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# Casenotes: Criminal Law — Accessoryship — an Accessory before the Fact May Be Convicted of a Greater Crime or Degree of Crime Than the Principal. Jones v. State, 302 Md. 153, 486 A.2d 184 (1985)

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CRIMINAL LAW — ACCESSORYSHIP — AN ACCESSORY BEFORE THE FACT MAY BE CONVICTED OF A GREATER CRIME OR DEGREE OF CRIME THAN THE PRINCIPAL. *Jones v. State*, 302 Md. 153, 486 A.2d 184 (1985).

One of three defendants was convicted of conspiracy to commit murder and accessory before the fact to first degree murder.[1] Of the two remaining defendants, one previously pled guilty as a principal to second degree murder, and the remaining defendant, following a first degree murder conviction, was awaiting a new trial.[2] The Court of Special Appeals of Maryland, in an unreported decision, affirmed the first defendant's conviction of conspiracy to commit murder and reversed, *sua sponte*, the conviction of accessory before the fact to first degree murder.[3] In doing so, the court perfunctorily followed the common law rule that prohibits an accessory's conviction of a greater crime than the principal's.[4] The Court of Appeals of Maryland, however, abrogated the common law rule, holding that an accessory before the fact may be convicted of a greater crime or degree of crime than the principal.[5]

At common law, parties to a felony are classified into four discrete categories:[6] (1) principals in the first degree are the actual perpetrators of the crime; (2) principals in the second degree are those who, without actually committing the offense, aid and abet the perpetrator during the commission of the crime; (3) accessories before the fact procure, counsel, or command the principal, but are not present during the commission of

1. Jones v. State, 302 Md. 153, 155, 486 A.2d 184, 185 (1985).
2. *Jones*, 302 Md. at 155, 486 A.2d at 185.
3. *Id.*
4. *Id.* Various common law rules protected accessories from capital punishment for felonious crimes. Among these was the rule that prohibited conviction of an accessory of a greater crime than the principal. State v. Ward, 284 Md. 189, 202, 396 A.2d 1041, 1049 (1978); *see supra* notes 11-15 and accompanying text.
5. *Jones*, 302 Md. at 161, 486 A.2d at 189. Because the defendant died prior to the court's decision, the case was moot. Judicial mootness occurs when "there is no longer an effective remedy which the court can provide." Hagerstown Reproductive Health Services v. Fritz, 295 Md. 268, 272, 454 A.2d 846, 848 (1983) (quoting Attorney General v. Anne Arundel County School Bus Contractors Ass'n, 286 Md. 324, 327, 407 A.2d 749, 752 (1979)), *cert. denied*, 103 U.S. 3538 (1983). Prior to *Jones*, Maryland case law failed to provide a general rule applicable to the disposition of moot cases. *Compare* Hagerstown Reproductive Health Services v. Fritz, 295 Md. 268, 454 A.2d 846 (1983) (remanding to intermediate appellate court with directions to vacate the trial court's judgment and remand with directions to dismiss the case), *with* National Collegiate Athletic Ass'n v. Tucker, 300 Md. 156, 476 A.2d 1160 (1984) (per curiam) (dismissing the appeal). The *Jones* court accepted the majority distinction between appeals of right and discretionary reviews, holding that the proper disposition of a case that becomes moot during discretionary review is dismissal of the writ of certiorari rather than dismissal of the entire indictment. Jones v. State, 302 Md. 153, 158, 486 A.2d 184, 187 (1985). In spite of dismissing the writ, the *Jones* court considered the merits of the case because there was "an urgency to establish a rule of future conduct on a matter of important public concern." *Id.*
6. Osborne v. State, 304 Md. 323, 326, 499 A.2d 170, 171 (1985); State v. Ward, 284 Md. 189, 196-97, 396 A.2d 1041, 1046-47 (1978); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 495-96 (1972).

the felony; and (4) accessories after the fact provide aid to the principal in order to impede his apprehension, conviction, or punishment.[7]

Capital punishment was originally the exclusive penalty administered to any party convicted of a felony. Certain procedural rules, probably designed to mitigate the harshness of the ubiquitous death penalty, emerged from the principal-accessory distinction.[8] First, under the sequence-of-trial rule, an accessory could not be tried, absent his consent, before the principal was tried, convicted, and sentenced.[9] Second, the greater-crimes rule prohibited the conviction of an accessory for a greater crime than his principal.[10] Third, an accessory who incited the perpetration of a felony in one jurisdiction could be tried only in that jurisdiction, even if the actual crime occurred in a different jurisdiction.[11] Finally, a party could be convicted as principal or accessory only if he was so designated in the pleadings.[12]

Certain illogical consequences followed from these procedural rules.[13] For example, if a principal died without being tried or convicted of a crime, the accessory, in spite of the palpability of his guilt, was shielded from prosecution.[14] Once most felonies were removed from the capital offense category, however, the primary reason for the principal-accessory distinction ceased to exist.[15] Consequently, virtually every state

7. State v. Ward, 284 Md. 189, 197, 396 A.2d 1041, 1046-47 (1978); W. LAFAVE & A. SCOTT, *supra* note 6, at 496-98, 522-23; R. PERKINS & R. BOYCE, CRIMINAL LAW 736-48 (3d ed. 1982); 4 W. BLACKSTONE, COMMENTARIES **34, 35, 37.
8. *See* R. PERKINS & R. BOYCE, *supra* note 7, at 751-58; *see also* W. LAFAVE & A. SCOTT, *supra* note 6 at 499 (identifying the problematic procedural rule that emerged from the principal-accessory distinction). Because the *Jones* case concerned the single rule that an accessory before the fact could not be convicted of a greater crime or degree of crime than the principal, this casenote will focus primarily on that rule, with some attention given to the closely related sequence-of-trial rule that prohibits the trial of an accessory before the trial and conviction of the principal.
9. W. LAFAVE & A. SCOTT, *supra* note 6, at 500; R. PERKINS & R. BOYCE, *supra* note 7, at 755; 4 W. BLACKSTONE, *supra* note 7, at *323. An additional reason against trying an accessory prior to the final disposition of the principal was the assumption that no accessory could exist unless there was a prior judicial determination, via the conviction of the principal, that a crime had been committed. 4 W. BLACKSTONE, *supra* note 7, at *4 n. 38. The rule was also thought to prevent the "absurdity" of acquitting a principal but convicting an accessory. *Id.* at *323.
10. 4 W. BLACKSTONE, *supra* note 7, at *36; R. PERKINS & R. BOYCE, *supra* note 7, at 757. A rationale proffered for this rule is that an accessory's guilt is derived from the principal's behavior; therefore, his culpability should not exceed the principal's guilt. 4 W. BLACKSTONE, *supra* note 7, at *36.
11. *See* W. LAFAVE & A. SCOTT, *supra* note 6, at 499; R. PERKINS & R. BOYCE, *supra* note 7, at 753-54.
12. *See* W. LAFAVE & A. SCOTT, *supra* note 6, at 499; R. PERKINS & R. BOYCE, *supra* note 7, at 754-55. This rule required that no variance between charge and proof exist. Thus, if one was charged as a principal, he could not be convicted on proof that he was an accessory. *See* Shelton v. Commonwealth, 286 Ky. 18, 86 S.W.2d 1054, 1057 (1935).
13. *See* State v. Ward, 284 Md. 189, 192, 396 A.2d 1041, 1044 (1978); W. LAFAVE & A. SCOTT, *supra* note 6, at 498; R. PERKINS & R. BOYCE, *supra* note 7, at 755-56.
14. State v. McDaniel, 41 Tex. 229, 230 (1874).
15. R. PERKINS & R. BOYCE, *supra* note 7, at 759.

has statutorily modified the common law accessory-principal distinctions.[16] As a result, the anomalous consequences of the accessoryship rules have disappeared to a large extent.[17]

Statutory modifications have not resulted in universal abrogation of the accessoryship rules. Although practically every jurisdiction permits an accessory to be tried prior to the principal,[18] a minority of jurisdictions continue to adhere to the greater-crimes rule.[19] Even so, the majority of reported jurisdictions permit an accessory to be convicted of a

16. *See* ALA. CODE § 13A-2-20 (1982); ALASKA STAT. §§ 11-16-100, 11-16-110 (1983); ARIZ. REV. STAT. ANN. § 13-303 (1978); ARK. STAT. ANN. § 41-301 (1983); CAL. PENAL CODE § 971 (West 1970); COLO. REV. STAT. § 18-1-603 (1978); CONN. GEN. STAT. ANN. § 53a-8 (West 1972); DEL. CODE ANN. tit. 11, § 271 (1979); D.C. CODE ANN. § 22-105 (1981); FLA. STAT. ANN. § 777.011 (West 1976); GA. CODE ANN. § 16-2-21 (1984); HAWAII REV. STAT. § 702-221 (1976); IDAHO CODE § 19-1430 (1979); ILL. ANN. STAT. ch. 38, § 5-2 (Smith-Hurd 1972); IND. CODE ANN. § 41-2-4 (Burns 1979); IOWA CODE ANN. § 703.1 (West 1979); KAN. STAT. ANN. § 21-3205 (1981); KY. REV. STAT. ANN. § 502.02 (Baldwin 1969); LA. REV. STAT. ANN. § 14:23 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 57 (1964); MASS. GEN. LAWS ANN. ch. 274, § 2 (West 1969); MICH. COMP. LAWS ANN. § 767.39 (1982); MINN. STAT. ANN. § 609.05 (West 1964); MISS. CODE ANN. § 97-1-3 (1972); MO. ANN. STAT. §§ 45-2-302, 45-2-303 (1983); NEB. REV. STAT. ANN. § 28-206 (1979); NEV. REV. STAT. § 195.020 (1979); N.H. REV. STAT. ANN. § 626:8 (1974); N.J. STAT. ANN. § 2C:2-6 (1982); N.M. STAT. ANN. § 30-1-13 (1978); N.Y. PENAL LAW § 20.00 (McKinney 1975); N.C. GEN. STAT. § 14-5-2 (1981); N.D. CENT. CODE § 12.1-03 (1976); OHIO REV. CODE ANN. § 2923.03 (Page 1982); OKLA. STAT. ANN. tit. 22, § 432 (1969); OR. REV. STAT. § 161.155 (1983); PA. STAT. ANN tit. 18, § 18-306 (1983); R.I. GEN. LAWS § 11-1-3 (1981); S.C. CODE ANN. § 16-1-40 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-3-31 (1979); TENN. CODE ANN. § 39-1-302 (1982); TEX. PENAL CODE ANN. § 7.01 (Vernon 1974); UTAH CODE ANN. § 76-2-202 (1953); VT. STAT. ANN. tit. 13, § 4 (1974); VA. CODE § 18.2-18 (1982); WASH. REV. CODE ANN. § 9A.08.020 (1977); W. VA. CODE § 61-11.7 (1984); WIS. STAT. ANN. § 939.05 (West 1982); WYO. STAT. § 6-1-201 (1983); *see also* W. LAFAVE & A. SCOTT, *supra* note 6, at 500 (summarizing the kinds of statutory changes made to the common law distinction between principals and accessories before the fact); R. PERKINS & R. BOYCE, *supra* note 7, at 759 (noting that the trend is toward abrogating the distinction between principals and accessories).

17. *See* W. LAFAVE & A. SCOTT, *supra* note 6, at 500. Statutory reform has not been uniform nor has it obviated all the anachronistic procedural consequences of the common law distinction between accessories and principals. *See* R. PERKINS & R. BOYCE, *supra* note 7, at 759 (describing interpretations of statutes that retain aspects of the common law accessoryship rules).

18. W. LAFAVE & A. SCOTT, *supra* note 6, at 500-01; *see also* R. PERKINS & R. BOYCE, *supra* note 7, at 759-60 (stating that the unavailability of the principal does not bar conviction of an accessory before the fact); 1 C. TORCIA, WHARTON'S CRIMINAL LAW 177 (1978) (no longer necessary for principal to be convicted prior to accessory's trial). *But see* Feaster v. State, 175 Ark. 165, 299 S.W. 737 (1927) (the court abused its discretion when it permitted the trial of an accessory before the trial of his principal when the principal was in custody and prepared for trial); People v. Wyherk, 347 Ill. 28, 178 N.E. 890 (1931) (when principal and accessory are tried together the statute requires the conviction of the principal to sustain the accessory's conviction).

19. *See, e.g.*, Feaster v. State, 175 Ark. 165, 299 S.W. 737 (1927); Davis v. State, 267 Ind. 152, 368 N.E.2d 1149 (1977); Tomlin v. State, 155 Tex. Crim. 207, 233 S.W.2d 303, 305 (1950).

greater crime than the principal,[20] especially in those jurisdicitons that have abrogated the distinction between accessories and principals.[21]

In an early case, *Fleming v. State*,[22] a defendant-accessory was convicted of murder, although the actual perpetrator previously was convicted only of manslaughter.[23] On appeal, the defendant, although present during the commission of the murder, argued that he was an accessory.[24] Thus, he claimed the court's instructions, which characterized him as "aiding, abetting, and assisting," erroneously permitted a conviction of murder because his principal was convicted only of manslaughter.[25] Relying on the statute that abrogated the distinction between an accessory before the fact and a principal,[26] the Supreme Court of Mississippi held that an accessory can be convicted of a greater crime than the principal once the guilt of the principal is established.[27]

On the other hand, some jurisdictions retain the greater-crimes rule.[28] In *Davis v. State*,[29] the defendant's petition for postconviction relief was predicated on the proposition that his conviction as an accessory before the fact to murder was improper because the subsequent trial of his principal had resulted in only a conviction for assault and battery.[30] The Supreme Court of Indiana stated that "in a situation where there has been two separate judicial determinations on the merits of the respective cases, and where they are contradictory, the law will impose a consis-

20. *See* Oaks v. People, 161 Colo. 561, 424 P.2d 115 (1967). *See generally* Annot. 9 A.L.R. 4th 972, 993-95 (1981 & Supp. 1985) (for a discussion of the effect of a conviction of a principal on the disposition of the accessory's case).

21. *See* Bridges v. State, 263 So.2d 705 (Ala. Crim. App. 1972) (per curiam) (statute abolishes all distinctions between common law parties and allows an aider and abettor to be convicted of a greater crime than the principal); People v. Hines, 28 Ill. App.3d 976, 329 N.E.2d 903 (1975) (under the state's common accountability statute an accessory's murder conviction upheld even though perpetrator pled guilty to only conspiracy to commit murder and armed robbery); State v. Norwood, 217 Kan. 150, 535 P.2d 996 (1975) (citing to statutory authority to support an accessory's conviction to a different crime or degree of crime than his principal); Fleming v. State, 142 Miss. 872, 108 So. 143 (1926) (accessory convicted of higher degree of crime than his principal based upon statutory authority).

22. 142 Miss. 872, 108 So. 143 (1926).

23. *Id.* at 878, 108 So. at 144.

24. *Id.* at 880, 108 So. at 144.

25. *Id.*

26. The statute read: "Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such; and this whether the principal have been previously convicted or not." *Id.* The current Mississippi statute is identical to the above. MISS. CODE ANN. § 97-1-3 (1972 & Supp. 1985).

27. Fleming v. State, 142 Miss. 872, 881, 108 So. 143, 145 (1926).

28. *See* Feaster v. State, 175 Ark. 165, 299 S.W. 737 (1927); Trozzo v. People, 51 Colo. 323, 117 P. 150 (1911); Davis v. State, 267 Ind. 152, 368 N.E.2d 1149 (1977). *See generally* Annot. 9 A.L.R. 4th 972, 995-97 (1981 & Supp. 1985) (discussing case law supporting the greater-crimes rule).

29. 267 Ind. 152, 368 N.E.2d 1149 (1977).

30. *Id.* at 154, 368 N.E.2d at 1150.

tency to their findings."[31]

Maryland embraces the common law classification of parties to a felony,[32] and, until recently, the courts adhered to the sequence-of-trial[33] and greater-crimes rules.[34] In *State v. Magliano*,[35] the defendant was charged as an accessory after the fact to the statutory crime of escape.[36] When the principal died prior to his trial, the defendant, relying on the sequence-of-trial rule, moved to dismiss the indictment.[37] The trial court granted the motion to dismiss,[38] and the court of special appeals affirmed.[39] In its ruling, the court considered itself bound by Maryland's constitutional incorporation of the common law of England[40] and rejected the argument that the accessoryship rules were anachronistic and should be ignored.[41] The court intimated dissatisfaction with the sequence-of-trial rule,[42] but concluded that the legislature, not the judiciary, was the more appropriate forum for change.[43]

In *State v. Ward*,[44] the Court of Appeals of Maryland acknowledged the procedural embarrassments sometimes caused by adherence to the

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31. *Id.* at 159, 368 N.E.2d at 1152 (quoting Schmidt v. State, 261 Ind. 81, 82-83, 300 N.E.2d 86, 87 (1973)).
32. R. GILBERT & C. MOYLAN, MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE 25-32 (1983); H. GINSBERG & I. GINSBERG, CRIMINAL LAW AND PROCEDURE IN MARYLAND 10-12 (1940); L. HOCHHEIMER, A MANUAL OF CRIMINAL LAW AS ESTABLISHED IN THE STATE OF MARYLAND 5-6 (1889).
33. *See* State v. Ward, 284 Md. 189, 201-02, 396 A.2d 1041, 1049 (1978); Randall v. Warden, 208 Md. 667, 670, 119 A.2d 712, 714 (1956); Davis v. State, 38 Md. 15, 45 (1873); State v. Magliano, 7 Md. App. 286, 289-90, 255 A.2d 470, 472 (1969); H. GINSBERG & I. GINSBERG, CRIMINAL LAW AND PROCEDURE IN MARYLAND 12 (1940); L. HOCHHEIMER, A MANUAL OF CRIMINAL LAW AS ESTABLISHED IN THE STATE OF MARYLAND 6 (1889).
34. State v. Ward, 284 Md. 189, 205-06, 396 A.2d 1041, 1049 (1978); Agresti v. State, 2 Md. App. 278, 281, 234 A.2d 284, 286 (1967). The Maryland courts have indicated their displeasure with the greater-crimes and sequence-of-trial rules. *See, e.g.*, State v. Ward, 284 Md. 189, 204-05, 396 A.2d 1041, 1050 (1978) (suggesting that reason does not support the greater-crimes rule); Watson v. State, 208 Md. 210, 218, 117 A.2d 549, 552 (1955) (quoting Bishop's characterization of the distinction between an accessory before the fact and a principal as a "pure technicality"); Jeter v. State, 9 Md. App. 575, 582, 267 A.2d 319, 323 (1970) (expressing adherence to accessoryship rules based solely on deference to the legislature).
35. 7 Md. App. 286, 255 A.2d 470 (1969).
36. *Id.* at 291, 255 A.2d at 473.
37. *Id.* at 291-92, 255 A.2d at 473.
38. *Id.* at 291, 255 A.2d at 473.
39. *Id.* at 301, 255 A.2d at 478.
40. *Id.* at 292, 255 A.2d at 473.
41. *Id.* at 298, 255 A.2d at 476.
42. *Id.* at 299, 255 A.2d at 477. The court enumerated procedural and substantive issues that would require change in the event that the accessoryship rules were altered. The procedural issues included where and under what circumstances an accessory should be tried and under what circumstances an accessory should be tried absent the trial of his principal. The substantive questions included issues regarding degrees of culpability and the type of punishment most appropriate for a convicted accessory. *Id.* at 300, 255 A.2d at 477-78 (1969).
43. *Id.* at 300-01, 255 A.2d at 478 (1969).
44. 284 Md. 189, 396 A.2d 1041 (1978).

accessoryship rules,[45] but still reaffirmed the greater-crimes rule.[46] In *Ward*, the defendant was charged as an accessory before the fact to first degree murder, even though the principals, in separate trials, pled guilty to second degree murder.[47] The trial court dismissed the indictment,[48] but the court of appeals concluded that the statutory nature of the indictment permitted the state to prosecute the defendant as an accessory before the fact to second degree murder.[49] Thus, it reversed and remanded with the clear intent that the defendant only be convicted as an accessory before the fact to second degree murder.[50] In its affirmation of Maryland's adherence to the greater-crimes rule, the court extended the rule's rationale to include statutorily created degrees of crime and held that an accessory before the fact "may not be convicted of a higher *degree* of murder than that principal committing that murder."[51]

*Lewis v. State*[52] provided the factual circumstances needed to begin the judicial reform of the accessoryship rules. In *Lewis*, the defendant was convicted as an accessory before the fact to first degree murder and related offenses.[53] In an earlier trial, the principal was tried and convicted of first degree murder, but he had not been sentenced prior to the defendant's conviction.[54] Relying on the sequence-of-trial rule,[55] the defendant appealed. The court of appeals reversed the conviction[56] because the principal had not been sentenced prior to the accessory's trial.[57] Nevertheless, after establishing its authority to modify the common law[58] and discounting any reason for the continuance of the accessoryship rule,[59] the court abrogated the sequence-of-trial rule and held prospectively that trials of accessories before or after the fact are not precluded by the failure to try the principal.[60]

*Jones v. State*[61] provided the Court of Appeals of Maryland with an

45. *Id.* at 192, 396 A.2d at 1044; *see* State v. Magliano, 7 Md. App. 286, 255 A.2d 470 (1969) (affirming the dismissal of an accessory because the principal died prior to conviction).
46. *Id.* at 206, 396 A.2d at 1051-52.
47. *Id.* at 192-93, 396 A.2d at 1044-45.
48. *Id.* at 193, 396 A.2d at 1045.
49. *Id.* at 200, 396 A.2d at 1048.
50. *Id.* at 207-09, 396 A.2d at 1052-53.
51. *Id.* at 206, 396 A.2d at 1051-52 (emphasis in original).
52. 285 Md. 705, 404 A.2d 1073 (1979).
53. *Id.* at 707, 404 A.2d at 1074.
54. *Id.* at 708, 404 A.2d at 1075.
55. *Id.* at 707, 404 A.2d at 1074.
56. *Id.* at 714, 404 A.2d at 1078.
57. *Id.* at 713, 404 A.2d at 1077.
58. *Id.* at 715, 404 A.2d at 1079. The court stated that it has a right to alter the common law when it "has become unsound in the circumstances of modern life." *Id.* at 715, 404 A.2d at 1079 (quoting White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966)).
59. *Id.* at 716, 404 A.2d at 1079.
60. *Id.* The court did, however, emphasize that the evidence presented at the accessory's trial must be sufficient to establish the occurrence of a felony. *Id.*
61. 302 Md. 153, 486 A.2d 184 (1985).

opportunity to reevaluate the greater-crimes rule in light of its *Lewis* decision. In *Lewis*, the court emphasized the illogic of shielding an accessory from punishment when there was overwhelming evidence of his criminal complicity.[62] By abrogating the sequence-of-trial rule, it permitted an accessory to be tried and convicted even though the principal had not been tried or was never to be tried. In *Jones*, the defendant's appeal of his first degree murder conviction was predicated, inter alia, on the greater-crimes rule.[63] The court of appeals held that "an accessory before the fact may be convicted of a greater crime or greater degree of crime than that of which his principal was convicted."[64]

The *Jones* court relied heavily on its earlier *Lewis* analysis and holding. The court observed that the *Lewis* decision already had sanctioned an accessory's greater-crimes conviction when the accessory was convicted of a crime, but the principal was never tried.[65] Within that context, the abrogation of the greater-crimes rule was a mere formalization and slight extension of the practical effect of *Lewis*. In addition, the *Jones* court acknowledged that the *Lewis* decision illogically made the application of the greater-crimes accessoryship rule contingent on the fortuitous circumstance of which party to the crime was tried first.[66] Finally, the *Jones* court, again borrowing from its *Lewis* rationale, argued that an accessory should not be shielded from prosecution merely because the principal entered a plea or was found guilty of a lesser crime by a separate jury.[67]

*Jones v. State* took the predictable and necessary step of abrogating the greater-crimes rule. The *Jones* analysis, however, would have been considerably strengthened by an expanded discussion of the now obsolete rationale for the accessory-principal classifications and concomitant procedural rules. As noted earlier, the statutory elimination of capital punishment for most felonious crimes obviated the need to protect defendants from the ubiquity of the death penalty.[68] In addition, the existence of many sensible reasons for the principal's conviction of a lesser crime than the accessory[69] made it unnecessary to equate the accessory's culpability with the principal's conviction.[70] If the *Jones* court

62. Lewis v. State, 285 Md. 705, 715, 404 A.2d 1073, 1079 (1979) (quoting State v. Ward, 284 Md. 189, 396 A.2d 1041 (1978)).
63. Jones v. State, 302 Md. 153, 153, 486 A.2d 184, 185 (1983).
64. *Id.* at 161, 486 A.2d at 189.
65. *Id.* at 160, 486 A.2d at 188.
66. *Id.* at 160-61, 486 A.2d at 188.
67. *Id.* at 161, 486 A.2d at 188.
68. *See supra* note 18 and accompanying text.
69. *See, e.g.*, Oaks v. People, 161 Colo. 561, 424 P.2d 115 (1967) (accessory's greater-crimes conviction upheld when principal pled guilty to lesser crime); Combs v. State, 260 Ind. 294, 295 N.E.2d 366 (1973) (upholding greater-crimes conviction when principal pled guilty to lesser crime); State v. Stocksdale, 138 N.J. Super. 312, 350 A.2d 539 (1975) (conviction of accessory permitted when principal exonerated by a defense specific to him).
70. Justice Holmes makes this point succinctly: It is revolting to have no better reason

had strengthened its reasoning by reference to these indicia of obsolescence, it would have helped to counterbalance the court's virtual disregard for the consequences of its decision on the "appearance of evenhandedness in the administration of justice."[71] Although the jurisprudentially sophisticated observer might understand that an accessory may be convicted of a greater crime than the principal, the relatively unsophisticated public[72] may not apprehend that possibility. The ostensible anomaly of a principal's conviction of manslaughter and his accessory's conviction for second degree murder seriously compromises the appearance of justice.

Finally, the *Jones* court's judicial activism[73] leaves several important accessoryship related issues unsettled. Of greatest significance is whether it is proper to permit an accessory before the fact to first degree murder to be sentenced to death, especially when the principal may be convicted of a lesser crime or no crime at all. By failing to address the propriety of such death sentencing for accessories before the fact,[74] *Jones* fails to bar the very harshness the common law accessoryship rules sought to obviate.

The *Jones* court was correct to abrogate the greater-crimes rule. The court's decision, however, left unanswered some questions posed by the common law rules of accessoryship; therefore, it remains for the legislature to consider the broader picture. Because the original reasons for the principal-accessory distinctions have become obsolete, the legislature should follow the modern trend and abolish the classificatory distinctions. It would be unwise, however, to permit an accessory before the fact to be sentenced to death, especially when the principal, could receive a

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for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 469 (1897).

71. United States v. Standefer, 610 F.2d 1076, 1108 (3d Cir. 1979) (Gibbons, J., concurring in part and dissenting in part), *aff'd*, 447 U.S. 10 (1980).

72. *See* Krasno, *National Survey Examines Public Awareness of Judicial System*, 67 JUDICATURE 309 (1984); Slonim, *Public Doesn't Understand Justice System: Survey*, 66 A.B.A.J. 1502, 1502-03 (1980).

73. Prior Maryland case law supports an activist role in abrogating or altering the common law. *See, e.g.*, Boblitz v. Boblitz, 296 Md. 242, 462 A.2d 506 (1983) (abrogates common law interspousal immunity rule in negligence cases); Moxley v. Acker, 294 Md. 47, 447 A.2d 857 (1982) (eliminates element of force in a common law action of forcible detainer); Williams v. State, 292 Md. 201, 438 A.2d 1301 (1981) (modifies common law principle that prohibits waiving the right to be present at every stage of a criminal trial by the defendant's attorney); Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979) (abrogates common law rule that an accessory before the fact cannot be tried prior to the conviction and sentencing of the principal); Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979) (refused to recognize common law offense of misprision of felony).

74. Maryland law provides for the death penalty for first degree murder. MD. ANN. CODE art. 27, § 413(e)(1), (d)(7) (1957). *But see* Osborne v. State, 304 Md. 323, 332, 499 A.2d 170, 174 (1985) (proscribing the death penalty for accessories after the fact to first degree murder).

lesser penalty. In that instance, not only is the appearance of justice compromised, but the cruel and unusual punishment prohibitions of the eighth amendment are implicated.[75] Thus, the legislature should insulate all accessories from capital punishment, but allow, in all other instances, an accessory before the fact to be treated as a principal.

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75. For a thorough discussion of the constitutional issues involved when an accessory is sentenced to death, see Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17 (1979).