild—learning disorders, behavioral changes—to moderate and severe, such as profound mental and developmental retardation, paralysis, blindness, inability to eat or exist in a permanent vegetative state." *Id.* Furthermore, the website contends that "50% to 75% of adults and teenagers do not know that shaking a baby could be dangerous." *Id.* In other words, the adult does not contemplate that the child may die or become permanently disabled as a result of the shaking. The author of a book on SBS argues, however, that while "the adult may not intentionally set out to kill a child, . . . he or she initiates action they recognize as dangerous—action that might produce great bodily harm or death." ANN-JANINE MOREY, WHAT HAPPENED TO CHRISTOPHER: AN AMERICAN FAMILY'S STORY OF SHAKEN BABY SYNDROME 151–52 (1998). Morey recites the "gruesome statistic" that 80% of all abused children are harmed by parents, and of the 2,000 children who die each year from abuse or neglect, 90% are killed by either a parent or a relative. *Id.* at 151. SBS, specifically, has become an epidemic with an estimated 1,200 to 1,400 cases of SBS occurring each year in the United States. Epilepsy Ass'n of Cent. Fla., Shaken Baby Syndrome Statistics, Information and Creating Awareness, <http://www.aboutshakenbaby.com> (last visited May 2, 2008). To bring that statistic closer to home, of the thirty-seven child deaths in Florida in 1995–1996, at least thirteen resulted from SBS. *Id.* (follow "SBS Facts" hyperlink). Despite the number of SBS-related deaths and the actor's apparent recognition that shaking a child is dangerous, it is often very difficult to convince a jury to convict a parent of first-degree murder. MOREY, *supra*, at 149–52. Be it the jury's sympathy, lack of understanding of child abuse deaths, or lack of understanding of the law, often the prosecutor faces an uphill battle in securing a guilty verdict. See *id.* Though it may sound cynical or even outright pathetic, some prosecutors have admitted that the easiest murder to get away with is that of a child by its parent. *Id.* at 157.

12. Griffin, *supra* note 1.

one count of negligent treatment of a child.¹³ Christopher was also charged with attempted murder, but that charge was dropped when the couple accepted a plea bargain and agreed to plead no contest to the abuse charges.¹⁴ Tina was sentenced to three years in prison and Christopher to five.¹⁵

After serving their sentences, Tina and Christopher Wells returned home to New Port Richey, Florida, and successfully petitioned the courts to regain custody of their three other children.¹⁶ In May 2005, Tina and Christopher went to Christina's adoptive home to visit her for the first time in nineteen years, perhaps in an effort to seek forgiveness for their acts of so long ago.¹⁷ On March 15, 2006, Christina died nearly twenty years after she was shaken as a two-month-old infant.¹⁸ The medical examiner deemed the cause of death "homicide due to complications of blunt force trauma."¹⁹ The injuries sustained in 1986 were, according to the medical examiner, the trauma that eventually caused Christina's death.²⁰ In late October 2006, shock waves rippled through the Tampa Bay area when Christopher Wells was indicted for Christina's murder.²¹

13. *Id.*

14. *Id.*

15. Griffin, *supra* note 3. In sentencing Tina and Christopher Wells, Circuit Judge Brandt C. Downey III considered the request of Christina's foster mother, Maureen Welch. *Id.* Welch gave accounts of the severity of Christina's injuries and asked the judge to punish Christina's parents more severely than the applicable sentencing guidelines recommended because the parents had "ruined their daughter's life." *Id.* Downey obliged and sentenced Tina to three years in prison, despite a sentencing guideline recommending probation or a year in the county jail. *Id.* Similarly, Downey sentenced Christopher to five years in prison, in excess of the recommended twelve to thirty months in prison or probation. *Id.*

16. Thomas Lake et al., *Death Puts Attention on Abuse from Long Ago*, ST. PETERSBURG TIMES, Aug. 5, 2006, at A1. Christina was adopted by her foster mother, Maureen Welch. *Id.* When Tina and Christopher Wells were sentenced for abusing Christina, they also had a four-and-a-half-year-old son and two younger children, both born after Christina. Griffin, *supra* note 3. The state placed the three other children with other family members when the couple was sentenced to prison. *Id.*

17. See Jamal Thalji, *Father's Crime Haunts Him as He Stands Accused of Murder*, ST. PETERSBURG TIMES, Dec. 9, 2006, at Pasco Times 1.

18. *Id.*

19. Lake et al., *supra* note 16.

20. Lake et al., *supra* note 4.

21. *Father Indicted in Death of Abused Girl*, ST. PETERSBURG TIMES, Oct. 26, 2006, at Pasco Times 1; see also Lake et al., *supra* note 4 (noting that none of the experts interviewed could recall a murder prosecution with so many years passing between the injury and the death). For an example of public reaction to the Wells indictment, see Postings to Ronnie Blair, *Dad Charged in Daughter's Death*, TAMPA BAY ONLINE, Nov. 2, 2006, http://www.tboblogs.com/index.php/news_wire/story/dad-charged-in-daughters-death/ (inviting Tampa Bay area residents to comment on the case and eliciting much local debate over the murder charge).

Christopher's defense attorneys responded with what one local newspaper called "an eyebrow-raising answer to the indictment."²² The defense argued that Christina's death was not a crime.²³ Relying on a common-law doctrine known as the year-and-a-day rule, the defense asserted that the rule precludes a murder charge when the victim does not die within a year and a day after the infliction of a fatal injury.²⁴ The wrinkle, however, is that the Florida legislature abolished the year-and-a-day rule in 1988,²⁵ before Christina's death but after the injury was inflicted.²⁶ The question now looms: Does the year-and-a-day rule apply in a situation like this?²⁷

The dilemma faced by the Florida court in addressing the question raised in the Wells case was inevitable. The same advances in medical technology that rendered the year-and-a-day rule obsolete in the first place²⁸ have made it possible for victims suffering from injuries inflicted prior to 1988 to live well beyond the common-law limitation and into an age where the year-and-a-day rule no longer applies. Should a defendant like Wells be allowed to invoke a defense to murder that was eliminated before the death occurred but after the injury was inflicted? In determining whether to allow Wells and others in his situation to use the year-and-a-day rule, Florida courts will likely examine the statutory language abrogating the year-and-a-day rule and will be required to address *ex post facto* concerns related to retroactively applying the rule's abolition. The outcome will lay the foundation for future application of the year-and-a-day rule in Florida and will perhaps provide some guidance to other jurisdictions that will undoubtedly face this dilemma.

This Note examines the strange history of the year-and-a-day rule from the rule's birth to its death and then to its unexpected resurrection. In the process, this Note discusses the approach that other courts have taken to problems similar to those arising in the Wells case and sheds light on the course that the Florida courts may take on this bizarre issue.²⁹

22. Jamal Thalji, *Case to Test Law, Time*, ST. PETERSBURG TIMES, Jan. 7, 2007, at B1.

23. *Id.*

24. *Id.*

25. See FLA. STAT. § 782.035 (2007).

26. Thalji, *supra* note 22.

27. Although the original act abolishing the year-and-a-day rule proposed that the act would apply "to any prosecution for homicide caused by an injury inflicted on or after the effective date of this act," Act of May 18, 1988, ch. 88-39, 1988 Fla. Laws 276-77 (codified at FLA. STAT. § 782.035), the provision is absent in the enacted statute. See FLA. STAT. § 782.035.

28. See *infra* Part III.A.

29. Most scholarly articles addressing the year-and-a-day rule argue only for its abolition. See, e.g., Neil M.B. Rowe, *The Year-and-a-Day Rule: A Common Law Vestige That Has Outlived Its Purpose*, 8 T.G. JONES L. REV. 1 (2004); Donald E. Walther, *Taming a Phoenix: The Year-and-a-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337 (1992). This Note

This Note presents the Wells case only as an illustration of the legal issues entwined with the abolition of the year-and-a-day rule. Specifically, the Wells case shows how, once abolished, the rule managed to find its way back into the Florida courts on an *ex post facto* argument. It seems certain that the year-and-a-day rule will not go down without a fight in Florida, and the rule will remain at the center of litigation in many other jurisdictions.³⁰

II. EARLY HISTORY: THE YEAR-AND-A-DAY RULE IS BORN

A. English Roots

The year-and-a-day rule is an English common-law doctrine providing that a defendant may not be convicted of murder unless the victim dies from defendant's act within a year and a day of the act.³¹ The rule

addresses the distinct and increasingly more prevalent issue of what courts should do when the rule has been abolished but somehow finds its way back to the courtroom. The Wells case offers a fascinating example of this issue. Both the Florida courts and the state legislature have made clear their intent to remove the year-and-a-day rule from Florida jurisprudence; however, they did so shortly after Wells inflicted the injury on his daughter. Wells argues that the year-and-a-day rule was the law when he committed the crime and asserts that the rule should bar his prosecution. These cases seem more and more likely to darken the courts' doors across the country as many jurisdictions have conformed to the trend of abolishing the year-and-a-day rule.

30. See Thalji, *supra* note 22. University of Florida law professor Robert Moffat was quoted in the *St. Petersburg Times* as stating, "What makes this a great exam question is that there is no clear right or wrong answer." *Id.* Moreover, legal authorities seem to agree that the only certainty in the Wells case is that future litigation concerning the year-and-a-day rule is likely both in Florida and elsewhere. *Id.* In the same news article, Pinellas-Pasco Senior Circuit Judge Susan Schaeffer was quoted as predicting that the issue "will not only be litigated here, it will be litigated in many appellate courts." *Id.* The Wells case may very well be the first case to test the waters in Florida courts: On March 15, 2007, Circuit Judge William Webb refused to quash the murder indictment, rejecting Wells's argument that the year-and-a-day rule barred his prosecution. See Jamal Thalji, *Dad Will Be Tried After 20 Years*, ST. PETERSBURG TIMES, Mar. 16, 2007, at Pasco Times 1. The report of the ruling in the local news forecasted that the circuit court ruling would not be the last word and suggested that an appeal is likely. *Id.*

31. *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 453 (2001); see FRANCIS WHARTON, A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES § 15.5 (Philadelphia, Kay & Brother 1875); see also 4 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 726 (Garland, photo. reprint 1978) (1816); WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 31, § 9, reprinted in 1 WILLIAM HAWKINS, PLEAS OF THE CROWN: 1716–1721, at 79 (P.R. Glazebrook ed., London, Prof'l Books Ltd. 1973) (1716). The "extra" day in the year-and-a-day rule may seem curious and perhaps unnecessary; however, the extra day serves a particular purpose. The addition of the extra day provides a more precise timeframe and prevents parties from disputing whether the last day of the year is included or excluded in the limitation period. See J. Emerson Tennent, "For a Year and a Day," NOTES & QUERIES, Jan.–June 1865, at 186, 186. The extra day ensures that the limitation encompasses the entire year, including the last day. See *id.*; see also 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 8 (Burt Franklin 1964) (1883) (articulating the

irrebuttably presumes that a death occurring more than a year and a day after the infliction of the injury was not caused by the injury.³² The rule can be traced back to the thirteenth century,³³ where it acted as a statute of limitations on the time a person could file a private murder action, called an “appeal of death.”³⁴ By the eighteenth century, the rule had taken firm hold in the public prosecution of murder and precluded prosecution for any death not occurring within a year and a day of the injury.³⁵

The primary justification for the year-and-a-day rule was quite simple at its inception. Medical technology in the thirteenth century was primitive, and science was incapable of establishing beyond a reasonable doubt that an injury caused a death when a great deal of time had passed between the injury and the death.³⁶ The year-and-a-day rule provided a bright-line rule that a death occurring more than a year and a day after the infliction of an injury was presumed to be the result of natural causes and

time frame as “more than a complete year reckoning the whole of the last day of the year”). Moreover, the phrase “year and a day” is not unique to the murder rule addressed in this Note; the phrase was originally part of the statutes made at Gloucester during the reign of Edward I. *See* Tennent, *supra*, at 186. In fact, the phrase appears in the Magna Carta in the context of the King holding a convicted felon’s land for no more than a year and a day. *Id.* The origins of the phrase itself are thought to predate even the Magna Carta, which consisted in part of earlier Norman, Saxon, and British laws. *Id.*

32. *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 398 (Tenn. 1999), *aff’d*, 532 U.S. 451 (2001); *see* HAWKINS, *supra* note 31, at 79. The first day of the year-and-a-day period began on the day the injury was inflicted. HAWKINS, *supra* note 31, at 79 (“[I]n the Computation whereof, the whole Day on which the Hurt was done shall be reckoned the first.”).

33. The first mention of the rule in the context of murder was in the Statutes made at Gloucester, signed into law by King Edward I of England in 1278. *See* 6 Edw., c. 9 (1278) (Eng.), *reprinted in* 1 THE STATUTES AT LARGE: FROM MAGNA CHARTA TO THE 14TH YEAR OF K. EDWARD III, INCLUSIVE 117, 124–25 (Danby Pickering ed., Cambridge, Joseph Bentham 1762) [hereinafter Statutes at Gloucester].

34. *Rogers II*, 532 U.S. at 463; *see also* DAVID C. BRODY ET AL., CRIMINAL LAW 235 (2001); Statutes at Gloucester, *supra* note 33, at 124–25. In the Statutes made at Gloucester, an “appeal of murder” had to be filed “within the Year and the Day after the Deed done.” Statutes at Gloucester, *supra* note 33, at 125.

35. *Rogers II*, 532 U.S. at 463; BRODY ET AL., *supra* note 34, at 235; *see, e.g.*, HAWKINS, *supra* note 31, at 79 (including the year-and-a-day rule as a limitation on the prosecution of murder in 1716).

36. *Rogers II*, 532 U.S. at 463; BRODY ET AL., *supra* note 34, at 235; RANETA LAWSON MACK, A LAYPERSON’S GUIDE TO CRIMINAL LAW 37 (1999).

not of the injury.³⁷ Thus, the rule provided a simple solution to a difficult causation problem.³⁸

The rule may have also alleviated pressure on jurors in the thirteenth century.³⁹ Early English courts relied on jurors to report the happenings in a case and required the jurors to reach their verdict based only on their own knowledge.⁴⁰ Witnesses were not permitted to testify to personal knowledge of the facts, and expert opinion testimony was prohibited.⁴¹ Thus, even if medical experts could discern that an injury occurring many months before had actually caused the death, the expert's testimony would be inadmissible.⁴² The year-and-a-day rule provided a clear answer to the causation question that jurors were probably incapable of determining on their own.

The practical justifications for the year-and-a-day rule allowed it to become firmly rooted in English common law. By the time British settlers set sail for America, the rule was deeply entrenched in English jurisprudence. Therefore, it was unsurprising that the tradition made its way to the new world.

B. Adoption in America

English common-law principles did not automatically transfer to the American colonies; these principles had to be adopted.⁴³ American courts

37. BRODY ET AL., *supra* note 34, at 235. The rule was arbitrary, but generally when a death occurred more than a year and a day after the injury, the causal connection was obscure. STEPHEN, *supra* note 31, at 8. However, as Sir James Fitzjames Stephen pointed out in his 1883 book, even long ago “[i]nstances of death from wounds or other injuries received many years before death [were] not unknown.” *Id.* Stephen specifically recounted two infamous instances where he suspected that a wound eventually caused a person’s death many years after its infliction. *See id.* First, Stephen wrote, “It is stated . . . that Andrew Jackson received a wound in a duel which displaced some of his internal organs, and rendered him liable to occasional severe fits of sickness, one of which, many years after the duel, caused his death.” *Id.* at 8 n.1. Second, Stephen wrote, “Sir William Napier received a ball in his back in the Peninsular War which caused him frightful torture for the rest of his life, and might, I suppose, have caused his death.” *Id.*

38. *See* MACK, *supra* note 36, at 37. Causation is a crucial element in criminal cases, and especially in a murder case, because causation links the defendant directly to the unlawful conduct. *Id.* In a murder case, the causal link between defendant’s act and the death must be very clear, must be direct, and must be sufficient to overcome any intervening causes that may have caused the death. *Id.* Due to the inherent uncertainty resulting from the lack of precise medical science in early cases, an artificial mechanism was necessary to establish the causal link. *Id.* Obviously, the more time that passed between the injury and the death, the more unlikely it became that a defendant’s act had caused the death. *See id.* The year-and-a-day rule lacked precision but at least drew an outer limit to the amount of uncertainty that the court was willing to accept in proving causation. *See id.*

39. BRODY ET AL., *supra* note 34, at 235.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 475 (2001) (Scalia, J., dissenting). Zephaniah Swift wrote of the adoption of the common law of England by the individual states of

and legislatures in the founding era of the country were authorized to adopt or reject English common-law precedent as they so chose.⁴⁴

The U.S. Supreme Court first explicitly mentioned the year-and-a-day rule in two cases decided in 1891,⁴⁵ although various state courts applied the rule prior to that date.⁴⁶ The most frequently cited of the two cases is

the United States:

Whenever a question arises which has not been settled by statute, or by some principle of the common law, adopted by our courts, we are then to examine and compare the rules of the common law of England relative to the point, and if they are found reasonable and applicable, the court will adopt them, and if not, then they will decide the question of such principles, as result from general policy of our code of jurisprudence, and which are conformable to reason and justice. That part of the English common law, which has been thus approved by the courts, may be considered as our common law by adoption

The English common law has never been considered to be more obligatory here, than the Roman law has been in England.

1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 44–45 (Arno Press, photo. reprint 1972) (1795). On a similar note, Sir William Blackstone wrote that “the common law of England . . . has no allowance or authority [in our American plantations]; they being no part of the mother country.” WILLIAM BLACKSTONE, 1 *COMMENTARIES* *108.

44. *Rogers II*, 532 U.S. at 475 (Scalia, J., dissenting). Swift noted that not requiring adoption of the English common law in the United States “permitted [judges] to reject many of the principles of the common law . . . introduced into England in a barbarous, and ignorant period, when the rights and privileges of man were inaccurately understood.” SWIFT, *supra* note 43, at 46. Allowing American judges to reject the English common law thus provided an “opportunity to introduce all those important principles, which better information had discovered.” *Id.*

45. *See* *Ball v. United States*, 140 U.S. 118, 133 (1891); *Cook v. United States*, 138 U.S. 157, 184 (1891) (finding an indictment fatally defective for failing to show that the victim died “within a year and a day from the infliction upon him of the alleged mortal wounds”).

46. *See, e.g., State v. Bantley*, 44 Conn. 537, 540 (1877) (finding that a death occurring within a year and a day of the mortal wound provided sufficient evidence of murder or manslaughter despite evidence that the victim may have recovered if he had taken better care of his injuries); *Dacy v. State*, 17 Ga. 439, 442 (1855) (stating that in a prosecution for murder, “death must be proved to have taken place within a year and a day from the time the stroke was given”); *Connor v. Commonwealth*, 76 Ky. (13 Bush) 714, 720–21 (1878) (“The crime of murder may be made out if it be proved that the deceased died within a year and a day next after the fatal injury was inflicted.”); *State v. Kennedy*, 8 Rob. 590, 602 (La. 1845) (“[I]t is equally true here, as in England, that the death must have occurred within a year and a day from the time when the blow was given, to constitute murder”); *State v. Conley*, 39 Me. 78, 94 (1854) (requiring the indictment to state time of both “the stroke and death” to demonstrate that the death occurred within a year and a day); *Commonwealth v. Parker*, 19 Mass. 550, 558 (1824) (“The mortal stroke, or the administering of poison, does not constitute the crime, unless the sufferer dies thereof within a year and a day.”); *Lester v. State*, 9 Mo. 666, 667–68 (1846) (requiring the indictment to state the time and place of death to ensure that death occurred within a year and a day of injury); *State v. Anderson*, 4 Nev. 265, 274 (1868) (“If the shot was fired more than a year and a day before the death, then the law would presume that the party died from some other cause than the wound.”); *State v. Orrell*, 12 N.C. 139, 141 (1826) (“[I]f death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion, that it was not the cause of death;

Ball v. United States.⁴⁷ In *Ball*, the Court reversed the murder convictions of three men because the murder indictment failed to allege the time and place of the murder.⁴⁸ The *Ball* Court opined that at common law, “[i]t was necessary that it should appear that the death transpired within a year and a day after the stroke.”⁴⁹

Three years later, in 1894, the U.S. Supreme Court again approved of the year-and-a-day rule in *Louisville, Evansville & Saint Louis Railroad Co. v. Clarke*.⁵⁰ In *Clarke*, the Court broadly proclaimed that the year-and-a-day rule “is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute.”⁵¹ The *Clarke* Court refused to extend the rule into the private sector as a bar to wrongful death actions,⁵² but the Court made it abundantly clear that the common-law year-and-a-day rule had been adopted in the United States.⁵³

The year-and-a-day rule took hold in American jurisdictions as it had in England. Early American jurisprudence clearly included the year-and-a-day rule.⁵⁴ However, as circumstances began to change in modern society, the rule began to lose its foothold and was eventually reduced to “an outdated relic of the common law.”⁵⁵

and neither the Court nor Jury, can draw a contrary one.”); *Bowen v. State*, 1 Or. 270, 272 (1859) (finding it “certain, from the indictment, that the death must have occurred within one year from the time the wound was inflicted, which we think is sufficient under our statute”); *Edmondson v. State*, 41 Tex. 496, 498 (1874) (“It is essential that it should appear from the indictment that death happened within a year and a day after the injuries were inflicted.”).

47. 140 U.S. 118 (1891); see, e.g., Walther, *supra* note 29, at 1340.

48. 140 U.S. at 136.

49. *Id.* at 133. Interestingly, the Court’s final holding was that the indictment was defective only for failure to state the place of victim’s death. *Id.* at 136. The time was important to establish that the year-and-a-day rule was met, but the failure to state the precise time of death was not a fatal error as long as the Court could conclusively determine that the death occurred within a year and a day. See *id.* In *Ball*, the indictment alleged that the victim had died on October 17, 1889, and the assault was alleged to have occurred on June 26, 1889. *Id.* Obviously, less than a year and a day had passed between the injury and the death. See *id.*

50. 152 U.S. 230, 239 (1894).

51. *Id.*

52. *Id.* at 241.

53. See *id.* at 239. The *Clarke* Court made an additional observation of the rule as it applies to murder. The Court stated, “In prosecutions for murder the rule was one simply of criminal evidence.” *Id.* at 241. This point becomes quite important in the discussion, in Part IV of this Note, of retroactive application of an abrogation of the rule.

54. For an example of an American criminal law treatise discussing the rule’s effect in the United States in 1875, see WHARTON, *supra* note 31, § 15.5 (discussing the requirement that death must occur within a year and a day from the injury).

55. *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 462 (2001).

III. LOSING ITS PLACE IN MODERN SOCIETY: THE YEAR-AND-A-DAY RULE IS SENTENCED TO DEATH

For most legal professionals, the common-law doctrine known as the year-and-a-day rule may arouse only a faint memory of a first-year criminal law course. The professor may have spent a few moments discussing the rule or may have merely mentioned its existence and moved on.⁵⁶ The limited discussion of the year-and-a-day rule is unsurprising. The rule has been abolished in most jurisdictions,⁵⁷ and both legal scholars and courts across the country have shunned it as “archaic and outdated,”⁵⁸ “‘clearly an anachronism,’ and ‘no longer realistic.’”⁵⁹ This Part identifies the reasons that the year-and-a-day rule has fallen into obsolescence and examines various methods that American jurisdictions have used to eliminate it.

A. *The Arbitrary Presumption Becomes Obsolete*

1. Advances in Medical Technology

The original justifications for the year-and-a-day rule rested primarily on the lack of medical technology.⁶⁰ When the rule was first introduced, it was extremely difficult—if not entirely impossible—to determine with any certainty that a wound inflicted more than a year and a day before the

56. For example, a common first-year criminal law text devotes only 2 of the total 970 pages to the year-and-a-day rule. See JOHN KAPLAN ET AL., *CRIMINAL LAW* 272–73 (5th ed. 2004). An additional six pages are devoted to *Rogers*, the leading U.S. Supreme Court case dealing with the abolition of the rule; however, the case is not included in the materials to teach anything about the year-and-a-day rule specifically. See *id.* at 136–41 (using *Rogers* to illustrate the issues raised by applying laws retroactively). Furthermore, some classes completely omit discussion of *Rogers*.

57. *Rogers II*, 532 U.S. at 463. Even England, the rule’s creator, has abolished the year-and-a-day rule. See Law Reform (Year and a Day Rule) Act, 1996, c. 19, § 1 (Eng.), available at <http://www.opsi.gov.uk/acts/acts1996/1996019.htm>.

58. *Rogers II*, 532 U.S. at 467.

59. *Jones v. Dugger*, 518 So. 2d 295, 297 (Fla. 2d DCA 1987) (quoting *State v. Sandridge*, 365 N.E.2d 898, 899 (Ohio C.P. 1977)). Even as far back as the 1870s the rule had its critics. See WHARTON, *supra* note 31, § 15.5. Wharton’s treatise on homicide includes a footnote quoting Fitzjames Stephen’s testimony before the English Homicide Amendment Committee in 1874:

[I]t seems to me a very rough kind of rule of evidence, adapted to an age when there was very little medical knowledge. . . . I never happened to hear or read of a case in which the question about the year and a day rule arose; but I should think in the present day it would seem very strange that you should be able to say that a man died of a wound eleven months after it was received, but that at thirteen months it became perfectly impossible to say whether he did or did not.

Id. § 15.5 n.3.

60. See *supra* Part II.A.

victim died directly caused the death.⁶¹ Today, however, medical technology can make that determination. Most jurisdictions recently reviewing the year-and-a-day rule have recognized that medical and scientific advances have “so undermined the usefulness of the rule as to render it without question obsolete.”⁶²

2. Dangers of Applying the Rule in Modern Society

In addition to rendering the year-and-a-day rule obsolete, application of the rule in a world with advanced medical technology presents brand new dangers. For example, what if the victim is on the verge of living past the year-and-a-day limit and the family must decide whether to continue life support? This question was a concern for the Supreme Court of Wisconsin in *State v. Picotte*.⁶³

In *Picotte*, the court addressed the appeal of a murder conviction and refused to apply the year-and-a-day rule.⁶⁴ Reasoning that the time had come to abolish the year-and-a-day rule, the court determined that all of the rule’s original justifications had been eliminated in modern society.⁶⁵ The court then gave an affirmative reason for abolishing the rule.⁶⁶ The court opined that “the common-law rule raises the specter of a family’s being forced to choose between terminating the use of a life-support system and allowing an accused to escape a murder charge.”⁶⁷

Even recognizing the possibility of keeping a victim alive on life support for many years into the future, the abolition of the year-and-a-day rule arguably does not unduly burden the defendant. Prosecutors must still

61. See *supra* Part II.A.

62. *Rogers II*, 532 U.S. at 463; see also *Commonwealth v. Lewis*, 409 N.E.2d 771, 773 (Mass. 1980) (“[T]he rule appears anachronistic upon a consideration of the advances of medical and related science”); *People v. Legeri*, 266 N.Y.S. 86, 88 (App. Div. 1933) (“Great advances have been made in medicine and surgery, and the doubt that the blow was the cause of death, when the latter ensued a year and a day after the former, has, in a large measure, been removed.”); *Commonwealth v. Evald*, 5 Pa. D. & C. 105, 107 (C.P. 1924) (noting that “the necessity and reason for [the rule] have disappeared with the marvelous advance of medical knowledge and skill,” but deferring the decision to abolish the rule to the legislature); JOSEPH DILLON DAVEY & LINDA DUBOIS DAVEY, *THE CONSCIENCE OF THE CAMPUS: CASE STUDIES IN MORAL REASONING AMONG TODAY’S COLLEGE STUDENTS* 38–39 (2001) (identifying the year-and-a-day rule as an example of increased knowledge of a subject dissolving the underlying rationale for a law and indicating that as “the reason for the rule ceased, the rule itself also ceased”); MACK, *supra* note 36, at 37.

63. 661 N.W.2d 381 (Wis. 2003).

64. *Id.* at 389–90. The court held that “new conditions and the progress of society have rendered the year-and-a-day rule ‘unsuited to present conditions’ and an impediment to society, and that the time has come to set it aside.” *Id.*

65. See *id.* at 390.

66. *Id.*

67. *Id.*

establish causation.⁶⁸ Obviously, the more time that elapses between the injury and the death, the more likely that the defendant will be able to develop a strong defense, even absent the bright-line year-and-a-day rule.⁶⁹ Given the horrific situation where the family must decide whether to keep a loved one artificially alive or to see the loved one's attacker punished, abolition of the year-and-a-day rule seems to be the right course from a policy standpoint.⁷⁰

3. A New Jury System

Yet another reason that the year-and-a-day rule has become obsolete is that the modern American jury system is quite different from the jury system in place in thirteenth-century England.⁷¹ Although the jury was once required to render its verdict based only on the jury members' personal knowledge,⁷² today the jury acts as a fact finder⁷³ and may draw its conclusions from witness testimony.⁷⁴ Most importantly, modern jurors

68. For an example of a court's analysis of the abolition of the rule in the face of life-prolonging medical technology, see *Commonwealth v. Lewis*, which states: "[T]he relatively short time limit is seen as not only capricious but as senselessly indulgent toward homicidal malefactors. It is reckoned a sufficient safeguard for defendants that the prosecution, quite apart from the rule, must establish the connection between act and death by proof beyond a reasonable doubt." 409 N.E.2d 771, 773 (Mass. 1980).

69. MACK, *supra* note 36, at 37; *see also* *People v. Brengard*, 191 N.E. 850, 853 (N.Y. 1934) ("An obscure or a merely probable connection between an assault and death will, as in every case of alleged crime, require acquittal of the charge of any degree of homicide.").

70. Another problem relating to the year-and-a-day rule when life-prolonging measures are available is the difficulty of determining—when such measures were refused—if the victim would have lived had heroic measures been taken. *In re J.N.* addressed precisely this problem. *See* 406 A.2d 1275, 1279 (1979). The defendants injured an eighty-five-year-old woman during a purse snatching. *Id.* at 1278. The woman remained on life support for six days at the hospital, but after showing no signs of improvement all "heroic measures" were ceased. *Id.* at 1278–79. The woman died within twenty minutes of removal of life support. *Id.* at 1279. The defendants argued that they were entitled to a jury instruction that if the jurors found that the victim could have lived for a year and a day had the heroic measures continued, then the defendants could not be convicted of murder. *Id.* The court found no evidence that could support such a finding. *Id.* at 1283–84. However, the case demonstrates the bizarre and difficult arguments arising from the year-and-a-day rule in a case involving life support.

71. *See* Rowe, *supra* note 29, at 11–12.

72. *See supra* text accompanying notes 39–42.

73. *See* *United States v. Comer*, 421 F.2d 1149, 1154 (D.C. Cir. 1970) ("[O]ur opinions have repeatedly emphasized our conviction that the jury's role as fact-finder is . . . central to our jurisprudence . . .").

74. *See* *State v. Brown*, 318 A.2d 257, 261 (Md. 1974) ("The trier of fact need not, as did the early English juries, find a verdict upon its own knowledge or merely give expression to the community conviction on the question, but today may place reliance on the testimony of expert witnesses."). In stark contrast to the old English common law, jurors in modern American cases are disqualified from testifying before a jury of which they are a member. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 468 (5th ed. 2004). The Federal Rules of

may now receive expert opinion testimony at trial.⁷⁵ Now that the modern juror may consider expert testimony regarding the medical cause of a victim's death—regardless of the amount of time passing between injury and death—the arbitrary year-and-a-day rule is no longer necessary to assist the juror in determining causation.

B. *The States Respond*

In response to the increasingly apparent obsolescence of the year-and-a-day rule, many states have moved away from the common-law rule.⁷⁶ The rule may be abolished legislatively either directly by abrogating the common law by statute or indirectly by creating laws that are inconsistent with it.⁷⁷ The rule may also be abolished judicially. The majority of states recently examining the year-and-a-day rule have taken one of these two paths toward eliminating or modifying the common-law rule.⁷⁸

1. Legislative Elimination of the Year-and-a-Day Rule

Several states have abolished or modified the year-and-a-day rule by statute.⁷⁹ Arizona,⁸⁰ California,⁸¹ Florida,⁸² Maryland,⁸³ Missouri,⁸⁴ and

Evidence specifically address this issue, providing that “[a] member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting.” FED. R. EVID. 606(a).

75. FED. R. EVID. 702. Adopted in many states, the Federal Rules of Evidence state: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise . . .” *Id.* Expert testimony greatly reduces the pressure on jurors to draw their own conclusions about causation in a murder case where the jurors have no inherent understanding of the medical or scientific cause of death. Assume that the defendant shot the victim on day one. The bullet remained lodged in the victim's abdomen, but the flesh healed over the wound. If the continued presence of the bullet in the victim's abdomen finally causes the victim to die on day 368, the average juror would be hard-pressed to make the connection, beyond a reasonable doubt, that the defendant's act of shooting the victim more than a year earlier caused the victim's death. Absent any medical knowledge, the lay juror can ascertain only that the victim was once shot, that the wound healed, and that the victim mysteriously died some time later. If, however, the juror hears testimony from the medical examiner that it was the bullet lodged inside the victim's belly that ultimately led to the victim's death, the juror may decide that the defendant's conduct caused the death. The expert testimony is key to the juror's understanding of the cause of death. *See* FED. R. EVID. 702 advisory committee's note (“[I]ntelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge.”).

76. *See* *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 463 (2001).

77. *See* *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 397 n.4 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

78. *See* *Rogers II*, 532 U.S. at 463.

79. *See* *Rogers I*, 992 S.W.2d at 397 n.4.

80. *See* ARIZ. REV. STAT. ANN. § 13-103 (2007) (abolishing all common-law offenses and affirmative defenses).

81. CAL. PENAL CODE § 194 (West 2007) (changing the rule to a rebuttable presumption that

Washington⁸⁵ are among the states that chose the direct legislative route. These states have either expressly abolished the rule or modified it from the common-law form.

California provides an example of a state that merely modified the rule.⁸⁶ California originally codified the year-and-a-day rule in its penal code in 1872.⁸⁷ In 1969, the rule was modified to extend the year-and-a-day limit to “three years and a day.”⁸⁸ In 1996, the California legislature further altered the rule by creating a rebuttable presumption that a death occurring more than three years and a day after the injury resulted from natural causes.⁸⁹

an injury is not the cause of death occurring more than three years and a day after infliction of the wound).

82. FLA. STAT. § 782.035 (2007) (abolishing the year-and-a-day rule specifically).

83. MD. CODE ANN., CRIM. LAW § 2-102 (West 2007) (abolishing the year-and-a-day rule specifically). The legislative abolition of the year-and-a-day rule in Maryland came soon after a case in which the Maryland Court of Appeals declined to abrogate the rule, and instead deferred the question to the state legislature. *Rogers I*, 992 S.W.2d at 397 n.4. In *State v. Minster*, the court opined, “Inasmuch as we believe this issue is more appropriately addressed by the legislature, we shall not abrogate the common law rule.” 486 A.2d 1197, 1197 (Md. 1985). The Maryland legislature responded by enacting § 2-102. Act of Oct. 1, 2002, ch. 26, § 2, 2002 Md. Laws 197, 212.

84. MO. REV. STAT. § 565.003 (2007) (“The length of time which transpires between conduct which results in a death and is the basis of a homicide offense and the event of such death is no defense to any charge of homicide.”).

85. WASH. REV. CODE. § 9a.32.010 (2007) (including in the definition of homicide: “death occurring at any time”). Washington first modified the year-and-a-day rule and then abolished it entirely. Prior to the current statute allowing murder prosecution for a “death occurring at any time,” the Washington legislature passed the Laramie Bill, effective on February 24, 1983, providing that “murder charges may be filed if a victim dies within [three] years and a day of the criminal act.” *State v. Edwards*, 701 P.2d 508, 509 (Wash. 1985).

86. See *People v. Snipe*, 102 Cal. Rptr. 6, 7 (Dist. Ct. App. 1972).

87. CAL. PENAL CODE § 194 (West 2007); THE PENAL CODE OF THE STATE OF CALIFORNIA 97 (James H. Deering ed., 1909).

88. Act of July 25, 1969, ch. 593, § 1, 1969 Cal. Stat. 1225.

89. Act of Sept. 15, 1996, ch. 580, § 1, 1996 Cal. Stat. 3204. The California statute now reads:

To make the killing either murder or manslaughter, it is not requisite that the party die within three years and a day after the stroke received or the cause of death administered. If death occurs beyond the time of three years and a day, there shall be a rebuttable presumption that the killing was not criminal. The prosecution shall bear the burden of overcoming this presumption. In the computation of time, the whole of the day on which the act was done shall be reckoned the first.

CAL. PENAL CODE § 194.

An example of a state expressly abolishing the rule is Florida.⁹⁰ Unlike California, Florida had never codified the common-law year-and-a-day rule, but Florida has passed legislation stating that all common-law rules remain in force as long as they are not inconsistent with the laws of the state.⁹¹ Therefore, Florida chose to enact a statute specifically abrogating the year-and-a-day rule.⁹²

Other states have abolished or modified the year-and-a-day rule through indirect legislation. Colorado, Delaware, North Dakota, and Utah are among the states that have eliminated the rule by expressly repealing a statute that had previously codified the rule.⁹³ Arkansas,⁹⁴ Georgia,⁹⁵ Illinois,⁹⁶ New York,⁹⁷ Oregon,⁹⁸ and Texas⁹⁹ have all adopted comprehensive criminal codes excluding the year-and-a-day rule, effectively eliminating the rule by intentionally leaving it out of the new statutes.¹⁰⁰

90. See FLA. STAT. § 782.035 (2007).

91. *Id.* §§ 2.01, 775.01.

92. *Id.* § 782.035. The Florida statute reads:

The common-law rule of evidence applicable to homicide prosecutions known as the “year-and-a-day rule,” which provides a conclusive presumption that an injury is not the cause of death or that whether it is the cause cannot be discerned if the interval between the infliction of the injury and the victim’s death exceeds a year and a day, is hereby abrogated and does not apply in this state.

Id. The confusion over the retroactive application of the statute and the possible prior judicial abrogation of the common-law year-and-a-day rule in Florida is discussed in Part V of this Note. See *infra* Part V; see also *supra* notes 25–27 and accompanying text.

93. *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 397 n.4 (Tenn. 1999), *aff’d*, 532 U.S. 451 (2001).

94. See ARK. CODE ANN. § 5-2-205 (2007) (providing specific criteria for determining causation and thus precluding use of the year-and-a-day rule).

95. *State v. Cross*, 401 S.E.2d 510, 511 (Ga. 1991).

96. *People v. Carrillo*, 646 N.E.2d 582, 585 (Ill. 1995).

97. *People v. Brengard*, 191 N.E. 850, 853 (N.Y. 1934).

98. *State v. Hudson*, 642 P.2d 331, 333 (Or. 1982).

99. *Martin v. State*, 732 S.W.2d 743, 745 (Tex. Ct. App. 1987), *vacated on other grounds*, 760 S.W.2d 662 (Tex. Crim. App. 1988).

100. Notably, the Model Penal Code also eliminated the year-and-a-day rule by intentionally excluding it from the criminal-homicide statute. See MODEL PENAL CODE § 210.1 & cmt. n.4 (Proposed Official Draft 1962 & rev. cmts. 1980). Comment 4 to § 210.1 specifically addresses the drafters’ intent to exclude the year-and-a-day rule. *Id.* § 210.1 cmt. n.4. The comment states that the Code “renders unnecessary the ancient requirement that the death of another take place within a year and a day of the actor’s conduct,” and the comment notes that “[m]ost modern statutes are in accord with the Model Code in eliminating the express time limitation as a special causal requirement.” *Id.*

2. Judicial Elimination of the Year-and-a-Day Rule

In addition to the states that have either directly or indirectly abolished the common-law rule via legislation, some states have judicially abolished the rule.¹⁰¹ Among the states that have judicially abolished the year-and-a-day rule are Massachusetts,¹⁰² Michigan,¹⁰³ New Jersey,¹⁰⁴ New Mexico,¹⁰⁵ North Carolina,¹⁰⁶ Ohio,¹⁰⁷ Pennsylvania,¹⁰⁸ Rhode Island,¹⁰⁹ Tennessee,¹¹⁰ and Wisconsin.¹¹¹ The District of Columbia has also judicially abolished the rule.¹¹² Moreover, the highest courts of at least two states—Connecticut¹¹³ and Iowa¹¹⁴—have expressly declared that the rule had never been part of the common law of the state.¹¹⁵ Of the state courts squarely facing the rule in modern times, only Alabama has found the rule to have a continuing role in society.¹¹⁶

101. See *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 397 n.4 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

102. *Commonwealth v. Lewis*, 409 N.E.2d 771, 775 (Mass. 1980).

103. *People v. Stevenson*, 331 N.W.2d 143, 143 (Mich. 1982).

104. *State v. Young*, 390 A.2d 556, 559, 561 (N.J. 1978).

105. *State v. Gabehart*, 836 P.2d 102, 105 (N.M. Ct. App. 1992).

106. *State v. Vance*, 403 S.E.2d 495, 499 (N.C. 1991).

107. *State v. Sandridge*, 5 Ohio Op. 3d 419, 419 (C.P. 1977).

108. *Commonwealth v. Ladd*, 166 A.2d 501, 506 (Pa. 1960).

109. *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987).

110. *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 394 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

111. *State v. Picotte*, 661 N.W.2d 381, 391 (Wis. 2006).

112. *United States v. Jackson*, 528 A.2d 1211, 1220 (D.C. 1987). The District of Columbia Court of Appeals vehemently rejected the rule, opining:

Surely, the dictates of justice and public policy favor removal of a “capricious” obstacle to a prosecution for murder where the victim died fourteen months after having his brains blown out by a gunshot to the rear of his head which rendered him a paraplegic. Accordingly, finding no compelling public policy reason to retain it, we abrogate the year and a day rule, and leave it to a future court to determine, in the absence of any legislative action, whether the facts of some unknown future case might warrant judicial imposition of a cutoff period significantly longer than a year and a day.

Id.

113. *Valeriano v. Bronson*, 546 A.2d 1380, 1387 (Conn. 1988).

114. *State v. Ruesga*, 619 N.W.2d 377, 380 (Iowa 2000).

115. See *Rowe*, *supra* note 29, at 8.

116. See *Ex parte Key*, 890 So. 2d 1056, 1067 (Ala. 2003) (reversing the Alabama Court of Criminal Appeals’ decision to abrogate the common-law year-and-a-day rule); see also *Rowe*, *supra* note 29, at 8–9. The decision by the Alabama Supreme Court to retain the year-and-a-day rule has been criticized. See, e.g., *id.* at 15 (calling *Ex parte Key* “Alabama’s missed opportunity” and opining that “the Alabama Supreme Court passed upon a prime opportunity to bring Alabama law into conformity with . . . the . . . majority of its sister-states that have rejected the anachronistic

IV. OLD RULES DIE HARD: THE YEAR-AND-A-DAY RULE IS RESURRECTED, EX POST FACTO

Despite attempts by legislators and judges to send the year-and-a-day rule to its grave, the rule continues to raise its ugly head in American courts. How can an archaic common-law defense continue to merit application in modern courts? The answer seems to lie in the curious difficulty in eliminating the rule. The rule no longer applies to cases where the deadly injury occurs after abolition of the rule. However, the difficulty arises when the injury is inflicted prior to the abolition of the rule. The states that have faced this problem so far have each chosen to address it differently. Riddled with ex post facto concerns, the dilemma of whether to charge a person with murder is quite complex when the victim dies more than a year and a day after the injury was inflicted, but the common-law rule was abolished in the interim between the injury and the death. This Part analyzes several potential solutions to this dilemma.

A. *The Starting Point: The Foundations of Ex Post Facto*

Article I, § 10 of the U.S. Constitution provides that “[n]o State shall . . . pass any . . . ex post facto Law.”¹¹⁷ The most obvious example of an ex post facto law, though admittedly one of the least common, is a law that criminalizes an act committed before the law was enacted.¹¹⁸ The seminal ex post facto case, however, dealt with a probate statute.¹¹⁹

In *Calder v. Bull*,¹²⁰ a Connecticut probate court invalidated the will of Normand Morrison and awarded his estate to his heirs, the Calders.¹²¹ Approximately two years later, the Connecticut legislature passed a new law that set aside the decision of the probate court.¹²² On rehearing, the court approved the will and ordered it recorded, thus allowing Bull and his wife to take under the will.¹²³ The Calders appealed, claiming that retroactive application of the new law granting the rehearing violated the Ex Post Facto Clause of the U.S. Constitution.¹²⁴ The U.S. Supreme Court

vestige of the common law”).

117. U.S. CONST. art. I, § 10, cl. 1.

118. JAMES M. MCGOLDRICK, JR., *LIMITS ON STATES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 68 (2005).

119. *See* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386–87 (1798).

120. 3 U.S. (3 Dall.) 386 (1798).

121. *Id.* at 386–87.

122. *Id.* at 386.

123. *Id.*

124. *Id.* at 387.

ultimately rejected that contention and held that the probate law was not within the prohibition against ex post facto laws.¹²⁵

In *Calder*, Justice Chase defined four types of ex post facto laws:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.¹²⁶

The Court noted, however, that not all *retrospective* laws are necessarily ex post facto laws.¹²⁷ In drawing the distinction, Justice Chase opined, “There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime.”¹²⁸

Although Justice Chase’s description of the four types of ex post facto laws was clearly dicta, it is an integral part of ex post facto jurisprudence.¹²⁹ The modern Court typically uses the four *Calder* factors as the starting point for an ex post facto analysis.¹³⁰ Justice Chase’s words have been cited repeatedly, often verbatim, in ex post facto cases.¹³¹

In addition to the *Calder* factors, the Court sometimes examines whether a law is contrary to one of the purposes for banning ex post facto laws.¹³² The Court has identified three main purposes for the ban: (1) to protect the individual’s reliance interest by providing fair warning, (2) to

125. *Id.* at 392.

126. *Id.* at 390. For an analysis of the third type of ex post facto law, see Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning Out Sex Offenders Through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1178–81 (2006).

127. *Calder*, 3 U.S. (3 Dall.) at 391. Justice Chase opined that all ex post facto laws are retrospective, but all retrospective laws are not ex post facto. *Id.* He conceded that in certain circumstances a law could justly relate to a time before its creation. *Id.*

128. *Id.* Anything that “mollifies the rigor of the criminal law” after the act is committed is not considered ex post facto. *Id.*

129. MCGOLDRICK, *supra* note 118, at 65.

130. *Id.*; see, e.g., *Stogner v. California*, 539 U.S. 607, 611–12 (2003); *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 456 (2001); *Lynce v. Mathis*, 519 U.S. 433, 441 n.13 (1997); *Collins v. Youngblood*, 497 U.S. 37, 41–42 (1990).

131. *Carmell v. Texas*, 529 U.S. 513, 525 (2000) (noting the numerous cases where Justice Chase’s four factors have been cited).

132. MCGOLDRICK, *supra* note 118, at 66.

restrict arbitrary and potentially vindictive legislation, and (3) to ensure fundamental fairness.¹³³ Examination under these three factors, particularly the third, may alter the outcome of an *ex post facto* challenge that had been analyzed under only the *Calder* factors.¹³⁴

B. *Is the Year-and-a-Day Rule Substantive or Procedural?*

Crucial to the analysis of whether a law may apply to crimes already committed is whether the rule is substantive or procedural.¹³⁵ Characterizing a retroactive law as procedural or evidentiary versus substantive can sometimes remove the *ex post facto* cloud.¹³⁶ The year-and-a-day rule has been characterized as a substantive rule in some cases¹³⁷ and as a mere rule of evidence in others.¹³⁸ Even where the rule's status is unclear, various policy considerations support an argument that the year-and-a-day rule is unique and should receive special consideration.¹³⁹

133. *Id.*; see also *Carmell*, 529 U.S. at 531 & n.21.

134. See *McGoldrick*, *supra* note 118, at 66. Perhaps the sense that retroactive application of a law results in fundamental unfairness sometimes leads the Court to “attempt to shoehorn the law into the *Calder v. Bull* category.” *Id.* That may have been the case in *Stogner*. *Id.* In *Stogner*, the Court found that a California statute permitting “resurrection of otherwise time-barred criminal prosecutions” violated the Ex Post Facto Clause of the U.S. Constitution. *Stogner*, 539 U.S. at 609. The dissenters in the 5–4 decision contended that the majority’s attempt to “force” the retroactive extension of the statute of limitations for serious sexual offenses against minors into the second category of *Calder* was improper. *Id.* at 633 (Kennedy, J., dissenting). The dissent opined, “A law which does not alter the definition of the crime but only revives prosecution does not make the crime ‘greater than it was, when committed.’” *Id.* (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). The dissent refuted that the extension of the statute of limitations fit into any of the four *Calder* categories. *Id.* at 653. It instead found that because the Court had “held, in the civil context, that expired statutes of limitations do not implicate fundamental rights under the Clause[,] . . . there [wa]s no reason to reach a different conclusion” in the instant case. *Id.* (citations omitted).

135. George P. Fletcher, *The Nature of Justification*, in *ACTION AND VALUE IN CRIMINAL LAW* 175, 184 (Stephen Shute et al. eds., 1993).

136. See *Weaver v. Graham*, 450 U.S. 24, 29 n.12 (1981); *McGoldrick*, *supra* note 118, at 75–80; see also Fletcher, *supra* note 135, at 184 (noting that the legislature may change procedural rules but not substantive rules). The U.S. Supreme Court stated in *Weaver* that “no *ex post facto* violation occurs if the change effected is merely procedural, and does ‘not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.’” *Weaver*, 450 U.S. at 29 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590 (1884)). The Court also noted that “[a]lteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form.” *Id.*

137. See *infra* Part IV.B.1.

138. See *infra* Part IV.B.2.

139. See *infra* Part IV.B.3.

1. Characterizing the Rule as Substantive

Some courts have characterized the year-and-a-day rule as substantive.¹⁴⁰ Two main arguments are consistently advanced in support of this characterization. First, some courts have reasoned that the rule actually supplies an element of the crime of murder.¹⁴¹ These courts typically look to the historic role of the year-and-a-day rule.¹⁴² Historically, a murder indictment was defective if it did not clearly indicate that the death occurred within a year and a day from the date of the injury.¹⁴³ Requiring inclusion of the time statement in the indictment

140. See, e.g., *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 468 (2001) (Scalia, J., dissenting) (calling the year-and-a-day rule an “*element* of the crime—a ‘substantive principle of law’” (quoting *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 399 (Tenn. 1999), *aff’d*, 532 U.S. 451 (2001))); *United States v. Chase*, 18 F.3d 1166, 1171 (4th Cir. 1994) (rejecting the argument that the year-and-a-day rule was eliminated from federal criminal law when the Federal Rules of Evidence were adopted, reasoning that the rule “is a principle of substantive law, not a rule of evidence”); *United States v. Jackson*, 528 A.2d 1211, 1224 (D.C. 1987) (“[T]he year and a day rule is more than merely a rule of evidence.”); *State v. Edwards*, 701 P.2d 508, 512 (Wash. 1985) (holding that a change in the year-and-a-day rule was an *ex post facto* law because the rule amounted to a substantive element of the crime rather than an evidentiary change); *State v. Spadoni*, 243 P. 854, 856 (Wash. 1926) (reversing the murder conviction of the defendant where the information failed to show that the victim died within a year and a day of the shooting, reasoning that at English common law the year-and-a-day rule “was regarded as a matter of substance material to the issue” and a required element of the pleading).

141. See, e.g., *Rogers II*, 532 U.S. at 468 (Scalia, J., dissenting) (opining that the year-and-a-day rule “is an actual *element* of the crime”); *Chase*, 18 F.3d at 1169 (“The controlling element which distinguished the guilt of the assailant from a common assault was the death within a year and a day” (quoting *Ball v. United States*, 140 U.S. 118, 133 (1891))); *People v. Stevenson*, 331 N.W.2d 143, 151 (Mich. 1982) (identifying the need for a time limit such as the year-and-a-day rule as an element of the offense); *State v. Young*, 390 A.2d 556, 559 (N.J. 1978) (“[W]e regard the year and a day rule as a constituent element of the crime of murder, not a mere rule of evidence.”); *Edwards*, 701 P.2d at 512 (finding the year-and-a-day rule an element of the crime of murder).

142. See, e.g., *Stevenson*, 331 N.W.2d at 144 (referring to *Chapman v. People*, 39 Mich. 357, 360 (1878), a case holding that a death occurring within a year and a day of the injury is one of two distinct controlling elements of murder); *Chase*, 18 F.3d at 1169 (examining the holding in *Ball*, an 1891 case addressing the year-and-a-day rule); *Spadoni*, 243 P. at 856 (referring to the English common law and the year-and-a-day rule’s role as “a matter of substance”).

143. See *Cook v. United States*, 138 U.S. 157, 184 (1891) (reversing a murder conviction because the indictment failed to state that the death occurred within a year and a day after the injury); *Ball*, 140 U.S. at 133 (requiring the indictment to allege that the death occurred within a year and a day because this allegation distinguishes the defendant’s guilt of murder from common assault); *People v. Wallace*, 9 Cal. 30, 31–32 (1858) (mandating that the time of the infliction of the wound and the time of the death be included in the indictment to make explicit that the death occurred within a year and a day after the injury); *Chapman*, 39 Mich. at 360 (noting that the law had always required a separate averment that the death occurred within a year and a day of the injury as an element of murder as distinguished from assault); WHARTON, *supra* note 31, §§ 15.5, 845. Wharton noted that the English common law deemed fatally defective an indictment that failed to aver that the death occurred within the year-and-a-day limit. *Id.* § 15.5. He also explained that

seemed to demonstrate that the time statement was an element of the crime itself.

Second, courts have reasoned that the rule must be substantive because it affects the verdict.¹⁴⁴ Closely related to the fundamental-fairness analysis,¹⁴⁵ this reasoning hinges on the fact that the outcome of a given case would be drastically different absent the year-and-a-day rule.¹⁴⁶ Whether taking the first or the second approach—or some combination of the two—courts that have found the year-and-a-day rule substantive have uniformly rejected retroactive abrogation of the rule as a violation of the Ex Post Facto Clause.¹⁴⁷

the law in the United States in 1854, the date his treatise was published, had a similar requirement. *Id.* § 845. Wharton wrote:

Thus an indictment, upon which it does not appear that the death happened within a year and a day after the wound was given, is fatally defective; because, when the death does not ensue within a year and a day after the wound is inflicted, the law presumes that it proceeded from some other cause.

Id.

144. See *Jackson*, 528 A.2d at 1224. This approach seems similar to the substantive-versus-procedural analysis in the seminal case on statutes of limitations with respect to choice-of-law in civil matters. See *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 107–10 (1945). The Court in *Guaranty Trust* concluded that the label of either “procedural” or “substantive” was not the real key in the choice-of-law arena. *Id.* at 109. The test for *Erie* purposes, the Court opined, was whether the application of the statute “lead[s] to a substantially different result.” *Id.* If application of a different statute of limitations would allow an otherwise time-barred claim, it should not be applied. See *id.* at 110. Perhaps, by analogy, the underlying equities of *Guaranty Trust* support classifying the year-and-a-day rule as substantive rather than procedural.

145. See *supra* Part IV.A.

146. In *Jackson*, the defendant shot the victim in the back of the head, but the victim survived in the hospital for fourteen months before succumbing to the injury. 528 A.2d at 1212. The defendant argued that the year-and-a-day rule barred his prosecution for murder. See *id.* The court concluded that the rule was more than merely a rule of evidence. *Id.* at 1224. The court emphasized that abrogation of the rule affected the offense that the defendant could have been charged with on the day that the victim died. See *id.* Because more than a year had passed since the injury, application of the rule meant no criminal liability and abrogation of the rule meant indictment for murder. See *id.* The gravity of impact that abrogation of the rule would have on the outcome of the defendant’s case led the court to hold both that the rule was substantive and that the rule’s abrogation would violate the Ex Post Facto Clause. See *id.*

147. See, e.g., *id.* at 1212 (holding that abrogation of the year-and-a-day rule violated the Ex Post Facto Clause); *State v. Edwards*, 701 P.2d 508, 512 (Wash. 1985) (holding that a change in the year-and-a-day rule resulted in an ex post facto law because the rule amounted to a substantive element of the crime rather than an evidentiary change).

2. Characterizing the Rule as Procedural or Evidentiary

Some courts, on the other hand, characterize the year-and-a-day rule as procedural or evidentiary.¹⁴⁸ Often, these courts point to the rule's absence in the statutory definition of murder. The Pennsylvania Supreme Court provided an illustrative example of this approach in *Commonwealth v. Ladd*.¹⁴⁹

The *Ladd* court distinguished a *description* of a crime from the *definition* of a crime.¹⁵⁰ The court reasoned, "In a description one may expect to find together but unsorted not only the elements of the crime but the jurisdictional requirements of time and venue and date of death. These latter requirements affect only the right to prosecute, not the structure of the crime."¹⁵¹ The *Ladd* court determined that the year-and-a-day rule was a part of the description of murder, but not of the definition; therefore, the rule was merely procedural.¹⁵² After establishing that the rule was procedural, the court determined that it was free to change the rule without running afoul of the Ex Post Facto Clause.¹⁵³

148. See, e.g., *Louisville, Evansville & Saint Louis R.R. v. Clarke*, 152 U.S. 230, 241 (1894) ("In prosecutions for murder the rule was one simply of criminal evidence."); *People v. Snipe*, 102 Cal. Rptr. 6, 8 (Dist. Ct. App. 1972) ("When the common law [year-and-a-day] rule was incorporated into the Criminal Practice Act of this state, it was not made an element of the offense itself; it was made 'a rule of evidence merely.'" (quoting *People v. Murphy*, 39 Cal. 52, 55 (1870))); *Jones v. Dugger*, 518 So. 2d 295, 298 (Fla. 2d DCA 1987) ("[T]he year and a day rule is a rule of evidence rather than an element of the offense of murder."); *Head v. State*, 24 S.E.2d 145, 147 (Ga. Ct. App. 1943) (framing the year-and-a-day rule question as "one of procedure and evidence"); *State v. Huff*, 11 Nev. 17, 20 (1876) (calling the year-and-a-day rule "a rule of evidence merely"); *Elliott v. Mills*, 335 P.2d 1104, 1112 (Okla. Crim. App. 1959) (calling the rule a "matter of procedure, pleading as well as evidence"); *Commonwealth v. Ladd*, 166 A.2d 501, 504 (Pa. 1960) (holding that the year-and-a-day rule "is not part of the definition of murder but only a rule of evidence or procedure"). In addition to the courts, a leading expert on the common law suggested that the rule was merely evidentiary. See WHARTON, *supra* note 31, § 15.5 n.3. In his testimony before the English Homicide Amendment Committee in 1874, Fitzjames Stephen called the year-and-a-day rule a "rough kind of rule of evidence." *Id.*

149. 166 A.2d 501, 505 (Pa. 1960).

150. *Id.*

151. *Id.*

152. See *id.* at 505–06. In concluding that the rule was not a part of the definition of murder in Pennsylvania, the court reviewed Blackstone's definition, which the state had adopted. *Id.* at 505. The court found it critical that Blackstone defined murder and then waited for two more pages before mentioning the year-and-a-day rule. *Id.* (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *195, *197). Had the rule been an element of murder, the court supposed that Blackstone would have included the rule in the definition. See *id.*

153. *Id.* at 507. The majority stated, "Our conclusion is that we may change a common-law rule of evidence without being guilty of judicial legislation and abolish it when we are aware that modern conditions have moved beyond it and left it sterile." *Id.* However, two justices strongly dissented. *Id.* at 520 (Musmanno, J., dissenting) ("I most vigorously protest what the majority is doing and emphatically dissent from its opinion."). The dissent argued that to charge the defendant

3. Policy Arguments for Special Treatment

Though the year-and-a-day rule may not fall neatly into either the substantive or the procedural category, some argue that its abrogation should nevertheless apply retroactively without violating the Ex Post Facto Clause.¹⁵⁴ The main support for this argument is that no one reasonably relies on the rule when deciding whether to injure the victim.¹⁵⁵ If the status of a particular law has no bearing on a person's actions, perhaps ex post facto concerns decrease.¹⁵⁶

Obviously, a person should be able to rely on the definition of a crime at the time he commits the act.¹⁵⁷ Common sense tells us that it would be unfair to convict someone for an act that was not criminal at the time it was committed.¹⁵⁸ The actor would have no opportunity to conform his conduct to comply with the law.¹⁵⁹ But the equities seem quite different when analyzing a change in the statute of limitations of a crime.

A statute of limitations is not intended to, nor is it reasonable to assume that it does, shape the conduct of a person contemplating the commission of a known crime.¹⁶⁰ Although a statute of limitations may sometimes be labeled “substantive,”¹⁶¹ a criminal defendant arguably cannot rely on such

“with murder for a death which occurred beyond the period of limitation . . . is to prosecute him on an *ex post facto* basis. It is to designate as murder an act which was not murder when the alleged victim of the defendant's alleged aggression died.” *Id.* at 519.

154. Fletcher, *supra* note 135, at 185.

155. *Id.*

156. *Id.*

157. *Id.* at 184.

158. *See id.* Fletcher gives an illustrative example of this notion: “If a physician removes the organs of a moribund patient with a flat EEG reading—legally dead at the time of the operation—it would be unfair to change the definition of death retroactively and thus convert to homicide that which was not homicide at the time of commission.” *Id.*

159. *See id.*

160. *Id.* Fletcher continues his physician hypothetical to demonstrate this point: If the physician knows that removing the organs of her patient will cause a death for which she may be charged with homicide, “should she be encouraged to think to herself: ‘If I commit this crime now, I am subject to prosecution, at most, for the next twenty years. This is a risk worth running?’ I should think not.” *Id.* Fletcher’s conclusion that such a result would be absurd certainly makes sense. It is unreasonable to think that the statute of limitations plays any role, much less a substantial role, in the perpetrator’s decision-making process.

161. *See Jinks v. Richland County*, 538 U.S. 456, 465 (2003). The *Jinks* Court addressed the statute of limitations in a civil context and opined that “[f]or purposes of *Erie* . . . statutes of limitation are treated as substantive.” *Id.* (citations omitted) (citing *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 110–11 (1945)). *But see Sun Oil Co. v. Wortman*, 486 U.S. 717, 736 (1988) (recognizing that “[s]tatutes of limitations . . . defy characterization as either purely procedural or purely substantive” and admitting that “[o]ne cannot neatly categorize this complicated temporal balance as either procedural or substantive”). The confusion over whether to characterize statutes of limitations as either substantive or procedural is equally prevalent in the criminal context.

a “peripheral” rule.¹⁶² Likewise, the year-and-a-day rule—regardless of how it is characterized—has no bearing on the actor’s decision to inflict an injury that later leads to death.¹⁶³ As a matter of policy, the year-and-a-day rule arguably should not be subjected to such strict ex post facto scrutiny because no actor could have reasonably relied, at that time the blow was struck, on the right to invoke the rule at some later date.¹⁶⁴

C. Was Retroactive Application Intended?

Even if the year-and-a-day rule is merely a rule of evidence and can survive constitutional scrutiny, the question still remains whether the

Compare State v. Creekpau, 753 P.2d 1139, 1144 n.13 (Alaska 1988) (holding that for purposes of an ex post facto analysis, criminal statutes of limitation are procedural), with People v. Zamora, 557 P.2d 75, 80 (Cal. 1976) (holding that in California the criminal statute of limitations constitutes a substantive rather than a procedural right). One U.S. Supreme Court case held that an increase in the statute of limitations that allowed prosecution of a crime already otherwise time-barred violated the Ex Post Facto Clause of the U.S. Constitution. See Stogner v. California, 539 U.S. 607, 609 (2003). However, the Court split 5–4, and the opinion included a passionate dissent asserting that a change in the statute of limitations did not fit into any of the four prohibited categories of ex post facto laws. *Id.* at 653 (Kennedy, J., dissenting). The dissent felt certain that a mere extension of the criminal statute of limitations, even if the statute had already run, did not violate the Ex Post Facto Clause. See *id.*

162. See Fletcher, *supra* note 135, at 185.

163. *Id.* Fletcher analyzes a California child abuse case, *People v. Snipe*, 102 Cal. Rptr. 6 (Dist. Ct. App. 1972), using this reasoning. Fletcher, *supra* note 135, at 185. Fletcher notes that it is “obviously absurd to think that the year-and-a-day rule should have entered the defendant’s calculations” in deciding whether to injure the child. *Id.* The defendant in *Snipe* never pondered how long it would take the victim to die before committing the act, and surely he never thought to himself, “‘If I can beat the child so that she dies slowly, I will do so: but if she dies quickly, I will be liable for murder and therefore I won’t do it.’” *Id.* It is worth noting, however, that at least one state court has rejected the analogy likening the year-and-a-day rule to a statute of limitations. See State v. Edwards, 701 P.2d 508, 512 (Wash. 1985). In *State v. Edwards*, the Washington Supreme Court distinguished the rule from a statute of limitations, stating:

[A] change regarding when death must occur in relation to the assault differs significantly from a change in the statute of limitations since a statute of limitations determines the time within which a case may be brought. The State may bring murder charges at any time, assuming death occurred within the statutorily prescribed period.

Id. The *Edwards* court reached its decision by characterizing the rule as substantive rather than evidentiary. *Id.*

164. See Fletcher, *supra* note 135, at 185. The defendant has no right to argue reliance on a rule that he certainly never relied on at the time the act was committed. See *id.* Allowing such reliance on a rule that can be construed as evidentiary in nature, such as the year-and-a-day rule, improperly encourages the idea that a would-be murderer should, in his decision whether to commit the act, consider how long he will have to “lie low” after the act to ensure that he cannot be prosecuted for the resulting death. See *id.*

abolition of the rule was intended to apply retroactively. Some courts clearly hold that judicial abrogation of the common-law rule cannot apply retroactively.¹⁶⁵ Similarly, some legislatures pass statutory provisions preventing retroactive application of any law absent express legislative intent to do so.¹⁶⁶ Such preemptive action by either the state court¹⁶⁷ or the state legislature may avoid the ex post facto challenge altogether.¹⁶⁸

Sometimes, however, it is unclear whether abrogation of the year-and-a-day rule was intended to apply to injuries inflicted before the rule was abolished. When the rule is abolished legislatively, the intent of the legislature should be examined,¹⁶⁹ but judicial abolition of the rule presents a different controversy. The U.S. Supreme Court addressed retroactive application of judicial abrogation of the rule in *Rogers v. Tennessee*.¹⁷⁰

165. See, e.g., *Commonwealth v. Lewis*, 409 N.E.2d 771, 775 (Mass. 1980) (abrogating the year-and-a-day rule but selecting a future effective date to avoid ex post facto concerns); *People v. Stevenson*, 331 N.W.2d 143, 143 (Mich. 1982) (“[T]he rule is hereby abrogated; and . . . the abrogation of the rule should not, and will not, be given retroactive effect.”); *State v. Young*, 390 A.2d 556, 559 (N.J. 1978) (deciding that the court’s abrogation of the rule should not apply retroactively); *State v. Pine*, 524 A.2d 1104, 1105 (R.I. 1987) (holding that the year-and-a-day rule was no longer viable but declining to give its abrogation retroactive effect).

166. See, e.g., ALASKA STAT. § 01.10.090 (2007) (“No statute is retrospective unless expressly declared therein.”); ARIZ. REV. STAT. ANN. § 1-244 (2007) (“No statute is retroactive unless expressly declared therein.”); CAL. PENAL CODE § 3 (2007) (“No part of [the penal code] is retroactive, unless expressly so declared.”); IDAHO CODE ANN. § 73-101 (2007) (“No part of these compiled laws is retroactive, unless expressly so declared.”); MONT. CODE ANN. § 1-2-109 (2007) (“No law contained in any of the statutes of Montana is retroactive unless expressly so declared.”). *But see Snipe*, 102 Cal. Rptr. at 8 (holding that retroactive application to a legislative change in the year-and-a-day rule did not violate the California Penal Code § 3 restriction on retroactive legislation because the change was to an evidentiary rule and not to an element of a crime). Notably, Florida lacks a statute generally prohibiting the retroactive application of its laws.

167. To be precise, the retroactive application of a *judicial* abrogation of the rule would fall under a due process analysis instead of an ex post facto analysis. See *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 459–60 (2001) (“The Ex Post Facto Clause, by its own terms, does not apply to the courts.”).

168. See *Lewis*, 409 N.E.2d at 775 (avoiding ex post facto concerns by expressing intent not to apply the abolition of the year-and-a-day rule retroactively). *But see Snipe*, 102 Cal. Rptr. at 8 (failing to avoid an ex post facto challenge with legislation about retroactivity).

169. See *Snipe*, 102 Cal. Rptr. at 8 (examining legislative intent and finding that the legislature intended California Penal Code § 3 to apply only to procedural changes in the element of crimes and not to substantive changes). The examination of legislative intent should begin with the plain language of the statute. *V.K.E. v. State*, 934 So. 2d 1276, 1286 (Fla. 2006) (Cantero, J., dissenting); *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006); *State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996) (“If the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without involving rules of construction or speculating as to what the legislature intended.”); see also *Garcia v. Browning*, 151 P.3d 533, 535 (Ariz. 2007) (en banc) (finding no need to look to legislative history if the statutory language is clear).

170. *Rogers II*, 532 U.S. 451 (2001).

D. *The U.S. Supreme Court Reviews a State's Abolition of the Year-and-a-Day Rule: Rogers v. Tennessee*

In *Rogers*, the U.S. Supreme Court examined the abolition of the year-and-a-day rule by the Tennessee Supreme Court.¹⁷¹ The defendant, Wilbert K. Rogers, stabbed the victim, James Bodery, with a butcher knife on May 6, 1994.¹⁷² Following the attack, the victim entered a coma and remained in that condition until his death on August 7, 1995.¹⁷³ The defendant was convicted of murder and appealed, contending that the year-and-a-day rule barred his conviction because the victim died fifteen months after the injury was inflicted.¹⁷⁴ When the defendant's case reached the Tennessee Supreme Court, the court reviewed the old common-law rule and judicially abolished it on the spot.¹⁷⁵ The court determined that applying the new decision abrogating the rule to the defendant violated neither the Ex Post Facto Clause¹⁷⁶ nor the Due Process Clause,¹⁷⁷ despite the defendant's argument that the year-and-a-day rule was still in effect when he committed the act.¹⁷⁸

The U.S. Supreme Court affirmed and held that application to the defendant of the decision abolishing the year-and-a-day rule was permissible.¹⁷⁹ The Court clarified that the Ex Post Facto Clause does not apply to acts of the judiciary.¹⁸⁰ Instead, the Court examined the abolition of the rule under the due process framework of *Bouie v. City of Columbia*.¹⁸¹ The proper test under *Bouie* asks whether "a judicial

171. *Id.* at 455.

172. *Id.* at 454.

173. *Id.*

174. *Id.*

175. *Id.* at 455. The Tennessee Supreme Court noted that it had recognized the rule in *Percer v. State*, 103 S.W. 780 (Tenn. 1907), but concluded that the original reasons for the rule no longer existed. *Rogers II*, 532 U.S. at 455. The Tennessee court accordingly held that abolition of the rule was appropriate. *Id.*

176. The Tennessee court concluded that the ex post facto analysis under *Calder v. Bull* applied only to legislative acts. *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 401–02 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

177. The Tennessee court analyzed the judicial act under the due process analysis. *Id.* at 402.

178. *Rogers II*, 532 U.S. at 455.

179. *Id.* at 467.

180. *Id.* at 460.

181. 378 U.S. 347 (1964); *see Rogers II*, 532 U.S. at 466. The Court rejected the defendant's invitation to extend *Calder's* ex post facto factors to judicial acts. *Rogers II*, at 460. The Court conceded that "the Due Process and Ex Post Facto Clauses safeguard common interests—in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws." *Id.* However, the Court indicated that incorporation of the *Calder* factors into the due process analysis used to review judicial acts would "place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system." *Id.* at 461. The Court stated that the defendant misread *Bouie* as requiring the incorporation of the *Calder* factors into the

alteration of a common law doctrine of criminal law violates the principle of fair warning.”¹⁸² The *Rogers* Court found that abolition of the year-and-a-day rule did not violate the principle of fair warning.¹⁸³

The *Rogers* decision created a brand new, albeit controversial, outlook for the year-and-a-day rule. Most importantly, *Rogers* makes it easier to rid the books of this and other outdated common-law rules.¹⁸⁴ So long as a rule is not codified or extensively used in the state, it seems that the reasoning of the *Rogers* majority would support judicial action eliminating the rule.¹⁸⁵

V. FLORIDA GETS ITS CHANCE: THE YEAR-AND-A-DAY RULE GOES BEFORE THE FIRING SQUAD AGAIN

The Wells case presents an excellent example of the difficulty of eliminating the year-and-a-day rule. Wells injured his infant daughter in 1986—more than twenty years before she died from her injuries in 2006.¹⁸⁶ In the meantime, in 1988, the Florida Legislature abolished the year-and-a-

due process analysis. *Id.* at 458. It was easy to see how *Bouie* could be “misread” in such a manner. *Bouie*, as the defendant pointed out, states: “If a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.” *Id.* (alterations in original) (quoting *Bouie*, 378 U.S. at 353–54). The *Rogers* majority simply dismissed the quoted language as dicta. *Id.* at 459. The dissent, on the other hand, found it quite curious that “elected representatives of all the people cannot retroactively make murder what was not murder when the act was committed; but . . . unelected judges can do precisely that.” *Id.* at 468 (Scalia, J., dissenting). Justice Scalia called the majority’s decision a “constitution that only a judge could love.” *Id.*

182. *Rogers II*, at 462. The principle of fair warning is violated and the judicial alteration cannot be applied retroactively “only where it is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” *Id.* (quoting *Bouie*, 378 U.S. at 354).

183. *Id.* at 466–67. The Court noted that when the defendant committed the act, the year-and-a-day rule “had only the most tenuous foothold as part of the criminal law of the State of Tennessee.” *Id.* at 464. Because the rule had been mentioned only in dicta in three Tennessee cases and had never been codified in the Tennessee criminal code the Court was unconvinced that the abolition of the rule was “unexpected and indefensible.” *Id.* at 464, 466.

184. Interestingly, the *Bouie* fair-warning test applied in *Rogers* did not depend on characterizing of the rule as either procedural or substantive. *See id.* Yet, both the majority and dissent pointed out that the Tennessee Supreme Court characterized the rule as substantive. *Id.* Regardless, the change in the rule did not violate defendant’s due process rights. *Id.* at 466–67.

185. That is, assuming that it can be shown that the fair-warning principle is not violated. *See id.* at 462. It may be a bit overreaching to assume that any judicial abolition of a rule is permissible as long as the defendant can see it coming, but certainly the standard of fair warning is an easier standard to overcome than the four *Calder* ex post facto factors. The dissent in *Rogers* noted that “‘fair warning’ of the legislature’s intent to change the law does not insulate retroactive legislative criminalization.” *Id.* at 470 (Scalia, J., dissenting). The Ex Post Facto Clause strikes down impermissibly retroactive laws regardless of fair warning. *See id.*

186. *See supra* notes 1–20 and accompanying text.

day rule.¹⁸⁷ Wells, who was indicted in 2006, argues that because Florida recognized the year-and-a-day rule in 1986 when he injured his daughter, he cannot be charged with murder because his daughter did not die within a year and a day of the date that he inflicted the injury.¹⁸⁸

This Part of the Note uses the Wells case to illustrate the bizarre state of the year-and-a-day rule in Florida. Specifically, this Part analyzes the problems faced by the Florida court in determining whether Wells's indictment may stand¹⁸⁹ and suggests possible resolutions. However, Wells is not the only defendant that might face this issue. Any act committed

187. FLA. STAT. § 782.035 (2007).

188. See *supra* notes 21–26 and accompanying text.

189. This Note addresses only the ex post facto concerns arising from retroactive application of the year-and-a-day rule. However, Wells also advanced a double-jeopardy argument against his indictment due to the time he already spent in prison for shaking his daughter over twenty years ago. See Thalji, *supra* note 22. Experts have found that contention weak because child abuse is one crime and murder another. *Id.* The U.S. Supreme Court long ago adopted the language of the Massachusetts Supreme Court in articulating the test for double jeopardy:

“A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”

Gavieres v. United States, 220 U.S. 338, 342 (1911) (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)). Under the facts of the Wells case, the double-jeopardy argument will likely fail. Wells has not been tried twice for the same offense; child abuse and murder are distinct crimes. Moreover, the necessary element of the murder charge, namely the death, was not an element of the child abuse conviction. The proof offered in the first conviction was insufficient to warrant conviction of murder because the death had not yet occurred. See *Diaz v. United States*, 223 U.S. 442, 448–49 (1912) (analyzing the double-jeopardy implications of a homicide and assault arising from the same act and finding no violation). In *Diaz*, where the facts were very similar to the Wells case, see *id.* at 444–45, the Court denied the double-jeopardy argument, reasoning:

The homicide charged against the accused in the Court of first instance and the assault and battery for which he was tried before the justice of the peace, although identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense.

Id. at 448–49.

before the abolition of the year-and-a-day rule that results in a later death could trigger the same ex post facto concerns present in the Wells case. There is no way to predict how many victims have lingered beyond the year-and-a-day limit before succumbing to their wounds.¹⁹⁰

A. Florida's Case Law

1. 1900: Mentioning the Rule in Passing

Roberson v. State,¹⁹¹ decided in 1900, was the first of only three occasions that the year-and-a-day rule has been mentioned in Florida case law. In *Roberson*, the defendant was convicted of murder and appealed, alleging that the indictment was defective for failure to show the part of the victim's body where the mortal wound was inflicted and for failure to specify the state and county where the victim died.¹⁹² The court affirmed the conviction, finding that the indictment was sufficient.¹⁹³

The year-and-a-day rule was mentioned only in passing in the discussion of whether the indictment must state the place where the victim died.¹⁹⁴ The rule's one-line appearance in the case is merely dicta. In *Roberson*, the Florida Supreme Court acknowledged that the year-and-a-day rule existed at common law,¹⁹⁵ but the court had no occasion to apply the rule.

190. For another recent example of a victim who lingered far beyond a year and a day, see Joann Loviglio, *Man Charged 41 Years After Officer's Shooting*, CHARLESTON DAILY MAIL, Sept. 5, 2007, at 6C (discussing a case where a seventy-one-year-old defendant was charged with murder when the victim died from a gunshot wound forty-one years after the shooting). Admittedly it may be unusual for a victim to survive for an extremely long period before perishing from her injuries, but a much shorter span may implicate the problem evident in the Wells case. First-degree murder does not have a statute of limitations; it may be prosecuted at any time. *See, e.g.*, FLA. STAT. § 775.15(1) (2007) ("A prosecution for a capital felony, a life felony, or a felony that resulted in a death may be commenced at any time."). Therefore, Florida's decision whether to apply the abolition of the year-and-a-day rule retroactively may affect any case where the death occurred after the abolition of the rule but the injury occurred before abolition of the rule. The victim could have lingered for thirteen months or thirteen years. Even if the death occurred shortly after the abolition of the rule, a murder prosecution is still possible. Furthermore, certain types of cases are more likely to result in criminal charges long after the injury. *See* Walther, *supra* note 29, at 1350–60 (discussing the special problem that the year-and-a-day rule creates in cases involving intentional infliction of HIV where victims typically die from AIDS beyond a year and a day).

191. 28 So. 427 (Fla. 1900).

192. *Id.* at 427.

193. *Id.* at 429.

194. *See id.* at 428.

195. *Id.*

2. 1916: Still Unconvinced that the Indictment Must Allege that the Death Occurred Within a Year and a Day

Smith v. State,¹⁹⁶ decided in 1916, was the second case to mention the year-and-a-day rule in Florida. In *Smith*, the defendant was convicted of manslaughter and appealed, alleging ten different deficiencies in the indictment.¹⁹⁷ One of the alleged deficiencies was that the indictment failed to aver that the death occurred within a year and a day of the injury.¹⁹⁸ The Florida Supreme Court affirmed the conviction and held that the indictment was not deficient for failure to allege that the death occurred within a year and a day.¹⁹⁹

The *Smith* court did not have the opportunity to fully address the rule.²⁰⁰ The court avoided the issue by pointing out that the indictment stated the date of the attack and that the date of the verdict in the trial was only four months later.²⁰¹ However, the court's dicta suggested that failure to allege that the death occurred within a year and a day would not invalidate the indictment.²⁰²

3. 1987: The Court Attempts to Abolish the Rule in Florida

Jones v. Dugger,²⁰³ decided in 1987, is the final Florida case to mention the year-and-a-day rule. In *Jones*, the defendant shot a coworker at the Tampa office of the U.S. Department of Housing and Urban Development.²⁰⁴ The victim survived in a coma for two years before dying from the injuries.²⁰⁵ The defendant was convicted of attempted murder and

196. 73 So. 354 (Fla. 1916).

197. *Id.* at 355.

198. *Id.*

199. *Id.* at 356.

200. *See id.*

201. *Id.* The court thought it was unnecessary to analyze whether the indictment could stand if the death had not occurred within a year and a day after the injury because there was no question that the death occurred within that time. *See id.*

202. *See id.* The court stated that "we are of the opinion that the better doctrine is . . . that failure to allege that the death took place within a year and a day cannot be taken advantage of on a motion in arrest of judgment after conviction." *Id.* This statement seems to hint that the Florida court viewed the rule as procedural or evidentiary. Had it viewed the rule as substantive, the sufficiency of the indictment could be challenged after the verdict. Lending further support to this hypothesis, the court stated: "Where an indictment does not wholly fail to allege a crime or an essential element of a crime . . . such indictment will not on a motion in arrest of judgment after verdict be held legally insufficient to sustain a conviction." *Id.* at 355. If the court had considered the year-and-a-day rule an essential element of the crime, the outcome of *Smith* would likely have been different.

203. 518 So. 2d 295 (Fla. 2d DCA 1987).

204. *Id.* at 296.

205. *Id.*

was in the process of appealing his conviction when the victim died.²⁰⁶ The defendant's counsel encouraged him to dismiss the appeal in exchange for the state's promise not to indict him for murder.²⁰⁷ The defendant thought the murder indictment would be barred by the year-and-a-day rule; however, he was advised that the rule was "far from a sure thing" and was persuaded to dismiss the appeal.²⁰⁸ The defendant later sought to have the appeal reinstated, asserting ineffective assistance of counsel.²⁰⁹

The Florida Second District Court of Appeal rejected the defendant's claim of ineffective counsel and held that the attorney was justified in his skepticism of the validity of the year-and-a-day rule.²¹⁰ The *Jones* court wrote the opinion "primarily to express [its] belief that the 'year and a day' rule has . . . lost any relevance . . . and thus should be abolished."²¹¹ The court discussed other jurisdictions that had already abolished the rule and weighed the choice of whether to judicially abolish the rule or to defer the question to the legislature.²¹² Analyzing the status of the rule, the court stated that the rule was "a rule of evidence rather than an element of the offense of murder."²¹³ Ultimately, the court agreed with *Head v. State*²¹⁴ and *Commonwealth v. Ladd*²¹⁵ that the rule was no longer viable, announcing that the year-and-a-day rule should be abolished.²¹⁶

The true effect of the *Jones* decision on the status of the year-and-a-day rule in Florida has never been addressed by the Florida courts. The *Jones* court wrote specifically to eliminate the rule,²¹⁷ but it is unclear whether the court was successful in its endeavor. Other jurisdictions apparently believe that the *Jones* court judicially abolished the year-and-a-day rule in

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 298.

211. *Id.* at 297. The court discussed the reasons for abolishing the rule, focusing mainly on the advances in medical technology. *Id.*

212. *See id.* at 297–98.

213. *Id.* at 298.

214. 24 S.E.2d 145 (Ga. Ct. App. 1943).

215. 166 A.2d 501 (Pa. 1960).

216. *Jones*, 518 So. 2d at 298.

217. *Id.* at 297. Interestingly, the Wells case, used as the example in this Note, falls within the Second District's jurisdiction.

Florida,²¹⁸ but the Florida Legislature felt compelled to legislatively abolish the rule a year after the court purportedly did so.²¹⁹

4. The Effect of Florida Case Law on the Wells Scenario

If *Jones* judicially abolished the rule, it is possible, even likely, that the abolition may be applied retroactively.²²⁰ Judicial abrogation would trigger analysis under *Rogers*, and the *Bouie* fair-warning test would apply.²²¹ This might be bad news for a defendant like Wells because Wells's scenario shares many similarities with *Rogers*. Namely, Florida courts have never based a decision on the year-and-a-day rule and have discussed the rule only in dicta in the three cases that mentioned it.²²² For the same reasons that the defendant in *Rogers* had fair warning that the rule might no longer apply, the Florida court may find that a defendant in Wells's position had fair warning that a change in the rule was on the horizon.²²³ Conversely, Wells may be rescued from the *Bouie* fair-warning test if the Florida Legislature's codification of the year-and-a-day rule's elimination converted the abrogation from a judicial act to a legislative act.²²⁴

B. Interpreting the Florida Statute

Given the sparse case law on the rule, Florida's statute abrogating the year-and-a-day rule presents a unique problem for the Florida court. The

218. See, e.g., *Gov't of the V.I. v. Barry*, No. 93-162, 1994 U.S. Dist. LEXIS 7956, at *8 n.12 (D.V.I. Jan. 19, 1994) (listing Florida as a jurisdiction that has decided that the rule is not part of its common law (citing *Jones*, 518 So. 2d at 298)); *State v. Ruesga*, 619 N.W.2d 377, 380–81 (Iowa 2000) (citing *Jones* as abrogating the year-and-a-day rule); *State v. Rogers (Rogers I)*, 992 S.W.2d 393, 397 n.4 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001) (listing Florida as one of ten jurisdictions judicially abrogating the year-and-a-day rule (citing *Jones*, 518 So. 2d at 298)); *Rowe*, *supra* note 29, at 8 (listing Florida as a jurisdiction judicially abrogating the rule).

219. See FLA. STAT. § 782.035 (2007) (enacted 1988).

220. See generally *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451 (2001) (holding that judicial abrogation of the year-and-a-day rule may be applied retroactively).

221. See *id.* at 459–60.

222. See *supra* Parts V.A.1–3 (discussing the limited treatment of the year-and-a-day rule in Florida jurisprudence). In *Rogers*, the Court found it extremely relevant that the Tennessee courts had mentioned the rule only in the dicta of three cases and had never actually applied the rule as a basis of a decision. *Rogers II*, 532 U.S. at 464. In Florida, like Tennessee, the rule has been mentioned only three times in dicta and has never been directly applied. See *supra* Parts V.A.1–3.

223. The *Rogers* Court held that the lack of use of the rule in Tennessee courts gave the defendant fair warning that the rule might no longer apply. *Rogers II*, 532 U.S. at 466–67. Similarly, the lack of use of the rule in Florida courts might have also given Wells fair warning.

224. Judicial acts are subject to the *Bouie* due process analysis. *Id.* at 459–60. However, legislative acts are subject to the more rigid *Calder* ex post facto test. See *id.* at 456. Because the Florida Legislature passed the law abrogating the year-and-a-day rule after the *Jones* court attempted to judicially eliminate the rule, it is unclear whether an ex post facto analysis of the legislative act or a due process analysis of the judicial act should control.

court must first determine whether the year-and-a-day rule was even a part of state common law when the legislative act was passed. If not, did the statute abrogating the rule really accomplish anything? Because *Rogers* relied heavily on the fact that the year-and-a-day rule had never been codified or applied in Tennessee, the Florida Legislature potentially committed an enormous blunder in even addressing the issue.

1. Was the Year-and-a-Day Rule a Part of Florida Law? What Can We Make of Florida Statutes §§ 2.01 and 775.01?

Although a review of Florida case law supports the contention that Florida has never embraced the year-and-a-day rule specifically in its courts,²²⁵ the Florida Legislature may have embraced the rule generally via statute. On November 6, 1829, the Florida Legislature enacted two statutes declaring that the common law of England was effective in the state unless inconsistent with a Florida statute.²²⁶ Florida courts have strictly construed both §§ 2.01 and 775.01, requiring explicit contradiction between the common law and a Florida statute before abrogating the common law.²²⁷ It does not seem, however, that the statute precluded the courts from attempting to judicially abrogate the common law.²²⁸

225. See *supra* Parts V.A.1–3.

226. Act of Nov. 6, 1829 § 1, FLA. STAT. §§ 2.01, 775.01 (2007). Section 2.01 states:

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Id. § 2.01. Section 775.01 states: “The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.” *Id.* § 775.01.

227. See, e.g., *State v. Ashley*, 701 So. 2d 338, 341 (Fla. 1997) (noting that the common law remains in effect unless a contradictory statute specifically says otherwise); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990) (“Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.”); *Sarasota Beverage Co. v. Johnson*, 551 So. 2d 503, 511–12 (Fla. 2d DCA 1989) (Campbell, C.J., dissenting) (“The presumption is that no change in the common law is intended unless the statute is explicit.”). Furthermore, Florida courts have refused to “displace the common law further than is *clearly* necessary” and will not construe a statute “to make *any* alteration in the common law other than that which the statute specifies and plainly pronounces.” *Sarasota Beverage*, 551 So. 2d at 511; cf. *State v. Dailey*, 134 N.E. 481, 481–82 (Ind. 1922) (holding that silence on the year-and-a-day rule in state statutes provided evidence that the legislature intended the year-and-a-day rule to govern where a statute had been passed adopting all common law not otherwise contradicted by statute).

228. See *Jones v. Dugger*, 518 So. 2d 295, 297 (Fla. 2d DCA 1987) (recognizing Florida Statutes § 775.01 but attempting judicial abrogation of the year-and-a-day rule).

The effect of these provisions on the Wells case is that the common-law year-and-a-day rule was probably in effect in Florida when the Wells committed the crimes in 1986.²²⁹ The rule was potentially abrogated in 1987 by the *Jones* court²³⁰ and was definitely eliminated by 1988 when the legislature passed a statute specifically abrogating the rule.²³¹ Either way, the fact that the rule existed as part of Florida law, if only by general adoption of the English common law, requires the abrogation of the rule to undergo scrutiny as to its retroactive effect.²³²

2. Sloppy Drafting? What Was the Florida Legislature Thinking When It Enacted Florida Statutes § 782.035?

If the Florida court conclusively establishes that the year-and-a-day rule applied in 1986 when Wells shook his daughter, the court's next challenge will be to determine exactly when and how the rule was abrogated. In 1988, the Florida Legislature passed a statute expressly abolishing the year-and-a-day rule.²³³ If the rule was abrogated previously in 1987 by the *Jones* court,²³⁴ then the court must ask, "What was the Florida Legislature thinking when it enacted § 782.035 in 1988?" Perhaps the best answer is that no one knows.²³⁵ All that is certain is that the enactment of the statute requires this Note to concede that the analysis under the due process construction of *Rogers* may no longer be warranted.²³⁶ If the rule was abolished by the statute, then *ex post facto* concerns attach.²³⁷ This potential blunder by the Florida Legislature could prevent retroactive application of the rule altogether.

229. *Id.* at 298 (finding no judicial precedent abrogating the rule).

230. *Id.*

231. See Act of May 18, 1988, ch. 88-39, 1988 Fla. Laws 276-77 (codified as amended at FLA. STAT. § 782.035 (2007)).

232. The broad adoption of the common law via the Florida statutes may create the same problem for all common-law rules. Florida's general adoption of the common law creates an odd situation where antiquated rules can remain good law in the state, despite the fact that they have not been used for many years.

233. Act of May 18, 1988, ch. 88-39, 1988 Fla. Laws 276-77 (codified as amended at FLA. STAT. § 782.035).

234. This is probable in light of other jurisdictions' proclamations that the rule was judicially abrogated in Florida. See *supra* note 218.

235. The legislature likely thought it was bringing the law into conformity with the trend to eliminate the rule. Of course, if the rule had already been eliminated, the act may have created a giant obstacle in the movement to rid the books of the outdated rule.

236. *Rogers* relied in part on the fact that the year-and-a-day rule had never been codified in Tennessee. *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 464 (2001). Perhaps the codification of the rule in Florida Statutes § 782.035 was enough to remove the abrogation of the year-and-a-day rule from a *Rogers* and *Bouie* fair-warning analysis and send it reeling into the realm of a four-factor *Calder* *ex post facto* analysis.

237. See *id.* at 456.

C. *So What if the Abrogation Was a Legislative Act?*

If the abrogation was legislative rather than judicial, then *ex post facto* concerns attach.²³⁸ Other jurisdictions have nevertheless held that retroactive application of an amendment of the year-and-a-day rule is permissible.²³⁹ Retroactivity is not precluded when the rule is characterized as procedural.²⁴⁰

Florida courts use a two-part test to determine whether to apply a statute retroactively.²⁴¹ First, the court must examine the statutory construction and determine whether the legislature intended the statute to apply retroactively.²⁴² Second, if there is clear evidence of intent to apply the statute retroactively, the court must examine whether retroactive application is constitutionally permissible.²⁴³

The Florida Constitution specifically prohibits retroactive application of the repeal or amendment of a criminal statute.²⁴⁴ The year-and-a-day rule, however, may fall outside that prohibition. Article X, § 9 of the Florida Constitution may not reach procedural changes in the criminal law.²⁴⁵ If the Florida court characterizes the rule as one of procedure, the Florida constitutional question under Article X, § 9 may be avoided.²⁴⁶

238. *Id.*

239. *See, e.g.,* *People v. Snipe*, 102 Rptr. 6, 9–10 (Cal. Dist. Ct. App. 1972) (upholding a retroactive change in the year-in-a-day rule from one to three years via statute); *cf. State v. Burns*, 524 N.W.2d 516, 521 (Minn. 1994) (allowing retroactive extension of a statute of limitations where prosecution would have otherwise been time-barred).

240. *See Snipe*, 102 Cal. Rptr. at 8.

241. *See Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

242. *Id.* The Florida court will undoubtedly find it difficult to demonstrate that the legislature clearly intended the statute abrogating the year-and-a-day rule to apply retroactively. The session law enacting the statute included an effective date of May 18, 1988 and indicated that the statute should apply to injuries occurring after that time. *See* Act of May 18, 1988, ch. 88-39, 1988 Fla. Laws 276–77 (codified as amended at FLA. STAT. § 782.035 (2007)). The statute, when codified as Florida Statutes § 782.035, did not specify that it should apply only to injuries occurring after the effective date, but the effective date stated in the session law should still hamper any attempt to say that retroactivity was intended. If the statute, rather than judicial abrogation, controls, the Florida court will be hard-pressed to say that the Florida Legislature intended to apply the abrogating statute retroactively.

243. *Chase Fed. Housing Corp.*, 737 So. 2d at 499.

244. *See* FLA. CONST. art. X, § 9.

245. *State v. Smiley*, 927 So. 2d 1000, 1003 (Fla. 4th DCA 2006); *see also Lee v. State*, 174 So. 589, 591 (Fla. 1937).

246. *See Smiley*, 927 So. 2d at 1003.

D. *A Chance for Florida to Lay the Year-and-a-Day Rule to Rest
Once and for All*

For the Florida court to end the year-and-a-day rule litigation once and for all, and to apply the rule's abrogation to defendants like Wells, the court must clear all of the obstacles set out above. The easiest route would be to find that the rule was judicially abrogated in 1987 in *Jones*.²⁴⁷ The court could then analogize the Wells case to *Rogers* and establish that Wells had fair warning of the rule's nearing end because the rule had not been treated favorably in Florida jurisprudence for nearly a century.²⁴⁸ Following the judicial-abrogation path avoids all of the ex post facto obstacles associated with legislative abrogation.

If the court determines that the Florida Legislature's action precludes the *Rogers* analysis, the court may still retroactively apply the abrogation to Wells; however, that would be a much harder row to hoe. A factor in favor of retroactively applying the rule comes out of the Florida Second District Court of Appeal's and the Florida Legislature's characterization of the year-and-a-day rule as a rule of evidence.²⁴⁹ But the examination of the legislative intent will be precarious.²⁵⁰ If the Florida statute can pass all four *Calder* ex post facto factors and the court can find that the legislature intended retroactive application,²⁵¹ then the statute may be applied to the act that Wells committed in 1986.

Under either approach, the court has a chance to rid Florida of the outdated rule once and for all.²⁵² The year-and-a-day rule clearly has no place in the modern law,²⁵³ and the Florida court should seize the

247. Thus, the subsequent legislation in 1988 was moot.

248. See *Smith v. State*, 73 So. 354 (Fla. 1916) (addressing the rule favorably for the last time before the court's attempt to abolish it in 1987); cf. *Rogers v. Tennessee (Rogers II)*, 532 U.S. 451, 464–67 (2001) (analyzing the history of the year-and-a-day rule in Tennessee courts and concluding that the abolition of the rule was not unexpected or unfair given the rule's "tenuous foothold" in the state criminal code).

249. See *Jones v. Dugger*, 518 So. 2d 295, 298 (Fla. 2d DCA 1987); FLA. STAT. § 782.035 (2007) (calling the year-and-a-day rule a rule of evidence). Characterizing the rule as procedural may remove the Article X, § 9 restrictions of the Florida Constitution. See *Smiley*, 927 So. 2d at 1003.

250. Florida lacks a statute requiring the legislature to expressly state its intent to apply a statute retroactively, but evidence that the Florida Legislature intended retroactive application is far from clear. In fact, the amendment notes that accompany Florida Statutes § 782.035 seem to indicate the opposite. See Act of May 18, 1988, ch. 88-39, 1988 Fla. Laws 276–77 (codified as amended at FLA. STAT. § 782.035) ("This act applies to any prosecution for homicide caused by an injury inflicted on or after the effective date of this act.").

251. See *supra* Parts IV.A and IV.C (discussing the *Calder* factors and the legislative-intent requirement).

252. The analysis would be the same for any common-law rule sought to be abolished in the state.

253. See *supra* Part III.

opportunity to lay the rule to rest. Florida's legislative act to abolish the rule in 1988 created a bizarre loophole in the law through which the year-and-a-day rule may be resurrected in situations like the Wells case. It is uncertain how many cases could fall into this gap,²⁵⁴ but the Florida courts should ensure that this loophole in the rule's abolition does not allow the year-and-a-day rule to rise again. Retroactive application is necessary to achieve this goal.

VI. IMPLICATIONS BEYOND THE SUNSHINE STATE

The year-and-a-day rule and the problems associated with its abolition are not unique to Florida. Of the fifty states, twenty-eight have abolished the rule.²⁵⁵ One state, Alabama, chose to retain the rule,²⁵⁶ and twenty-one states await their turn to address the validity of the year-and-a-day rule.²⁵⁷ Some of those states have faced the same ex post facto dilemma that the Florida courts now face.

A prime example of a court forced to deal with these ex post facto concerns is the California court in *People v. Snipe*.²⁵⁸ In a case eerily similar to the Wells case in Florida, the defendants in *Snipe* brutally beat a child and were convicted of "willful cruelty and of inflicting unjustifiable punishment on a child."²⁵⁹ The child died from the injuries inflicted in the beating some twenty-one months later.²⁶⁰ When the child was beaten, the year-and-a-day rule was in effect in California.²⁶¹ However, the rule was changed to "three years and a day" in the interim between the beating and the death.²⁶² The prosecution proceeded under the amended rule, and the defendants claimed that applying the new three-years-and-a-day rule to them was ex post facto and unconstitutional.²⁶³

254. See *supra* note 190.

255. See *supra* Part III.B (discussing the abolition of the rule in Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, and Wisconsin).

256. See *Ex parte Key*, 890 So. 2d 1056, 1067 (Ala. 2003).

257. Because the year-and-a-day rule is a common-law doctrine, and because long ago the U.S. Supreme Court broadly proclaimed that "such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute," *Louisville, Evansville & Saint Louis R.R. v. Clarke*, 152 U.S. 230, 239 (1894), the rule may potentially be raised in any state that has not abolished it. As the Wells case in Florida demonstrates, the rule may also be raised under certain circumstances in a state that has already abolished it. The ex post facto argument can easily resurrect the abolished year-and-a-day rule.

258. 102 Cal. Rptr. 6, 8 (Dist. Ct. App. 1972).

259. *Id.* at 7.

260. *Id.*

261. *Id.* at 7–8.

262. *Id.* at 7.

263. *Id.* at 8.

The California court in *Snipe* held that the change in the law was only procedural, modifying a rule of evidence, and that the change did not alter any element of the crime of murder.²⁶⁴ The *Snipe* court opined:

[I]f a change allowing the admission of evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence in effect at the time the offense was committed is not ex post facto, we cannot perceive any ground on which to hold a statute to be ex post facto which does nothing more than extend the time during which the state can prove its case against an accused murderer through the use of essentially the same medical evidence it would have used if the victim had not lived beyond the preexisting arbitrary requirement of a year and a day.²⁶⁵

The *Snipe* court avoided the ex post facto issue by classifying the year-and-a-day rule as a rule of evidence.

Courts in the states that have not yet addressed the year-and-a-day rule will look to states like California and Florida for guidance in dealing with the abolition of the rule. As this Note suggests, classifying the rule as procedural rather than substantive may allow the abolition of the rule to apply retroactively.²⁶⁶ Furthermore, judicial abrogation of the rule, as strange as it may seem, may remove the ex post facto cloud entirely.²⁶⁷ These issues will likely weigh into the decisions of many other states in choosing how to abolish the antiquated year-and-a-day rule and in deciding how to apply the abolition to past cases.

VII. CONCLUSION

The year-and-a-day rule has a long history in the law. From its birth in England to its adoption in America, the rule once served an integral role limiting the prosecution's ability to prove that a particular injury caused the victim's death. As the times changed and our medical technology and legal system evolved, the rule lost its place in modern society. However, the courts had not seen the last of the year-and-a-day rule. Defendants in several states that have abolished the rule have since raised the year-and-a-day rule as a bar to murder charges where the defendant inflicted the injury prior to the abolition of the rule and where the victim died more than a

264. *Id.* at 9.

265. *Id.*

266. *See supra* Part IV.B.

267. *See supra* Part IV.D (discussing the U.S. Supreme Court's decision in *Rogers v. Tennessee*). I am not at all suggesting that judicial abrogation is preferable, but merely pointing out that it works. The evils of legislation from the bench are far beyond the scope of this Note.

year and a day later. In each case, the defendant has argued that the retroactive application of the rule's abolition violates the Ex Post Facto Clause.

Such was the argument raised in the Wells case in Florida. The Wells case exemplifies the bizarre state of the year-and-a-day rule in the modern world and the peculiar difficulty that states have faced in eliminating the rule. The tragic story of Christina Wells, who lived nearly twenty years before perishing from her injuries, demonstrates both why the rule is obsolete and how the rule continues to enjoy its own life after death. If retroactive application is not allowed, the rule may continue to haunt Florida courts for years to come.

Florida is neither the first nor the last state to face the ex post facto challenges arising from retroactive application of the year-and-a-day rule's abolition. Approximately twenty-one states have not yet decided whether to abolish the year-and-a-day rule. Surely these states will examine the course taken by states that have already abolished the rule when considering how to rid their own law of the common-law relic. The question is not merely whether the year-and-a-day rule should be abolished; the question is whether the abolition should apply to past injuries that later result in a death. Florida is now faced with its chance to decide that very question. Many other states will be watching.