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Reconciling *Ex Post Facto* Analysis and Straddle Offenses: Alternative Approaches to Incomplete Crimes in *Commonwealth v. Rose*

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I. INTRODUCTION

Consider the act of throwing a ball. When is the "throw" complete? When the thrower ceases the act of throwing, or when the

ball comes to rest? The former bases its conclusion on the premise that the throw's completeness is directly tied to the act of throwing, while the latter presumes that the result is what determines the completed nature of the throw.

Apply this concept to a criminal defendant. When he sets into motion a chain of events, he is then responsible for every crime that may flow from those events, so long as the chain itself remains unbroken.[1] Legal issues develop, however, when the criminal action and its resulting crime are separated by the passage of time. Laws can change, potentially giving rise to ex post facto violations. The question is: should the prohibition on ex post facto laws attach when the criminal acts are completed, or when the crime itself results?

Ex post facto laws are most commonly associated with the criminalization of an act that was innocent when done,[2] reflecting the common law abhorrence of laws that retroactively attach a penalty to an action without affording citizens proper notice of that penalty.[3] The United States Supreme Court expanded upon these concepts in *Calder v. Bull*[4] in 1798, setting forth the four kinds of laws that are ex post facto in nature, in what is now known as "the *Calder* categories."[5] For example, when a law increases the penalty of a crime after its commission, the law violates the ex post facto clause as applied to any defendant who committed his crime prior to the legislation's enactment.[6] But what happens when the criminal acts are completed, yet the crime itself is not?[7] Seemingly, the *Calder* categories, which operate as the firmly established foundation for ex post facto jurisprudence, would conflict with one another.

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1. Taylor Wofford, *Will John Hinckley Jr. Face Murder Charges for the 'Delayed Death' of James Brady?*, NEWSWEEK (Aug. 9, 2014), http://www.newsweek.com/will-john-hinckley-jr-face-murder-charges-delayed-death-james-brady-263716.

2. Calder v. Bull, 3 U.S. 386, 390 (1798); U.S. CONST. art. I, § 9, cl. 3; 1 WILLIAM BLACKSTONE, COMMENTARIES, *46 ("[W]hen after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.").

3. BLACKSTONE, *supra* note 2, at *45–46.

4. 3 U.S. at 390.

5. *See Id.*

6. *Id.* (specifically referring to the third *Calder* category).

7. J. Richard Broughton, *On Straddle Crimes and the Ex Post Facto Clauses*, 18 GEO. MASON L. REV. 719, 725 (2011). In his article, Broughton questions whether the language of the *Calder* categories "refers merely to a completed course of [criminal] conduct . . . or whether it refers to any affirmative act on the part of the defendant that pre-dates a new law that makes that act an element of a crime." *Id.* Broughton's article addresses this issue solely with respect to the first *Calder* category. *See Calder*, 3 U.S. at 390. This article focuses on the third *Calder* category's "criminal act" versus "completed crime" debate, and will analyze the facts of Commonwealth v. Rose, 127 A.3d 794 (Pa. 2015), *petition for cert. docketed*, No. 15-1036 (U.S. Feb. 17, 2016), in light of that conclusion.

The Supreme Court of Pennsylvania recently addressed this issue in *Commonwealth v. Rose*,[8] a case involving the death of a woman fourteen years after she was beaten into a coma.[9] As the victim lay in a vegetative state, the Pennsylvania legislature amended the sentencing scheme for third-degree murder, increasing it from a mandatory sentence of ten to twenty years of imprisonment[10] to a mandatory sentence of twenty to forty years of imprisonment.[11] When the victim succumbed to her injuries more than ten years after they were inflicted, the two men who attacked her were exposed to criminal liability for her death.[12]

After one of the co-defendants was found guilty of third-degree murder and sentenced under the new sentencing regime, the question became whether this sentence was a violation of the state[13] and federal ex post facto clauses.[14] The facts of *Rose* present what has been described as a "straddling offense": the defendant completed one or more elements of the crime before the alleged ex post facto law was enacted, and satisfied the remaining elements after the law's effective date.[15] In *Rose*, the Pennsylvania Supreme Court held that, under *Calder*, an ex post facto violation exists when all of the criminal actions are done prior to the legislation's enactment, regardless of whether the crime itself is completed.[16] According to the court, Rose was unconstitutionally sentenced under the new, more punitive statute, and the sentence in place at the time he committed his criminal acts should have controlled.[17]

The facts of *Rose* are best equated to the act of throwing a ball. Although the defendant's actions were completed at the time of the attack, the result had not yet come to fruition; the ball had not yet ceased to roll. This article endeavors to explain why the Pennsylvania Supreme Court's holding in *Rose* incorrectly focuses on the

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8. 127 A.3d 794 (Pa. 2015), *petition for cert. docketed*, No. 15-1036 (U.S. Feb. 17, 2016).
9. *Id.* at 796.
10. 18 PA. CONS. STAT. § 1103(1) (1972); *see generally* Commonwealth v. Domingo Soto, 1990 WL 902476 (Pa. Super. Ct. Jan. 28, 1990).
11. 18 PA. CONS. STAT. §1102(d) (1995).
12. *Rose*, 127 A.3d at 796-97.
13. PA. CONST. art. I, § 17 ("No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."). "Ex post facto" is a Latin phrase that translates to "after the fact," but the Supreme Court of the United States has defined an ex post facto law as "penal statutes which disadvantage the offender affected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990) (citing Calder v. Bull, 3 U.S. 386, 390-92 (1798)).
14. U.S. CONST. art. I, § 9 cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").
15. Broughton, *supra* note 7, at 720.
16. *Rose*, 127 A.3d at 807 n.18.
17. *Id.*

completion of the criminal *acts* instead of on the completion of the actual crime.[18] The plain language, purpose, and traditional interpretation of the ex post facto clause and the accompanying *Calder* categories dictate that a completed crime is required to invoke the prohibition against ex post facto laws in the context of the third *Calder* category.

Parts II and III of this article set out the common law foundation of the ex post facto clause and the subsequent United States Supreme Court interpretation of the clause. Part IV addresses several important distinctions between state and federal ex post facto cases, namely the lack of coextensivity in the analysis. Part V explains the facts of *Rose* and the accompanying opinions from the Pennsylvania Supreme and Superior Courts. Part VI sets forth the analysis that this article argues is more appropriate for the issue presented in *Rose*, including (1) looking to the plain language of the *Calder* categories; (2) analyzing the case under one of the competing approaches to straddle offenses, either the Completion Approach[19] or the Continuing Offense Approach;[20] and (3) turning to double jeopardy cases for guidance. As this article concludes in Part VII, the increased sentencing statute at issue in *Rose* does not implicate the ex post facto clause, because his crime was incomplete at the time of the law's enactment. Where a defendant could not have been charged with a crime under the old law, applying a new statute to him does not violate the ex post facto clause.

II. THE COMMON LAW FOUNDATION OF THE EX POST FACTO CLAUSE

The Latin phrase "ex post facto" has been defined as "[d]one or made after the fact; having retroactive force or effect."[21] It follows that an ex post facto law is one that is enacted, or "done," after the

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18. *Id.* The court stated:

> [F]or purposes of an *ex post facto* inquiry, the Commonwealth's focus on the *result* of an individual's criminal acts—in this case, the death of the victim—is misplaced. Rather, we hold that, where a crime requires both a criminal act and a subsequent result (e.g., a homicide), the imposition of a more severe sentence based on a statute that was amended after the act was committed, but prior to the result of that act, violates the *ex post facto* prohibition.

Id.

19. Broughton, *supra* note 7, at 727; *see infra* Part VI.A.1.

20. Broughton, *supra* note 7, at 731; *see infra* Part VI.A.2.

21. *Ex post facto*, BLACK'S LAW DICTIONARY (9th ed. 2009).

fact, so as to retroactively apply to some conduct or event that occurred prior to the enactment.[22] The abhorrence of retroactive legislation dates back to Greco-Roman society,[23] and the bias against retroactive laws is clearly evidenced in the thirteenth-century English common law treatise by Sir William Blackstone, *Commentaries on the Laws of England*.[24] Blackstone's *Commentaries* relies heavily on Roman jurisprudence[25] to lay the foundation for the two purposes that came to underlie the prohibition of ex post facto clause: (1) to provide the public fair notice of new laws and their accompanying punishments,[26] and (2) to protect the public against vindictive government legislation.[27]

According to Blackstone, without proper notice of the law through "some external sign," the legislation is never properly law.[28] Blackstone refers to the objectionable practice used by the Roman Emperor, Caligula, to illustrate the necessity of notifying the public of new laws:[29] Caligula would write laws in small text, and post the laws high on pillars, making it difficult for citizens to see and understand them.[30] Caligula "effectually . . . ensnare[d]" the Roman people by making it impossible to know the law, therefore making it impossible to follow the law.[31]

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22. Note that while every "ex post facto law must necessarily be retrospective . . . every retrospective law is not an ex post facto law." Calder v. Bull, 3 U.S. 386, 391 (1798). While there is overlap between retroactivity and ex post facto arguments, an ex post facto claim requires more than a mere retroactive application of a statute; it must also disadvantage the defendant. Weaver v. Graham, 450 U.S. 24, 29 (1981).

23. *See, e.g.*, Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 499-500 (2003). Natelson provides several Roman maxims that evidence the early distaste for retroactive laws: "What the law permits in the past, it bans for the future"; "[n]o one can change his plan to the injury of another"; and "[t]he penalty for a past wrong is never increased ex post facto." *Id.* (internal citations and quotations omitted). The Framers were "intensely interested in Roman law, ideas, and examples [and American] common law and equity . . . ha[s] borrowed liberally from [the Romans]." *Id.*

24. Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 WM. & MARY BILL OF RTS. J. 439, 444 (2004) (citing Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775-77 (1936)).

25. Natelson, *supra* note 23, at 499.

26. BLACKSTONE, *supra* note 2, at *45; *see also* Broughton, *supra* note 7, at 752.

27. BLACKSTONE, *supra* note 2, at *46.

28. *Id.* at *45 (a rule of law must be "prescribed," because "a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law").

29. *Id.*; *see also* Broughton, *supra* note 7, at 751.

30. BLACKSTONE, *supra* note 2, at *46; *see also* Broughton, *supra* note 7, at 751.

31. BLACKSTONE, *supra* note 2, at *46.

Yet Blackstone believed ex post facto laws to be "an even 'more unreasonable method' than Caligula's."[32] Blackstone explained that when an action is declared a crime after it was innocently committed, punishing the actor for "not abstaining [from that action] is 'cruel and unjust.'"[33] Because the actor was not on notice of the illegality of his action or the punishment attached thereto, he had no reason to abstain from the act.[34] According to Blackstone, "[a]ll laws should be therefore made to commence in [the] futur[e], and be notified before their commencement."[35]

Blackstone also worried about the potential for the legislature to impose arbitrary or vindictive ex post facto laws, as the British Parliament was infamous for doing.[36] The Parliament passed "legislative judgments"[37] that declared "acts to be treason, which were not treason[] when committed;"[38] violated the rules of evidence by receiving evidence without oath, or allowing one witness to satisfy the burden of legal proof when the law required two;[39] and inflicted "greater punishment[] than the law annexed to the offence" at the time of the crime.[40] In *Commentaries*, Blackstone recognized the twin purposes underlying the prohibition of ex post facto laws: protecting against vindictive legislation, and providing fair notice to citizens of the effective laws and their accompanying punishments.[41] These two purposes would come to shape American ex post facto jurisprudence, evidenced by the inclusion of the ex post facto clause in the United States Constitution, and the plain language of the *Calder* categories.[42]

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32. Broughton, *supra* note 7, at 751, (citing BLACKSTONE, *supra* note 2, at *46). Note that the traditional, most basic understanding of an ex post facto law is reflected in the first category.

33. Broughton, *supra* note 7, at 752, (citing BLACKSTONE, *supra* note 2, at *45-46).

34. Broughton, *supra* note 7, at 752.

35. BLACKSTONE, *supra* note 2, at *45.

36. *See* Calder v. Bull, 3 U.S. 386, 389 (1798).

37. *Id.*

38. *Id.* (citing the case of the Earl of Strafford, in 1641).

39. *Id.* (citing the case of Sir John Fenwick, in 1696).

40. *Id.* (citing The Coventry act, in 1670 (22 & 23 Car. II. c. 1)).

41. BLACKSTONE, *supra* note 2, at *45-46.

42. *See* Weaver v. Graham, 450 U.S. 24, 29 (1981) (finding the purposes of the ex post facto prohibition to be ensuring notice of punishments and protecting against vindictive legislation). Compare the language of Blackstone to that of Justice Chase in *Calder*. *Calder*, 3 U.S. at 390. Blackstone states an ex post facto law is "when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." BLACKSTONE, *supra* note 2, at *46. The first *Calder* category is as follows: "Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder*, 3 U.S. at 390. The language and sentence structure of Blackstone's definition and the first *Calder* category are nearly identical, further showing the immense influence Blackstone had on American Constitutional jurisprudence and the interpretation of the

III. *CALDER V. BULL* AND THE SUBSEQUENT UNITED STATES SUPREME COURT INTERPRETATION OF THE *CALDER* CATEGORIES

Article 1, Section 9 of the United States Constitution states that "[n]o Bill of Attainder or ex post facto law shall be passed" under federal law,[43] and Article 1, Section 10 extends this prohibition to state laws.[44] The Framers of the Constitution included this prohibition on "after-the-fact laws" or "retroactive legislation" to ensure that federal and state legislators could not enact laws that would oppress the citizens of the newly formed United States.[45] Although the drafters of the Constitution generally agreed[46] that ex post facto laws went against "every principle of sound legislation"[47] and are among the "most formidable instruments of tyranny,"[48] the Framers still debated whether or not to include the ex post facto clause.[49] Some believed a provision prohibiting ex post facto laws was unnecessary because such laws were so obviously unenforceable.[50] In the end, however, the Framers included the clause as a precautionary measure.[51]

As stated by the United States Supreme Court, the ex post facto clause, "naked and without explanation . . . is unintelligible, and means nothing."[52] Justice Samuel Chase provided the necessary context and interpretation of the clause in the seminal ex post facto

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ex post facto clause. This suggests we should harken back to Blackstone and the foundational purposes of the ex post facto clause when interpreting modern cases. *See* discussion *infra* Part VI.B.

43. U.S. CONST. art. I, § 9 cl. 3.

44. U.S. CONST. art. I, §10 cl. 1.

45. Danielle Kitson, *It's an Ex Post Fact: Supreme Court Misapplies the Ex Post Facto Clause to Criminal Procedure Statutes*, 91 J. CRIM. L. & CRIMINOLOGY 429, 430 (2001); *see also* Ogden v. Saunders, 25 U.S. 213, 216 (1827) (The Framers included the ex post facto clause "in order to restrain the State legislatures from oppressing individuals by arbitrary sentences, clothed with the forms of legislation, and from making retrospective laws applicable to criminal matters."). The ex post facto prohibition is only concerned with legislative acts, not judicial decisions. Rogers v. Tennessee, 532 U.S. 451, 460 (2001) (rejecting the argument that because both the Due Process and Ex Post Facto Clauses protect the interests of fundamental fairness and prevention of arbitrary and vindictive legislation, the constructs of the ex post facto clause should similarly apply to judicial construction).

46. Broughton, *supra* note 7, at 750 (internal citations omitted). *See also* Natelson, *supra* note 23, at 517-22.

47. THE FEDERALIST NO. 44, at 3 (James Madison); *see also* Broughton, *supra* note 7, at 751.

48. THE FEDERALIST NO. 84, at 472 (Alexander Hamilton); *see also* Broughton, *supra* note 7, at 751.

49. Broughton, *supra* note 7, at 750.

50. *Id.* (citing James Madison, Notes on the Constitutional Convention (Aug. 22, 1787)).

51. *Id.*

52. Calder v. Bull, 3 U.S. 386, 390 (1798).

case, *Calder v. Bull*,[53] which would supply the framework for ex post facto interpretation to date.[54] The Supreme Court's interpretation in *Calder* upholds the original intent of the clause: to provide the public with notice of the consequences of unlawful behavior, and protect the public from arbitrary or vindictive legislation.

In *Calder*, Justice Chase "endeavour[s] to show what law is to be considered an ex post facto law," as the text itself requires "some explanation"[55] of the scope of the clause.[56] The *Calder* decision not only established that the ex post facto clause "unquestionably refers to crimes, and nothing else,"[57] but also reiterates that the clause's purpose is "to protect [citizens] from punishment by legislative acts, having a retrospective operation."[58] Thus, the *Calder* decision solidified English common law and Blackstone's *Commentaries* as the foundation for analyzing ex post facto cases in the United States.

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53. 3 U.S. 386 (1798). In *Calder*, a Connecticut probate court issued a decree disapproving of and refusing to record a will, which the Bulls stood to inherit. *Id.* at 386. Two years later, the Connecticut legislature set aside this decree and ordered a new hearing regarding the disputes surrounding the will. *Id.* The Calder's argued that applying the resolution of the legislature to the 1793 decree was an ex post facto violation. *Id.* The unanimous decision of the United States Supreme Court held that the ex post facto clause was not implicated because it only applied to criminal laws. *Id.* at 399 ("the true construction of the prohibition extends to criminal, not to civil, cases").

54. *See Calder*, 3 U.S. 386.

55. *Id.* at 390.

56. Broughton, *supra* note 7, at 721. *Calder* limits the scope of the ex post facto clause to criminal laws, though there is debate among scholars regarding whether this is dicta or not. *See infra* note 58.

57. *Calder*, 3 U.S. at 396.

58. *Id.* at 390. There has been some debate over whether the *Calder* court's limitation of ex post facto violations to criminal legislation is dicta. Andrew J. Gottman, *Fair Notice, Even for Terrorists: Timothy McVeigh and a New Standard for the Ex Post Facto Clause*, 56 WASH. & LEE L. REV. 591, 599 (1999) (citing Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 321 (1996) (stating the *Calder* limitation of the ex post facto clause to criminal law was dicta)). Commentators rely on two cases to illustrate this point: Fletcher v. Peck, 10 U.S. 87 (1810), and Cummings v. Missouri, 71 U.S. 277 (1866). The *Fletcher* decision did not reference *Calder* nor the categories created there within, but used the ex post facto clause and the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1, to invalidate a civil statute revoking fraudulent land grants. Gottman, *supra* at 600. The *Fletcher* Court held that an ex post facto violation could exist when a civil law retroactively repeals "absolute rights [that] have vested under [a] contract." *Fletcher*, 10 U.S. at 135; *see generally* Gottman, *supra* at 600.

In *Cummings*, the Supreme Court invalidated a loyalty oath that citizens were required to take before holding certain offices of employment. *Cummings*, 71 U.S. at 316; *see also* Gottman, *supra* at 601 n.72. Although this was a civil amendment with no criminal penalties, the Supreme Court found that there was a "punitive purpose" underlying the oath. Gottman, *supra* at 602. Given the post-Civil War context, the Court found that the legislative intent in imposing the oath was to "punish Confederate sympathizers." *Id.; see Cummings*, 71 U.S. at 328-32. While some read *Fletcher* and *Cummings* to expand the applicability of the ex post facto clause to civil legislation, allegedly turning the assertion in *Calder* that the clause only extends to criminal statutes into dicta, both cases are actually in line with recent ex post facto jurisprudence. In both cases, it was "the effect, not the form, of the law that determine[d] whether it [was] *ex post facto*." Weaver v. Graham, 450 U.S. 24, 31 (1981).

The *Calder* decision inaugurated the four categories of laws that serve as a threshold in determining whether there is an ex post facto violation. The four categories are:

> 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.[59]
>
> 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.[60]
>
> 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.[61]
>
> 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 offense, in order to convict the offender.[62]

These laws, "and similar laws, are manifestly unjust and oppressive,"[63] and are viewed as expressly prohibited by the Constitution.[64] The Framers described the ex post facto clause as a provision they "considered to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains.'"[65] The clause "imposes a requirement of notice consistent with the principle of legality" by requiring that the legislature provide fair notice of any intent to "treat conduct as criminal so that individuals may ensure that their actions conform to law."[66] This, in turn, protects against

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Because the civil laws involved in *Fletcher* and *Cummings* were held to be punitive in their effect, the application of such laws gave rise to ex post facto violations. Thus, the focus of a law, though civil in nature, may still constitute an unconstitutional ex post facto law.

59. *Calder*, 3 U.S. at 390. This is the quintessential ex post facto example. An innocent act is later criminalized, and the law attempts to reach "backward in time, before its enactment, in order to punish." Broughton, *supra* note 7, at 752. This category focuses exclusively on the criminalization of past *acts*; such *acts* are not considered criminal when carried out. Perhaps because this category is so often what is associated with ex post facto claims, there is a misconception that the categories are all "acts based." *See* discussion *infra* Part VI.B.

60. *Calder*, 3 U.S. at 390.

61. *Id.*

62. *Id.*

63. *Id.* at 391.

64. *Id.*

65. Carmell v. Texas, 529 U.S. 513, 521 (2000) (quoting THE FEDERALIST NO. 84, at 511 (Alexander Hamilton)).

66. Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 463 (2001); *see also* United States v. Lanier, 520 U.S. 259, 266 (1997) (describing the fair notice requirement as a bar on courts' application of a "novel construction of a criminal statute to conduct that neither the statute nor any prior

any attempts by the government to impose arbitrary or vindictive legislation,[67] thus furthering the two common law purposes of the ex post facto bar put forth by Blackstone.

More than two hundred years after *Calder*, courts still follow the categorical framework it established, thus protecting against common law concerns that created the ex post facto clause.[68] Courts and commentators alike have read the ex post facto clause and its interpretive *Calder* categories as serving three main functions:[69] (1) to ensure citizens are provided fair notice of crimes and their accompanying punishments;[70] (2) to protect citizens from arbitrary or vindictive legislation;[71] and (3) to protect the separation of powers.[72] While all three of these purposes are in line with the traditional interpretation of the ex post facto clause, courts have made clear that the "fundamental principle" of the clause is the fair notice requirement.[73]

Recent United States Supreme Court ex post facto cases have been decided in accordance with these purposes.[74] In *Weaver v.*

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judicial decision has fairly disclosed to be within its scope"). Note how this quote and logic seems to relate most applicably to the acts-based first *Calder* category.

67. The two policy purposes protected by the ex post facto clause—providing fair notice and abhorrence of vindictive legislation—go hand in hand: "The Clause does not prohibit the passage of arbitrary or vindictive legislation generally, but only legislation that is arbitrary or vindictive on account of its retroactive application." Andrew C. Adams, *One-Book, Two Sentences: Ex Post Facto Considerations of the One-Book Rule After* United States v. Kumar, 39 AM. J. CRIM. L. 231, 236 (2012); *see* Weaver v. Graham, 450 U.S. 24, 29 (1981).

68. *See Weaver*, 450 U.S. at 28-29 (finding the purpose of the ex post facto clause to ensure that laws provide "fair warning of their effect and permit individuals to rely on their meaning until explicitly changed").

69. Kitson, *supra* note 45, at 432-33; *see also* Derek J. T. Adler, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 FORDHAM L. REV. 1191, 1196-97 (1987); David S. DeMatteo, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (and a Convicted Sex Offender): Sex Offender Registration and Notification Laws in* E.B. v. Verniero, 43 VILL. L. REV. 581, 595 (1998); Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1276 (1998).

70. *Weaver*, 450 U.S. at 28-29. *See also* BLACKSTONE, *supra* note 2, at *46 ("[I]t is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.").

71. *Weaver*, 450 U.S. at 29.

72. *Id.* at 29 n.10 (citing Ogden v. Blackledge, 6 U.S. 272, 277 (1804)) (The ex post facto clause "upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law."); *see* WAYNE R. LAFAVE, CRIMINAL LAW 116 (5th ed. 2010) (the clause protects the separation of powers in that it "assures the legislature can make recourse to stigmatizing penalties of the criminal law only when its core purpose of deterrence could thereby possibly be served.").

73. Wallace v. State, 905 N.E.2d 371, 377 (Ind. 2009) ("The underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties.").

74. *See, e.g.*, *Weaver*, 450 U.S. at 29.

Graham,[75] the high court interpreted the *Calder* categories and the common law concerns surrounding ex post facto laws as requiring two elements for a criminal law to be ex post facto: (1) it must be retrospective, meaning the law applies to events occurring before its enactment;[76] and (2) it must disadvantage the offender in its application.[77] Although the Supreme Court has never had occasion to address the distinction between the criminal acts referenced in the first category and the completed crimes of the other categories, the Court's recent decision in *Peugh v. United States*[78] could be interpreted as doing just that. In *Peugh*, the defendant was convicted of bank fraud for crimes completed during 1999 and 2000.[79] He was not sentenced, however, until 2010, after the penalty for bank fraud was increased in 2009.[80] The court found that application of the 2009 Guideline to Peugh constituted a third *Calder* category ex post facto law, as the new law was "promulgated after [the defendant] committed his criminal *acts*."[81]

The primary holding of *Peugh*, however, was that federal sentencing guidelines—which are not mandatory[82]—can still implicate the ex post facto clause, an issue that was previously debated amongst federal courts.[83] The question of whether Peugh's crime was completed at the time of the new law's enactment was not at issue; in fact, his subsequent trial had already begun when the law became effective.[84] Thus, *Peugh* does not control in a case like *Rose*, where the dispositive question is whether the prohibition on ex post facto laws applies only to completed crimes. In fact, the Supreme Court's interchangeable use of "acts," "offense," and "crime" in *Peugh* suggests that it has not contemplated the idea that a criminal's actions and the resultant crime may take place at distinct moments in time,

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75. 450 U.S. 24 (1981).

76. *Id.* at 29; *see also id.* at 29 n.11, (citing Jaehne v. New York, 128 U.S. 189, 194 (1888) (legislation is void if it "should endeavor to reach by its retroactive operation acts before committed")).

77. *Weaver*, 450 U.S. at 29; *see also* Lindsey v. Washington, 301 U.S. 397, 401 (1937).

78. 133 S. Ct. 2072 (2013).

79. *Id.* at 2078.

80. *Id.*

81. *Id.* (emphasis added).

82. *See generally* United States v. Booker, 543 U.S. 220 (2005); see *infra* note 102.

83. *Peugh*, 133 S. Ct. at 2079 (discussing United States v. Demaree, 459 F.3d 791 (7th Cir. 2006); *compare Demaree*, 459 F.3d 791, *and* United States v. Deegan, 605 F.3d 625 (8th Cir. 2010), *with* United States v. Turner, 548 F.3d 1049 (D.C. Cir. 2008), *and* United States v. Ortiz, 621 F.3d 82 (2d Cir. 2010) (rejecting the position that advisory sentencing Guidelines cannot implicate the ex post facto clause); *see also infra* part IV.

84. *Peugh*, 133 S. Ct. at 2078.

and be separated by a change in the law.[85] This conflation of terms is rampant throughout United States Supreme Court ex post facto opinions, indicating that the critical distinction inherent in these words seems to have been lost not only on the Pennsylvania Supreme Court in *Rose*, but also on the United States Supreme Court as well.[86]

IV. RECONCILING INHERENT DISPARITIES BETWEEN STATE AND FEDERAL EX POST FACTO ANALYSIS

The *Peugh* decision brings to light some inherent issues in applying federal ex post facto analysis to any state court case. Pennsylvania, like other states, has adopted the Supreme Court's requirements that a law must be retrospective[87] and disadvantageous to the defendant[88] to constitute an ex post facto violation.[89] The Pennsylvania Supreme Court has strictly adhered to the *Calder* categories in making ex post facto determinations,[90] which is the proper method of analysis according to the Supreme Court of the United States.[91] In its prior decisions, the Pennsylvania Supreme Court has been reluctant to find ex post facto violations,[92] and in some

85. *See id.* The court states that the question in *Peugh* is "whether there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal *acts* and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the *offense*." *Id.* (emphasis added). In this one sentence, the court uses the words "acts" and "offense" to describe the exact same event. Additionally, even if the Supreme Court did deliberately use these words interchangeably, *Peugh* would still be inapplicable to *Rose* because the crime in *Peugh* was not a straddling offense. *See* discussion *infra* Part VI.A. The elements of bank fraud were fully satisfied in conjunction with the criminal acts, unlike in *Rose*.

86. *See* discussion *infra* Part VI.B.

87. Commonwealth v. Young, 637 A.2d 1313, 1317 (Pa. 1993) ("[O]nly those retrospective laws . . . violate the prohibition against ex post facto legislation.").

88. *Id.* at 1318 ("Only those laws which disadvantage a defendant . . . are ex post facto laws and constitutionally infirm.").

89. Note that the ex post facto clause does not apply to "procedural" retroactive statutes—defined as any change in the "procedures by which a criminal case is adjudicated"—unless the procedural statute infringes upon a substantial right. Collins v. Youngblood, 497 U.S. 37, 45 (1990). An example of such would be a law that "affects matters of substance . . . by depriving a defendant of substantial protections with which the existing law surrounds the person accused . . . or arbitrarily infringing upon substantial personal rights." *Id.* (internal citations and quotations omitted). Because the statute involved here is not procedural in nature, this issue will not be discussed in this article.

90. *Young*, 637 A.3d at 1317 (Only laws "encompassed by the *Calder* categories violate the prohibition against ex post facto legislation."); *id.* at 1318 ("Only those laws which . . . fall within a *Calder* category are ex post facto laws.").

91. Carmell v. Texas, 529 U.S. 513, 539 (2000) ("[I]t was a mistake to stray *beyond Calder*'s four categories" in previous holdings.); *see Collins*, 497 U.S. at 49 ("[D]eparture from *Calder*'s explanation of the original understanding of the *Ex Post Facto* Clause was, [the court held], unjustified.").

92. *See Young*, 637 A.2d at 1317-18 (holding that a later-enacted law that allowed defendant to be sentenced to death was not an ex post facto violation because he "faced exactly

instances even avoided extending the protection of the clause on an as-applied basis.[93] While the United States Supreme Court's interpretation of the ex post facto clause is of course a necessary consideration in any ex post facto analysis,[94] the outcomes of *federal* ex post facto decisions must be critically evaluated in light of issues that are only present at the federal level.

Article 1, Section 17 of the Pennsylvania Constitution states that "[n]o *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."[95] This clause is almost verbatim to the clause found in the United States Constitution,[96] and the Pennsylvania Supreme Court has stated that ex post facto determinations under both constitutions are comparable.[97]

But "comparable" is not necessarily identical. Closer examination of the issues involved in federal ex post facto cases—specifically with respect to sentencing statutes that would implicate the second and third *Calder* categories—presents questions about whether complete coextensivity in ex post facto analysis truly exists between the state and federal courts.[98] In other words, presented with the same set of facts, would a federal court rule exactly the same way

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the same potential punishment" and there was no increase in his potential sentence); Dial v. Vaughn, 733 A.2d 1, 5-6 (Pa. Commw. Ct. 1999) (holding that requiring convicts to submit DNA samples before they were released on parole was not ex post facto because the law was not penal and was something prisoners could have reasonably contemplated); Commonwealth v. Gaffney, 733 A.2d 616, 622 (Pa. 1999) (finding no ex post facto violation in requiring sex offender registration); Commonwealth v. Allshouse, 985 A.2d 847, 865 (Pa. 2009), *rev'd on other grounds*, 131 S. Ct. 1597 (2011) (holding that a law allowing admission of hearsay statements from a child abuse victim was not ex post facto because it "simply *expanded* the class of persons whose out-of-court statements [were] admissible," and did not alter the "type of evidence sufficient to support a conviction.") (emphasis in original).

93. *See* Cimaszewski v. Bd. of Prob. & Parole, 868 A.2d 416, 428 (Pa. 2005) (stating that although the law in question could violate the ex post facto clause, the defendant did not sufficiently show that the statute created a "significant risk" of increasing his punishment).

94. For example, the Supreme Court's interpretation that a law must be retrospective, disadvantage the defendant, and not provide fair notice is relevant both in a state and federal law ex post facto analysis. *See* Weaver v. Graham, 450 U.S. 24, 29 (1981).

95. PA. CONST. art. I, § 17.

96. *Compare* PA. CONST. art. I, § 17, *with* U.S. CONST. art I, § 9; *see also Allshouse*, 985 A.2d at 861 ("[T]he ex post facto clauses of the United States and Pennsylvania Constitutions are virtually identical in language.").

97. *Young*, 637 A.2d at 1317 n.7; *see also* Commonwealth v. Rose, 81 A.3d 123, 127 (Pa. Super. Ct. 2013) (en banc), *aff'd*, 127 A.3d 794 (Pa. 2015) (internal citations omitted) ("Our Supreme Court has opined that the same pre-revolutionary-war concerns shaped the ex post facto provisions of the constitutions of Pennsylvania and the United States. Accordingly, the standards applied to determine an ex post facto violation under the Pennsylvania Constitution and the United States Constitution are comparable.").

98. *See, e.g.*, Doe v. Dep't. of Pub. Safety & Corr. Servs., 62 A.3d 123, 136 (Md. 2013) (refusing to follow *Collins v. Youngblood*, 497 U.S. 37 (1990), on state law grounds).

as the state supreme court? As this section explains, complete co-extensivity is impossible with respect to federal and state sentencing guidelines as potential ex post facto violations. State courts must be aware of this fact when turning to federal sentencing ex post facto cases for direction. This is true for two reasons: first, the debate over whether federal sentencing guidelines are mandatory or advisory has muddled the ex post facto analysis;[99] and second, federal district courts are actually required to apply the sentencing guidelines in effect at the time of sentencing.[100]

First, until *Peugh*,[101] there was substantial debate over whether federal sentencing guidelines were mandatory or advisory, and whether advisory guidelines could even implicate the ex post facto clause.[102] The logic was that if a law was not mandatory, then a

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99. Peugh v. United States, 133 S. Ct. 2071, 2081 (2013); *see also infra* note 102. There was also previously substantial confusion over whether the ex post facto clause applied to statutes imposing procedural rather than substantive changes in the law, which could have an equally drastic distorting effect on prior holdings. *Collins*, 497 U.S. at 45 ("We think [language from previous Supreme Court cases] has imported confusion into the interpretation of the *Ex Post Facto* Clause" with respect to the procedural versus substantial debate.). This issue, however, is outside the scope of this article as the statute in *Commonwealth v. Rose*, 127 A.3d 794 (Pa. 2015), is not procedural in nature; *see supra* text accompanying note 66.

100. 18 U.S.C. § 3553(a)(4)(A)(ii) (2012).

101. *See Peugh* 133 S. Ct. at 2081.

102. Adams, *supra* note 67 at 245-51 (stating that circuits are split over whether the post-*Booker* advisory Guidelines can be applied retroactively without raising ex post facto concerns). *See* Gregory S. Dierdorf, *Yes, We Were Wrong; No, We Will Not Make It Right: The Seventh Circuit Denies Post-Conviction Relief From An Undisputed Sentencing Error Because It Occurred In The Post-*Booker*, Advisory Guidelines Era*, 9 SEVENTH CIR. REV. 301, 301-04 (2014). Before 1984, judges were afforded complete discretion in sentencing defendants, creating an inconsistent application of the federal sentencing scheme. *Id.* at 303. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989). To combat this disparity and achieve uniformity in federal sentencing, Congress enacted the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (2012), which created uniform federal Sentencing Guidelines. Dierdorf, *supra* at 304. The Guidelines "serve as a rubric for calculating the appropriate sentencing range for 'each category of offense involving each category of defendant.'" *Id.* (quoting 28 U.S.C. § 994(b)(1) (2012)). The Sentencing Guidelines were originally said to be binding on all federal sentencing judges, i.e., mandatory, and thus subject to potential ex post facto violations. *Mistretta*, 488 U.S. at 367. *See also* Sarah French Russel, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 90 (2012).

However, in United States v. Booker, 543 U.S. 220 (2005), the United States Supreme Court modified the Guidelines, making them advisory rather than mandatory to remedy the Sixth Amendment violation disputed in *Booker*. *Id.*; *see also* Dierdorf, *supra* at 304. Now, although a sentencing court must still consider the relevant Guidelines, the court may depart from the recommended sentencing range so long as it explains its rationale with respect to the sentencing factors set forth in the Guidelines. *Booker*, 543 U.S. at 226; *see also* Dierdorf, *supra* at 304. The Supreme Court's imposed alteration means that the post-*Booker* Guidelines should no longer give rise to ex post facto concerns. *Peugh*, 133 S. Ct. at 2081.

The recent decision in *Peugh* reintroduced confusion into this matter by holding that advisory sentencing schemes may still violate the ex post facto clause because even though the Guidelines are more like "guideposts" than "fences," district courts are unlikely to waiver from the guidelines, thus creating the "legally binding effect" of a mandatory sentencing range. *Id.* at 2086. According to the *Peugh* court, because district courts must "begin their

judge may use discretion in applying it.[103] This essentially removes the ability to prove that the law "disadvantaged [the] offender."[104] If a federal district court judge may, in her discretion, increase or decrease the defendant's sentence based on the specific facts at hand, imposing a sentence lower than the guidelines would not disadvantage the defendant, and imposing a sentence higher than the guidelines would be a "regular excessive sentence" issue.[105] Any further disagreement over the sentence would then be considered error on the part of the judge, subject to the abuse of discretion standard of review.[106]

Before *Peugh*, the federal courts debated whether the Guidelines were mandatory or advisory.[107] Disagreement over this threshold determination may have skewed federal ex post facto analysis in those cases. For example, if the facts of a case plainly indicated an ex post facto violation in the retroactive application of a federal sentencing guideline, but the reviewing court believed that advisory laws could not be ex post facto, the court would find no violation in retroactively applying the Guideline.[108] However, Pennsylvania,[109] along with several other states, imposes mandatory sentencing guidelines.[110] Thus, if one looks to federal ex post facto precedent

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sentencing analysis with the Guidelines . . . and use them to calculate the sentencing range correctly" those Guidelines will "anchor" the district court's discretion. *Id.* at 2087. Justice Scalia dissented, stating that the flexible nature of advisory sentencing guidelines could not raise ex post facto concerns, *id.* at 2091 (Scalia, J., dissenting), but even if they could, the "'risk of an increased sentence created [would not] be 'sufficient' for *ex post facto* purposes." *Id.* at 2092.

103. *Peugh*, 133 S. Ct. at 2083 ("[S]entencing courts possess discretion to deviate from the recommended sentencing range.").

104. Weaver v. Graham, 450 U.S. 24, 29 (1981) (to constitute an ex post facto law, the statute "must disadvantage the offender affected by it.").

105. *See generally Peugh*, 133 S. Ct. at 2089 (Thomas, J., dissenting).

106. *Id.* at 2080.

107. The disagreement over this issue is referenced in the past tense because the *Peugh* decision seemingly resolves the debate by holding that while the guidelines are advisory, they can still implicate the ex post facto clause. *See generally id.* at 2085-88. However, some courts have declined to follow this holding. *See, e.g.*, United States v. Vallone, 752 F.3d 690, 700 (7th Cir. 2014). The Seventh Circuit specifically applied the *Peugh* holding to a conspiracy straddle crime, *see discussion infra* Part VI, and found that *Peugh* was inapplicable, at least in the context of straddling offenses. *Vallone*, 752 F.3d at 693-95. It is yet to be seen whether this issue is truly resolved or not.

108. Ignoring the debate over the mandatory or advisory nature of federal sentencing guidelines would be akin to ignoring a court's threshold determination of standard of review. If we do not understand that the court applied strict scrutiny over intermediate scrutiny, it is manifestly more difficult to understand why the law was found to be invalid.

109. 204 PA. CONS. STAT. § 303.9(h) (2014).

110. *See generally* Neal B. Kauder and Brian J. Ostrom, *State Sentencing Guidelines: Profiles and Continuum*, NAT'L CTR ST. CTS. (July 2008), http://www.ncsc.org/~/media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx (finding that Alaska, Kansas, Michigan, Minnesota, New York, North Carolina, Oregon, and Washington all impose mandatory sentencing guidelines).

without fully understanding the underlying "mandatory versus advisory" tension, a case may misleadingly appear analogous when it is not, or vice versa.

Second, federal district courts are actually mandated to apply the Guidelines in effect at the date of sentencing.[111] Indeed, the Supreme Court's decision in *Peugh* is predicated on this statute, and the justices held that when the crime was already completed and the sentencing guidelines were amended during the trial phase, the district court must apply the pre-amended guidelines.[112] Again, the crimes in *Peugh* were not only completed when the new sentencing guidelines were enacted, but the defendant's subsequent trial had also already begun.[113] This requirement that judges apply the sentencing guidelines in effect on the date of sentencing is *only* a federal requirement.[114]

In light of the distinctions between state and federal sentencing guidelines, complete coextensivity among the state and federal application of the ex post facto clause is impossible. While federal ex post facto law cases and analysis are certainly instructive, they must be read critically with respect to their applicability to state court cases.[115] State courts should keep in mind that cases arising within the context of the federal Guidelines implicate many issues that are not present in state law ex post facto cases, and such issues may skew the outcome of the federal case.

V. *COMMONWEALTH V. ROSE*

On July 13, 1993, Stevenson Leon Rose ("Rose") and Shawn Sadik ("Sadik") attacked Mary Mitchell ("Mitchell") in a public park in Pittsburgh, Pennsylvania.[116] For more than twenty minutes, Rose and Sadik beat and stomped Mitchell, kicking her approximately sixty times, and stabbed her to the point of nearly severing her throat.[117] Rose and Sadik also shoved a sixteen-inch piece of metal

111. 18 U.S.C. § 3553(a)(4)(A)(ii) (2012).
112. *Peugh*, 133 S. Ct. at 2088.
113. *Id.* at 2078-79.
114. 18 U.S.C. § 3553(a)(4)(A)(ii).
115. Because straddle offenses have only been significantly addressed on the federal level, this article is forced to apply the logic of several federal cases in its analysis of straddle crimes. *See* discussion *infra* Part VI.A. In the interests of candor, it is important to understand the inherent limitations of that application.
116. Commonwealth v. Rose, 127 A.3d 794, 796 (Pa. 2015), *petition for cert. docketed*, No. 15-1036 (U.S. Feb. 17, 2016).
117. *Id.*

into Ms. Mitchell's vagina before leaving her unconscious in a pool of her own blood.[118]

Around 3:00 a.m. on July 13th, two men discovered Mitchell—bleeding and naked—lying in the park.[119] Mitchell was transported by ambulance to the hospital, where doctors determined that she was in a comatose state.[120] The next morning, Pittsburgh police officers apprehended Rose and Sadik based on evidence linking them to Mitchell's attack.[121] On September 3, 1993, Rose was charged[122] with criminal attempted homicide,[123] aggravated assault,[124] involuntary deviate sexual intercourse,[125] recklessly endangering another person,[126] and criminal conspiracy with Sadik.[127] Following a jury trial on January 24, 1994, Rose was found guilty on all counts, and on March 16, 1994 was sentenced to fifteen to thirty years in prison.[128]

During the three months following her attack, doctors were able to stabilize Mitchell's condition, but she remained in a nearly vegetative state for approximately fourteen years.[129] On September 17, 2007, Mitchell died from complications related to a lack of brain function directly resulting from the injuries she suffered in 1993 at the hands of Rose and Sadik.[130] Rose was charged with criminal homicide on January 24, 2008,[131] based on the now fatal 1993 attack

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118. Commonwealth v. Rose, 81 A.3d 123, 125 (Pa. Super. Ct. 2013) (en banc), *aff'd*, 127 A.3d 794 (Pa. 2015).

119. *Rose*, 127 A.3d at 796.

120. *Id.*

121. *Id.*

122. *Id.* Rose was charged in the Court of the Common Pleas of Allegheny County, Criminal Division, at Docket No. CC-1993-09829.

123. 18 PA. CONS. STAT. § 901(a) (1972).

124. *Id.* at § 2702(a)(1).

125. *Id.* at § 3123(1)-(2).

126. *Id.* at § 2705.

127. *Id.* at § 903; *see* Commonwealth v. Rose, 127 A.3d 794, 796 (Pa. 2015).

128. *Rose*, 127 A.3d at 796.

129. Commonwealth v. Rose, 81 A.3d 123, 125 (Pa. Super. Ct. 2013) (en banc), *aff'd,* 127 A.3d 794 (Pa. 2015).

130. *Id.* Following her death, Allegheny County Medical Examiner Dr. Karl Williams concluded, to a reasonable degree of medical certainty, that there was an unbroken chain of events from the time that Rose and Sadik attacked Mitchell until the day she died. *Id.* In other words, despite the fact that Ms. Mitchell died from pneumonia, her death was a direct result of her weakened state from being in a coma for fourteen years, which left her unable to fight off the pneumonia. While causation could well be an issue in other delayed death cases, it is not an argument Rose has chosen to bring on appeal, and is therefore not discussed in this article.

131. 18 PA. CONS. STAT. § 2501(A).

on Mitchell.[132] After a six-day trial, the jury found Rose guilty of third-degree murder.[133]

The case then proceeded to the sentencing phase, which raised various questions regarding the appropriate sentencing guidelines to apply to the third-degree murder charge. When Rose and Sadik assaulted Mitchell in 1993, the sentencing statute in effect at the time attached a sentence of ten to twenty years' imprisonment for the crime of third-degree murder.[134] In 1995, the Pennsylvania legislature amended the sentencing guidelines and increased the sentence for third-degree murder to a statutory range of twenty to forty years' imprisonment.[135] The trial court ultimately sentenced Rose to prison for twenty to forty years under the 1995 amended sentencing guideline because "the applicable guidelines and the statutory maximums that were in effect on the date of the victim's death [were] the appropriate ones to apply."[136] The trial court's application of the new sentencing guideline was seemingly in line with the general rules of sentencing.[137]

Rose appealed the legality his third-degree murder sentence to the Superior Court of Pennsylvania [hereinafter "Superior Court"],[138] arguing that he should have been sentenced under the

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132. Rose was charged in the Court of Common Pleas of Allegheny County, Criminal Division, Docket No. CC-2008-00810.

133. *Rose*, 127 A.3d at 797. *See* 18 PA. CONS. STAT. § 2502(c). Pennsylvania defines murder as the following: (a) murder of the first degree is an intentional killing; (b) murder of the second degree "is committed while [a] defendant was engaged as a principal or an accomplice in the perpetration of a felony"; and (c) murder of the third degree is "all other kinds of murder" and shall be a felony of the first degree. *Id.*

134. 18 PA. CONS. STAT. § 1103(1); *see also* Commonwealth v. Green, 431 A.2d 918, 919-20 (Pa. 1981) (stating that § 1103 imposed a sentencing range of ten to twenty years' imprisonment for the crime of third-degree murder).

135. 18 PA. CONS. STAT. § 1102(d).

136. Transcript of Sentencing at 28, Commonwealth v. Rose, No. CP-02-CR-0000810-2008 (Ct. Com. Pl. Allegheny Cty. Dec. 7, 2010).

137. As explained by the Third Circuit Court of Appeals, "we will continue to expect that district courts will calculate the applicable sentencing ranges using the Guidelines extant at the time of sentencing." United States v. Wise, 515 F.3d 207, 220 (3d Cir. 2008). Under the common law and the *Calder* understanding of the ex post facto clause, "courts must compare the punishment affixed to the crime at the time of the offense with the punishment affixed at the time of sentencing. [Only] [i]f the latter is harsher than the former, the court must apply the punishment in effect at the time of the offense." Peugh v. United States, 133 S. Ct. 2072, 2094 (2013). While this is the general rule for federal sentencing, there is no such rule in Pennsylvania. However, it is not uncommon for the Pennsylvania state judiciary to look to the Third Circuit for guidance at times. Because the trial court determined that the crime of murder was not completed until Mitchell's death in 2007—twelve years after the new sentencing guideline took effect—the new sentencing guideline was the "punishment in effect at the time of the offense." *Id.*

138. The Superior Court is the intermediate appellate court in Pennsylvania, which handles criminal appeals from the Pennsylvania Courts of Common Pleas. THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, http://www.pacourts.us/learn/ (last visited Mar. 14, 2016).

more lenient guidelines in effect in 1993, when he attacked Mitchell.[139] A three-judge panel of the Superior Court agreed and reversed the trial court's sentence on the grounds that the application of the new sentencing guideline was a violation of the ex post facto clause of both the Pennsylvania[140] and United States Constitutions.[141] This opinion was vacated when the Commonwealth was granted a rehearing en banc,[142] but a nine-judge panel again found for Rose, holding that the statute in effect at the time of the attack was the proper sentencing guideline.[143] Judge Susan Gantman filed a dissenting opinion where she stated that because the crime of murder is "committed only when the victim of the assault dies[,]" the trial court's imposition of the heightened sentence was proper.[144]

The Commonwealth petitioned the Pennsylvania Supreme Court to review the Superior Court's opinion,[145] which it granted to address the following issue:

> Whether the Superior Court erred in concluding, as a matter of first impression, that [Rose] was entitled to a reduced punishment under the *ex post facto* clause for a murder that he had yet to commit when the law was changed to increase the punishment prior to the victim's death?[146]

Rose asserted that the application of Pennsylvania's amended sentencing guideline fell within the third *Calder* category;[147] specifically, that the amendment inflicted a greater punishment than what was annexed to the crime when it was committed.[148] The question for the Supreme Court was whether the crime of murder was "committed" in 1993 for the purposes of the ex post facto

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139. Commonwealth v. Rose, 81 A.3d 123, 126 (Pa. Super. Ct. 2013) (en banc), *aff'd*, 127 A.3d 794 (Pa. 2015).

140. PA. CONST. art. I, § 17 (stating "[n]o *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed").

141. U.S. CONST. art. I, § 9, cl. 3 (applying the Ex Post Facto Clause to the federal government); U.S. CONST. art. I, § 10 (applying the Ex Post Facto Clause to the state governments).

142. En banc comes from the French term "on the bench;" *see En Banc*, BLACK'S LAW DICTIONARY (9th ed. 2009). In Pennsylvania, normally three Superior Court judges preside over an appeal, but a party may move to have the court re-hear the case *en banc*, meaning that nine active judges will hear the case instead. PA. R. APP. P. 3103(a)(1).

143. *Rose*, 81 A.3d at 136.

144. *Id.* at 136-37 (Gantman, J., dissenting).

145. Commonwealth v. Rose, 95 A.3d 274 (Pa. 2014).

146. *Id.*

147. *Rose*, 81 A.3d at 134.

148. Calder v. Bull, 3 U.S. 386, 390 (1798).

clause.[149] Essentially, the court addressed whether or not completion of the crime—which occurred upon Mitchell's death—is necessary for a later enacted sentencing guideline to constitute an ex post facto law.

The Pennsylvania Supreme Court affirmed the en banc Superior Court ruling on November 18, 2015.[150] Relying on a North Carolina Supreme Court decision, *State v. Detter*,[151] the court found that "'for purposes of the prohibition against Ex post facto legislation, we hold that the date(s) of the murderous acts rather than the date of death is the date the murder was committed.'"[152] The *Detter* decision is often cited for its premises that (1) the "date of an offense for one purpose, such as meeting the statutory elements of a crime, may be different than the date of the offense for another purpose, such as an *ex post facto* inquiry[,]"[153] and (2) choosing between the time a fatal blow is struck or the time of death for ex post facto purposes "'should be dictated by the nature of the inquiry.'"[154]

Using *Detter* as foundation, the *Rose* court concluded that "the date on which all of the elements of the statutory crime of third-degree murder are met, including the death of the victim, is not dispositive" in ex post facto analysis.[155] Rather, the law that should control is that which is in effect at the time when the criminal actions are undertaken. The court quoted several United States Supreme Court cases and Blackstone to support this conclusion,[156] before stating that one of the underlying rationales of the ex post facto clause, fair notice, is consistent with the acts-based application of the clause.[157] After finding that Rose had no fair notice that he could face a forty-year prison sentence if Mitchell died,[158] the court

149. *Rose*, 95 A.3d at 274.
150. Commonwealth v. Rose, 127 A.3d 794, 807 (Pa. 2015).
151. 260 S.E.2d 567 (N.C. 1979).
152. *Rose*, 127 A.3d at 801 (quoting State v. Detter, 260 S.E.2d 567, 590 (N.C. 1979).
153. *Id.* at 802.
154. *Id.* at 801 (quoting *Detter*, 260 S.E.2d at 590).
155. *Id.* at 802-03.
156. *See id.* (citing Beazell v. Ohio, 269 U.S. 167 (1925) and De Veau v. Braisted, 363 U.S. 144 (1960)); *id.* at 803-04 (citing Weaver v. Graham, 450 U.S. 29 (1977)); *id.* at 804-05 (citing Collins v. Youngblood, 467 U.S. 37 (1990) and BLACKSTONE, *supra* note 2).
157. *Id.* at 805-06 ("This focus on acts is consistent with one of the Ex Post Fact Clause's underlying rationales—fair warning.").
158. *Id.* at 806. This argument seems shaky, as there are so many variables that could have changed the outcome of this case. The causal chain of events linking Rose to Mitchell's death could have broken; the District Attorney could have chosen not to bring murder charges; the jury could have found Rose guilty of first-degree murder instead of third. Based on the last scenario, it is hard to imagine that Rose was not effectively "on notice" that he may receive a punishment of forty years in prison. He and his co-defendant beat Mitchell for nearly half an hour, kicked her more than fifty times, and repeatedly stomped on her head; at some point, these acts cross over into intentional murder, and Rose would be on notice

held that "the Commonwealth's focus on the *result* of an individual's criminal acts—in this case, the death of the victim—is misplaced."[159] As the remaining sections of this article will show, the *Rose* court's holding is inconsistent with the plain language of the *Calder* categories.

First, though, the court's reliance on several cases is misplaced. For example, the *Detter* decision involved a law that imposed the death penalty for the charged crime of first-degree murder.[160] In *Detter*, the defendant poisoned her husband on various occasions over the course of several months, during which the highest penalty for first-degree murder was life imprisonment.[161] The victim, however, did not die from the poisoning until after the death penalty became the effective punishment, and the North Carolina Supreme Court held it would violate the ex post facto clause to subject the defendant to death.[162] In relying on *Detter*, the *Rose* court failed to at least make note of the fact that the death penalty may have complicated the ex post facto analysis in *Detter* simply because "death is different."[163] As the United States Supreme Court has noted, there is a "'qualitative difference between death and all other penalties,'"[164] and it is this difference that makes any case involving the death penalty effectively have an asterisk next to it when applied outside the capital punishment realm.[165] Because *Rose* does not involve an ex post facto death penalty statute, the *Detter* decision

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that his crime may, in fact, get him sentenced to life in prison. Thus, I do not find particular credence in this conclusion made by the court.

159. *Rose*, 127 A.3d at 807 (emphasis in original).

160. State v. Detter, 260 S.E.2d 567, 572 (N.C. 1979).

161. *Id.* at 589. The court stated:

> [D]efendant committed all of her efforts to kill her husband in January, February and March, 1977. At that time, the penalty in this State for first-degree murder was life imprisonment . . . The deceased died on 9 June 1977. Our new death penalty statute . . . became effective 1 June 1977.

Id. (internal citations omitted).

162. *Id.*

163. Deborah W. Denno, *"Death Is Different" and Other Twists of Fate*, 83 J. CRIM. L. & CRIMINOLOGY 437, 439-40 (1992); *see also* Furman v. Georgia, 408 U.S. 238, 287-89 (1972) (Stewart, J., concurring):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

164. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) (quoting Harmelin v. Michigan, 501 U.S. 957, 1006 (1991)).

165. Further analysis of the *Detter* opinion supports this premise. At the time of the decision, the rule in North Carolina was that "murder is a crime requiring both an act and a result[,]" and because the crime of murder is not complete until the resulting death occurs, the crime "occurs" at the time of death. *Detter*, 260 S.E.2d at 590 (relying on State v. Williams, 49 S.E.2d 617 (N.C. 1948). But the *Detter* court rejected this logical rule by finding that, for ex post facto analysis, "the date(s) of the murderous acts rather than the date of

should not warrant as much weight as the Pennsylvania Supreme Court granted it.

The *Rose* court cited three other cases to bolster its emphasis on criminal acts over completed crimes:[166] *People v. Gill*,[167] *State v. Masino*,[168] and *State v. Debney*.[169] While these cases are instructive, they do not implicate the third *Calder* category, and should not be treated as particularly persuasive. The *Gill* and *Masino* decisions both involved situations where new crime categories were created after the commission of the offense.[170] This is not analogous to *Rose*. Of course, because there is not significant precedent for this issue, the court must look to analogize where it can, but it also must recognize distinctions when necessary. The *Calder* categories are not a cohesive unit; the analysis or logic of one category does not apply carte blanch to the three other categories.[171] Thus, relying on *Gill* and *Masino*—two cases that do not implicate a third *Calder* category law—is improper. In those two instances, the proper focus may very well be on criminal acts, but that does not mean that the same is true for factual scenarios invoking the third category.

Further, in *Debney*, the issue was not one of ex post facto concern, but rather was jurisdictional.[172] The court had to decide where the murder "occurred" for the purposes of charging the defendant; did it occur where the blows were inflicted, or where the death physically occurred?[173] In that context, the murder charges were to be brought in the jurisdiction where the blows were inflicted.[174] The

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death is the date the murder was committed." *Id.* The *Rose* court adopts this same premise, something that seems counterintuitive. How can a murder be "committed" when the victim is not dead yet? Like Rose, the defendant in *Detter* could not have been charged with or convicted of murder when the old sentencing scheme was in effect. But unlike Rose, Detter's new sentencing statute imposed the death penalty. It would appear that the *Detter* court was unwilling to impose the harshest penalty, and instead relied on the acts-based theory of ex post facto laws to get around the logical rule of *Williams*.

166. Commonwealth v. Rose, 127 A.3d 794, 802-806 (Pa. 2015).

167. 6 Cal. 637 (1856).

168. 43 So.2d 685 (La. 1949).

169. 64 N.W. 446 (Neb. 1895).

170. *See* Calder v. Bull, 3 U.S. 386, 390 (1798); State v. Masino, 43 So.2d 685, 686 (La. 1949) (noting that defendants committed negligent acts between July of 1940 and May of 1942 that led to the deaths of several persons, but the crime of negligent homicide was not created until July of 1942); *see also Gill*, 6 Cal. at 637. Though the *Gill* decision may appear facially applicable to *Rose*, as it also involves the delayed death of the victim, the year of this decision cannot be ignored. *Id. Gill* was decided in 1856, when our criminal jurisprudence was still very much tied to criminal acts, as it was at common law. *Id.* Since this time, though, we have moved away from acts-based analysis of crimes, indicating the *Rose* court placed significant weight in the outdated logic of *Gill*.

171. *See* discussion *infra* part VI.B.

172. *Debney*, 64 N.W. 446, 446-47 (Neb. 1895).

173. *Id.* at 447-48.

174. *Id.*

Rose court cited *Debney* for its own premise immediately after citing *Detter* for the idea that a crime may be complete for one purpose but not for another.[175] If we accept *Detter*'s logic, however, the *Debney* decision is easily distinguishable from *Rose* because while it may be logical for jurisdictional purposes to assign jurisdiction based on where most, if not all, of the criminal acts took place, it does not follow that this logic should be extended to the ex post facto realm.

Second, the *Rose* court cited several United States Supreme Court decisions to support its conclusion that the High Court intended the ex post facto prohibition to attach to criminal actions, not just completed crimes.[176] Again, though, the *Rose* court failed to provide any context for these cases and their holdings. Just as the ex post facto clause itself is "unintelligible"[177] without explanation, the cases the Pennsylvania Supreme Court relies on mean nothing when taken out of context.[178] Specifically, the court relied on *Weaver*,[179] but failed to acknowledge that *Weaver* only speaks to *completed* crimes: "For prisoners who committed crimes before [the law's] enactment, [the new law] substantially alters the consequences attached to a crime *already completed*, and therefore changes 'the quantum of punishment.'"[180] Further, the *Weaver* court explained that the statute at issue was "void as applied to petitioner, whose crime occurred before its effective date."[181] In *Rose*, the crime of murder had not occurred before the effective date of the new third-degree murder sentencing statute.

Finally, although the Pennsylvania Supreme Court acknowledged that the United States Supreme Court repeatedly "conflate[s] the words 'acts' and 'crime' or 'acts' and 'offense' when analyzing *Calder* questions,"[182] the *Rose* court continued to treat the high court's use of the word "acts" as proof that the prohibition against ex post facto laws apply to criminal acts, not just the completed

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175. *See* Commonwealth v. Rose, 127 A.3d 794, 802 (2015).

176. *Id.* at 803-05 (citing Collins v. Youngblood, 497 U.S. 37 (1990)), De Veau v. Braisted, 363 U.S. 144 (1960); Beazell v. Ohio, 269 U.S. 167 (1925), and Weaver v. Graham, 450 U.S. 24 (1981)).

177. Calder v. Bull, 3 U.S. 386, 390 (1798).

178. For example, *Beazell* did not even implicate the ex post facto clause because the law in question was procedural in nature. 269 U.S. at 171 (noting the ex post facto provision "was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance").

179. *See Rose*, 127 A.3d at 803-04.

180. *Weaver*, 450 U.S. at 33 (emphasis added) (quoting Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)).

181. *Id.* at 36.

182. *Rose*, 127 A.3d at 805 n.16.

criminal offense.[183] The *Rose* court cites *Beazell*, *Collins*, *De Veau*, and *Weaver* for this idea, but ignores the fact that those cases blatantly use "acts," "offense," and "crimes" interchangeably.[184] A criminal action is not synonymous with a completed crime, at least for the purposes of the third *Calder* category. As the next section shows, the *Rose* court should have made an in depth analysis of the plain language of the *Calder* categories on an individualized basis, rather than applying the logic of the first category to this third-category case.

VI. ALTERNATIVE ANALYSIS OF *COMMONWEALTH V. ROSE*

This section sets forth what I believe is a more appropriate analysis of Rose's ex post facto claim. First, the Pennsylvania Supreme Court could have analyzed the situation as a "straddle offense," applying one of the approaches to such crimes laid out by several United States Circuit Courts of Appeal. Second, the *Rose* court should have focused more on the literal language of the *Calder* categories and the distinctions therein. And third, the court should have looked to other areas of criminal law where the specific issue of delayed death has been addressed, rather than simply attempting to analogize to the other *Calder* categories.

A. *Straddle Offenses and the Competing Approaches to Ex Post Facto Laws*

The time at which an offense is committed lies at the heart of ex post facto analysis;[185] it establishes whether a law is retroactive and whether the offender was afforded fair notice of the crime and its punishment.[186] Determining when a crime is committed is normally easy: the crime of robbery is committed when an offender "[illegally takes] property from the person of another . . . by violence or

183. *Id.* at 803-05.

184. *Compare* Beazell v. Ohio, 269 U.S. 167, 168 (1925) (noting that February 13, 1923 was the "date of the *offense*") *with id.* at 170 (stating that the law at issue did not "affect the criminal quality of the *act* charged") (emphasis added); *see also* Collins v. Youngblood, 497 U.S. 37, 39 (1990) (noting that the statute in question "was passed after respondent's *crime*"); *id.* at 49 (finding that a "law that abolishes an affirmative defense . . . [is ex post facto] because it expands the scope of a criminal prohibition after the *act is done.*") (emphasis added).

185. *See Collins*, 497 U.S. at 54 (Stevens, J., concurring) (noting the "critical importance of evaluating the [rights of the defendant] by reference to the time of the offense").

186. Weaver v. Graham, 450 U.S. 24, 29 (1981) (stating these two points as the foundation of an ex post facto law).

intimidation."[187] All of the elements are committed in a single criminal episode, at a single point in time, constituting what is known as an instantaneous crime, or a "discrete act."[188]

However, when the offense in question is not completed at an instant moment in time—for example, when "straddling offenses" are implicated—determining the point at which the crime is "committed" for the purposes of the ex post facto clause becomes complicated.[189] This is because traditional ex post facto analysis presumes that the actor has ceased the illegal conduct before the alleged ex post facto law is enacted.[190] At common law, the potential for a crime to be a "straddle" offense was unfathomable.[191] Modern courts are now faced with deciding how straddle offenses fit into this traditional understanding of the *Calder* categories and the purposes of the ex post facto clause, and must decide when a crime is "committed" for the purposes of ex post facto analysis.[192]

Straddle offenses involve a single crime, but elements of that crime are satisfied both before and after a new law either aggravates the crime or increases the punishment for its completion.[193]

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187. *Robbery*, BLACK'S LAW DICTIONARY, (9th ed. 2009).

188. United States v. Bucheit, 134 F. App'x. 842, 853 (6th Cir. 2005); *see also* Jeffery R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL'Y. 219, 227 (2012).

189. Adams, *supra* note 67, at 238.

190. *Id.*

191. *See, e.g.,* Commonwealth v. Rose, 81 A.3d 123, 129 (Pa. Super. Ct. 2013) (en banc), *aff'd*, 127 A.3d 794 (Pa. 2015).

192. Adams, *supra* note 67, at 238 ("In Justice Chase's words, [straddle offenses] require[] a court to determine when an action is finally 'done.'"); *see also* Broughton, *supra* note 7, at 727 n.35; United States v. Vivit, 214 F.3d 908, 917 (7th Cir. 2000) ("[W]hen a defendant commits crimes that straddle the date of promulgation of new guidelines provisions, the defendant can be punished under a guideline effective after the beginning of the straddle period."); United States v. Zimmer, 299 F.3d 710, 717-18 (8th Cir. 2002) ("[W]here a defendant's offense conduct straddles an enactment, the enactment can be applied to the defendant without violating the Ex Post Facto clause even when the enactment would result in a harsher sentence."); United States v. Reetz, 18 F.3d 595, 598 (8th Cir. 1994) (With continuing offenses, "the completion date controls which version of the Sentencing Guidelines should apply.").

193. Adams, *supra* note 67, at 251. The scope of commentary on straddle offenses and the ex post facto clause is a limited one. Adams's article analyzes the relationship of straddle offenses, the ex post facto clause, and the "one-book rule." *See* U.S.S.G. § 1B1.11(b)(3) (1992). The rule requires that when a "defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." *Id.* This is consistent with the federal mandate requiring application of the Guidelines in effect at the time of sentencing. 18 U.S.C. § 3553(a)(4)(A)(ii) (2012); *see also* United States v. Stephenson, 921 F.2d 438, 441 (2d Cir. 1990); United States v. McMillian, No. 13-3577, 2015 WL 329467, at *2 (7th Cir. Jan. 27, 2015). The other source Adams' article relies on—Broughton's George Mason Law Review article, *supra* note 7—discusses straddle offenses only with respect to the first *Calder* category. *See* Broughton, *supra* note 7, at 725. While neither Broughton nor Adams's articles address ex post facto issues identical to the one here, their general premises and logic are nonetheless persuasive.

Courts have unanimously held that imposing a later-enacted increased punishment is not an ex post facto clause violation when the criminal conduct straddled the law's enactment.[194] The Pennsylvania Supreme Court should have recognized the facts of *Rose* as a straddle offense,[195] and approached the issue in light of the two competing approaches to such offenses: the Completion Approach and the Continuing Offense Approach.[196] This section explains the two approaches, and concludes which is the most useful in analyzing the issue presented in *Rose*.

1. The Completion Approach

Under the Completion Approach, the ex post facto clause is not violated when a law is applied to a crime that was incomplete at the time that the law was enacted.[197] The logic behind this approach is that if some of the elements of a crime are committed before the new statute is effective, but other elements are only completed after the date of enactment, then there can be no ex post facto violation because the defendant theoretically could have refrained from completing the remaining elements of the crime.[198] The defendant cannot then bend the Constitution to his will to claim an ex post facto violation when he actively chose to complete the crime. On the other hand, if all of the elements of a crime are completed but the

194. Adams, *supra* note 67, at 252. For cases addressing this issue at the federal level, see generally United States v. Regan, 989 F.2d 44, 48 (1st Cir. 1993) ("Where a 'continuing offense' straddles the old and new law . . . applying the new is recognized as constitutionally sound."); United States v. Ferrara, 458 F.2d 868, 874 (2d Cir. 1972) (no ex post facto violation for a conspiracy straddling offense); United States v. Brennan, 326 F.3d 176, 198 (3d Cir. 2003) (no ex post facto violation for a fraud straddling offense); United States v. Manges, 110 F.3d 1162, 1172 (5th Cir. 1997) (mail fraud); *Vivit*, 214 F.3d at 917; *Zimmer*, 299 F.3d at 717-18; United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975) (racketeering conspiracy).

For cases addressing this issue at the state level, *see generally* People v. Grant, 973 P.2d 72 (Cal. 1999) (child molestation); People v. Chilelli, 170 Cal. Rptr. 3d 395, 400, (Cal. Ct. App. 2014) (stalking); People v. Williams, 13 Cal. Rptr. 3d 569, 570 (2004) (continued theft crimes); People v. Dalton, 70 P.3d 517, 521 (Colo. App. 2002) (sexual abuse); Ivey v. Chiles, 604 So. 2d 542, 543 (Fla. Dist. Ct. App. 1992) (RICO).

195. The court simply stated in a footnote that the facts of *Rose* may be a straddle offense. Commonwealth v. Rose, 127 A.3d 794, 800 n.14 (Pa. 2015). But *Rose* is an exemplar of what a straddle crime is; some elements of his crime were completed, while one or more were not. It is unclear why the Pennsylvania Supreme Court chose not to address the issue as a straddle offense.

196. *See generally* Broughton, *supra* note 7, at 745. Broughton also refers to the Continuing Offense Approach as the "elemental approach." *Id.* For the purposes of this article and for clarity, I will only refer to this approach as the "Continuing Offense Approach." Broughton actually discusses the three ways courts have treated straddle crimes and the ex post facto clause: "(1) those that employ the completion approach; (2) those that employ the continuing-offense doctrine; and (3) those that avoid the ex post facto claim by interpreting the statute to apply only prospectively." Broughton, *supra* note 7, at 725.

197. *Id.* at 727.

198. *See Dalton*, 70 P.3d at 520-21; United States v. Alkins, 925 F.2d 541 (2d Cir. 1991).

resultant criminal effect has not occurred yet at the time of the legislation's enactment, the defendant can do nothing to prevent the criminal result from occurring.[199]

The Completion Approach is seemingly in line with the United States Supreme Court's ruling in *Weaver v. Graham*,[200] where the court held that the critical inquiry in ex post facto decisions is whether the law increases the punishment for events *completed before* its effective date.[201] The language of *Weaver* suggests that every element of the crime must be completed prior to enactment of the new law for it to truly fall within the universally accepted "retroactive increase in punishment" definition of ex post facto laws.[202]

However, the Completion Approach has only been considered in cases where the unsatisfied element or elements required that the defendant take an affirmative criminal act to complete the crime. In *United States v. Dixon*,[203] Judge Richard Posner of the Seventh Circuit enunciated the crux of the Completion Approach:

> If all the acts required for punishment are committed before the criminal statute punishing the acts takes effect, there is nothing the actor can do to avoid violating the statute, and the twin purposes[204] of the ex post facto clause are engaged. But by the same token as long as at least one of the acts took place later, the clause does not apply.[205]

Courts following the Completion Approach are unwilling to find an ex post facto violation where the defendant is on notice as to the criminality of his conduct and the punishments attached thereto, yet still chooses to take an affirmative criminal action to complete the crime.[206] For example, in *United States v. Alkins*,[207] the Second

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199. *See* United States v. Dixon, 551 F.3d 578 (7th Cir. 2008), *rev'd on other grounds sub nom* Carr v. United States, 560 U.S. 438 (2010).

200. 450 U.S. 24 (1981).

201. *Id.* at 31.

202. *See* Broughton, *supra* note 7, at 728.

203. 551 F.3d 578.

204. *Id.* at 584. According to the Seventh Circuit, the ex post facto clause:

> [B]oth enforces the principle that legislation is prospective, whereas punishment—the job assigned by the Constitution to the judicial branch—is retrospective, and gives people a minimal sense of control over their lives by guaranteeing that as long as they avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered.

Id. Essentially, the Seventh Circuit agrees that the foundational purposes of the ex post facto clause are providing fair notice and restricting vindictive government action.

205. *Id.* at 584-85; *see also* Broughton, *supra* note 7, at 731 n. 65.

206. *See* United States v. Alkins, 925 F.2d 541 (2d Cir. 1991).

207. *Id.*

Circuit found no ex post facto clause violation because the defendants were on notice of the crime and its sentence[208] and "permitted" the final element of the crime to be satisfied.[209] The mail fraud crime in *Alkins* was not completed until the letters were actually mailed—something that had not yet taken place when the new Guideline became effective.[210] The Second Circuit held that the defendants could have prevented the crime from being completed,[211] but instead, defendants "acquiesced," and allowed the final element to be committed.[212]

While Broughton states that this approach looks at whether all of the *elements* are completed before the effective date of the new law,[213] in effect, the Completion Approach asks a different question. As evidenced by the Seventh Circuit's application of the theory, the real inquiry seems to be whether all of the criminal *acts* were completed prior to the new law's enactment.[214] Note how Judge Posner specifically uses the word "acts," not merely "elements," in his explanation of the approach.[215] Although the passive voice used by the Second Circuit in *Alkins* suggests that an affirmative criminal act is not required to avoid violation of the ex post facto clause, the court still focused exclusively on the defendant's active *decision* to complete the crime, despite the increased punishment.[216] Rose made no such choice in this case—all of his choices were made in 1993.[217] Of course, this distinction may simply be more apparent because the completion approach has only been applied to crimes

208. This harkens back to the key purpose of the prohibition of ex post facto laws: to ensure citizens have fair notice of the laws and their penalties. *Alkins*, 925 F.2d at 549.

209. *Id.* ("Since appellants permitted the final element of the crime to occur after the effective date of the statute" the ex post facto clause was not violated); *see* Broughton, *supra* note 7, at 731.

210. *Alkins*, 925 F.2d at 549.

211. *Id.*

212. *Id.* Broughton also discusses a "modified" Completion Approach used by the Second Circuit in United States v. Monaco, 194 F.3d 381, 386 (2d Cir. 1999). Broughton, *supra* note 7, at 732. In *Monaco*, the court held that if a reasonable jury could have convicted solely on pre-enactment conduct, then there is an ex post facto violation. *Monaco*, 194 F.3d at 386. As Broughton points out, this modified approach is confusing, because if a defendant could have potentially been convicted solely based on the pre-enactment criminal conduct, there is no straddle offense because, presumably, the crime was completed and a straddling offense did not exist. Broughton, *supra* note 7, at 732. This confusion shows the difficulty surrounding straddle crimes and their potential ex post facto implications; courts are unsure how to reconcile the *Calder* categories and continuing offenses.

213. Broughton, *supra* note 7, at 725.

214. *See* United States v. Dixon, 551 F.3d 578, 584 (7th Cir. 2008), *rev'd on other grounds sub nom* Carr v. United States, 560 U.S. 438 (2010) ("If all the acts required for punishment are committed before the criminal statute punishing the acts takes effect, there is nothing the actor can do to avoid violating the statute.").

215. *Id.*

216. *See Alkins*, 925 F.2d at 549.

217. *See* Commonwealth v. Rose, 127 A.3d 794, 796-97 (Pa. 2015).

that inherently require additional acts to complete the crime, unlike the situation in *Rose*. Still, the approach is premised on the idea that after new legislation is effective, a defendant has the choice not to go through with the crime. If he choses to affirmatively act in completion of the crime, then the new, harsher punishment applies, free and clear of potential ex post facto violations.[218]

2. *The Continuing Offense Approach*

The second approach to straddle crimes is the Continuing Offense Approach, which is based off of the continuing offense doctrine.[219] The doctrine circumvents statutes of limitation by beginning the tolling period not when the elements of the offense are first met, but when the offense is terminated.[220] Under the continuing offense approach to straddle crimes, if the crime in question is defined as a "continuing offense," and the course of criminal conduct continues past the new law's enactment, then the ex post facto clause is not implicated.[221]

A continuing offense refers to a course of criminal conduct that spans over an extended period of time.[222] The most common example of a continuing offense is a conspiracy.[223] In a conspiracy, the elements of conspiracy are completed on the day that the concert of action begins. But the conspiracy is not terminated; rather, it continues to exist through the completion of the crime for which the conspiracy was formed, should that ever occur. Like the completion approach, for a straddle crime to fall outside of the scope of the ex post facto clause under the continuing offense theory, the defendant must take an affirmative criminal action after the enactment of the new law.[224] This seemingly puts the facts of *Commonwealth v. Rose* outside of the realm of continuing offenses, as Rose did not actively engage in an ongoing course of criminal conduct with respect to Mitchell's murder.[225]

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218. *See* Broughton, *supra* note 7, at 729.
219. *Id.* at 736-37.
220. Boles, *supra* note 188, at 221.
221. Broughton, *supra* note 7, at 732.
222. Boles, *supra* note 188, at 228.
223. Broughton, *supra* note 7, at 732; *see also* Boles, *supra* note 188, at 233 ("Conspiracy is widely recognized as the classic example of a continuing offense . . . because the conspirators' ongoing actions in pursuit of their conspiratorial agreement cause harm that lasts as the course of conduct persists.").
224. United States v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991) ("[T]here is no question that the basic conduct in question was criminal under state law. Having committed it, appellants were not powerless to prevent the consequences of their actions.").
225. *See* Commonwealth v. Rose, 127 A.3d 794, 796-97 (Pa. 2015).

If the facts of *Rose* do not represent a continuing offense, we must ascertain what type of offense is at play. Crimes are classified according to their nature as either continuing or instantaneous.[226] An instantaneous crime is one that occurs at a single and immediate point in time;[227] unlike continuing offenses, which involve a course of conduct, an instantaneous offense is a "discrete act."[228] Further, Congress can specifically define certain crimes as continuing, or the United States Supreme Court may similarly do so if it finds that the crime is of such a nature that "Congress must assuredly have intended that it be treated as a continuing one."[229]

Yet the facts of *Rose* do not seem to fit in either of these classifications of criminal law. Rose did not participate in a course of criminal conduct, nor are the crimes of assault and murder deemed continuing by the legislature. But in no way did the harm Rose inflicted end at the moment of injury, either.[230] While Rose's actions were completed, the injurious force of his attack was still working to produce its fatal effect.[231] With respect to his criminal liability, it is as if he had been continuously "pressing" his injurious force upon Ms. Mitchell for fourteen years.[232] This in no way reflects an instantaneous crime.

3. Best Approach for Commonwealth v. Rose

Because courts have only addressed straddle offenses with respect to offenses that require some affirmative criminal act to satisfy the remaining elements,[233] when attempting to fit the round

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226. Boles, *supra* note 188, at 227.

227. *Id.*

228. United States v. Bucheit, 134 F. App'x 842, 853 (6th Cir. 2005); *see also* Boles, *supra* note 188, at 227.

229. Toussie v. United States, 397 U.S. 112, 115 (1970); *see* Broughton, *supra* note 7, at 732.

230. Boles, *supra* note 188, at 227-28 ("The harm which [an instantaneous offense] causes occurs in that moment and does not continue beyond it. . . . A battery transpires, for instance, at the moment when the perpetrator's closed fist makes contact with a victim's body. The crime and its attendant harm cease when the perpetrator removes his fist from the victim's body.").

231. State v. Littlefield, 70 Me. 452, 459 (1880) ("The force was acting to produce its effect, and the defendant was as much responsible for its natural and necessary result as if he had all the while been pressing it upon the body of the victim.").

232. *Id.*; *see also* Commonwealth v. Rose, 127 A.3d 794, 796 (Pa. 2015).

233. For example, in a mail fraud case, the "crime is completed when the offending letter is mailed." United States v. Manges, 110 F.3d 1162, 1172 (5th Cir. 1997). In mailing the letters and thus completing the crime, the criminals take an affirmative criminal action; when this affirmative criminal action takes place after a new sentence is enacted, there is no ex post facto violation. Compare this with the situation in *Commonwealth v. Rose*. Rose took no affirmative criminal action after the third-degree murder sentence was aggravated—his

peg of *Rose* into the square hole of the completion or continuing offense approach, we must examine the competing approaches in light of their potential applicability beyond their current, limited scope. In a situation such as the case at bar—where the criminal actions are completed but the consequences are not, and within the consequences another, *separate* crime is committed—the continuing offense approach is the most applicable for two reasons.

First, while both approaches are fairly acts driven, the Completion Approach is the more "acts-based" of the two, with the Second, Fifth, and Seventh Circuits all focusing on whether all of the "acts," not elements, required for the crime are completed.[234] The Continuing Offense Approach offers more flexibility, even within the confines of the "acts" requirement, making it better suited to apply to *Rose*.

Second, the underlying purpose of the continuing offense doctrine points to the applicability of the Continuing Offense Approach beyond the realm of conspiracies and other statutorily defined continuing offenses. If we apply the continuing offense doctrine itself to *Rose*, the statute of limitations to prosecute Rose for murder would toll until Mitchell's death in 2007, because until that point an essential element of the crime of murder was not satisfied.[235] Thus, although the crimes in *Rose* were not continuing, the potential for criminal liability remained present throughout the entire fourteen-year period. As such, the Continuing Offense Approach could, and should, be expanded to encompass straddle offenses where a discrete course of criminal conduct results in an additional, separate crime.

B. Examining the Plain Language of the Calder *Categories in Light of the Proper Straddle Crime Approach*

As noted by the Superior Court, "[n]either the framers nor the ratifiers of the Pennsylvania or federal constitution contemplated application of the *ex post* facto law to the factual situation herein."[236] However, the Pennsylvania Supreme Court should still have looked primarily to the plain language of the *Calder* categories

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earlier criminal conduct merely had a later-realized consequence. While this is clearly distinct from the straddle offenses addressed by state and federal courts to date, it begs the question of whether the ex post facto clause would, and should, extend to circumstances such as those present in *Rose*.

234. *See* discussion *supra* Part VI, A.1.

235. Meaning, the statute of limitations for Rose's murder of Mitchell would not begin to run until the date of her death in 2007, and not on the date that the blows were inflicted.

236. Commonwealth v. Rose, 81 A.3d 123, 129 (Pa. Super. Ct. 2013) (en banc), *aff'd*, 127 A.3d 794 (Pa. 2015).

in its analysis, as the United States Supreme Court has stated that proper ex post facto analysis begins with the *Calder* categories and the traditional understanding of the ex post facto clause.[237] In that same vein, courts must follow the "commonsense understanding"[238] of the *Calder* categories and the underlying purposes of the clause itself.[239] The Pennsylvania Supreme Court has stated that "'great regard should be paid to [the] *spirit* and *intention*'" of the Pennsylvania Constitution,[240] yet this seems to have been lost in *Rose*, where the court appears to transpose the language and logic of the first category upon the third category at issue.

With the spirit of the ex post facto clause in mind, a closer examination of the *Calder* categories suggests that there was conscious thought behind Justice Chase's use of "acts," "commissioned," and "committed"[241] in the text of the first, second and third, and fourth categories, respectively.[242] This reading of *Calder* further favors adoption of the Continuing Offense Approach in *Rose*.

1. *Criminal Acts Are Not Synonymous With Completed Crimes*

The first *Calder* category applies only to *actions* done before the passing of the law, the second and third categories apply to *committed crimes*, and the fourth category applies to offenses when commissioned.[243] With respect to the third category specifically, Rose argued that the fact that the United States Supreme Court has not explicitly stated that "committed crimes" is effectually equal with "completed crimes" functions as conclusive proof that the Court intended to "speak broadly" of conduct, "rather than specifically of a completed or perfected crime."[244] Rose used this premise to contend

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237. *See* Carmell v. Texas, 529 U.S. 513, 539 (2000) ("[I]t was a mistake to stray *beyond Calder*'s four categories" in previous holdings.) (emphasis in original); Collins v. Youngblood, 497 U.S. 37, 49 (1990) ("[D]epature from *Calder*'s explanation of the original understanding of the *Ex Post Facto* Clause was, we think, unjustified.").

238. *See Carmell*, 529 U.S. at 571-72 (Ginsberg, J., dissenting) (arguing that the Court must apply the "commonsense understanding" of the categories); *Collins*, 497 U.S. at 47.

239. *Carmell*, 529 U.S. at 571-72 (Ginsberg, J., dissenting); *see also Collins*, 497 U.S. at 47 (Ex post facto analysis should be "consistent with the understanding of the term '*ex post facto* law' at the time the Constitution was adopted.").

240. *Rose*, 81 A.3d at 127 (citing Farmers' & Mechanics' Bank v. Smith, 1817 WL 1771, 5 (Pa. 1817)) (emphasis in original).

241. Calder v. Bull, 3 U.S. 386, 390–91 (1798).

242. *Id.*

243. *Id.*

244. Brief for Appellee at 26, Commonwealth v. Rose, 127 A.3d 794 (Pa. 2015), (No. 26 WAP 2014); *id.* at 11 ("The Supreme Court has never expressly limited the reach of the *ex post facto* prohibition to completed crimes, instead frequently referring to the more expansive definition referring to past acts, conduct, or activity."). Additionally, simply because the

that the United States Supreme Court intended for each category to apply to criminal acts, as the first category does.[245] If the categories were intended to universally apply only to criminal acts, however, then Justice Chase's deliberate use of "acts," "committed crimes," and "commissioned offenses" would be moot.[246] In failing to recognize this fact, the Pennsylvania Supreme Court did not adequately weigh the plain language of the categories.

It is somewhat understandable where the confusion and association of "acts" with all of the *Calder* categories stems from. The first category is the most well-known, and the most commonly associated with the ex post facto clause. The first category does reflect the basic and traditional common law understanding of an ex post facto law, as Justice Chase adopted almost verbatim the language of Blackstone.[247] There is a tendency to regard the categories as a cohesive unit, as the Pennsylvania Supreme Court did, and in so doing unintentionally impose the "acts" framework onto the remaining three categories. But the first category is the only one to address an "act" because this kind of law inherently does not involve a crime that could potentially be completed;[248] rather, the focus in the first category is on an act, "innocent when done," which is retroactively criminalized.[249] Further, the identical language and

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United States Supreme Court has not yet had the opportunity to address the narrow issue of whether "committed crimes" means "completed crimes" does not mean the Court would not do so in the future. The Commonwealth petitioned for certiorari in February, so perhaps the Court will address this issue in the near future. Pennsylvania v. Rose, No. 15-1036 (U.S. Feb. 17, 2016).

245. Brief for Appellee at 21, Commonwealth v. Rose, 127 A.3d 794 (Pa. 2015), (No. 26 WAP 2014) (relying on De Veau v. Braisted, 363 U.S. 144 (1960), for the premise that it "is clear that it is past acts, conduct, or activity which are subject to the constitutional provision forbidding *ex post facto* laws contained in Art. I, § 10 of the United States Constitution."); *id.* at 16-17 ("the focus of *ex post facto* analysis from the earliest days of this country has been on 'acts'") (internal quotations omitted). Rose bases these two arguments on the idea that the *Calder* categories are not intended to be rigid or formalistic, but should reflect the "flexibilities in the history" of the United States Supreme Court jurisprudence. *Id.* at 34.

246. Calder v. Bull, 3 U.S. 386, 390 (1798).

247. *See supra* note 42. "[W]hen after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." BLACKSTONE, *supra* note 2, at *46. "Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder*, 3 U.S. at 390.

248. Arguably, though, even the first category inherently requires that the innocent act reflect a completed version of the later-enacted crime. For example, if theft was legal today, and I took a friend's car with the intent to return it later, I would not be guilty of theft if the legislature criminalized it tomorrow and charged me. Because I did not intend to permanently deprive my friend of the car, an element of the crime is unsatisfied, and thus the crime is incomplete.

249. *Calder*, 3 U.S. at 390.

structure of the second and third categories,[250] which is strikingly similar to the language of the fourth category,[251] stands in stark contrast to the "acts" language in the first category. Taken together, this suggests that the first category is the only one that is acts based, and that the categories must be regarded as distinct and individual—not a cohesive unit.

With respect to the second and third *Calder* categories, a violation must require a completed crime, primarily because the question of whether new legislation retroactively aggravates a crime or punishment suggests that a completed criminal offense already occurred.[252] In the second and third *Calder* categories, the offender is presumed to know that his conduct is criminal and what his potential punishment is at the time he *commits* his crime. He is only believed to be unaware that later aggravation or increase of the punishment is possible. This is wholly distinct from the first category, where an offender's legal conduct is later criminalized and he is never on notice of any potential punishment.[253]

Much of the case law interpreting the ex post facto clause lends itself to this interpretation, as well.[254] In *Beazell v. Ohio*,[255] the United States Supreme Court described an ex post facto law as one that "makes more burdensome the punishment for a crime *after its commission*."[256] More recently, in *Collins v. Youngblood*[257] the Court held that the ex post facto clause applies to a defendant who "committed" a crime prior to the passage of the violating law.[258] Despite what the Pennsylvania Supreme Court concluded, these deci-

250. The second *Calder* category prohibits laws that aggravate a crime "or make[ ] it greater than it was, *when committed*." *Id.* (emphasis added). The third *Calder* category prohibits laws that inflict a greater punishment than "the law annexed to the crime, *when committed*." *Id.* (emphasis added).

251. The fourth *Calder* category prohibits laws that alter the rules of evidence from those required "at the *time of the commission* of the offense." *Id.* (emphasis added). Compare this, and the previous footnote, with the structure and language of the first category: "Every law that makes an *action*, done before the passing of the law, and which was innocent when done, criminal; and punishes such *action*." *Id.* (emphasis added).

252. *See* Broughton, *supra* note 7, at 728. Presumably any completed crime requirement found in the second and third categories would also extend to the fourth, as "commissioned" is defined as "an act of committing something," making the terms effectively synonymous. *Commission*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003). *See Committed*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003) (defining "committed" as "to carry into action deliberately"; "to do something").

253. *See Calder*, 3 U.S. at 390.

254. *See generally* Kring v. State of Missouri, 107 U.S. 221 (1883); Beazell v. Ohio, 269 U.S. 167 (1925); Collins v. Youngblood, 497 U.S. 37 (1990).

255. 269 U.S. 167 (1925).

256. *Id.* at 169 (emphasis added).

257. 497 U.S. 37 (1990).

258. *Id.* at 48.

sions properly focus on when the crime itself was actually committed, and not necessarily on when the criminal acts are finished.[259] This, in turn, supports adoption of the Continuing Offense Approach when analyzing straddle crimes because that theory is also concerned specifically with when the offense "terminates," not when the actions of the offender are completed.

The conclusion that the focus of the second and third *Calder* categories is the completion of the crime at issue is further bolstered by the two requirements of an ex post facto law: (1) that it be retroactive, and (2) that it disadvantage the defendant.[260] Retroactivity is not an issue presently, but there are questions about whether a defendant can be disadvantaged if an incomplete crime is subject to the prohibition against ex post facto laws. With an incomplete crime, the defendant could not have been exposed to criminal liability for the crime, so how can he claim a law that, realistically, did not actually apply to him, disadvantages him? If, for example, an individual mails a letter containing Anthrax with the requisite criminal intent to kill the letter's recipient, his criminal acts are completed once he places the letter in the mailbox. But, until the recipient dies from the Anthrax, the would-be defendant is not guilty of the crime of murder, only of the fully-completed lesser-included offenses. If the sentencing scheme for murder changed between the time of mailing and the time that the recipient-victim dies, and the individual then raised a third *Calder* category ex post facto violation, he would not be entitled to relief because he was never exposed to the murder sentence, and thus was not disadvantaged by the change. The case is the same with *Rose*: he could not have been tried for murder—third degree or otherwise—at the time that the less punitive penalty controlled. He was not guilty of the crime of murder until Mitchell died in 2007.[261] Therefore, Rose's factual scenario does not lend itself to an ex post facto analysis because the relevant law was imposed before the crime in question was completed.

As stated in *Weaver v. Graham*,[262] the critical question in ex post facto determinations is "whether the new provision imposes a greater punishment *after the commission of the offense*, not merely whether it increases a criminal sentence."[263] Because increasing a

259. *See Collins*, 497 U.S. at 54, 58 (Stevens, J., concurring) (noting the "critical importance of evaluating the [rights of the defendant] by reference to the time of the offense").
260. Weaver v. Graham, 450 U.S. 24, 29 (1981).
261. Commonwealth v. Rose, 127 A.3d 794, 796 (Pa. 2015).
262. 450 U.S. 24 (1981).
263. *Id.* at 32, n.17 (emphasis added); *see also* Lindsey v. Washington, 301 U.S. 397 (1937).

criminal sentence would satisfy the disadvantaged requirement, the language of the *Weaver* holding suggests that the commission of the offense is an added requirement for ex post facto violations. Thus, it is clear that the words "commission" or "committal" of the criminal offense are not just cursory, explanatory language. Rather, the use of these specific words in each specific category holds meaning: in the third category at least, completed criminal acts are insufficient to give rise to an ex post facto violation. For a statutory change in punishment to constitute an ex post facto law, the crime in question must be fully completed at the time that the new law is enacted.

2. *Abrogation of the Year and a Day Rule*

The evolution of Pennsylvania criminal law also supports focusing on the completeness of the crime over the completeness of the criminal acts for the purposes of ex post facto analysis. At common law, the rule for delayed death[264] cases like Mitchell's was the "year and a day rule."[265] Under the rule, if death did not occur within one year and one day of the infliction of the injurious blows, there arose "an irrebuttable presumption of law that the death [was] attributable to some other cause[,] and the person who inflicted the [initial] injury [was] not punishable for murder or manslaughter."[266] The primary purpose of the year and a day rule was tied to causation: in the times of rudimentary science, the cause of death was difficult to determine after an extended period of time.[267] The rule set the cutoff for causation for homicides at one year and one day from the infliction of the blows, noting that if the victim died at some point

264. The term "delayed death" comes from double jeopardy analysis, and refers to situations where a victim dies from physical injuries resulting from an earlier assault. People v. Rivera, 456 N.E. 2d 492, 494 (N.Y. 1983). There is an exception to the double jeopardy "prohibition against separate prosecutions for two offenses based on the same act or criminal transaction, in cases of delayed death where the victim subsequently dies from the physical injuries resulting from the 'assault or the other offense' for which the assailant was previously prosecuted." *Id.* (internal citations and quotations omitted). *See* discussion *infra* Part VI.C.

265. Commonwealth v. Ladd, 166 A.2d 501, 503 (Pa. 1960) ("[I]n prosecutions for murder the year and a day rule runs from the time the fatal blow was given or the cause of death administered . . . this rule, so interpreted, was part of the common law of England in and before 1776.").

266. *Id.* at 506 (internal citations omitted). The year and a day rule, however, is "one simply of criminal evidence." *Id.* at 504 (internal citations and quotations omitted). The rule was never a part of the definition of murder. Commonwealth v. Rose, 127 A.3d 794, 796 n.7 (Pa. 2015).

267. *Ladd*, 166 A.2d at 506; *see generally* State v. Rogers, 992 S.W.2d 393 (Tenn. 1999).

after that, the cause of death could not properly be discerned or attributed to an offender.[268]

The year and a day rule reflects our gravitation toward finality. Our justice system dislikes the idea that an individual could potentially live his life wondering if he is going to be tried for a crime from his past.[269] Further, the strict common law punishment for murder was death,[270] and the year and a day rule tempered this punishment by barring prosecution for murder or manslaughter stemming from an earlier criminal assault or attack when the cause of death was not easily discernable.[271]

The rule—like many common law criminal procedures—focused solely on the criminal action, and not on the crime itself. At its simplest, the year and a day rule found criminal liability to be tethered to the defendant's affirmative criminal action, not the resulting consequences of that action. Pennsylvania's abrogation of this rule in 1960 represented a critical shift away from this "act-based" line of thinking.[272] Much like the first *Calder* category,[273] the common law rule focused on when the blows were inflicted, *i.e.* when the criminal "act" took place. Abrogating the year and a day rule signifies that Pennsylvania has moved away from imposing criminal liability based on criminal acts, and is instead embracing a results-based analysis and application.

C. Double Jeopardy Analysis and the Ex Post Facto Clause

Instead of trying to analogize cases based off of "acts versus crime," the Pennsylvania Supreme Court should have compared *Rose* to other delayed death cases. One body of case law that *has* dealt with delayed death cases is double jeopardy jurisprudence.[274]

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268. *Ladd*, 166 A.2d at 502-03.

269. *See infra* note 278 and accompanying text.

270. Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PENN. L. REV. 756, 760 (1949).

271. *Id.* at 514.

272. *See Id.* In abrogating the year and a day rule, the Pennsylvania Supreme Court noted that "a rule becomes dry when its supporting reason evaporates." *Id.* at 506. With advances in medical technology, the underlying rationale for the year and a day rule became moot—any doubt that the original injurious blows were the cause of death was by and large eliminated. People v. Legeri, 266 N.Y.S. 86, 88 (N.Y. App. Div. 1933). The Court held that the modern rule governing delayed death situations "should be based on causation in light of the current knowledge . . . [and it] is therefore not a strange idea to put no restriction of time upon the death of the victim and to require only proof of causation of conventional quality at the trial." *Ladd*, 166 A.2d at 506.

273. Calder v. Bull, 3 U.S. 386, 390 (1798); s*ee supra* note 58.

274. *See, e.g.*, Chapman v. People, 39 Mich. 357, 360 (Mich. 1878); State v. Littlefield, 70 Me. 452 (1880).

The double jeopardy and ex post facto clauses are both "fundamental" to American legal tradition, and cases implicating these clauses use similar analyses, stemming from their common emphasis on "finality" and a prisoner's constitutional "right to preserve settled expectations."[275]

The United States Supreme Court addressed the issue of delayed death and its possible double jeopardy implications in its 1912 decision *Diaz v. United States*,[276] which involved a nearly identical factual scenario to *Rose*. In *Diaz*, the defendant inflicted bodily injuries on the victim during a fight,[277] and was subsequently charged with and convicted of assault.[278] A month later, the victim died as a result of that attack and the defendant was charged with his murder.[279] The defendant argued that this violated his right against double jeopardy because he had already been tried for the assault stemming from the same instantaneous event.[280]

The *Diaz* court found that even though the crimes of assault and murder were "identical in some of their elements," and stemmed from the same criminal episode, the crimes were nonetheless "distinct offenses in both law and in fact."[281] Critically, the court emphasized that death is an essential element of the crime of murder; an element that is not present in an assault.[282] Because death did not occur until after the defendant's assault trial, that trial did not jeopardize him of being exposed to a second trial for the crime of murder, as the crime of homicide was not committed until the death occurred.[283]

This logic is similarly recognized at common law: "The injury which causes death is never regarded as constituting the crime of murder or manslaughter."[284] Critically, "[t]he injury must be followed by an actual death."[285] State courts, including Pennsylvania, have also adopted this reasoning. In *Commonwealth v. Ramunno*,[286] the Pennsylvania Supreme Court reiterated the seemingly simple idea that "[m]urder is committed only when the victim

275. Hawkins v. Freeman, 195 F.3d 732, 758-59 (4th Cir. 1999); *see* Commonwealth v. Gaffney, 733 A.2d 616, 619 (1999).
276. 223 U.S. 442 (1912).
277. *Id.* at 444.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 448-49.
282. Diaz v. United States, 223 U.S. 442, 448-49 (1912).
283. *Id.* at 449.
284. Chapman v. People, 39 Mich. 357, 360 (Mich. 1878).
285. Commonwealth v. Ladd, 166 A.2d 501, 516 (Pa. 1960).
286. 68 A. 184 (Pa. 1907).

of the assault dies[,]"[287] and further held that when the defendants in that case were tried for assault, "they were tried for the only offense they had committed *up to that time*. When they were tried . . . for murder, it was for an offense of which they were [previously] guiltless."[288]

The *Ramunno* court relies on the Maine Supreme Court's decision in *State v. Littlefield*,[289] which builds upon the Supreme Court's logic in *Diaz*. The *Littlefield* court found that the defendant's murder prosecution was not a double jeopardy violation because even though "the force had been inflicted on the body," the event that triggers a murder charge—actual death of the victim—had not ensued.[290] The *Littlefield* court further added that "[t]he force was acting to produce its effect, and the defendant was as much responsible for its natural and necessary result as if he had all the while been pressing it upon the body of the victim."[291]

In holding that, until the victim died, "the only crime for which [the defendant] could then be punished was the crime of felonious assault,"[292] the *Ramunno* court recognized two critical things: first, that a defendant is not in jeopardy of being tried for the same offense twice when the latter offense requires an essential element not needed to complete the former offense; and second, that the word "committed" is synonymous with "completed crime."[293]

The Pennsylvania legislature identifies double jeopardy violations as: (i) "any offense of which the defendant could have been convicted on the first prosecution"; and (ii) "any offense based on the same conduct or arising from the same criminal episode, if such offense was known to the prosecuting officer at the time of the commencement of the first trial. . . ."[294] Undoubtedly, the crimes committed by Rose stem from the same criminal episode, but the facts at bar do not fit under either of these two categories of prosecution prohibited by the double jeopardy statute. Further, double jeopardy decisions acknowledge that the crime of murder is not committed until the victim dies.[295] This reasoning has never had to be applied to an ex post facto situation before now.

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287. *Id.* at 185.
288. *Id.*
289. 70 Me. 452 (1880).
290. *Id.* at 459.
291. *Id.*
292. *Ramunno*, 68 A. at 185.
293. *Id.*
294. 18 PA. CONS. STAT. § 110 (1995).
295. *See Littlefield*, 70 Me. at 459.

The facts of *Rose* can be analogized to the throwing of a ball: the act of throwing the ball is not complete when it leaves the hand of the thrower; rather, it is considered "completed" once the ball stops moving. Rose's criminal act began in 1993 when he attacked Mary Mitchell, but the murder was not completed until her death in 2007. Logically, it would seem that even though Rose "threw the ball" in 1993, it did not stop moving until 2007. Therefore, the fact that he was charged with and convicted of a lesser crime is irrelevant. Much like the *Ramunno* double jeopardy case, in 1993, Rose was tried "for the only offenses [he] had committed up to that time."[296] After Mitchell's death, he was tried for murder—"an offense of which [he was previously] guiltless."[297]

When the case at bar is reexamined through the double jeopardy lens, the "delayed death" scenario gives rise to a pseudo-continuing offense that would thus not implicate the ex post facto clause. There are two distinct crimes involved in delayed death cases, yet only one discrete criminal episode. When the law does not find a double jeopardy violation in the prosecution of both of these crimes, it follows that there should be no ex post facto violation should the law change during the delay of death.

VIII. CONCLUSION

The traditional understanding of the ex post facto clause, its underlying purposes, and its interpretive *Calder* categories suggest that every element of a crime must be completed *before* the enactment of a retrospective law to constitute an ex post facto violation. The Pennsylvania Supreme Court instead found that the focus of the ex post facto clause was on criminal acts, not completed crimes. This holding was premised on several inapplicable cases, and the failure to recognize that the United States Supreme Court continually conflates the words "acts," "crimes," and "offenses" in its ex post facto line of cases. The Pennsylvania Supreme Court should have instead looked directly to the text of *Calder v. Bull*, and noted Justice Chase's intentional use of "action" only in the first category.

When a crime straddles the enactment of a new, allegedly ex post facto law, and no affirmative criminal act must be taken to complete the crime, as was the case here, courts should instead turn to the Continuing Offense Approach and the double jeopardy clause for guidance. Under the framework of the continuing offense doctrine,

296. *C.f. Ramunno*, 68 A. at 185.
297. *Id.*

read in conjunction with the relevant "delayed death" analysis conducted within the double jeopardy context, Rose's situation does not give rise to an ex post facto claim. While he was disadvantaged, and the statute is applied retroactively, the underlying purposes and foundation of the ex post facto clause is not at play in his case. He completed the crime of murder upon Mitchell's death in 2007, a crime for which he could not have been prosecuted at any time prior; therefore, the new sentencing guidelines were the proper statute under which he should be sentenced.