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Recent Developments: Criminal Law—Judicial Affirmance of the Validity of the Year and a Day Rule in Maryland. State v. Brown, 21 Md. App. 91, 318 A.2d 257 (1974)

Lucy A. Loux
University of Baltimore School of Law

tion of *Woolworth*, significantly reveals Maryland's future posture in the area of *respondeat superior*. The absolute liability of the master seems to be an inevitable result.

Barry Genkin

CRIMINAL LAW — JUDICIAL AFFIRMANCE OF THE VALIDITY OF THE YEAR AND A DAY RULE IN MARYLAND. *STATE V. BROWN*, 21 Md. App. 91, 318 A.2d 257 (1974).

A mortal wound rarely claims its victim more than a year after the fatal infliction. The common law established the rule that, in order to constitute felonious homicide, death of the victim must occur within a year and a day after the fatal act.

In *State v. Brown*,[1] a case of first impression, the Court of Special Appeals addressed itself to the applicability of the year and a day rule in Maryland. The appellee was indicted for the murder of his wife. It was not disputed that the decedent, who lingered almost two years before she died, was injured by the appellee.[2] The Criminal Court of Baltimore, in granting the appellee's motion to dismiss the indictment, found the year and a day rule to be valid and viable in Maryland. Upon appeal by the State, the Court of Special Appeals, in affirming the trial court's decision, held that the year and a day rule is in "full force and effect in Maryland."[3] Although the *Brown* court recognized the advancements made by medical science, it was not prepared to conclude that the rule is presently anachronistic.[4] Adjudging any alteration of the rule by judicial discretion inappropriate, the court reasoned that if change in the rule was to occur, it should be by the General Assembly.[5]

The rule is not intended to be a statute of limitations on an indictment for felonious homicide.[6] It is a test of proximate causation

1. 21 Md. App. 91, 318 A.2d 257 (1974).
2. Appellee had pleaded guilty to assault with intent to murder and was subsequently sentenced to a six-year prison term notwithstanding the fact that the State had recommended a five-year sentence. Brief for Appellant at 2.
3. 21 Md. App. at 97, 318 A.2d at 261. The State, in its brief, had not disputed the validity of the common law rule in Maryland but had urged abrogation of the rule. Brief for Appellant at 2.
4. *Id. See also* notes 63–65 *infra*.
5. *Id. See also* note 62 *infra*.
6. A statute of limitations connotes the time in which a prosecution can be brought after the completion of the crime, which, in the case of murder, does not commence until the death of the victim. Because the overwhelming majority of states do not limit prosecution for murder, prosecution may be brought at any time during the life of the offender. *See, e.g.*, GA. CODE ANN. § 26-502 (1972); KAN. STAT. ANN. § 21-3106(1) (Supp. 1972). *Contra*, N.M. STAT. ANN. § 40A-1-8 (1953), no person shall be prosecuted for a capital felony unless an indictment can be found, information or complaint filed within ten years from the time the crime is committed. A number of states do limit the prosecution period for felonies other than murder. *See, e.g.*, OHIO REV. CODE § 2929.11 (1974), prosecution for all felonies other than aggravated murder or murder is barred unless commenced within six years after the offense.

which concludes that "if [the victim] died after [a year and a day] it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death, and in the case of life, the law ought to be certain."[7] The rule created arbitrary settlement for the difficult question of proof of physical causation. The difficulty of proof was attributed to two factors. First, at early common law, the science of medicine was relatively primitive, not having advanced to the point where death from a particular cause could be conclusively determined. Second, the testimony of expert witnesses was unknown to the trier of facts in the early English courts.[8] The jury could only base its determination of causation upon the conclusions of fact and persuasive assertions.[9] One of the more arbitrary features of the rule was the tacking on of an additional day to the year. The early English law gave no recognition to fractions of days; a day was conveniently added so that a whole year would have elapsed after the fatal stroke.[10]

Three forms of actions dealing with murder and manslaughter existed at common law.[11] An important element in each form of action was death within a year and a day. The earliest mentioned action within English common law appears to be the "appeals of death."[12] Essentially a private prosecution for the punishment of public crimes, the action placed the feud in the hands of the male nearest in blood to the decedent.[13] The action provided that if the victim died within a year and a day after the assault, the "appeal of death" should not be abated.[14] Reasoning that personal vengence should be promptly ex-

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7. 3 E. COKE, INSTITUTES 53 (2d ed. 1648) [hereinafter cited as COKE].
8. 10 WISC. L. REV. 112, 113 (1934).
9. J. THAYER, EVIDENCE 174 (1898).
10. 3 COKE 53.
11. *See* Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894) for a full analysis of the three forms of action in early English common law dealing with murder and manslaughter. *See also* Brown v. State, 21 Md. App. 91, 94 n.4, 318 A.2d 257, 259-60 n.4, and in particular the second paragraph where the court recites other aspects of ancient law where the limitation appeared.
12. 4 W. BLACKSTONE, COMMENTARIES *312-13 [hereinafter cited as BLACKSTONE], described the origin of appeals of death as a Germanic custom by which pecuniary satisfaction was paid to the injured party or his relatives by the assailant. *See also* 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 39 (Milson ed. 1968) [hereinafter cited as POLLOCK & MAITLAND].
13. 4 BLACKSTONE *312-13.
14. Statute of Glouchester of 1278, 6 Edw. 1, c. 9:

> The King commandeth that no Writ shall be granted out of the Chancery for the Death of a Man to enquire whether a Man did kill another by Misfortune, or in his own Defence, or in other Manner without Felony; (2) but he shall be put in Prison until the coming of the Justices in Eyre, or Justices assigned to the Goal-delivery, and shall put himself upon the County before them for Good and Evil: (3) In case it be found by the Country, that he did it in his Defence, or by Misfortune, then by the Report of the Justices to the King, the King shall take him to his Grace, if it please him. (4) It is provided also, that no Appeal shall be abated so soon as they have been heretofore; but if the Appellor declare the Deed, the Year, the Day, the Hours, the Time of the King, and the Town where the Deed was done and with what Weapon he was slain, the Appeal shall stand in Effect, (5) and shall not be abated for Default of fresh Suit, if the Party shall sue within the Year and a Day after the Deed done.

ecuted, the statute was misinterpreted as requiring that the private appeal be initiated within a year and a day after the victim's death and not after infliction of the mortal wound. Thus, the statute was, in effect, one of limitation.[15] Albeit, through transition or ignorance, the year and a day limitation evolved from its origins in private appeal prosecutions into a substantial element of criminal homicide.[16]

A second method, "inquisitions against deodands," like "appeals of death," was essentially a criminal action even though civil in some procedural aspects. It was an action of forfeiture, whereby the party committing the injury forfeited to the king personal chattels used in making his assault.[17] The forfeited chattels were to be applied to pious uses including the distribution of alms.[18] However, if the assaulted party lingered more than a year and a day, there arose a conclusive presumption that death had resulted from an independent cause precluding institution of the forfeiture action.[19]

The advent of "public prosecution" established the foundations for the third form of action. Brought in the name of, and on behalf of, the king, the action recognized that criminal offenses were essentially indignities against the public peace, not personal wrongs against the victim.[20] As modern criminal prosecution evolved, the "appeal of death" disappeared.[21] Thus, the rule that no one could be held responsible for a felonious homicide when more than a year and a day elapsed between infliction of the mortal wound and death was firmly settled in the common law of England.[22]

The rule was eventually adopted in the United States. With only two

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15. The confusion as to whether the time was to run from the date of the blow or from the date of the victim's death was witnessed in Heydon's Case, 76 Eng. Rep. 631 (King's Bench 1558). The court's holding that the time ran from the date of death has served as a primary authority that the rule was by nature a limitation. *See also* 4 BLACKSTONE *315.
16. See 19 CHI.-KENT L. REV. 181 (1941) for an exhaustive treatment of the transition of the statute from a form of limitation to an element of criminal homicide.
17. 1. BLACKSTONE *300. The concept was derived from the legal fiction that the inanimate object used in making the assault was guilty of a wrong doing. 2 POLLOCK & MAITLAND 473. A contemporary analogy will be found in automobile forfeiture statutes which authorize confiscation by the state of motor vehicles used to transport or conceal narcotics. MD. ANN. CODE art. 27 § 297 (1970). *See generally* 3 U. BALT. L. REV. 270 (1974).
18. 2 POLLOCK & MAITLAND 474. This original charitable purpose was eventually abused when the king granted the properties so obtained to his favorites. 1 BLACKSTONE *301.
19. 1 W. HAWKINS, PLEAS OF THE CROWN 75-76 (8th Curwood ed. 1824). The inquisitions against deodands were abolished by statute in England in 1846, 9 & 10 Vict., c. 62. (1846).
20. 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 256-57 (4th ed. 1936).
21. The appeal was abolished by statute in England in 1819, 39 Geo. III. c. 46, and never existed as a method of trial in the United States.
22. Louisville, E. St. L. R.R. v. Clarke, 152 U.S. 230 (1894) (dictum); Commonwealth v. Ladd, 402 Pa. 164, 175, 166 A.2d 501, 507 (1960) (concurring opinion); 3 COKE 47. Though usually phrased in terms of murder, the common law rule was reasserted to apply with equal force to manslaughter. Rex v. Dyson, [1908] 2 K.B. 254; *cf.* Commonwealth v. Evaul, 5 Pa. D. & C. 105 (Phil. Co. Ct. 1924) (rule does not apply to involuntary manslaughter).

exceptions,[23] those courts which have considered the question have determined that the rule prevails.[24] Although acknowledging the rule's existence, the decisions of those same courts occasioned sharp judicial conflict as to the precise nature of the rule. The struggle centered on whether the rule was substantive or evidentiary in nature.[25] Those jurisdictions treating the rule as evidentiary conclusively presumed that if a year and a day elapsed prior to death, it resulted from other causes and no evidence was admissible.[26] Those jurisdictions finding the rule to be substantive reasoned that no felonious homicide was chargeable if death failed to occur within the time proscribed by the rule.[27] Notwithstanding the fact that the rule was approached by two different avenues of thought, every jurisdiction, with the two exceptions stated above, reached the conclusion that the rule was valid.[28]

The first judicial exception occurred in *People v. Legeri*,[29] a 1933 lower court decision in New York. The *Legeri* court held that, while the rule was a substantive element of common law felonious homicide, the New York Penal Law and Code had implicitly abrogated all common law crimes.[30] In its stead, the New York Penal Law and Code was to serve as a complete compilation and definition of all crimes. Since no reference to the year and a day rule was included in the statutory definition of murder, the court concluded that the intention of the legislature was the abolition of the rule.[31] The *Legeri* court further

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23. People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 239 App. Div. 47, 266 N.Y.S. 86 (1933); Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1961).
24. *See, e.g.*, Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943); State v. Dailey, 191 Ind. 678, 134 N.E. 481 (1922); Elliott v. Mills, 335 P.2d 1104 (Okla. Crim. App. 1959). *See generally* Annot., 93 A.L.R. 1470 (1934); Annot., 20 A.L.R. 1006 (1922).
25. The procedural view was essentially discarded. *See, e.g.*, Ball v. United States, 140 U.S. 118 (1890), an indictment, failing to show that the date of death occurred within a year and a day, was no longer fatally defective if brought within that time. *But cf.* State v. Spadoni, 137 Wash. 684, 243 P. 854 (1926). As to where silence is not deemed a fault see People v. Murphy, 39 Cal. 52 (1870), rule is evidentiary, not procedural; Smith v. State, 72 Fla. 449, 73 So. 354 (1916), objection coming after the trial was too late; Jane v. Commonwealth, 60 Ky. Rep. (3 Met.) 18 (1860), allegation of death regarded as unnecessary.

    It should be noted that in many cases which discuss the evidentiary or substantive nature of the rule, the issue actually before the court was whether or not the State's indictment sufficiently stated a cause of action. Debate on the nature of the rule was mere dictum.
26. *See, e.g.*, Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894) (dictum); People v. Murphy, 39 Cal. 52 (1870); Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943); State v. Heff, 11 Nev. 17 (1876).
27. *See, e.g.*, State v. Moore, 196 La. 617, 199 So. 661 (1940); People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934) (dictum); State v. Spadoni, 137 Wash. 684, 243 P. 854 (1926).
28. *See* note 24 *supra*. *See also* Commonwealth v. Macloon, 101 Mass. 1, 100 Am. Dec. 89 (1869); State v. Orrell, 12 N.C. (1 Dev. L.) 139, 17 Am. Dec. 563 (1836); Edmondson v. State, 41 Tex. 496 (1874).
29. 239 App. Div. 47, 266 N.Y.S. 86 (1933).
30. *Id.* at 48, 266 N.Y.S. at 87.
31. To aid the *Legeri* court in ascertaining legislative intent, reference was made to statutes existing prior to the adoption of the NEW YORK PENAL LAW AND CODE which had incorporated the year and a day rule. For example, by the Law of February 14, 1787, ch. 22 [1787] willful killing by poison was deemed premeditated murder. If death did not

buttressed its decision by noting the inapplicability of the rule in light of medical advancements.[32] The following year, the New York Court of Appeals in *People v. Brengard*[33] became the first state court of last resort to determine that the common law rule was an anachronism.[34]

More then twenty-five years elapsed before occurrence of the next judicial exception. In 1961, Maryland's sister state of Pennsylvania abolished the rule with its decision in *Commonwealth v. Ladd*.[35] The court reasoned that if the rule was evidentiary rather than substantive in nature, it was subject to judicial abolition.[36] In reaching its decision, the *Ladd* court relied upon Blackstone's definition of murder. "A felonious homicide occurs when a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign with malice prepense or aforethought."[37] Blackstone did not refer to the year and a day rule until two pages later. "In order also to make the killing murder it is requisite that the party die within a year and a day after the stroke received or cause of death administered."[38] The court reasoned that since Blackstone had deliberately not mentioned the rule until after two intervening pages, Blackstone did not consider the rule substantive. Finding the rule to be arbitrary and taking judicial notice of medical advances, the *Ladd* court saw no more reason for reading Blackstone's addendum into his substantive definition of murder than for considering a rule of venue as part of the substantive definition.[39] The rule was evidentiary and thus subject to judicial abolition.[40]

It was within this historical and judicial context that the court in *State v. Brown*[41] was confronted with the validity and viability of the

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ensue within the year and a day under the Law of February 10, 1813, ch. 29 [1813] when there was an intent to murder by poisoning, punishment could not exceed a 14-year prison term. The *Legeri* court reasoned that, since prior statutes had specifically incorporated the rule, repeal of such statutes in 1828 and the Legislature's subsequent failure to include the rule when enacting the PENAL LAW AND CODE indicated the Legislature's intent to abrogate the rule. 239 App. Div. 47, 266 N.Y.S. 86 (1933).

32. 239 App. Div. at 49, 266 N.Y.S. at 88.
33. 265 N.Y. 100, 191 N.E. 850 (1934).
34. For discussion provoked by these cases see, *e.g.*, 10 WISC. L. REV. 112 (1934); 19 MINN. L. REV. 240 (1935); 19 CORNELL L. Q. 306 (1934).
35. 402 Pa. 164, 166 A.2d 501 (1960).
36. *Id.*
37. 4 BLACKSTONE *195; 402 Pa. at 172, 166 A.2d at 505.
38. 4 BLACKSTONE *197; 402 Pa. at 172, 166 A.2d at 505.
39. 402 Pa. at 172, 166 A.2d at 505-06.
40. In finding the rule to be evidentiary, rather than substantive, the *Ladd* court relied upon the dictum of the Supreme Court case of Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894). The concurring opinion in *Ladd*, while finding the rule to be part of the substantive English common law, determined that the rule had never been adopted into Pennsylvania's common law. A vigorous dissent attacked the majority's analysis of Blackstone, found the rule valid in Pennsylvania, and challenged the majority's arbitrary rewriting of the criminal law as a "despotic untrammeled usurpation of power . . . taking away constitutional prerogatives . . . [and] making a mockery of the law of cause and effect." 402 Pa. at 201, 166 A.2d at 520. The *Ladd* decision aroused extensive comment and criticism. *See, e.g.*, 65 DICK. L. REV. 166 (1961); 40 N.C. L. REV. 327 (1962); 47 VA. L. REV. 880 (1961).
41. 21 Md. App. 91, 318 A.2d 257 (1974).

year and a day rule in Maryland. The court, after considering the rule's historical derivation, its apparent arbitrary nature, and the rationale for its existence, concluded that, "[i]t follows from what we have said that, although there does not appear to be a case in this jurisdiction applying the common law rule, we think that it is in full force and effect in Maryland."[42] The court relied upon the interpretation of Maryland's Declaration of Rights:

> That the Inhabitants of Maryland are entitled to the common law of England, . . . according to the course of that Law, . . . as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Court of Law or Equity.[43]

The principle Maryland case construing Article 5 of the Declaration of Rights was *State v. Buchanan*,[44] where the court interpreted the Article as supportive of English common law "except such portions of it as are inconsistent with the spirit of that instrument, and the nature of our new political institutions."[45] The *Brown* court, following the lead of the Criminal Court, did not question the validity of either condition precedent for adoption of the year and a day rule into the Maryland common law.[46] The court concluded that the rule "has had overwhelming support in the United States."[47]

Although the *Brown* court sustained the existence of the rule in Maryland common law, it discussed the precise nature of the rule only indirectly. The court simply stated that the "law will not recognize a homicide"[48] when the victim lingers more than a year and a day. While

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42. *Id.* at 97, 318 A.2d at 261. The court said that the rule was promulgated by judicial decisions, but inaccurately cited the Supreme Court case of Louisville, E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894), as recognizing the rule when in fact recognition occurred only in dictum. 21 Md. App. at 95, 318 A.2d at 260. The Maryland appellate cases of State v. Hamilton, 14 Md. App. 582, 587 n.10, 287 A.2d 791, 794 n.10 (1972) and Whitehead v. State, 9 Md. App. 7, 9 n.2, 262 A.2d 316, 318 n.2 (1970) support the existence of the year and a day rule in Maryland by way of obiter dictum. 21 Md. App. at 97 n.8, 318 A.2d at 261 n.8.
43. MD. CONST., Declaration of Rights art. 5. Article 5 "appeared first as Section III of the Declaration of Rights in the Constitution of 1776, as Article 3 in the Declaration of Rights of the Constitution of 1851, and as Article 4 of the Declaration of Rights in the Constitution of 1864." Gilbert v. Findlay College, 195 Md. 508, 513, 74 A.2d 36, 38 (1950).
44. 5 Har. & J. 317 (1821).
45. *Id.* at 358. Whether particular parts of the common law are applicable to our local circumstances and political institutions is a question for the courts to decide. *Id.*
46. On July 4, 1776 the rule existed in England. If an English common law rule did not conflict with the Maryland Constitution or contemporaneous political institutions, adoption of the rule occurred. It should be noted that the State, in its brief, stipulated that the common law rule was in force in Maryland. *See* note 3 *supra*; *cf.* Commonwealth v. Ladd, 402 Pa. 164, 175–85, 166 A.2d 501, 507–12 (concurring opinion).
47. 21 Md. App. at 95, 318 A.2d at 260. While the Maryland appellate courts are under no obligation to follow majority views, neither are they under any obligation to expound a position contrary to that majority which has passed upon an issue. Association of Independent Taxi Operators, Inc. v. Yellow Cab Co., 198 Md. 181, 204–05, 82 A.2d 106, 117 (1951).
48. 21 Md. App. at 92, 318 A.2d at 258. *See also id.* at 99, 318 A.2d at 262. The implication

the court implied that the rule should be considered a substantive element of common law felonious homicide rather than an evidentiary rule, it did not reach a definite conclusion,[49] noting that the cases in other jurisdictions are equally divided in declaring the rule to be substantive or evidentiary.[50]

Some advantages flow from the court's failure to articulate a stance on the rule's precise nature. First, it allows the rule to be both substantive and evidentiary. The soundest reasoning for this view appears in the recent case of *Elliott v. Mills*.[51] The court, having determined that in a criminal act death within a year and a day must be both pleaded (by indictment) and proved, termed the rule as both substantive and evidentiary. However, the *Elliott* court's approach would seem to suggest that the rule is actually substantive since the court incorporated the rule as an essential element which must be pleaded and proved.[52] Second, extended discussion of the nature of the rule may obscure the principle issue. When a valid common law rule, whether substantive or evidentiary, has been adopted, the vital controversy should center on whether authority for abrogation or amendment properly belongs to the legislature or the judiciary. Such a determination falls into one of the gray areas of law. Indeed, on occasion and without doing violence to the Constitution, the judiciary may, in its discretion "legislate;" however, indiscriminate or unjustifiable "judicial legislation" defies the very nature and purpose of the Constitution.

The decision in the *Ladd* case illustrates such a misuse of judicial discretion. The court summarily soncluded 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."[53] In announcing this conclusion, the *Ladd* decision failed to refer to a single case precedent in Pennsylvania indicating that the judiciary has the prerogative to abolish common law rules of evidence.[54]

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arises from the court's disagreement with the reasoning of the majority opinion of the *Ladd* court as to its interpretation of Blackstone and their ultimate conclusion that the rule is evidentiary, rather than substantive. *Id.* at 96 n. 7, 318 A.2d at 260-61 n.7.

49. 21 Md. App. at 96, 318 A.2d at 260.

50. *Id.* Whether the rule is evidentiary or substantive the courts subscribe to the view that alteration of criminal law, for other than procedural purposes, should be by the legislature. *Id.* at 96, 318 A.2d at 260–61.

51. 335 P.2d 1104 (Okla. Crim. App. 1959).

52. *Cf.* Md. Ann. Code art. 27 § 616 (1971). Since it is unnecessary to set forth the time of death on an indictment for murder or manslaughter, it would appear to be unnecessary to plead directly that the victim died within a year and a day. This would lend further credence to the belief that the court probably intended to promulgate the common law rule as substantive in nature.

53. 402 Pa. at 174, 166 A.2d at 507.

54. In support of its conclusion that evidentiary rules are subject to judicial abolition, the *Ladd* court, quoting from Nesbit v. Riesenman, 298 Pa. 475, 483, 148 A. 695, 697 (1930) stated: "The function of determining whether a rule of the common law exists, and what it is, lies solely with the court, as does also the question whether given conditions offend that law." 402 Pa. at 174, 166 A.2d at 507. It is suggested that, upon determining what a rule is and that it exists, a further finding that given conditions offend the law does not, in and

The Maryland appellate courts have not clearly delineated when a common law rule, whether evidentiary or substantive, once adopted in Maryland may be abrogated or amended. The *Buchanan* court indicated that the common law consisted of a system of principles not capable of expansion. This system was to have perpetual existence, which would apply to whatever particular matter or circumstances might arise and come within it.[55] Subsequent courts have abandoned such a rigid attitude. On occasion the courts have held that "the common law is not static but adapts itself to changing conditions and increasing knowledge."[56] The courts may implement change via abrogation, revision or amendment.[57] On infrequent occasions the judiciary has exercised its discretionary powers, but only in civil cases.[58] There is no judicial precedent in Maryland authorizing abrogation of, revision or amendment to, a substantive element of the criminal common law.[59]

The *Brown* court alluded to the existence of judicial authority to alter or abrogate a common law rule. "[U]nless changed by legislative enactment or judicial decision,"[60] the inhabitants of Maryland are entitled to the Maryland common law. The cases cited by the *Brown* court fail, however, to support the proposition that criminal common law rules can be changed by judicial decision.[61] Subsequent to this early observation, the court made no further reference to judicial prerogative for the abolition of the common law.

The *Brown* court's decision not to invoke judicial discretion is defensible. In criminal law, where punishment by confinement exists, the constitutional rights guaranteed to the offender demand the highest protection. The only proper forum for any abolition or alteration of a viable law belongs to the legislature. The *Brown* court ascribed to this view:

> When a court is abolishing a rule of law, it is submitted that the proper exercise of judicial power should be explained and supported by broad policies concerning the criminal law rather than narrow determinations resting on very technical bases. The aim and purpose of the criminal law is to provide adequate protection for society and simultaneously assure justice for the

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of itself, reserve to the judiciary the omnipotent prerogative abolition. *Cf. id.* at 185–201, 166 A.2d at 512–20 (dissenting opinion).

55. 5 Har. & J. 317 (1821); *cf.* Gilbert v. Findlay College, 195 Md. 508, 74 A.2d 36 (1950).
56. Md. *ex rel.* Weaver v. O'Brien, 140 F. Supp. 306, 311 (D. Md. 1956).
57. *Cf.* Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930).
58. *See, e.g.*, Latz v. Latz, 10 Md. App. 720, 272 A.2d 435 (1971), citing Schneider v. Schneider, 160 Md. 18, 152 A. 498 (1930).
59. *See* notes 60–61 *infra*.
60. 21 Md. App. at 92, 318 A.2d at 258.
61. Of the two criminal cases cited by the court, McGraw v. State, 234 Md. 273, 199 A.2d 229 (1963) (at common law, burgulary included church as a 'dwelling house') can be cited only for the proposition that although occasion for use of the common law had not occurred prior to July 4, 1776, such nonuse did not preclude its adoption on that date. State v. Buchanan, 5 Har. & J. 317 (1821) serves as the principle case for interpretation of the Declaration of Rights.

> individual accused. A balance between the two requires a determination which necessarily varies with the environment and background of the particular individual making the inquiry. For this reason it seems that alteration or modification of the criminal law (other than a mere procedural rule) should be by the legislature where a more representative determination may be made.[62]

The *Brown* court relied upon three precepts in concluding that abolition of the rule, if warranted, reposes in the legislature. While the court recognized that "major advances have been made in medical science and that improvements have been made in scientific crime detection"[63] it declined to presume on this basis that the rule is no longer realistic.[64] Supportive of this posture the court also noted the lower court's refusal to take judicial notice of such changes.[65] Second, the court considered the possibility that abolition of the rule might result in an imbalance between justice for the accused and the adequate protection of society.[66] Third, the court believed that there remains a need to limit causation by some method.[67] The court's view that the legislative branch of government is the proper forum for consideration of the rule does not terminate the issue. It merely shifts the problem of resolving the issue to the legislature. Should the legislature act upon the year and a day rule and, if so, to what extent? Various courses of action have been offered for solution and some have been implemented by state legislatures. The legislature may adopt the common law rule as a conclusive presumption,[68] it may modify the rule, expanding the time span of the conclusive presumption,[69] or, it

62. 21 Md. App. at 96, 318 A.2d at 261, quoting from Note, *The Abolition of Year and A Day Rule: Commonwealth v. Ladd*, 65 DICK. L. REV. 166, 169 (1961). The court concluded that "because expression and weighing of divergent views, consideration of potential effects, and suggestion of adequate safeguards, are better suited to the legislative forum" any change should be by the General Assembly. *Id.* (footnote omitted)

63. 21 Md. App. at 97, 318 A.2d at 261.

64. *Id.*

65. The court quoted from the lower court's statement that it was "hesitant to take such judicial notice of a subject which clearly calls for complex expert evidence. . . . [I]t cannot be definitely stated by this Court [Criminal Court of Baltimore], in the absence of expert testimony, that contemporary medical science is capable of establishing causation after the lapse of a year and a day" which evidence the State failed to produce. *Id.* at 98-99 n.11, 318 A.2d at 262 n.11.

66. *Id.* at 97, 318 A.2d at 261. *See also* text at note 62 *supra*.

67. *Id.*

68. *See, e.g.*, ARIZ. REV. STAT. § 13-458 (1956); ARK. STAT. ANN. § 41-2210 (1964); COLO. REV. STAT. § 40-2-9 (1963); LA. REV. STAT. § 14:29 (1974); NEV. REV. STAT. § 200.100 (1973); N.D. CENT. CODE § 12-27-27 (1960).

69. CAL. PENAL CODE § 194 (West 1969) (three years and a day); REV. CODE WASH. ANN. § 9.48.110 (1973) (three years and a day). The California court found a Constitutional question of the 'retroactivity' of the rule when confronted with the application of the 1969 legislative amendment which had extended the time span from a year and a day to three years and a day, People v. Snipe, 25 Cal. App. 3rd 742, 102 Cal. Rptr. 6 (1972) (wherein a child died some twenty-one months after the infliction of the mortal wound. At the time of the beating, California's PENAL CODE codified the year and a day rule. However, at the date of the child's death, statutory amendment had increased the rule to three years and a day. The court held that because the amendment became effective several

may refuse to consider the issue raised by the court and by its silence, sanction the rule.[70] In addition, the legislatures of several states, following the early lead of New York,[71] have recently prepared and adopted new penal laws and codes.[72] The intent of these legislatures has been to abolish the criminal common law, replacing it with a statutory code. These codes purport to be all inclusive by codifying the offenses creating, the defenses to, and the sentences for, crimes. As witnessed in New York's *Legeri* and *Brengard* cases, however, the use of a code which attempts to obviate ambiguity may necessitate resort to appellate courts for clarification if the code fails to be all-inclusive.

The Maryland Legislature is provided with an opportunity to join those jurisdictions which have adopted a criminal code. The State of Maryland Commission on Criminal Law is presently preparing a proposed Criminal Code for consideration by the Maryland Legislature.[73] To serve as the general model or basis for the proposed Criminal Code, the Commissioners selected the New York Penal Law and Code.[74] Neither the New York Penal Code nor the proposed Maryland Code makes reference to the year and a day rule. Unlike the New York Penal Code, the proposed Maryland Code abolishes all common law offenses.[75] Probably through inadvertence, the Commissioners failed to consider the year and a day rule.[76] However, § 10.05 of the proposed Code provides that:

> Undefined words or phrases in this Code, which are used at common law or in statutes which are or have been in force in this State and which have a judicially determined meaning in the context in which they are used in this Code, shall be construed in the light of such judicially determined meaning.[77]

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months before the immunity of the prior statute had attached, the increased span in the time requirement did not deprive defendants of a vested defense and thus did not contravene constitutional prescription against ex post facto laws.

70. *See, e.g.*, Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943); Elliott v. Mills, 335 P.2d 1104 (Okla. Crim. App. 1959).
71. N.Y. PENAL LAW (McKinney 1967); *see* note 31 *supra*.
72. *See, e.g.*, CONN. GEN. STAT. tit. 53a-1 (1972); Code of Ga., tit. 26-1 (1972); ILL. ANN. STAT., Crim. Law and Proc. (1972); MASS. ANN. LAWS ch. 38, § 1 (1974); OHIO REV. CODE ANN., tit. 29, § 2901.01 (1974). A number of these codes have been based upon the NEW YORK PENAL LAW AND CODE. In only one code is the year and a day rule mentioned specifically and then only by a Note. The definition of murder is "generally consistent with the common law definition of Murder, but defines the crime in non-technical terms and without adopting the common law rule that for guilt the victim had to die within a year and a day from the infliction of the fatal wound." Revision Commission Note, chap. 265, § 2, at p. 95 of the PROPOSED CRIMINAL CODE OF MASSACHUSETTS (1972) (effective January 1, 1974).
73. STATE OF MARYLAND COMMISSION ON CRIMINAL LAW: PROPOSED CRIMINAL CODE (June 1, 1972) [hereinafter cited as PROPOSED CRIMINAL CODE].
74. It should be noted that the Commissioners have made use of the MODERN PENAL CODE where they have determined that it is more applicable to the Maryland situation. PROPOSED CRIMINAL CODE at viii.
75. PROPOSED CRIMINAL CODE § 1.10, at 2.
76. The *Brown* decision had not been handed down at the time the proposed code was published.
77. PROPOSED CRIMINAL CODE § 10.05, at 31.

Undoubtedly, the Commissioners intend that § 10.05 apply only to those terms which appear directly in, but have not been defined by, the code. An inaccurate application of § 10.05 coupled with the *Brown* decision may provide some future defendant with an argument that legislative caveat has resulted in the validity and viability of the year and a day rule. Such an approach by a defendant may necessitate consideration and interpretation of the proposed Code by the appellate courts ending in a Maryland version of the *Legeri* and *Brengard* cases.[78]

Further appellate deliberation on the year and a day rule need not occur. The Commissioners and the Legislature have an opportunity to rectify the problem prior to adoption of the proposed Code. They may follow the lead of the Massachusetts Legislature and by Commentary declare that the year and a day rule is no longer applicable in Maryland.[79] While Commentary is expressive legislative intent, it is not law and appellate debate may still ensue should a defendant raise the issue. Therefore, should the Commissioners and the Legislature determine that the correct conclusion is complete abolition of the rule with guilt to be ascertained solely through a causal relationship, that position should be so codified.

As an alternative, the Legislature may, as implied by the *Brown* court,[80] determine that abolition is not warranted. If this approach is adopted by the Legislature, the year and a day rule should be codified to prevent resort to the appellate courts at a future date.

A third and more viable posture exists, which takes into account the medical advances made in the 20th century, the protection of society, and the accused's constitutional rights. The Legislature could expressly enact a section which sanctions the rule that if the injured party does not die within, for example three years and a day after the infliction of the injury there is a rebuttable presumption that the infliction of the injury was not the cause of death.[81] The prosecution would still have the burden of proving causation beyond a reasonable doubt. It is unlikely that institution of a three-year rebuttable presumption would place any greater obstacles in the prosecution's path when proving causation. The approach would leave adjudication of causation to the trier of the facts while reminding him that, if the injury did not result in death within three years and a day, the presumption arises, which the prosecution must overcome, that the decedent did not die of that injury.

Lucy A. Loux

78. It should be noted that Maryland has no prior statutes incorporating the year and a day rule. The New York courts relied heavily upon prior incorporation of the rule in the case of murder by poison and the subsequent abolition by the legislature of that statute. The Maryland courts will not be able to avail themselves of such reasoning should a version of the *Legeri* and *Brengard* cases appear in this State. *See* note 31 *supra*.
79. *See* note 72 *supra*.
80. *See* notes 63–67 *supra*.
81. The use of three years and a day is merely for illustrative purposes. A proper period of limitation can only be ascertained after a thorough analysis by the legislature of medical and scientific advancements.