THE YEAR AND A DAY RULE: HAS ITS TIME RUN OUT?

INTRODUCTION

On September 21, 1978, a lone sniper perched atop a vacant building in a large eastern city fires at an unsuspecting passerby. The pedestrian is paralyzed by a bullet which passes within an inch of his spinal column. Despite the best efforts of modern medicine, the victim dies quietly on September 23, 1979, in a hospital, one year and two days after the original injury. The assailant is charged with murder in the first degree. Is a conviction forthcoming?

At common law, there could be neither murder nor manslaughter unless the person slain died within a year and a day after the injury was received.1 This limitation on homicide prosecutions had its origin in a thirteenth century English statute2 and currently enjoys the support of a majority of American3 and English4 jurisdictions. This comment will trace the development of the "year and a day rule" from its origin in 1278 to its present status in common and statutory law. The original justification for the rule will be examined in light of the advances of modern medicine, and the extent to which judicial modification of the rule is presently appropriate will be considered.

THE DEVELOPMENT AND RATIONALE OF THE YEAR AND A DAY RULE

The year and a day rule was first mentioned in 1278 in the Statute of Gloucester.5 The Statute was primarily concerned with the

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1. A concise statement of the "year and a day rule" is found in Conner v. Commonwealth, 76 Ky. (13 Bush) 714, 719 (1878).
2. The Statute of Gloucester, 1278, 6 Edw. 1, c. 9. For the text of this statute, see note 5 infra.
3. See notes 15 and 16 infra.
4. 11 HALSBURY'S LAWS OF ENGLAND § 1155 (4th ed. 1976) notes that "[i]f death does not follow until after the expiration of a year and a day from the date when the injury was inflicted, it is an irrebuttable presumption of law that the death is attributable to some other cause, and the person who inflicted the injury is not punishable for either murder or manslaughter." Accord, Rex v. Dyson, [1908] 2 K.B. 454, 456.
5. The Statute of Gloucester, 1278, 6 Edw. 1, c. 9., provides in pertinent part:

An Appeal of Murther

The King commandeth that no Writ shall be granted out of the Cancery for the Death of a Man to enquire whether 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 Juftices in Eyre, or Juftices aIGNED
procedure for appealing a murder conviction\textsuperscript{6} and articulated the
rule without offering an explanation for the year and a day require-
ment.\textsuperscript{7} Lord Coke appears to have been the first writer to offer a
rationale for the rule: "for if he [the victim] die after that time [a
year and a day], it cannot be discerned, as the law presumes,
whether he died of the stroke or poison, etc. or of a natural death;
and in case of life the rule of law ought to be certain."\textsuperscript{8} Lord Coke's
explanation for the rule—that science is unable to determine the
cause of death when a victim survives more than 366 days after
being injured—has generally been accepted by modern courts\textsuperscript{9}
and commentators\textsuperscript{10} as the obvious basis of the rule.\textsuperscript{11}

With the primitive state of medical technology as a justifica-
tion, the year and a day rule became an indisputable element of
common and statutory law in England and the United
States.\textsuperscript{12} As Lord Alverston writing for the English court in \textit{Rex v. Dyson}\textsuperscript{13} ob-
served:

\begin{quote}
to the Gaol-delivery, and fhall put himfelf upon the Country before them
for Good and Evil: (3) In cafe 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 fhall take him to his Grace, if it pleafе him. (4) It is provided
also, that no Appeal fhall be abated fo foon as they have been heretofore;
but if the Appellor declare the Deed, the Year, the Day, the Hour, the Time
of the King, and the Town where the Deed was done and with what
Weapon he was flain, the Appeal fhall f tand in effect, (5) and fhall not be
abated for Default of frefh Suit, if the Party fhall sue within the Year and
the Day after the Deed done.
\end{quote}

\textit{Id}. 6. The Statute actually has several chapters dealing with a variety of topics;
chapter nine, which mentions the year and a day rule, is concerned with the proce-
dure for appealing a murder conviction. \textit{See id}. 7. The requirement of a year and a day was common in ancient law. For ex-
ample, the rule was applied in the inquisition of deodands (deodands were chattel
that occasioned death and as such were forfeited to the King and applied to pious
Young, 148 N.J. Super. 405, ---, 372 A.2d 1117, 1120 (1977).}
10. \textit{See, e.g., W. LaFAVe & A. scott, JR., HANDBOOK ON CRIMINAL LAW § 35, at
266 (1972).}
11. Although the year and a day rule has been the subject of numerous articles in
legal periodicals, few articles have contained an in-depth analysis. \textit{See, e.g., Note,
14 AlA. L REV. 447 (1962); 65 DICK. L REV. 166 (1961).}
12. While specifically embracing Lord Coke's explanation for the rule, a Penn-
sylvania court suggests an additional explanation: "It is a rule of convenience, arbit-
rary but necessary, and designed to mitigate the rigor of the old law which exacted
a life for a murder and manslaughter indiscriminately." \textit{Commonwealth v. Evaul, 5
Pa. D. & C. 105, 106 (1924).}
13. \textit{[1908] 2 K.B. 454.}
[W]hatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause.\textsuperscript{14}

In this country the courts of at least twenty-five states recognize the year and a day rule.\textsuperscript{15} In several states the rule is incorporated by statute.\textsuperscript{16} A typical state statute provides: "In order to make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered . . . ."\textsuperscript{17}

The wisdom of the year and a day rule was not seriously questioned by American courts until 1933, when a New York Supreme Court, in \textit{People v. Legeri},\textsuperscript{18} concluded that the rule had been abrogated by the legislature.\textsuperscript{19} After noting that there were no common law crimes in New York, the court reasoned that the legislature, by enacting a comprehensive penal code without reference to the rule, had abolished it.\textsuperscript{20} The court went on to note that great advances in medical science had largely done away with the problem of tracing the cause of death to an injury suffered more than 366 days earlier.\textsuperscript{21}

The following year, in \textit{People v. Brengard},\textsuperscript{22} the New York Court of Appeals was asked to decide if the year and a day rule had in fact been abrogated by the state legislature. The factual sit-
uation in *Brengard* was significant because it graphically illustrated what the *Legeri* court had suggested the year before: advances in modern science have so undermined the justification for the year and a day rule as to render it a dangerous anachronism. In *Brengard* the defendant was convicted of first degree murder in the shooting death of a policeman. The victim suffered a gunshot wound in the back in July, 1928, and died some four years later in July, 1932. In its recitation of the facts, the *Brengard* court described the striking causal link between the bullet wound and the officer's death, concluding that even without expert testimony, the cause of death was clearly determinable by a law jury:

At the time of his injury, Kennedy was 23 years of age, 6 feet 4 inches in height, and weighed 210 or 220 pounds. Subsequent to the infliction of his gunshot wound he lost more than 100 pounds in weight. His right leg was completely paralyzed by the shot in his spinal column, and the left leg 95 per cent paralyzed; he totally lost control of the bladder and the rectum. In June, 1929, the bullet was removed from his spine, and in April, 1932, his right leg was amputated. In July, 1932, he died. *Even without expert opinion evidence, the jury could decline to entertain any reasonable doubt that it was the bullet wound which caused his death.*

Had the court not concluded that the year and a day rule had been superseded by the state's penal code, it might have faced the unhappy prospect of overturning a murder conviction which seemed clearly warranted by the facts of the case. *Brengard* thus illustrates the potentially anomalous situation that can result from an inflexible application of the rule, where the cause of death is readily apparent even though the victim died more than a year and a day after being injured. The extreme factual situation of *Brengard*, however, has seldom been faced by modern courts, a

23. 239 A.D. at —, 266 N.Y.S. at 88.
24. 265 N.Y. at —, 191 N.E. at 853.
25. *Id.* at —, 191 N.E. at 850.
26. While the court indicated that expert testimony was unnecessary, there was expert opinion evidence presented at trial sufficient to indicate that the bullet wound was the cause of death. *Id.* at —, 191 N.E. at 851-52.
27. *Id.* at —, 191 N.E. at 851-52 (emphasis added).
28. *Id.* at —, 191 N.E. at 852-53.
29. In fact, few American jurisdictions purporting to embrace the rule have ever directly considered it on its own merits. Most American common law support for the rule arises under a factual situation where death occurred only a few hours or days after injury, whereupon the court articulates the rule while dismissing the defendant's argument that the indictment is fatally defective because it fails to state the time of death.
circumstance which may explain the continued vitality of the common law rule.

Since the *Brengard* decision, a number of other states have confronted the year and a day rule for the first time. The issue arose on first impression in Oklahoma in 1959, where the Oklahoma Criminal Court of Appeals held in *Elliott v. Mills* that the petitioner could not be prosecuted for first-degree manslaughter when the victim died some fourteen months after being injured. The court observed that the year and a day rule was an integral part of the common law and that, except for its abolition by New York, the rule enjoyed the unanimous support of the states which had considered it. After noting that Oklahoma recognized the common law, the court followed the rule. Similarly, Maryland courts first considered the year and a day rule in 1974. Reasoning as the *Elliott* court had, the Maryland Court of Special Appeals in *State v. Brown* concluded 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."

The first state to abrogate the rule by judicial decision was Pennsylvania. In *Commonwealth v. Ladd* the majority contended that the year and a day rule was merely a rule of evidence which recognized "the primitive state of medical knowledge." After taking judicial notice of the advances in medical science, the court reasoned that there was no longer any justification for the rule, declaring that "a rule becomes dry when its supporting rea-

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A typical example is *People v. Corder*, 306 Ill. 264, 137 N.E. 845 (1922). There the victim was shot on November 11, 1921, and died at a local hospital six days later. Answering the appellant's contention that the indictment was defective because it did not specifically aver the date of death, the court stated: "Where, as in this case, it appears from the indictment that the indictment was returned within a year and a day after the cause of death was administered it is not necessary to allege the exact date of the death." *Id.* at 272, 137 N.E. at 849.

For other cases where courts failed to address the merits of the year and a day rule, see *Brassfield v. State*, 55 Ark. 556, 185 S.W. 1040 (1892) (court recognized the rule in the context of an indictment challenged for failure to state venue); *Debney v. State*, 45 Neb. 856, 64 N.W. 446 (1895) (court recognized the rule in the context of a challenged jury instruction' without addressing the merits of the rule).


31. *Id.* at 1106.

32. *Id.* at 1110.

33. *Id.* at 1111-13.

34. *Id.* at 1111-13.


36. *Id.* at —, 318 A.2d at 261.


38. *Id.* at —, 166 A.2d at 504, 506.
son evaporates." Judge Musmanno's forceful dissent countered that the year and a day rule was not merely a rule of evidence but rather an integral part of the common law definition of murder. The dissent further argued that any change in the rule should come not from the courts but from the legislature.

The most recent discussion of the year and a day rule is found in the 1977 decision of State v. Young, in which a New Jersey Superior Court abrogated the rule. The court observed that the rule is a safeguard against homicide prosecution "when the cause of death is uncertain and medical conjecture the only means of determining it." Citing the controversial decision of In Re Quinlan, the court maintained that the law must respond to advances in medical science: "[t]he common law year and a day rule does not conform to present-day medical realities, principles of equity or public policy. We reject it as an anachronism and declare that it is no longer part of the common law of the State.

The year and a day rule has also been modified by express legislative decree. California has a statutory provision which extends the rule to three years and a day, and Washington has legisla-
tively repealed its version of the rule. California's statutory change was made by the state legislature "in recognition of the well-known fact that modern medicine not only has made it possible to prolong the life of an intended murder victim but also has made it feasible to establish the cause of death even if the victim dies several years after the injury."

Thus, while a majority of American jurisdictions still support the year and a day rule, it has been abrogated by judicial decree in Pennsylvania and New Jersey, and has been superseded by New York's penal code. The rule has been legislatively repealed in Washington and has been extended statutorily to three years and a day in California. This discernible trend among the few states which have thoughtfully considered the rule suggests a dissatisfaction with it arising from a firm judicial and legislative perception that modern medicine is now capable of establishing that death was caused by an injury inflicted more than a year and a day before.

THE YEAR AND A DAY RULE CONSIDERED IN LIGHT OF MODERN MEDICINE AND ITS SUSCEPTIBILITY TO JUDICIAL MODIFICATION

In light of modern scientific ability to successfully establish the cause of death in most homicide cases, judicial concern with the rationale behind the year and a day rule seems justified. The modern pathologist who seeks to establish the cause of death will invariably begin with a complete anatomical examination of the homicide victim. The pathologist "seeks . . . organic abnormalities . . . whose presence is incompatible with survival," clarifying obscured anatomic changes through the use of chemical analysis. Even though there is a significant time lapse between injury and death, the modern pathologist can usually determine the cause of the killing either murder or manslaughter, it is requisite that the party die within three years and a day after the stroke received or cause of death administered. In the computation of such time, the whole of the day on which the act was done shall be reckoned from the first." Cal. Penal Code § 194 (West 1970).

50. For a technical description of the pathological procedure in homicide cases, see A. Moritz, The Pathology of Trauma 13-73 (2d ed. 1954).
52. Id.
death. There can be little doubt that the enormous progress of medical science has made it possible to establish that death was caused by an injury inflicted more than a year and a day before.

If the progress of modern pathological science has, as the Pennsylvania court suggested, "evaporated" the justification for the year and a day limitation, it would seem that modern courts considering the rule would have little difficulty opting for its abolition. However, as the Pennsylvania dissent in Ladd and the decisions in Oklahoma and Maryland indicate, this is not the case; while all three jurisdictions acknowledged the progress of modern science, only one abolished the rule. In Ladd, the dissent reasoned that the year and a day rule was so firmly established in common law that the majority decision to abolish the rule amounted to judicial legislation. The Oklahoma court in Elliott concluded that the rule could only be altered by the legislature, after stating that the rule was one of the "elements" of murder and manslaughter. The Maryland court in Brown voiced concern about the rights of the accused: "Abolition of the rule may well result in imbalance between the adequate protection of society and justice for the individual accused . . . ."

Not insensitive to these considerations, the courts which have abrogated the year and a day rule have looked at other factors beyond the mere observation that modern medicine has "evaporated" the rationale for the rule. For example, New Jersey's

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53. According to the current precepts of pathological examination, "if an unbroken chain of events extends from primary traumatic damage through the pathogenesis of the ensuing sequelae to death, the fatality must be ascribed to the original incident." Id. at 17.

54. For an appreciation of the sophistication of modern pathological techniques, see R. MOREHEAD, HUMAN PATHOLOGY 290-301 (1965). It is further pointed out by Dr. Adelson that "[w]hen the pathologist's findings are integrated with information accumulated by other members of the investigating team, they usually furnish reliable answers . . . ." L. ADELSON, supra note 51, at 102.


56. Id. at —, 166 A.2d at 512-20 (Musmanno, J., dissenting).


59. Elliott v. Mills, 335 P.2d 1104, 1112-13 (Okla. Crim. 1959). The court in Elliott noted that "[i]f there is a time lapse of more than a year and a day the elements of murder or manslaughter are not complete . . . ." Id. at 1112-13. This characterization of the rule as a substantive "element" of homicide seems inconsistent with the court's earlier declaration that prior case law "definitely establishes the rule as one of evidence." Compare id. at 1112-13 with id. at 1111-12.

decision to abrogate the rule in *State v. Young*\(^6\) was grounded in a concern for both the adequate protection of society and justice for the individual.\(^6\) In *Young*, the New Jersey Superior Court faced an extreme factual situation, like *Brengard*, where the cause of death had been clearly linked to the defendant's assault, and the victim, through the efforts of modern medicine, lived more than a year and a day after the injury.\(^6\) Under the circumstances, had the court followed the year and a day rule, it would have been forced to reverse a murder conviction which seemed clearly justified by the facts of the case. Deciding instead to abolish the rule, the court observed that "medical technology and machines which can postpone the actual time of death . . . as a result of wounds inflicted upon a victim, should not insulate the assailant from trial and punishment for the crime."\(^6\) It is difficult to envision a policy consideration compelling enough to dictate that a court reverse a murder conviction where the cause of death has been clearly established and the assailant's only defense is that modern science has postponed his victim's death for more than a year and a day.

The Pennsylvania Supreme Court, in abolishing the year and a day rule in *Ladd* considered the threshold problem of whether its action was appropriate for a judicial body.\(^6\) The court discussed the nature of the year and a day rule\(^6\) and concluded that it was

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\(^6\)2. *See id.* at —, 372 A.2d at 1121.
\(^6\)3. In *Young*, the defendant fired five shots, three of which hit the victim Story. As the court explained:

> Story was taken to a hospital where it was ascertained that one of the bullets had entered his neck, causing severe damage to his spinal cord, resulting in complete paralysis from the neck down, including all four extremities. He received extensive treatment at the hospital and was ultimately transferred to a nursing home. His condition deteriorated and he was again hospitalized; he died on November 17, 1973, 1 year and 63 days after the shooting.

*Id.* at —, 372 A.2d at 1118.
\(^6\)4. *Id.* at —, 372 A.2d at 1121. Machines which can sustain life even though there is no hope of recovery pose a very complicated problem for application of the year and a day rule: How will the law judge a homicide defendant whose victim survives more than a year and a day after injury only by virtue of a machine which offers "survival" with no chance of recovery? To mechanically apply the year and a day rule in this situation would exculpate an assailant simply because his victim was "fortunate" enough to have access to modern life-sustaining technology. This is an ironic application for a rule which was intended to limit homicide prosecutions in a time when medical technology was so primitive that it was impossible to accurately determine the cause of death.

A related and perhaps more difficult problem regarding application of the year and a day rule involves the determination of when death occurs in a case where the victim is being artificially kept alive. *See generally* Comment, *The Law of Homicide: Does It Require a Definition of Death?*, 11 WAKE FOREST L. REV. 253 (1975).
\(^6\)6. While there is some controversy as to whether the year and a day rule is a
merely a rule of evidence.\textsuperscript{67} The majority contended that a court could properly amend a rule of evidence: "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."\textsuperscript{68} The determination that the year and a day rule is merely a rule of evidence was pivotal in the court's decision to judicially abolish the rule. If the year and a day rule, as the dissent contended, is not evidentiary but part of the common law definition of murder, the judicial prerogative to abrogate the rule becomes more precarious.\textsuperscript{69}

There is, however, considerable support for the contention that the year and a day rule is merely a rule of evidence and not a part of the common law definition of murder. A survey of early writers reveals a general uncertainty regarding the significance of the year and a day rule at common law. While the rule is mentioned in several early treatises, the significance which the various writers attached to the rule is often strikingly inconsistent.\textsuperscript{70} The

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proposition that the rule is a part of the common law definition of homicide finds only nominal support among early English commentators. There appears to be only one writer who included the year and a day rule as a part of the common law definition of murder. Lord Coke defined murder as "when a man of sound memory, . . . unlawfully killeth . . . under the king's peace, with malice forethought . . . so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same." Interestingly, Sir Blackstone later cited this definition by Lord Coke in his Commentaries, but in formulating his own definition of murder, he specifically omitted Lord Coke's reference to the year and a day rule. Lord Coke's inclusion of the year and a day rule in his definition of murder and Sir Blackstone's specific exclusion of the rule

king's peace, of malice prepenfe or aforethought either express or implied by law . . . ." 1 E. EAST, PLEAS OF THE CROWN 214 (1803 ed.), indicating only in his section on indictments that it was necessary to allege that the victim died within a year and a day of injury. Id. at 343.

71. 3 E. COKE, INSTITUTES 47, 2d ed. 1648). The common law confusion regarding the year and a day rule is further apparent from a careful examination of the Institutes. While Lord Coke included the year and a day rule in his definition of murder, he went on to indicate that the rule runs not from the time the stroke is given, but from the time of death: "whether shall the year and day be accounted after the stroke or poyfon [poison] given, or after the death? and it shall be accounted after the death . . . ." Id. at 52. It is clear that if the rule runs from the death and not the stroke, as Lord Coke states, the rule being described is a procedural limitation on the period within which an action for homicide or appeal therefrom can be brought. This is a concept which departs altogether from the standard version of the rule, which states that there can be neither murder nor manslaughter where the victim survives the injury for more than a year and day because the cause of death in such a case is unclear.

Interestingly, in support of the proposition that the year and a day requirement runs not from the stroke but from the death, Lord Coke cites the Statute of Gloucester. Id. See note 5 supra. This is the same statute that is universally cited as the source of the standard common law rule that there can be no homicide prosecution where the victim survives his injury more than a year and a day. See notes 2 and 5 and accompanying text supra.

Several hundred years of judicial interpretation notwithstanding, a literal reading of the Statute of Gloucester does indeed suggest that the Statute's year and a day requirement is intended as a limitation on the time for bringing a homicide appeal—a limitation which would logically run, as Lord Coke suggests, from the death and not the stroke. Since the Statute of Gloucester announced the literal proposition that "an Appeal of Murther", can be brought only within a year and a day after the death, then the actual common law origin of the requirement that a homicide victim must die within a year and a day after the injury received is altogether unclear. This suggests that reliance on the Statute of Gloucester as the source of the modern year and a day rule by courts and commentators—from Coke to Musmanno—may well be misplaced.

72. According to Blackstone, "[m]urder is . . . thus defined . . . by Sir Edward Coke; 'when a person, of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought . . . .'") 4 W. BLACKSTONE, COMMENTARIES 195 (1769 ed.).
illustrates the early common law confusion regarding the rule's significance.

The contention that the year and a day rule is merely a rule of evidence and not one of the common law elements of murder also finds support among American courts. The United States Supreme Court had occasion to consider the rule in *Louisville, Evansville & St. Louis Railroad v. Clarke*, where it was contended that the rule should be applied to bar recovery under Indiana's wrongful death statute. While the Court refused to extend the rule to civil cases, it did observe that in murder prosecutions “the rule was one simply of criminal evidence.”

In light of the confusion at common law regarding the significance of the year and a day rule, and the pronouncement by the United States Supreme Court that the rule is simply one of criminal evidence, it seems clear that the rule should not be treated as an element of the common law definition of murder, but rather as an evidentiary rule susceptible of judicial modification or abolition.

**CONCLUSION**

The rule that there can be neither murder nor manslaughter where the victim survives for more than a year and a day after being injured has been a part of the common law for 700 years. Recognizing the primitive state of medical knowledge, the year and a day rule served as an evidentiary safeguard against homicide prosecutions in a time when it was impossible to accurately determine the cause of death. Advances in medical knowledge have obviated the need for the rule and, in addition, have rendered it counterproductive. In cases where the cause of death is clearly established and where modern medicine prolongs a victim's life for more than 366 days after injury, the year and a day rule functions not as an evidentiary precaution but as an anachronistic obstacle to justice.

Thus, the year and a day rule is no longer a viable part of the common law and should be altered by judicial decree to conform to the advances of modern science. One viable and persuasive alternative to the rule was suggested by Judge Brett of the Oklahoma Court of Criminal Appeals, who proposed that courts should “recognize the rule as a rebuttable presumption and thus remove adju-

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74. 152 U.S. 230 (1893).

75. *Id.* at 235.

76. *Id.* at 241.
dication of such grave matters from the field of presumptive law and place it on the basis of fact to be determined by the jury upon proper proof. Recasting the year and a day rule as a rebuttable presumption of law would enable it to operate in those rare cases where the cause of death is unclear and at the same time ensure that the guilty do not go unpunished solely because their victims have the benefit of modern life-sustaining equipment.

Phillip S. Lorenzo—'80
