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Casenotes: Criminal Law — Homicide — Felony-Murder — Felon Is Culpable for Murder in the First Degree under Maryland's Felony-Murder Statute When Police Officer Kills Kidnapped Hostage Used by Felon as Human Shield. Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979)

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CRIMINAL LAW — HOMICIDE — FELONY-MURDER — FELON IS CULPABLE FOR MURDER IN THE FIRST DEGREE UNDER MARYLAND'S FELONY-MURDER STATUTE WHEN POLICE OFFICER KILLS KIDNAPPED HOSTAGE USED BY FELON AS HUMAN SHIELD. *JACKSON v. STATE,* 286 Md. 430, 408 A.2d 711 (1979).

At common law, when one commits homicide while perpetrating a felony, the felony-murder rule raises that homicide to murder.[1] In Maryland, when a person commits murder in the perpetration of one or more statutorily-enumerated felonies, that murder is in the first degree under the state's felony-murder statute.[2] Maryland courts have readily applied this statute when the felon has struck the fatal blow.[3] Recently, in *Jackson v. State,*[4] the Court of Appeals of Maryland extended the application of the felony-murder statute to a case in which the victim was killed, not by the felon, but accidentally by a police officer resisting the felony. This casenote examines the court's extension of the felony-murder statute in *Jackson* and describes how the court used the state's common law and statutory felony-murder rules together to elevate the homicide to murder in the first degree.

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1. Common law murder is the unlawful, malicious killing of a human being. Under the felony-murder rule, malice may be shown by evidence of an unmitigated, unexcused, unjustified homicide committed in the perpetration of, or attempt to perpetrate, a felony. Malice may also be shown by evidence of a homicide caused by the wilful commission of an act, the natural tendency of which is to cause death or great bodily harm. *See* W. CLARK & W. MARSHALL, TREATISE ON THE LAW OF CRIMES § 10.04, at 628 (7th ed. 1967) [hereinafter cited as CLARK & MARSHALL].
2. Maryland's felony-murder statute provides:

   > All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape in any degree, sexual offense in the first or second degree, sodomy, mayhem, robbery, burglary, kidnapping . . ., storehouse breaking . . ., or daytime housebreaking . . ., or in the escape or attempt to escape from the Maryland Penitentiary, the house of correction, the Baltimore City jail, or from any jail or penal institution in any of the counties of this State, shall be murder in the first degree.

   MD. ANN. CODE art. 27, § 410 (Supp. 1980).

   Under the felony-murder statute, the state need not show premeditation or intent to kill. State v. Frye, 283 Md. 709, 393 A.2d 1372 (1978). *See* Newton v. State, 280 Md. 260, 373 A.2d 262 (1977) in which the court of appeals asserted: "[T]o secure a conviction for first degree murder under the felony murder doctrine, the State is required to prove the underlying felony and the death occurring in the perpetration of the felony." *Id.* at 269, 373 A.2d at 267.
3. *See, e.g.,* Harrison v. State, 276 Md. 122, 345 A.2d 830 (1975); Lipscomb v. State, 223 Md. 599, 165 A.2d 918 (1960).

   Accomplices are equally culpable for a murder committed by a co-felon in furtherance of the common scheme of a felony. Mumford v. State, 19 Md. App. 640, 643–44, 313 A.2d 563, 566 (1974).
4. 286 Md. 430, 408 A.2d 711 (1979).

I. THE FACTUAL BACKGROUND OF *JACKSON v. STATE*

William Henry Jackson and James Wells, Jr., walked into an Ellicott City jewelry store and, brandishing handguns, forced the two storekeepers to lie on the floor.[5] The robbers then appropriated jewelry worth over ten thousand dollars from the store's display cases and safe.[6] When the police arrived, the robbers tried to leave the store, but quickly retreated upon finding police at both exits.[7] Using the storekeepers as human shields,[8] the felons exited through the rear door, forced the hostages into a police vehicle, and drove off with the police in pursuit.[9]

The getaway car was finally stopped by a roadblock in Baltimore County. Police manning the roadblock, apparently unaware that hostages were in the car, began firing. Maryland state police and officers from Baltimore City, Baltimore County, and Howard County converged on the scene and joined in the shooting.[10] One officer, carrying a shotgun, ran toward the felons' vehicle. As he leapt onto the hood of the getaway car, he saw Wells waving a gun from one of the windows. Attempting to knock the gun out of the felon's hand, the police officer swung his shotgun across the roof of the car. The shotgun discharged and mortally wounded one of the hostages, Bernard Sugar, who was lying on the front seat of the car.[11]

Jackson and Wells both pleaded guilty in circuit court to the charge of first-degree murder.[12] To support the pleas, the state

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5. *Id.* at 432, 408 A.2d at 713.
6. *Id.* About thirty minutes into the robbery, a woman entered the store and asked to see one of the shopkeepers, Mrs. Farber. Wells told the woman that Mrs. Farber was gone, but would return in half an hour. The woman left, but was suspicious of Wells' response. She called the police, who arrived about five minutes later. *Id.* at 432–33, 408 A.2d at 713.
7. *Id.* at 433, 408 A.2d at 713.
8. Wells grasped one of the storekeepers in a headlock, placed his gun to her neck, and said, "You do what I do. I walk, you walk, I run, you run. If they shoot me, you're dead. If they shoot me, I'm going to kill you." Jackson grabbed the other storekeeper. *Id.* at 433, 408 A.2d at 713–14.
9. During the chase, Wells forced his hostage to kneel on the back seat with her face in the rear window, exposing her to gunfire from the pursuing police. *Id.* at 433, 408 A.2d at 714.
10. *Id.* at 434, 408 A.2d at 714; Record at 15.
11. 286 Md. 430, 434, 408 A.2d 711, 714 (1979). After shooting the hostage, the police captured the felons. Officers found two handguns in and near the getaway vehicle. One was fully loaded, the other had been fired once. *Id.*
12. Originally brought in Baltimore County Circuit Court, the case was transferred for trial to Worcester County in accordance with Maryland Rule 744. *Id.* at 431, 408 A.2d at 713. Rule 744 allows for the transfer of criminal proceedings to another court having jurisdiction. Md. Rule 744.

    The defendants pleaded guilty to first-degree murder in return for the state's agreement to recommend life imprisonment for the murder and to nol pros all other charges against the defendants relating to the incident. 286 Md. 430, 432, 401 A.2d 711, 713 (1979). Arguably, the state could have asked for the death penalty. The Maryland statute governing sentencing for first-degree murder describes aggravating circumstances to be considered by the court or

proffered evidence demonstrating the defendants' guilt.[13] The trial judge accepted the guilty pleas[14] and, relying on Maryland's felony-murder statute, found each defendant guilty of murder in the first degree.[15] The judge sentenced Jackson and Wells to life imprisonment.[16]

On direct appeal, the Court of Special Appeals of Maryland affirmed the conviction.[17] The intermediate appellate court agreed

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the jury in determining whether to sentence a defendant to death or life imprisonment. Two such aggravating circumstances are:

> (3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
>
> (4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

MD. ANN. CODE art. 27, § 413(d)(3)–(4) (Supp. 1980). If the court or jury found either or both of these aggravating circumstances to exist, the trier of fact would also be required to weigh that factor against any mitigating circumstances. MD. ANN. CODE art. 27, § 413(g) (Supp. 1980). One such circumstance is: "The act of the defendant was not the sole proximate cause of the victim's death." MD. ANN. CODE art. 27, § 413(g)(6) (Supp. 1980). Only if the trier of fact found that the aggravating factors outweighed the mitigating circumstances would the sentence be death. MD. ANN. CODE art. 27, § 413(h)(2)–(3) (Supp. 1980).

13. 286 Md. 430, 432, 408 A.2d 711, 713 (1979). The state's proffer is summarized in notes 5–11 and accompanying text *supra*.

14. "The [trial] court, through extensive inquiry of the defendants, placed on the record an affirmative showing that the plea of each of them was made voluntarily, unconditionally, and with an intelligent understanding of the nature of the offense and the possible consequences of the effect of the pleas." Jackson v. State, 286 Md. 430, 432, 408 A.2d 711, 713 (1979). By placing this information on the record, the trial court showed that the defendants waived their consitutional rights to trial by jury, to face their accusers, and to be free from compulsory self-incrimination. *See* Williams v. State, 10 Md. App. 570, 571–74, 271 A.2d 777, 778–80 (1970), *cert. denied,* 261 Md. 730 (1971).

15. Record at 27–28, Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979). For the text of Maryland's felony-murder statute, see note 2 *supra*. The trial judge told the defendants:

> [E]ven though the fatal shot was not fired by either of you, . . . it was you who triggered the entire episode, and it was as a result of your criminal conduct, your robbery of this store . . . that [the storekeeper] died.
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> . . . .
>
> I think any jury would have found you guilty of murder in the first degree, and, of course, you would have been found guilty, unquestionably, of the kidnapping charges. You have run afoul of the felony/murder rule in Maryland. And if one is killed as a result of the perpetration of a crime the character in which you two perpetrated in Ellicott City, then you are guilty of murder in the first degree.

Record at 27. Although the trial judge found that the robbery was the underlying felony in the case, the court of appeals found the kidnapping to be the underlying felony for the felony-murder conviction. 286 Md. 430, 435 n.3, 408 A.2d 711, 714–15 n.3 (1979).

16. 286 Md. 430, 431, 408 A.2d 711, 713 (1979).

17. Jackson v. State, No. 681 Sept. Term 1978 (Md. Ct. Spec. App. Mar. 16, 1979). For a summary of the defendants' argument on appeal, see note 57 and accompanying text *infra*.

with the trial court that the state's factual statement supported the conviction, ruling that " '[e]ven an unintentional, an unplanned, an unparticipated-in death that occurs in the course of a felony is, by statutory definition, murder in the first degree.' "[18] The court of appeals affirmed.[19]

II. THE FELONY-MURDER RULE

Common law murder is criminal homicide committed with malice aforethought.[20] The state may use any of the following common law theories to prove malice:[21] the defendant killed with the intent to do so (express malice);[22] the killer acted with a "depraved heart" — a reckless disregard for human life (implied malice);[23] or, under the felony-murder rule, the death occurred in the perpetration of a felony (constructive malice).[24]

At early English common law, whenever a person acting unlawfully killed another person, that homicide was murder.[25] The commission of the unlawful act established the element of malice necessary for murder.[26] As the law evolved, English courts required

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18. *Id.*, slip op. at E.3 (quoting Middleton v. State, 6 Md. App. 380, 385, 251 A.2d 224, 227 (1969)). Note that the appellant in *Middleton* was an accomplice of the person who actually killed the victim, thus distinguishing the quoted case from *Jackson*.
19. Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979).
20. CLARK & MARSHALL, *supra* note 1, § 10.04 at 628.
21. *See* Evans v. State, 28 Md. App. 640, 696–97, 349 A.2d 300, 335–36 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976).
22. CLARK & MARSHALL, *supra* note 1, § 10.04 at 628.
23. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 541–45 (1972) [hereinafter cited as LAFAVE & SCOTT]. "Extremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another . . . which actually causes death, may constitute murder." *Id.* at 541.
24. CLARK & MARSHALL, *supra* note 1, § 10.07 at 656. In order to prove the commission of the felony, the state must show that the defendant committed the crime with a felonious mens rea — a guilty state of mind. When a homicide results from the commission of the felony, the common law applies the felonious mens rea to the homicide and thereby imputes or "constructs" the malice required to support a murder conviction. *Id.*

    For a discussion of the malice required to raise a homicide to murder, see Evans v. State, 28 Md. App. 640, 689–700, 349 A.2d 300, 332–37 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976). Historically, proof that the defendant intended to kill the victim established express malice and thereby raised the homicide to murder. Later, the courts began to infer the intent to kill from other, non-homicidal intents of the defendant, such as the intent to do grievous bodily harm, the intent to commit a felony, or the intent to commit an act, almost certain to cause death or serious bodily harm, with wanton and wilful disregard for human life. *Id.* at 696, 349 A.2d at 335.
25. E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (6th ed. 1680).
26. *Id.* The felony-murder rule is not a rule of causation, but a legal fiction used to impute malice. *See* Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58–64 (1956).

the defendant's unlawful act to be a felony before he could be found guilty of murder.[27] Because all felonies were subject to capital punishment,[28] application of the felony-murder rule mattered little to the condemned felon. Hanging for the underlying felony was virtually indistinguishable from hanging for murder. The common law felony-murder rule is still in effect except in jurisdictions in which it has been abrogated by statute.[29]

Maryland's felony-murder statute did not abrogate the common law rule.[30] The Maryland statutes describing murder[31] neither created new crimes nor altered the common law definition of murder,

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27. M. FOSTER, CROWN LAW 258 (2d ed. 1791).
28. 4 W. BLACKSTONE, COMMENTARIES *98, *216, *222.
29. CLARK & MARSHALL, *supra* note 1, § 10.07 at 657. The felony-murder rule has been abolished by statute in England (Homicide Act, 1957, 5 & 6 Eliz. 2, c.11, § 1), and in the states of Hawaii (HAWAII REV. STAT. § 707–701 note (1976) (Felony-Murder Rule)), Michigan (*see* People v. Aaron, 409 Mich. 672, 209 N.W.2d 304 (1980)), and Kentucky (KY. REV. STAT. ANN. § 500.020 (Baldwin 1975) (abolishing all common law offenses in Kentucky)). Kentucky has a felony-murder statute which raises statutorily-defined murder to a capital offense when "[t]he defendant's act of killing was intentional, and occurred during the commission of" one of the enumerated felonies (arson, robbery, burglary, or rape). KY. REV. STAT. ANN. § 507.020 (Baldwin 1975).
30. *See, e.g.*, Stansbury v. State, 218 Md. 255, 260, 146 A.2d 17, 20 (1958). The court of appeals in *Jackson*, however, cited Lindsay v. State, 8 Md. App. 100, 105 n.6, 258 A.2d 760, 763 n.6 (1969), *cert. denied*, 257 Md. 734 (1970) for the suggestion that the common law felony-murder rule was eventually narrowed to require that the underlying felony be one dangerous to human life. 286 Md. 430, 435 n.3, 408 A.2d 711, 714–15 n.3 (1979). The rule appears to have been narrowed in Maryland to apply only to those felonies enumerated in the felony-murder statute. MD. ANN. CODE art. 27, § 410 (Supp. 1980). *See* Jeter v. State, 9 Md. App. 575, 578, 267 A.2d 319, 321 (1970), in which the court of special appeals assumed that the felony-murder rule did not apply to the case because the underlying felony was not then enumerated in the statute. Arguably, the enumerated felonies are those that are inherently dangerous to human life. Because the court of appeals found the underlying felony in *Jackson* to be kidnapping, a felony inherently dangerous to human life, the court found it unnecessary to decide "whether the qualification was recognized when the common law of England was constitutionally incorporated into [Maryland] law." 286 Md. at 435 n.3, 408 A.2d at 714–15 n.3. *See* MD. CONST., DECL. OF RIGHTS art. 5.
31. MD. ANN. CODE art. 27, §§ 407–411 (1976 & Supp. 1980). Section 407 reads: "All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of willful, deliberate and premeditated killing shall be murder in the first degree." MD. ANN. CODE art. 27, § 407 (1976). Under the felony-murder statute, § 410, the commission of the felony is not a substitute for premeditation. Instead, the felony-murder statute describes circumstances other than premeditated murder under which the state legislature has determined that murder should be in the first degree. Newton v. State, 280 Md. 260, 268–69, 373 A.2d 262, 266–67 (1977).

    Section 408 of article 27 makes "[a]ll murder which shall be committed in the perpetration of, or attempt to perpetrate any arson" first-degree murder and § 409 makes all murder committed in the burning or attempting to burn any barn or similar structure containing livestock or goods murder in the first degree. MD. ANN. CODE art. 27, §§ 408, 409 (1976). Section 411 deems all murder not covered in §§ 407–410 to be second-degree murder. MD. ANN. CODE art. 27, § 411 (1976).

but merely divided common law murder into degrees for purposes of sentencing.[32] In enacting the first-degree murder statutes, the General Assembly spelled out the circumstances under which a murder is deemed so atrocious that capital punishment is appropriate.[33] When the murder is not committed under any of the enumerated circumstances, it is in the second degree, and the punishment is mitigated.[34] The felony-murder statute therefore represents the legislature's attempt to graduate the measure of punishment meted out to felons found guilty of murder under the common law felony-murder rule.[35] Only those murders committed in the perpetration of one of the enumerated felonies are murder in the first degree.[36]

In order to secure a first-degree murder conviction under Maryland's felony-murder statute, the state must show that the felon committed criminal homicide in the course of committing or attempting to commit one of the enumerated felonies.[37] Maryland courts have many times found defendants guilty of first-degree murder under the state's felony-murder statute when the felon or co-felon killed the victim.[38] Before *Jackson v. State,*[39] however, the Court of Appeals of Maryland had never had the opportunity to review a felony-murder conviction in a case in which the lethal blow was inflicted, not by the felon, but by a person resisting the felony.[40] Other jurisdictions have encountered such cases, with widely varying results.[41] Conviction or acquittal of a felony-murder charge generally depended upon whether the court adopted the agency or causation theory of felony-murder.

Under the agency theory, the felony-murder rule applies only when the defendant or his co-felon actually strikes the fatal blow or

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32. *E.g.*, Stansbury v. State, 218 Md. 255, 260, 146 A.2d 17, 20 (1958).
33. *See* Davis v. State, 39 Md. 355 (1874).
34. *See id.* at 375.
35. *See* Stansbury v. State, 218 Md. 255, 260, 146 A.2d 17, 20 (1958).
36. For the text of Maryland's felony-murder statute, including the enumerated felonies, see note 2 *supra*. Two other first-degree murder statutes in Maryland also are based on the felony-murder rule. Sections 408 and 409 of article 27, described in note 31 *supra*, make murder committed in the perpetration of, or attempt to perpetrate any arson or storehouse burning murder in the first degree. MD. ANN. CODE art. 27, §§ 408, 409 (1976).
37. State v. Frye, 283 Md. 260, 393 A.2d 1372 (1978); Newton v. State, 280 Md. 709, 373 A.2d 262 (1977). The state must also show a direct causal relationship between the felony and the homicide. Mumford v. State, 19 Md. App. 640, 643–44, 313 A.2d 563, 566 (1974).
38. *See, e.g.*, Harrison v. State, 276 Md. 122, 345 A.2d 830 (1975); Lipscomb v. State, 223 Md. 599, 165 A.2d 918 (1960); Shockley v. State, 218 Md. 491, 148 A.2d 371 (1959); Brooks v. State, 2 Md. App. 291, 234 A.2d 467 (1967).
39. 286 Md. 430, 408 A.2d 711 (1979).
40. Brief for Appellee at 6, Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979).
41. *See* Annot., 56 A.L.R.3d 239 (1974) and cases collected therein.

fires the fatal shot.[42] If the fatal act is committed by a third party, the felon will not be held culpable for the homicide.[43] The California Supreme Court, rejecting a felony-murder conviction under a statute substantially the same as Maryland's,[44] ruled: "When a killing is not committed by a robber or by his accomplice . . . malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery."[45] Because it was not committed with malice, the killing was not murder. The California court reasoned that to include such a homicide within the state's felony-murder statute would expand beyond common understanding the meaning of "murder committed in the perpetration of" a felony.[46]

Other courts have rejected the agency rule and adopted a theory based on proximate causation.[47] Under this theory, the felony-murder rule applies whenever the defendant, by committing a felony, sets into motion a series of events that results in a homicide and there is no intervening cause.[48] The fact that the felon did not actually strike the fatal blow is no defense to felony-murder under the causation theory.[49] Some courts temper this rule by requiring

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42. *See, e.g.*, Taylor v. Superior Ct., 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970); Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965).

Occasionally, the language of a state's felony-murder statute will dictate the adoption of the agency theory by the courts of that state. For example, Mississippi's Code provides:

> The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
>
> . . . .
>
> (c) *When done* without any design to effect death *by any person engaged in the commission of any felony* [other than certain enumerated felonies] . . . .

MISS. CODE ANN. § 97–3–19 (Supp. 1980) (emphasis added).

43. *E.g.*, Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970); *see* Annot., 56 A.L.R.3d 239, 249–52 (1974) and cases collected therein.

44. The California murder statute contains the provision: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or [lewd acts with a child], is murder in the first degree . . . ." CAL. PENAL CODE § 189 (West 1970 & Supp. 1980).

45. People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

46. *Id.* Although the California courts have held that a felon may not be convicted under that state's felony-murder statute unless he actually strikes the fatal blow, a defendant may nevertheless be held accountable for murder if he committed an act likely to cause death with a reckless disregard for human life, and death in fact resulted. *See, e.g.*, People v. Reed, 270 Cal. App. 2d 37, 75 Cal. Rptr. 430 (1969).

47. *See, e.g.*, People v. Hickman, 59 Ill. 2d 89, 319 N.E.2d 511 (1974); People v. Podolski, 332 Mich. 508, 52 N.W.2d 201, *cert. denied*, 344 U.S. 845 (1952); State v. Moore, 580 S.W.2d 747 (Mo. 1979).

48. *See* Annot., 56 A.L.R.3d 239, 252–56 (1974).

49. *E.g.*, State v. Moore, 580 S.W.2d 747 (Mo. 1979).

that the death be reasonably foreseeable.[50] The rule that a man is criminally liable for the foreseeable deaths he causes is supported by Blackstone: "If a man however does such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended . . . ."[51] The Michigan Supreme Court, quoting Blackstone, held that the murder conviction of a defendant who did not actually fire the fatal shot "can be considered to be within the principles of the common law, notwithstanding the fact that the fatal bullet was fired by an officer."[52]

Courts have upheld murder convictions, even in jurisdictions that follow the agency theory, in cases in which the felon used his hostage as a human shield or otherwise placed the hostage in a position of danger to deter police from firing for fear of injuring the hostage.[53] These cases, however, were not necessarily decided under the felony-murder rule.[54] In "human shield" cases, the courts often look to the felon's act of placing the victim in a position of known grave danger, not the underlying felony, to prove the malice necessary for a murder conviction.[55] The factual background of *Jackson* was ideal for a decision following the human shield cases in other jurisdictions. The trial court, however, convicted the defendants under Maryland's felony-murder statute, and the court of

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50. *See, e.g.*, State v. Moore, 580 S.W.2d 747 (Mo. 1979). The Supreme Court of Missouri, noting that some resistance to a robbery was "reasonably foreseeable," ruled that the salient factor in a felony-murder case was not who actually struck the fatal blow, but "whether the death was the natural and proximate result" of the felon's actions. *Id.* at 752. *See generally* 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 26 (14th ed. C. Torcia 1978).
51. 4 W. BLACKSTONE, COMMENTARIES *197. Blackstone was not referring to felony-murder, but to negligent murder, as indicated by his discussion of acts other than felonies which directly caused the death of a victim. Blackstone's rule refers to the causal connection between the action of the defendant and the homicide. Because the felony-murder rule imputes malice, and is not a rule of causation, application of Blackstone's rule to felony-murder is inappropriate. *See* Morris, *The Felons Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58–64 (1956). For Blackstone's discussion of the felony-murder rule, see 4 W. BLACKSTONE, COMMENTARIES *192–93, *200–01.
52. People v. Podolski, 332 Mich. 508, 511–12, 52 N.W.2d 201, 205, *cert. denied*, 344 U.S. 845 (1952). *But see* People v. Aaron, 409 Mich. 672, 209 N.W.2d 304 (1980).
53. *See, e.g.*, Johnson v. State, 252 Ark. 1115, 482 S.W.2d 600 (1972); Pizano v. Superior Ct., 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978); State v. Kress, 105 N.J. Super. 514, 253 A.2d 481 (1969).
54. *See* Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970); Annot., 56 A.L.R.3d 239, 261–63 (1974) and cases cited therein.
55. *See, e.g.*, Johnson v. State, 252 Ark. 1115, 482 S.W.2d 600 (1972); Pizano v. Superior Ct., 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978). *But see* State v. Kress, 105 N.J. Super. 514, 253 A.2d 481 (1969), a human shield case in which the court refused to quash an indictment for murder on the grounds that the case was encompassed by the New Jersey murder statute, which included a felony-murder provision. *See* N.J. STAT. ANN. § 2A:113–1 (West 1952) (repealed by N.J. Laws, ch. 95 (1978)).

appeals was therefore required to determine whether the felony-murder rule was applicable.

III. THE *JACKSON* DECISION

Because Jackson and Wells pleaded guilty to murder in the first degree, the only issue before the Court of Appeals of Maryland was whether the prosecution had established a sufficient factual foundation to substantiate the plea.[56] The defendants contended on appeal that, because they did not fire the fatal shot, the facts proffered by the state at trial were insufficient to prove every element of first-degree murder, and the trial court therefore improperly accepted their pleas of guilty to that offense.[57] The state argued that the evidence proffered at trial proved first-degree murder under the causation theory of felony-murder, notwithstanding the fact that the victim was shot by a police officer attempting to apprehend the defendants.[58]

The court of appeals noted that, at common law, "homicide arising in the perpetration of, or in the attempt to perpetrate, a felony is murder whether death was intended or not, the fact that the person was engaged in such perpetration or attempt being sufficient to supply the element of malice."[59] Because malice was established by the commission of the felony, the killing of the storekeeper was murder if it was committed by Jackson and Wells in the perpetration of that felony. The question, as the court saw it, was one of "causal relationship."[60] If the state's proffer of evidence proved that Jackson and Wells caused the homicide in perpetration of a felony enumerated in the felony-murder statute, then the state's evidence established a factual basis sufficient to support the pleas of guilty to first-degree murder.

Applying the rationale of three similar cases in other states,[61] the court of appeals concluded that the felons did in fact cause the

56. Jackson v. State, 286 Md. 430, 431, 408 A.2d 711, 713 (1979); *see* Boykin v. Alabama, 395 U.S. 238 (1969).

57. *See* Brief for Appellants at 5–6, Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979). A conviction based upon a guilty plea is derived from an admission of conduct. The conduct that the defendant has admitted, which is often described in a statement of facts proffered by the state and agreed to by the defense at trial, must satisfy every element of the offense charged before a guilty verdict may be upheld. Williams v. State, 10 Md. App. 570, 271 A.2d 777 (1970), *cert. denied*, 261 Md. 730 (1971). *See* Md. Rule 731(c).

58. *See* Brief for Appellee at 3, 8, 12, Jackson v. State, 286 Md. 430, 408 A.2d 711 (1979). For a summary of the state's proffered evidence, see notes 5–11 and accompanying text *supra*.

59. 286 Md. 430, 435, 408 A.2d 711, 715 (1979). *Accord,* Stansbury v. State, 218 Md. 255, 146 A.2d 17 (1958).

60. 286 Md. 430, 436–37, 408 A.2d 711, 715 (1979).

61. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934); Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900).

storekeeper's death.[62] The court particularly stressed the conclusion of the Supreme Court of Arkansas in *Wilson v. State*,[63] a case factually analogous to *Jackson*. In *Wilson*, the defendant used his robbery victim as a human shield while attempting to escape capture.[64] The Arkansas court ruled that the felon's "action in forcing [the victim] to a place which was known by him to be perilous was just as much the cause of his death as if he had himself fired the fatal shot."[65] In the other two cases relied on by the court in *Jackson*, the Texas Court of Criminal Appeals upheld first-degree murder convictions of train robbers who put their victim in a dangerous place, where he was shot and killed by a passenger trying to halt the felony.[66] By using their hostages as human shields, the defendants in *Jackson* also placed their victim in a perilous position where they should have foreseen the possibility of the hostage being killed or seriously injured. Therefore, the court of appeals reasoned that "[t]hey were just as much the cause of [the storekeeper's] death as if each had fired the fatal shot."[67]

The court of appeals bolstered its conclusion that the death of the storekeeper was attributable to the defendants by examining causation in terms of *sine qua non*: "but for" the defendants' conduct the storekeeper would not have been killed.[68] Although the fatal shot was fired by the police officer, the court ruled that the action of that officer was caused by the conduct of the felons.[69] In addition, the court found that the result of the defendants' felonious behavior was foreseeable and that "[t]he causal relationship between the acts of Jackson and Wells and the death of [the storekeeper] for which they were prosecuted [was] clear and direct."[70]

Because the felons caused the killing, and they had neither justification nor excuse for this act, the court reasoned that the defendants were criminally liable for the homicide.[71] Further, as the commission of the felony of kidnapping established malice, the criminal homicide was murder under the common law felony-murder

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62. 286 Md. 430, 442, 408 A.2d 711, 718 (1979).
63. 188 Ark. 846, 68 S.W.2d 100 (1934).
64. *Id.* at 847–48, 68 S.W.2d at 100.
65. *Id.* at 853, 68 S.W.2d at 102.
66. Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900).
67. 286 Md. 430, 442, 408 A.2d 711, 718 (1979).
68. *Id.*
69. *Id.*
70. *Id.* The court was unclear regarding exactly what felonious behavior made the fatal result foreseeable. Although the court determined that the underlying felony for purposes of the felony-murder rule was the kidnapping, it also described the rest of the felons' behavior, from the initial robbery to the final shoot-out, in the discussion of causation and foreseeability. *See id.*
71. *Id.* at 436, 408 A.2d at 715.

rule.[72] In light of Maryland's felony-murder statute, the murder was in the first degree because it was committed during the perpetration of kidnapping, one of the statute's enumerated felonies.[73] The court of appeals concluded that the state had proved the corpus delicti of first-degree murder for which the defendants entered guilty pleas at trial, and that the trial court had acted properly in accepting the pleas.[74]

IV. EVALUATION OF THE COURT'S HOLDING

In affirming the first-degree murder convictions of Jackson and Wells, the court of appeals relied on the common law felony-murder rule and Maryland's felony-murder statute.[75] The court also adopted the causation theory of felony-murder, holding that the felons could be held culpable for the murder only if they caused the victim's death.[76] Implicit in the causation theory of the felony-murder rule is the requirement of a causal link between the harm done (the homicide) and the felony on which the murder conviction is based.[77] Although it found a causal connection between the conduct of the felons and the resulting homicide, the court of appeals in *Jackson* failed to show that the felony itself caused the victim's death. Instead, the court found that the felons caused the homicide by using their victim as a human shield and placing him in a position of known grave danger. As heinous as this conduct appears, such conduct is not a felony as described either by the common law or statutory felony-murder rules.[78] Therefore, the use of the felony-murder rule in deciding the *Jackson* case was inappropriate.

The requirement of a causal link between the felony and the resulting homicide is rooted in a basic theory of criminal law. Generally, a person is not considered criminally culpable for wrongful conduct unless he acts with a "guilty mind."[79] For the conduct to be criminal, the guilty mind (mens rea) must concur with

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72. *Id.*
73. *Id.* The court attributed the crime to both Jackson and Wells because they were jointly engaged in the felonies and, therefore, were each responsible for all consequences that naturally and necessarily flowed from the acts of each participant. *Id.* at 443, 408 A.2d at 719. *See* Mumford v. State, 19 Md. App. 640, 313 A.2d 563 (1974).
74. 286 Md. 430, 444, 408 A.2d 711, 719 (1979).
75. *Id.* at 435–36, 408 A.2d at 714–15.
76. *Id.* at 443, 408 A.2d at 719.
77. LAFAVE & SCOTT, *supra* note 23, at 264. *See* Mumford v. State, 19 Md. App. 640, 643–44, 313 A.2d 563, 566 (1974). *Cf.* R. PERKINS, CRIMINAL LAW 44 (2d ed. 1969) ("Homicide is murder if the death results from the perpetration of an inherently dangerous felony.").
78. *See* note 2 *supra.*
79. 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 27 (14th ed. C. Torcia 1978); *see also* Morrisette v. United States, 342 U.S. 246 (1952).

the criminal conduct (actus reus).[80] The very definition of murder — criminal homicide committed with malice aforethought[81] — exemplifies the necessity that the actus reus concur with the mens rea.[82]

Under the felony-murder rule, the actus reus is the conduct causing the homicide.[83] The mens rea is established by the defendant's commission of the felony upon which the felony-murder charge is based.[84] Concurrence of actus reus and mens rea in a felony-murder case, therefore, requires the conduct causing the homicide to be the underlying felony. Because the court in *Jackson* determined that the underlying felony was the kidnapping,[85] the defendants were guilty of felony-murder only if the commission of the kidnapping caused the homicide.

The court in *Jackson* failed to establish a causal link between the commission of the kidnapping alone and the death of the victim. The language used in the decision indicates that the court relied not on the kidnapping, but on other conduct of the felons to establish the actus reus necessary for a murder conviction:

> "[B]ut for" the acts of Jackson and Wells — committing the armed robbery, kidnapping [the storekeepers] to use them as hostages, forcing them against their will into a position of known grave danger, attempting to elude apprehension by fleeing in stolen automobiles, all the while purposely exposing their hostages to gunfire, and, when ultimately halted in their flight by police action, resisting arrest — "but for" those acts, [the storekeeper] would not have been killed.[86]

The conduct of the felons that caused the homicide was not the mere commission of the kidnapping or the robbery. The homicide was more directly linked to the felons' additional actions: exposing the

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80. 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 27 (14th ed. C. Torcia 1978). *See also* Jackson v. State, 102 Ala. 167, 15 So. 344 (1894); Wilson v. State, 96 Ark. 148, 131 S.W. 336 (1910); State v. Sandborn, 120 Me. 170, 130 A. 54 (1921); Sykes v. State, 291 So. 2d 697 (Miss. 1974).

The term "actus reus" has been used by authorities alternatively to designate the conduct causing the harmful result, the harmful result of the conduct, and both the harm and the conduct causing it. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 222–25 (2d ed. 1960). In this casenote, "actus reus" is used to designate the conduct causing the harmful result.

81. CLARK & MARSHALL, *supra* note 1, § 10.04 at 628.
82. The court in *Jackson* defined murder as criminal homicide committed with malice aforethought, but did not discuss the necessity that the two elements occur contemporaneously. *See* Jackson v. State, 286 Md. 430, 435, 408 A.2d 711, 714 (1979).
83. *See* discussion of actus reus at note 80 *supra*.
84. R. PERKINS, CRIMINAL LAW 45 (2d ed. 1969).
85. 286 Md. 430, 435 n.3, 408 A.2d 711, 714–15 n.3 (1979).
86. *Id.* at 442, 408 A.2d at 718.

storekeeper to police gunfire, forcing him into a place of grave danger, and resisting arrest.

The cases upon which the court of appeals in *Jackson* relied illustrate that the court considered more than the underlying felony to establish the causal connection between the defendants' conduct and the homicide. The court discussed three cases from other jurisdictions — two from Texas and one from Arkansas[87] — which were based on factual situations similar to *Jackson*. In the Texas cases, the felons placed their victim in an obviously dangerous position where the victim was shot and killed by parties trying to stop the felons.[88] In the Arkansas case, the victim, who was being used as a human shield by the felon fleeing a robbery, was accidentally shot and killed by a peace officer.[89] In effect, the courts in Texas and Arkansas considered the defendants' acts of placing their victims in the path of oncoming bullets, which the defendants knew were likely to be fired, as the basis for holding that the defendants caused the homicides.[90] By following the rationale of these cases to establish causation, the court of appeals in *Jackson* indicated that it relied on more than the mere commission of the felony to establish a causal connection between the defendants' conduct and the homicide.

Other language of the court of appeals indicates that the court did not even consider the felonies in finding a causal link between the defendants' conduct and the homicide. The court cited *Wharton's Criminal Law* for the suggestion that:

> [T]he general rule is that the defendant is not responsible for a death caused by the shots of a police officer, but that "[t]he general rule recognizes two exceptions in which the felon is guilty of first degree murder, namely, when he uses the

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87. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934); Keaton v. State, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900).

88. In neither of these cases, which arose out of the same train robbery, did the Texas court find a causal link between the felony and the homicide. Instead, the court likened the actions of the defendants to leading a blind man to a precipice where he falls and is killed. The homicidal act of the defendants was placing the victim in a position of known danger, not the commission of the felony. Keaton v. State, 41 Tex. Crim. 621, 630, 57 S.W. 1125, 1129 (1900); Taylor v. State, 41 Tex. Crim. 564, 570–71, 55 S.W. 961, 964 (1900).

89. Wilson v. State, 188 Ark. 846, 847, 68 S.W.2d 100, 102 (1934). The Arkansas court did not use the felony-murder rule to affirm the defendant's conviction. Instead, the court found the defendant's act of using the victim as a "breastwork" to ward off hostile gunfire sufficient to uphold the murder conviction. *Id. See* Johnson v. State, 252 Ark. 1115, 482 S.W.2d 600 (1972).

90. Johnson v. State, 252 Ark. 1115, 482 S.W.2d 600 (1972); Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970).

> victim as a shield, and when he compels the victim to occupy a place or position of danger."[91]

The *Jackson* court, however, disagreed with Wharton's assertion that the described circumstances are exceptions to any general rule.[92] Instead, the court of appeals found that the felon's acts "establish[ed] a causal relationship with the harm sustained sufficient to make the felon criminally liable."[93] The court thus concluded that the homicide resulted not from the commission of the underlying felony, but from the felon's additional wanton and reckless conduct.

The concurrence of the malice and the conduct that caused the homicide is critical to the conclusion that the homicide was murder. Only if the kidnapping alone had been the proximate cause of the homicide would the malice established by the commission of that felony have coincided with the conduct causing the death. Because the proximate cause of the homicide was not merely the kidnapping, but rather the defendants' entire course of conduct, including using the hostages as human shields and knowingly placing them in a position of known grave danger, the malice established by the commission of the kidnapping did not coincide with the defendants' acts that caused the homicide. Without contemporaneous actus reus and mens rea, the criminal homicide was not felony-murder as defined at common law.[94] Therefore, the felony-murder statute was inapplicable.

If the *Jackson* court had applied the depraved heart theory of murder to establish malice,[95] the defendants' homicidal conduct would have been concurrent with their criminal state of mind. Under the depraved heart theory, the court could establish malice by showing that the defendants acted with reckless disregard for human life.[96] The acts of Jackson and Wells, using their hostages as

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91. Jackson v. State, 286 Md. 430, 443 n.5, 408 A.2d 711, 719 n.5 (1979) (quoting 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 253 (R. Anderson ed. 1957)). Wharton cited as authority for the exceptions to the general rule the same Arkansas and Texas cases that the Maryland court relied on in convicting the defendants in *Jackson* of felony-murder. *Id.* at 548 nn.15 & 16.
92. 286 Md. 430, 443 n.5, 408 A.2d 711, 719 n.5 (1979).
93. *Id.*
94. 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 27 (14th ed. C. Torcia 1978) and cases therein.
95. *See* Evans v. State, 28 Md. App. 640, 696–97, 349 A.2d 300, 335–36 (1975), *aff'd*, 278 Md. 197, 362 A.2d 629 (1976). In *Evans*, Judge Moylan stated that depraved heart murder as developed at common law is today a part of Maryland substantive law. *Accord*, Lindsay v. State, 8 Md. App. 100, 104–05, 258 A.2d 760, 763–64 (1969), *cert. denied*, 257 Md. 734 (1970). *See generally* LAFAVE & SCOTT, *supra* note 23, at 541–45.
96. This course has been followed in California. When someone has been killed by a non-felon during a felony, the California courts have considered whether the defendant's conduct in addition to the felony established malice. *See, e.g.*, People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

human shields, showed that the defendants acted with a reckless disregard for the victim's life. This conduct established the element of malice necessary for a murder conviction. As the court in *Jackson* demonstrated, the defendants' use of their victim as a human shield caused the homicide.[97] Therefore, under the depraved heart theory, the same act — using the hostage as a human shield — could have been used to establish both the malice and the conduct causing the harm, and the mens rea would have been concurrent with the actus reus.

The court, however, could not have upheld a first-degree murder conviction based on the depraved heart theory of murder. Such a crime is not described in any of Maryland's first-degree murder statutes.[98] Instead, the murder would be in the second degree.[99] Even though the court of appeals would have had to reverse and remand *Jackson,* a decision based on the depraved heart theory to prove malice would have more narrowly defined the issue underlying the decision in *Jackson*: whether a felon who uses his victim as a human shield during the course of a felony is culpable for first-degree murder if someone accidentally kills that victim in an attempt to capture the felon. A decision based on the depraved heart theory would also enjoy stronger legal support, because both the actus reus and mens rea upon which the convictions would be based are evidenced by the same conduct and therefore are concurrent.

V. CONCLUSION

By finding the defendants in *Jackson* guilty of murder, the Court of Appeals of Maryland joined virtually every other court that has contemplated similar "human shield" cases.[100] Whenever a felon uses an innocent person as a shield while perpetrating a felony, the felon is guilty of murder if that innocent person is killed by anyone resisting the felony or attempting to capture the felon. In relying on the felony-murder statute to uphold the first-degree murder convictions in *Jackson,* Maryland's highest court indicated that it will also apply the statute to cases in which no human shield is involved. The court of appeals did not clearly establish a causal relationship between the commission of the underlying felony and the homicide for which the felons in *Jackson* were prosecuted. Instead, the court found that the felons' conduct in addition to the commission of the

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97. See text accompanying notes 86–92 *supra.*
98. *See* MD. ANN. CODE art. 27, §§ 407–410 (1976 & Supp. 1980). Maryland's first-degree murder statutes are described in note 31 *supra.*
99. Maryland's second-degree murder statute makes all murder not statutorily described in the first-degree murder statutes murder in the second degree. *See* MD. ANN. CODE art. 27, § 411 (1976).
100. *See* 56 A.L.R.3d 239, 261–63 (1974) and cases cited therein.

felony caused the death of the victim. In finding that this causal connection between the felons' conduct and the homicide was sufficient to invoke the felony-murder statute, the court indicated that it will probably uphold first-degree murder convictions whenever the defendant, while committing a felony, causes the death of another person, even if the causal connection between the commission of the felony and the homicide is tenuous.[101]

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101. By failing to require a stronger causal link between the underlying felony and the homicide, the court has opened the door for felony-murder convictions whenever a homicide might arguably have resulted from a felony, even if that homicide is remote in time and place from the felony. For example, a Baltimore criminal court jury recently found a felon guilty of first-degree felony-murder for the death of an accomplice who was shot by the robbery victim. State v. Freeman, The Evening Sun, Oct. 14, 1980, at D2, col. 2 (Baltimore City Crim. Ct., No. 180–193–20, filed Oct. 7, 1980). In *Freeman,* the defendant robbed an apartment dweller. After the robber left the apartment, the victim got a gun and fired from his apartment at the robber. One of the shots struck and killed the robber's accomplice, who was helping to carry away the stolen goods. *Id.*