UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 81 ● Winter 2019

A LIFETIME FOR SOMEONE ELSE'S CRIME: THE CRUELTY OF PENNSYLVANIA'S FELONY MURDER DOCTRINE

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ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2019.679
http://lawreview.law.pitt.edu

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Dolly Prabhu*

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* Candidate for J.D., 2020, University of Pittsburgh School of Law. I would like to thank Bret Grote and the rest of the Abolitionist Law Center for their guidance, feedback, and support.

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I. INTRODUCTION

The felony murder rule is one of the most widely criticized legal doctrines in American criminal jurisprudence.[1] The continued existence of this historical relic well into the 21st century is baffling. Put simply, the felony murder rule allows an individual who has committed a felony to be charged with murder should someone die during the course of that felony.[2] Such a charge may be brought regardless of who is responsible for the death, who is actually killed, whether any actor involved possessed an intent to kill, or whether there was even a known possibility of violence or confrontation.[3] This means that one can be culpable in the eyes of the law for any of the following: the death of a bystander caused by a co-felon,[4] the death of a co-

[1] Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404 n.1 (2011) (citing MODEL PENAL CODE § 210.2 cmt. 6, at 36 (Official Draft and Revised Comments 1980); SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 106–08 (1998); Charles Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L.Q. 191, 210; George Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 413–15 (1981); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706–07; James J. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1045 (1973); Robert G. Lawson, *Criminal Law Revision in Kentucky: Part I—Homicide and Assault*, 58 KY. L.J. 242, 252–55 (1970); Roy Moreland, *A Re-Examination of the Law of Homicide in 1971: The Model Penal Code*, 59 KY. L.J. 788, 804 (1971); Herbert L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 4 (1973); Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 427–28 (1963); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 491 (1985); Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1542–43 (1974); Jeanne Hall Seibold, Note, *The Felony-Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 161–62 (1978); Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 427 (1957); Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1935 (1986); Adam Liptak, *Serving Life for Providing Car to Killers*, N.Y. TIMES, Dec. 4, 2007, at A1).

[2] Binder, *supra* note 1, at 404–08.

[3] *Id.*; *see also* Marc Bookman, *The 14-Year-Old Who Grew Up in Prison*, VICE (July 20, 2016), https://www.vice.com/en_us/article/7bm9xe/ricky-olds-prison-juvenile-justice-sentencing-reform-america (detailing the story of Ricky Olds, who was sentenced to life-without-parole for felony murder at age 14 for essentially being present at the time of a crime).

[4] Abbie VanSickle, *California Law Says He Isn't a Murderer. Prosecutors Disagreed*, N.Y. TIMES (May 16, 2019), https://www.nytimes.com/2019/05/16/us/california-felony-murder.html.

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felon caused by a bystander,[5] the death of a co-felon caused by a responding officer,[6] and even the death of a responding officer caused by another responding officer.[7]

The felony murder rule is a remnant from a long-gone era and calls for its abolition have been made for decades.[8] Unfortunately, the United States Supreme Court has not yet held that the rule violates the Eighth Amendment's prohibition on cruel and unusual punishments.[9] It is time, therefore, that Pennsylvania courts squarely address the issue and abolish the doctrine on their own, especially because the state's mandated punishment for felony murder is especially harsh. Indeed, in an age where the United States Supreme Court cannot be expected to be a champion for criminal justice reform, perhaps it is time for progressive federalism to be the bearer of change in Pennsylvania. Individuals seeking to bring claims that would traditionally be grounded in the Federal Constitution should consider looking for grounding in the Pennsylvania Constitution, which may be interpreted more expansively than its federal counterpart. Pennsylvania courts ought to interpret Article I, Section 13 of the Pennsylvania Constitution, which bars the imposition of cruel punishments, as prohibiting the mandatory imposition of a life-without-parole sentence for felony murder.

II. THE FELONY MURDER RULE IN PENNSYLVANIA

In Pennsylvania, felony murder is second-degree murder.[10] One is charged with second-degree murder if a death occurs during the commission or attempted

[5] Jake Griffin, *Controversial Felony Murder Rule Under Microscope After Lake County Shooting*, DAILY HERALD (Aug. 16, 2019), https://www.dailyherald.com/news/20190815/controversial-felony-murder-rule-under-microscope-after-lake-county-shooting.

[6] Jamiles Lartey, *Alabama Police Shot a Teen Dead, but His Friend Got 30 Years for the Murder*, THE GUARDIAN (Apr. 15, 2018), https://www.theguardian.com/us-news/2018/apr/15/alabama-accomplice-law-lakeith-smith.

[7] Larry Celona et al., *How the Tragic Friendly Fire Death of NYPD Detective Brian Simonsen Unfolded*, N.Y. POST (Feb. 13, 2019), https://nypost.com/2019/02/13/how-the-tragic-friendly-fire-death-of-nypd-detective-brian-simonsen-unfolded/.

[8] MODEL PENAL CODE § 210.2 cmt. 2, at 32–42 (Official Draft and Revised Comments 1980).

[9] The furthest the United States Supreme Court's jurisprudence has gone thus far regarding Eighth Amendment challenges to felony murder is to prohibit the imposition of life-without-parole sentences for juveniles who commit nonhomicide crimes and to limit the use of the death penalty for felony murder to only instances where the defendant expressed reckless indifference to human life and majorly participated in the felony. Graham v. Florida, 560 U.S. 48, 82 (2010); Tison v. Arizona, 481 U.S. 137, 158 (1987).

[10] 18 PA. CONS. STAT. § 2502(b) (2019).

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commission of a felony to which one was a principal or accomplice.[11] In Pennsylvania, individuals can be charged with felony murder if the felony committed or attempted was one of the following crimes: robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.[12]

Additionally, Pennsylvania *mandates* a life-without-parole sentence for those convicted of second-degree murder.[13] It bears no effect on the sentence whether the convicted individual actually did the killing, intended for someone to die, or anticipated the possibility of violence. Pennsylvania prisons currently hold over one thousand individuals convicted of second-degree murder.[14]

III. HISTORY OF THE FELONY MURDER RULE

The history of the felony murder rule is a bizarre one. A 1797 description of the felony murder doctrine, written by Sir Edward Coke, is often pointed to as the origin of the common law rule:

> If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.[15]

Unfortunately, this description appears to have been an inaccurate translation of another passage, written by Henry de Bracton.[16] Bracton's passage stated that an unintentional killing during the commission of a lawful activity was not blameworthy, while an unintentional killing which occurred during the commission

[11] *Id.*

[12] *Id.* § 2502(d).

[13] *Id.* § 1102(b).

[14] Samantha Melamed, *An Accomplice Will Die in Prison While the Killer Goes Free: The Strange Justice of Pennsylvania's Felony-Murder Law*, PHILA. INQUIRER (Feb. 16, 2018), https://www.philly.com/philly/news/crime/375250-pennsylvania-philly-felony-murder-law-da-larry-krasner-criminal-justice-reform-20180216.html.

[15] People v. Aaron, 299 N.W.2d 304, 309 (Mich. 1980) (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (E. & R. Brooke 1797)).

[16] *Id.* at 309–10.

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of an *unlawful* activity was.[17] This merely seems to suggest that a killing which occurred during the course of a felony would be a more culpable, "blameworthy" act. At best, it could be interpreted to mean that such a killing would be unlawful.[18] But Bracton in no way suggested that such an act would constitute *murder*, a crime that at the time referred only to secret assassinations[19] and today generally requires a culpable *mens rea* in regard to the act of killing[20]—neither of which were the case in the scenario described by Sir Coke. A review of the other sources cited to by Sir Coke reveals that none of these explain his formulation of the felony murder doctrine either.[21] For the aforementioned reasons, his description of the rule has been referred to as "the common law only of Sir Edward Coke."[22]

But, sadly, this formulation of the felony murder rule survived the age of Sir Edward Coke and has indeed become common law in this country. Of course, Sir Coke's inaccurate translation was harmless throughout early common law, as all felonies were punishable by death.[23] Yet, inexplicably, the felony murder rule lived on in the United States even as the punishments for felonies drastically declined in severity.[24] Even England, the birthplace of the felony murder doctrine, rarely invoked the archaic rule, and ultimately eliminated it entirely by 1957.[25]

Though still prolific in this country, the doctrine has been limited by every state in some regard to diminish its harshness.[26] Some states, like Pennsylvania, have listed a limited number of felonies to which the doctrine applies.[27] Others have

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[17] *Id.* at 310.

[18] *Id.*

[19] *Id.*

[20] *Constructive Murder*, 65 LAW TIMES 291, 292 (1878).

[21] *Aaron*, 299 N.W.2d at 310.

[22] 6 THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 88 (1839).

[23] 299 N.W.2d at 310.

[24] *Id.* at 307.

[25] Sidney Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 635 (1957).

[26] *Aaron*, 299 N.W.2d at 312.

[27] *See, e.g.*, *id.* at 315; 18 PA. CONS. STAT. § 2502(b) (2019).

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limited its application to felonies inherently dangerous to life.[28] Some have curtailed the rule so that it only applies to those who committed the actual killing.[29] A few states have taken the lead in abolishing the doctrine altogether.[30] Another approach taken by some states is to limit the severity of the punishment. For instance, many states reserve life-without-parole sentences only for intentional murder or especially violent crimes,[31] and the minimum sentence for felony murder starts as low as five years in some states.[32] This nationwide trend of limiting the scope of the rule suggests that this doctrine is not compatible with modern notions of justice.

IV. A LIFE-WITHOUT-PAROLE SENTENCE FOR FELONY MURDER VIOLATES ARTICLE 1, SECTION 13 OF THE PENNSYLVANIA CONSTITUTION, WHICH PROHIBITS CRUEL PUNISHMENTS

Though state courts are bound by federal courts' constitutional rulings, their interpretations of their own constitutional provisions need not mirror such decisions exactly.[33] Rather, state courts have always had the power to expand state constitutional protections further than federal courts' interpretations of analogous provisions of the United States Constitution.[34] In other words, "[t]he fact that Pennsylvania is not required to go further than new federal law or policy does not mean that the Commonwealth should not do so."[35] Indeed, "[t]he United States Supreme Court has repeatedly affirmed that the states are not only free to, but also encouraged, to engage in independent analysis in drawing meaning from their own state constitutions."[36] That being said, if a litigant does wish to argue for a broader

[28] *See, e.g.*, KAN. STAT. ANN. § 21-5405(a)(2) (2019); Gore v. Leeke, 199 S.E.2d 755, 758–59 (S.C. 1973).

[29] *See, e.g.*, CAL. PENAL CODE § 189(e)(1) (West 2019); COLO. REV. STAT. § 18-3-102(2)(b) (2018); N.D. CENT. CODE, § 12.1-16-01(1)(c)(1) (2019).

[30] Michigan, Hawaii, Kentucky, and Ohio have all abolished the doctrine. *Aaron*, 299 N.W.2d at 314–15, 335.

[31] Craig S. Lerner, *Who's Really Sentenced to Life Without Parole?: Searching for "Ugly Disproportionalities" in the American Criminal Justice System*, 2015 WIS. L. REV. 789, 861.

[32] ALASKA STAT. § 12.55.125(b) (2019); TEX. PENAL CODE ANN. § 12.32(a) (West 2019).

[33] Danforth v. Minnesota, 552 U.S. 264, 282 (2008).

[34] *Id.*

[35] Commonwealth v. Cunningham, 81 A.3d 1, 15 (Pa. 2013) (Castille, C.J., concurring).

[36] Commonwealth v. Edmunds, 586 A.2d 887, 894 (Pa. 1991) (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80–82 (1980)).

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retroactive application of an analogous Pennsylvanian constitutional rule, the litigant should couch such an argument in terms of *Pennsylvania* laws, legislative policy directives, and norms.[37]

Knowing then that states need not replicate United States constitutional protections exactly, there comes the question of how an analysis of a state constitutional provision should proceed. Conveniently, the Pennsylvania Supreme Court has laid out the procedure for such an inquiry.[38] In *Commonwealth v. Edmunds*, the court determined that the good faith exception to the exclusionary rule, although permitted by federal law, was impermissible as a matter of state law, per the Pennsylvania Constitution.[39] It thus interpreted Article 1, Section 8 of the Pennsylvania Constitution to be more protective than the Fourth Amendment, despite the almost identical text of the provisions.[40] In undertaking this analysis of the Pennsylvania Constitution, the Court laid out four factors to be considered: (1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania case law; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.[41] An analysis of these factors in regard to Article 1, Section 13 of the Pennsylvania Constitution reveals that this provision should likewise be interpreted to grant greater protections than its federal counterpart, the Eighth Amendment, by prohibiting the imposition of a mandatory life-without-parole sentence for second-degree murder.

A. Text of Pennsylvania Constitution Article I, Section 13

Per Article 1, Section 13 of the Pennsylvania Constitution, "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel punishments inflicted*."[42] This section of the Pennsylvania Constitution is the state's counterpart to the Eighth Amendment's federal ban of "cruel and unusual" punishments.[43] It is already clear that, in this realm, Pennsylvania offers greater protections as a matter

[37] *Cunningham*, 81 A.3d at 13.

[38] *Edmunds*, 586 A.2d at 895.

[39] *Id.* at 906.

[40] *Id.*

[41] *Id.* at 895.

[42] PA. CONST. art. I, § 13 (emphasis added).

[43] U.S. CONST. amend. VIII.

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of state law than the Eighth Amendment does: it bars all "cruel" punishments, while the Eighth Amendment qualifies that the only cruel punishments that are barred are those which are also "unusual." To assume anything else would be to assume that one of the most cited protections guaranteed by the Federal Constitution is mere surplusage; certainly, "unusual" must have some additional, separate meaning.

Historical evidence shows that the drafters of the Bill of Rights likely intended for the word "unusual" to refer to practices that were "contrary to long usage."[44] Even the United States Supreme Court appears to support this definition, having previously stated that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[45] This also seems to imply a meaning relating to historical practice. Another similar distinction the United States Supreme Court has made between "cruel" and "unusual" is as follows: "a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.'"[46] This too suggests that the word has independent meaning, and that its exclusion from the Pennsylvania Constitution is significant and intentional.

B. History of Pennsylvania Constitution Article I, Section 13

Pennsylvania's anti-cruelty provision was ratified in 1790, one year before the Eighth Amendment was adopted.[47] It is thus inaccurate to assume that the meaning of the Pennsylvania provision was intended to mirror the Eighth Amendment. As stated by the *Edmunds* court, "contrary to the popular misconception that state constitutions are somehow patterned after the United States Constitution, the reverse is true."[48] This makes independent analyses of state constitutional provisions all the more critical.

Though Pennsylvania courts have heard many claims brought under Article I, Section 13 of the Pennsylvania Constitution, those claims tend to be brought alongside Eighth Amendment claims, and the analyses of these provisions is

[44] John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1825 (2008).

[45] Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991).

[46] *Id.* at 967.

[47] PA. CONST. of 1790, art. IX, § 13.

[48] Commonwealth v. Edmunds, 586 A.2d 887, 896 (Pa. 1991).

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generally conflated.[49] The first independent consideration of the provision was undertaken by the Pennsylvania Supreme Court in *Commonwealth v. Zettlemoyer*, wherein the court held that the death penalty did not violate Article I, Section 13 of the Pennsylvania Constitution.[50] The *Zettlemoyer* Court did not attempt to define the meaning of the provision, however.[51] It merely concluded that, because the death penalty has been an accepted practice since the founding of the state, it could thus not be so cruel as to be barred by Article 1, Section 13.[52]

To this point—and also in response to the posited definition of "unusual" as "contrary to long usage"[53]—it is worth noting that life-without-parole sentences do not enjoy the same historical acceptance as the death penalty. Life-without-parole sentences did not exist at common law,[54] nor did they exist in Pennsylvania until the Parole Act of 1941 gave the parole board the exclusive power to grant parole for all individuals *except* those sentenced to life, essentially making every life sentence a life-without-parole sentence by default.[55] Additionally, sentence commutation used to be quite frequent in the 1970s and 1980s.[56] In the 1970s, about twenty people per year had their life sentences commuted.[57] Commutations then became increasingly rare, with only six individuals total receiving a commutation of their sentence from

[49] *See* Commonwealth v. Smith, 131 A.3d 467, 470–73 (Pa. 2015); Commonwealth v. Walter, 119 A.3d 255, 292–94 (Pa. 2015); Commonwealth v. Towles, 106 A.3d 591, 608 (Pa. 2014).

[50] Commonwealth v. Zettlemoyer, 454 A.2d 937, 967–69 (Pa. 1982).

[51] *Id.*

[52] *Id.* Notably, the Supreme Court of Pennsylvania recently heard arguments that the death penalty violates Article I, Section 13 of the Pennsylvania Constitution, and thus had the opportunity to modify its former analysis and engage in further interpretation of this provision. Julie Shaw, *Pa. Supreme Court Rejects Petition to Find Death Penalty Unconstitutional*, PHILA. INQUIRER (Sept. 27, 2019), https://www.post-gazette.com/news/crime-courts/2019/09/27/Pa-Supreme-Court-rejects-petition-to-find-death-penalty-unconstitutional/stories/201909270179. Even the Philadelphia District Attorney's Office, representing the state in this appeal, conceded that the death penalty as applied is unconstitutional and presented its own evidence showing that seventy-two percent of death penalty sentences imposed in the jurisdiction in the past forty years were overturned. *Id.* The court ultimately avoided addressing the substantive legal issues raised by rejecting the petition on procedural basis. *Id.*

[53] Stinneford, *supra* note 44.

[54] *Id.* at 1762 n.135.

[55] QUINN COZZENS & BRET GROTE, A WAY OUT: ABOLISHING DEATH BY INCARCERATION IN PENNSYLVANIA 28 (2018).

[56] *Id.* at 18.

[57] *Id.*

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1995 to 2015.[58] Today, there is little hope of release for those sentenced to life-without-parole.[59] However, there has been a very recent spike in commutations granted by the Pennsylvania governor—now up to nineteen since 2015[60]—perhaps signaling a political shift disfavoring life-without-parole sentences.[61]

The Pennsylvania Supreme Court also briefly considered the meaning of the provision in *Commonwealth v. Batts*.[62] The *Batts* court declined to give meaning to the textual difference of "cruel" versus "cruel and unusual," seemingly forgetting that *Edmunds* calls for a consideration of the text of the provision.[63] The court also pointed out that nowhere in Pennsylvania's history is it suggested that Article I, Section 13 of the Pennsylvania Constitution should be interpreted to be broader than the Eighth Amendment.[64] While this may be true, it says nothing about what Pennsylvania courts would find the meaning of the provision to be if they *did* attempt to interpret it independent of its federal counterpart. Pennsylvania courts should not decline to give meaning to a state constitutional provision merely because they have not had the opportunity (or willingness) to do so in the past.

Based on this brief case history, it does not appear that Pennsylvania courts have seriously undertaken the task at hand. Despite the Pennsylvania Supreme Court's directive in *Edmunds* to give independent, meaningful construction to state constitutional provisions,[65] Pennsylvania courts have repeatedly failed to do. As both the felony murder rule and life-without-parole sentencing have come under increasing scrutiny,[66] Pennsylvania's own version of the rule, along with its mandated life-without-parole sentence, is particularly ripe for review under Article

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[58] *Commutation of Life Sentences (1971–Present)*, PA. BD. PARDONS, https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx (last visited Feb. 4, 2020).

[59] *See* COZZENS & GROTE, *supra* note 55, at 18.

[60] *Commutation of Life Sentences (1971–Present)*, *supra* note 58.

[61] An-Li Herring, *As Political Tides Shift, Chances at Commutation Rise for Pennsylvania Lifers*, 90.5 WESA (Sept. 9, 2019), https://www.wesa.fm/post/political-tides-shift-chances-commutation-rise-pennsylvania-lifers#stream/0.

[62] Commonwealth v. Batts, 66 A.3d 286, 297–99 (Pa. 2013).

[63] *Id.*; Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

[64] *Batts*, 66 A.3d at 299.

[65] *Edmunds*, 586 A.2d at 895.

[66] *See* Miller v. Alabama, 567 U.S. 460, 465 (2012); Graham v. Florida, 560 U.S. 48, 52 (2010); Roper v. Simmons, 543 U.S. 551, 555 (2005).

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1, Section 13. When doing so, Pennsylvania courts are obligated to give the state constitutional provision the meaningful consideration it deserves.

C. Related Case Law from Other States

Almost every state has a provision in its constitution that is analogous to the Eighth Amendment; those that do not have read in a prohibition on cruel and unusual punishment into other provisions in their state constitutions.[67] The text of these provisions vary, with some states mirroring the Eight Amendment's language barring "cruel and unusual punishment,"[68] others banning cruel *or* unusual punishments,[69] and some (like Pennsylvania) barring merely cruel punishments.[70]

There are only five other states besides Pennsylvania whose constitutional provisions ban only "cruel" punishments: Delaware, Kentucky, Rhode Island, South Dakota, and Washington.[71] Of those states, Kentucky, Rhode Island, and South Dakota have not explicitly addressed the question of whether their constitutions offer more protection than the Eighth Amendment.[72] Instead, they too tend to conflate the

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[67] *See* State v. Santiago, 122 A.3d 1, 14 (Conn. 2015) ("It is by now well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9."); People v. Sharpe, 839 N.E.2d 492, 514 (Ill. 2005) ("This court has stated that the proportionate penalties clause was clearly intended by the framers to be synonymous with the eighth amendment to the United States Constitution's cruel and unusual punishment clause."); Godin v. Corr. Corp. of Am., 2017 Vt. Super. LEXIS 86, at *38 (Vt. 2017) ("The Vermont Supreme Court has held that Article 18 and § 39 are the equivalent of the Eighth Amendment in other circumstances.").

[68] ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; COLO. CONST. art. II, § 20; FLA. CONST. art. I, § 17; GA. CONST. art. I, § I, para. XVII; IDAHO CONST. art. I, § 6; IND. CONST. art. 1, § 16; IOWA CONST. art. I § 17; MD. CONST. Declaration of Rights art. 16; MO. CONST. art. I, § 21; MONT. CONST. art. II § 22; NEB. CONST. art. I, § 9; N.J. CONST. art. I, para. 12; N.M. CONST. art. II, § 13; N.Y. CONST. art I, § 5; OHIO CONST. art. I, § 9; OR. CONST. art. I, § 16; P.R. CONST. art. II, § 12; TENN. CONST. art. I, § 16; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6.

[69] ALA. CONST. art. I, § 15; ARK. CONST. art. 2, § 9; CAL. CONST. art. I § 17; HAW. CONST. art. I, § 12; KAN. CONST. Bill of Rights § 9; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MASS. CONST. pt. I, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. 3, § 28; NEV. CONST. art. 1, § 6; N.H. CONST. pt. I, art. 33; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § 9; S.C. CONST. art. I, § 15; WYO. CONST. art. 1, § 14.

[70] DEL. CONST. art. I, § 11; KY. CONST. § 17; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.D. CONST. art. VI, § 23; WASH. CONST. art. I, § 14.

[71] *Id.*

[72] *See* Wilson v. Commonwealth, No. 2013-SC-000731-MR, 2015 Ky. LEXIS 20, at *13 (Ky. May 14, 2015); State v. Ciresi, 151 A.3d 750, 755 (R.I. 2017); State v. Blair, 721 N.W.2d 55, 73 (S.D. 2006) (Konenkamp, J., concurring).

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analyses for these federal and state claims.[73] While the Delaware Supreme Court has heard arguments claiming that certain punishments that may not violate the Eighth Amendment may independently violate its state constitution's anti-cruelty provision, the court has dismissed such claims as "conclusory statement[s]" where they are presented without state-specific analyses.[74] Thus—just as in Pennsylvania—such an interpretation still appears possible so long as it is presented accordingly.

Washington courts, however, have engaged in clear and thoughtful consideration of their constitutional provision banning cruel punishments.[75] In *State v. Bassett*, the Washington Supreme Court held that sentencing a juvenile to life-without-parole, even after individualized sentencing, violated Article I, Section 14 of Washington's state constitution—the provision which bans cruel punishments.[76] The *Bassett* court firmly acknowledged that its constitutional provision offered greater protection than the Eighth Amendment "because it prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual."[77] Even more recently, the Washington Supreme Court applied this reasoning to strike down the state's death penalty; its failure to serve any legitimate penological goals and the arbitrary and racially biased manner in which it was imposed was held to violate the state's ban on cruel punishments.[78]

Similarly, in *People v. Bullock*, the Michigan Supreme Court held that the imposition of a life sentence for possession of 650 or more grams of cocaine violated the Michigan Constitution's prohibition against "cruel or unusual" punishments, despite the United States Supreme Court having previously held that such a sentence did not violate the Eighth Amendment's ban on "cruel and unusual" punishments.[79]

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[73] *Id.*

[74] Burrell v. State, 207 A.3d 137, 143 (Del. 2019) (quoting Wallace v. State, 956 A.2d 630, 637 (Del. 2008)) ("A proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the following non-exclusive criteria: textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes. Simply reciting that his sentence . . . violates Article I, section 11, without more, is a conclusory statement.").

[75] *See* State v. Bassett, 428 P.3d 343 (Wash. 2018); WASH. CONST. art. I, § 14.

[76] *Bassett*, 428 P.3d at 355.; WASH. CONST. art. I, § 14.

[77] *Bassett*, 428 P.3d at 349 (citing State v. Dodd, 838 P.2d 86, 96 (Wash. 1992)).

[78] State v. Gregory, 427 P.3d 621, 636–37 (Wash. 2018).

[79] People v. Bullock, 485 N.W.2d 866, 870, 877 (Mich. 1992); Harmelin v. Michigan, 501 U.S. 957, 961–62, 996 (1991).

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As put by the court, "the Michigan provision prohibits 'cruel or unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel and unusual.' This textual difference does not appear to be accidental or inadvertent."[80] Minnesota, Florida, and California courts have also described the same textual difference between the Eighth Amendment and their own constitutional provisions (all "cruel or unusual") as meaningful: The Minnesota Supreme Court referred to this variation as "not trivial,"[81] a California Court of Appeals referred to it as "purposeful and substantive rather than merely semantic,"[82] and the Florida Supreme Court indicated that difference demonstrated "that both alternatives (i.e., 'cruel' and 'unusual') were to be embraced individually and disjunctively within the Clause's proscription."[83] The aforementioned case law from other states demonstrates that a more protective interpretation of Article I, Section 13 of the Pennsylvania Constitution would be both justifiable and prudent.

D. Pennsylvania Public Policy Considerations

1. Frequency of Life-Without-Parole Sentencing in Pennsylvania

Life-without-parole is one of the harshest sentences in this country, second only to the death penalty. Considering how severe and unforgiving this punishment is, one would expect that life-without-parole sentences would be imposed sparingly. Though this is true throughout the rest of the world,[84] it is not the case for our own country.[85] The state of Pennsylvania is especially atrocious in its frequency of imposing such sentences, with well over 5,000 individuals currently serving life-without-parole.[86] This accounts for over 10% of all people currently serving a life-without-parole sentence throughout the country and about 11% of Pennsylvania's total prison population.[87] This number has rapidly increased in the past few

[80] *Bullock*, 485 N.W.2d at 872.

[81] State v. Mitchell, 577 N.W.2d 481, 488 (Minn. 1998).

[82] People v. Carmony, 26 Cal. Rptr. 3d 365, 378 (Cal. Ct. App. 2005).

[83] Armstrong v. Harris, 773 So. 2d 7, 17 (Fla. 2000).

[84] COZZENS & GROTE, *supra* note 55, at 27.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 28.

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decades.[88] In 1974, less than 500 people were serving such sentences throughout the state.[89] From 2003 to 2016, the population of individuals serving a life-without-parole sentence rose 40%, despite a 21% decrease in crime over the same period.[90] Individuals charged with felony murder *make up 25%* of those serving life-without-parole sentences in Pennsylvania.[91]

Though many of Pennsylvania's jurisdictions have rates of life-without-parole sentencing that are higher than the national average, the jurisdiction of Philadelphia stands out amongst all of them as the harshest.[92] Over half of all of the individuals serving life-without-parole sentences in Pennsylvania were sentenced in Philadelphia.[93] Indeed, Philadelphia is the leading jurisdiction in the world in sentencing people to die in prison.[94]

2. Similarity to Capital Punishment

As its name implies, a life-without-parole sentence precludes any possibility of parole. Consequently, such a sentence practically guarantees that one will die behind bars, which is why communities have shifted from using the term "life-without-parole" to the less embellished term "death-by-incarceration."[95] Life-without-parole sentencing has received increased attention since the United States Supreme Court held in *Miller v. Alabama* that the imposition of mandatory life-without-parole sentences for juveniles violated the Eighth Amendment's ban on cruel and unusual punishment.[96] This decision came on the heels of *Roper v. Simmons* and *Graham v. Florida*.[97] In 2005, *Roper* held that sentencing juveniles to the death penalty violated the Eighth Amendment, mainly on account of national and international trends reflecting a rejection of juvenile execution,[98] scientific considerations of the

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 16.

[92] *Id.* at 29.

[93] *Id.*

[94] *Id.* at 16.

[95] *Id.* at 11.

[96] Miller v. Alabama, 567 U.S. 460, 465 (2012).

[97] Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010).

[98] *Roper*, 543 U.S. at 564, 578.

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characteristics of youth,[99] and the sentence's failure to serve legitimate penological goals.[100] Five years later, the Court in *Graham* used the same reasoning to hold that sentencing juveniles to life-without-parole when they did not commit or intend to commit homicide also constituted cruel and unusual punishment.[101]

Miller v. Alabama came next, in 2012, explicitly relying on both *Roper* and *Graham* to determine that the imposition of a mandatory sentence of life-without-parole on a juvenile offender for *any* crime violated the Eighth Amendment.[102] *Miller* centered around a fourteen-year-old defendant involved in a robbery, during the course of which his co-felon had killed someone.[103] Per Alabama's felony murder statute, the defendant was charged with murder and sentenced to the mandatory minimum of life-without-parole.[104] The Court held that a mandatory life-without-parole sentence that fails to consider the mitigating circumstances of youth was unconstitutional to impose on a defendant younger than eighteen.[105]

Because of the similarities between death-by-execution and death-by-incarceration, the United States Supreme Court saw fit to apply death penalty jurisprudence to life-without-parole sentencing.[106] Both sentences are especially harsh and leave no hope of reentry into society. Some even argue that execution is more merciful than life-without-parole, which necessarily entails long periods of monotony, isolation, and suffering.[107] As stated by the *Graham* Court:

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties

[99] *Id.* at 569–70.

[100] *Id.*

[101] *Graham*, 560 U.S. at 82.

[102] Miller v. Alabama, 567 U.S. 460, 469–70 (2012).

[103] *Id.* at 465–66.

[104] *Id.*

[105] *Id.* at 487–89.

[106] *Graham*, 560 U.S. at 69–70.

[107] *Life Sentence*, READING TIMES (Oct. 13, 1924).

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> without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.[108]

The death penalty has been the subject of much international controversy and Supreme Court litigation.[109] The United States Supreme Court has insisted that, in order to impose capital punishment, states must go through individualized sentencing,[110] and that the class of death-eligible offenders must be narrowed in some additional manner, beyond merely being convicted of first-degree murder.[111] The resemblances between these two sentences suggests a similar need for universal individualized sentencing and a greater restriction of the class of offenders who are eligible for life-without-parole.

3. Failure to Consider Individual Culpability

Homicide is split up into two categories in Pennsylvania: murder and manslaughter.[112] There are three degrees of murder.[113] First-degree murder is an intentional killing, punishable by either life-without-parole or death.[114] Second-degree murder is felony murder, which mandates a sentence of life-without-parole.[115] All other kinds of murder are classified as third-degree murders, which are punishable by a sentence of not more than forty years.[116] Manslaughter is divided into two categories: voluntary and involuntary.[117] The former refers to so-called "crimes of passion"[118]—killings resulting from serious provocation—and is punishable by not more than fifteen years, while the latter encompasses unintentional

[108] *Graham*, 560 U.S. at 69–70.

[109] *Id.* at 81–82.

[110] Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976).

[111] Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).

[112] 18 PA. CONS. STAT. § 2501(b) (2019).

[113] *Id.* § 2502.

[114] *Id.* §§ 2502(a), 1102(a).

[115] *Id.* §§ 2502(b), 1102(b).

[116] *Id.* §§ 2502(c), 1102(d).

[117] *Id.* § 2501(b).

[118] Eugene Volokh, *The 'Heat of Passion' Voluntary Manslaughter Theory*, WASH. POST. (Nov. 20, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/the-heat-of-passion-voluntary-manslaughter-theory-responsibility-and-punishment/.

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killings that result from recklessness or gross negligence and is punishable by not more than ten years.[119]

Criminal offenses generally have at least two required elements: an *actus reus* and a *mens rea*.[120] The former refers to the illegal act itself and the latter to the requisite mental state.[121] For nearly all forms of murder and manslaughter, the *mens rea* of the offender in relation to committing a killing is a determinative factor in homicide grading. However, second-degree murder stands out as the sole anomaly in this regard, as it requires only an intent to commit the underlying felony, rather than the killing.[122] Such is the function of the felony murder rule: to magically impute *mens rea* to kill where none may exist.[123] Stranger still is that, in addition to not requiring a true *mens rea* for the crime charged, there is also no requisite *actus reus* of actually killing.[124] Once again, participation in the underlying felony is a sufficient act, though—depending on the circumstances of the crime—this can be as minimal as mere presence during the crime.[125]

Pennsylvania initially developed multiple degrees of murder to categorize the more serious crimes into first-degree murder, thus separating them from the less culpable forms of homicide.[126] At the time, this was a progressive decision, ensuring that felony murder would not be punishable by death, the way intentional homicides were.[127] Of course, in the present era, this separation is not as impactful, as the death penalty is rarely imposed in the state at all; the most recent death sentence carried

[119] 18 PA. CONS. STAT. §§ 2503, 2504, 1103 (2019).

[120] *Actus reus*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Mens rea*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[121] *Id.*

[122] *See* Norval Morris, *Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58–61 (1956).

[123] *Id.*

[124] *Id.*

[125] *See, e.g.*, Bookman, *supra* note 3.

[126] Edwin Roulette Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 770–71 (1949).

[127] *Id.*

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out in Pennsylvania was twenty years ago, in 1999.[128] The result is that felony murder is once more punished just as harshly as first-degree murder: with a life-without-parole sentence. Thus, a second-degree murder charge offers no additional leniency in the overwhelming majority of cases. This is not to suggest that *more* death sentences should be carried out, but to point out that Pennsylvania's mandated sentence for felony murder is a glaring exception to the overall trend of reducing the imposition of harsh punishments.

Second-degree murder is one of the few crimes in Pennsylvania that has only one possible sentence: life-without-parole.[129] The majority of crimes allow the judge or jury some discretion in imposing a sentence, at least within a limited range.[130] This discretion usually allows for consideration of the offender's characteristics and culpability in determining what the ultimate punishment shall be.[131] Even first-degree murder, with two possible punishments, offers more room for sentencing discretion than second-degree murder.[132] Second-degree murder is thus a major outlier in the Pennsylvania Criminal Code in mandating a single possible punishment.

This failure to account for individual culpability is concerning, as it has long been a cornerstone for classifying crimes in this country. The United States Supreme Court has remarked that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[133] Criminal culpability is especially paramount in capital cases, as death is considered far too severe a punishment to be imposed mandatorily without individualized consideration of the offender's character and the circumstances of the crime.[134] Because of the aforementioned similarities between life-without-parole and death sentences, individual culpability should carry similar weight in sentencing determinations for

[128] Mark Scolforo, *Study Recommends Changes to Pennsylvania Death Penalty Amid Governor Wolf Moratorium*, MORNING CALL (June 25, 2018), https://www.mcall.com/news/breaking/mc-nws-pa-death-penalty-changes-20180625-story.html.

[129] 18 PA. CONS. STAT. § 1102(b) (2019).

[130] 204 PA. CODE § 303.15 (2019).

[131] *Id.* § 303.1.

[132] 18 PA. CONS. STAT. § 1102(a) (2019).

[133] Tison v. Arizona, 481 U.S. 137, 156 (1987).

[134] Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

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second-degree murder. The Court agrees with this concept in the juvenile context, as it has ruled that imposing a mandatory life-with-parole sentence without individualized consideration of the offender is unconstitutional for anyone who is younger than eighteen at the time of the crime.[135] As mentioned, this decision was premised in great part on the similarity between life-without-parole and the death penalty.[136]

The United States Supreme Court has emphasized the importance of culpability in other contexts, as well. In *Weems v. United States*, a statute making it a crime for a public official to falsify public records and requiring a punishment of, among other things, a minimum of twelve years of hard labor, was struck down.[137] The Court held that the statute violated the Eighth Amendment on account of its disproportionately harsh punishment.[138] Similar to how Pennsylvania criminalizes felony murder, the statute at issue in *Weems* criminalized the act without regard to the offender's intent to harm others: "A false entry is all that it necessary to constitute the offense. Whether an offender against the statute injures any one by his act or intends to injure any one is not material."[139] Likewise, the United States Supreme Court has held that statutes which criminalize drug addiction are unconstitutionally excessive, in light of the fact that addictions are often developed innocently or involuntarily.[140] The Court has also struck down the imposition of a death sentence where it could not be demonstrated that the defendant's consciousness was more "depraved" than that of any other murderer.[141]

Additionally, in *Enmund v. Florida*, which held that the death penalty was an unconstitutionally excessive penalty for unintentional homicide, the United States Supreme Court stated that Enmund, the defendant, "did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed

[135] Miller v. Alabama, 567 U.S. 460, 465 (2012).

[136] *Id.* at 474–76.

[137] Weems v. United States, 217 U.S. 349, 382 (1910).

[138] *Id.*

[139] *Id.* at 363.

[140] Robinson v. California, 370 U.S. 660, 667 (1962).

[141] Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

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the [victims]. This was impermissible under the Eighth Amendment."[142] Extending this logic, felony murder itself, regardless of the penalty, ought to be impermissible under the Eighth Amendment, as it often attributes the culpability of one actor to another. The United States Supreme Court's failure to make this obvious rational leap is nothing short of irresponsible. At the very least, Pennsylvania courts should correct this injustice for state law convictions.

Over 99% of life-without-parole sentences in Pennsylvania are imposed mandatorily.[143] This means that nearly everyone serving this sentence was denied an opportunity for a court to consider the particular facts of the case and the character or background of the defendant. The United States Supreme Court has repeatedly emphasized that harsh penalties are excessive where personal culpability is not taken into account at sentencing, at least in the context of the death penalty and life-without-parole sentencing for juveniles.[144] This doctrine ought to be extended further still. Pennsylvania's current second-degree murder scheme mandates one of the harshest sentences in the world, all without even considering individual culpability; therefore, it should be significantly modified or—better yet—struck down altogether. At early common law, culpability was not an element of homicide, so the felony murder rule was not out of place in that prior era of our legal system.[145] However, that age is long gone, and it is high time that Pennsylvania laws shed the antiquated vestiges of those times, beginning with the legal fiction of felony murder.

4. Disproportionality of Punishment

Though the Eighth Amendment does not guarantee that all punishments be proportionate to the crime, it does prohibit those punishments which are grossly disproportionate.[146] Pennsylvania courts acknowledge that proportionality claims may be brought under Article I, Section 13 of the Pennsylvania Constitution as well.[147]

The age of the offender is of vital significance when it comes to evaluating the proportionately of a life-without-parole sentence, as the length of one's sentence is

[142] Enmund v. Florida, 458 U.S. 782, 798 (1982).

[143] COZZENS & GROTE, *supra* note 55, at 44.

[144] Graham v. Florida, 560 U.S. 48 (2010); Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976).

[145] People v. Aaron, 299 N.W.2d 304, 318 (Mich. 1980).

[146] Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

[147] Commonwealth v. Cunningham, 81 A.3d 1, 18 (Pa. 2013) (Castille, J., concurring).

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ostensibly inversely correlated with one's age at the time of conviction. In other words, the younger one is when sentenced, the greater the length of incarceration is likely to be. The punishment would thus be vastly different for someone convicted and sentenced at an elderly age compared to someone who has just recently celebrated an eighteenth birthday.

Additionally, the United States Supreme Court has accepted that the characteristics of youth, including a lack of maturity, higher susceptibility to peer pressure, and greater capacity to change, are demonstrative of a lessened culpability.[148] Though the Court's discussion of youth was limited to those younger than eighteen, modern-day science has demonstrated that these characteristics can persist into one's mid-twenties, due to continued brain development.[149] This is highly relevant, considering that the majority of people sentenced to life-without-parole in Pennsylvania are twenty-five years or younger.[150] And so, ironically, those who are arguably the least culpable will serve the longest sentences.

Many of those convicted of second-degree murder had a fairly minimal role in the felony itself, and an almost negligible role in the killing.[151] Some were lookouts, some helped to hide the murder weapons, and others were merely in the wrong place at the wrong time.[152] Mandating perpetual incarceration for this level of participation in a crime is both grossly disproportionate and immensely cruel.

5. Failure to Serve Legitimate Penological Goals

There are four penological goals which the United States Supreme Court has recognized as legitimate: rehabilitation, retribution, deterrence, and incapacitation.[153] The Court has made it clear that a punishment which fails to serve

[148] Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[149] Teena Willoughby et al., *Examining the Link Between Adolescent Brain Development and Risk Taking from a Social-Developmental Perspective*, 83 BRAIN & COGNITION 315, 315 (2013).

[150] COZZENS & GROTE, *supra* note 55, at 18.

[151] Melamed, *supra* note 14.

[152] *Id.*; Reply Brief for Appellant at 25–26, Commonwealth v. Lee, 206 A.3d 1 (Pa. Super. Ct. 2019) (No. 198005128).

[153] Christopher J. Walsh, Comment, *Out of the Strike Zone: Why* Graham v. Florida *Makes It Unconstitutional to Use Juvenile-Age Convictions as Strikes to Mandate Life Without Parole Under § 841(B)(1)(A)*, 61 AM. U. L. REV. 165, 193 (2011).

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any of these goals "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."[154]

One goal that is clearly forsaken altogether by all life-without-parole sentences is rehabilitation: "The process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."[155] Life-without-parole sentences preclude this possibility altogether and often forgo other measures of support for those serving the sentence. As put by the *Graham* Court:

> The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society . . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual. In some prisons, moreover, the system itself becomes complicit in the lack of development. As noted above . . . it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration.[156]

The second penological goal, deterrence, is unlikely to be achieved by these harsh sentences either. Deterrence rests on the theory that the threat of harsh sentences will deter individuals from committing crimes in the future.[157] There are two types of deterrence—specific and general deterrence.[158] Specific deterrence refers to discouraging an individual offender from reoffending, while general deterrence refers to discouraging the public at large from engaging in a particular criminal activity.[159] Obviously, the former is not being achieved if a life-without-

[154] Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

[155] *Rehabilitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[156] Graham v. Florida, 560 U.S. 48, 74, 79 (2010).

[157] Walsh, *supra* note 153, at 180–81.

[158] *Id.* at 180.

[159] Markus Dirk Dubber, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 210–14 (1990).

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parole sentence is imposed, as there is no opportunity for the offender to be released and resist reoffending. Nor is it likely that general deterrence can be achieved, as individuals cannot be deterred from committing crimes that they never intended to commit in the first place, as is the case for those charged with felony murder when they lack the intent to commit murder. It is for this very reason that the *Enmund* Court stated that imposing the death penalty for an unintentional murder did not serve the penological goal of deterrence.[160]

Some states insist that harsh penalties are necessary to deter individuals from committing dangerous felonies where the chance of deadly violence exists,[161] but this theory rests on faulty logic. For one thing, only one-half of one percent of robberies involve a killing, so most people who commit felonies are probably not too concerned with this remote possibility.[162] Even those who intend to kill, or who are apathetic to whether a killing occurs, should theoretically be deterred enough by the possibility of being charged with murder or manslaughter. It is unclear what value the additional threat of being charged with felony murder has for such individuals.

Retribution is a third theory of punishment, which calls for punishing individuals for the wrongs that they have committed.[163] It is, simply put, "the ethic of vengeance."[164] Even so, retribution still encompasses a proportionality principle: One should be punished in accordance with their culpability.[165] As put by the *Roper* Court: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished."[166] This lack of proportionality is especially obvious in the realm of felony murder, where individual culpability is not considered at all. Thus, the *Enmund* Court found that the penological goal of retribution was not served by imposing the death penalty for felony murder:

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[160] Enmund v. Florida, 458 U.S. 782, 799–800 (1982).

[161] Todd v. State, 884 P.2d 668, 686 (Alaska Ct. App. 1994); Santiago v. State, 874 So. 2d 617, 620–21 (Fla. Dist. Ct. App. 2004); State v. Tribble, 790 N.W.2d 121, 127–28 (Iowa 2010); State v. Shafer, 789 S.E.2d 153, 161 (W. Va. 2016).

[162] *Id.*

[163] Dubber, *supra* note 159, at 201–03.

[164] COZZENS & GROTE, *supra* note 55, at 42.

[165] Roper v. Simmons, 543 U.S. 551, 571 (2005).

[166] *Id.*

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> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.[167]

Though the often stated justification for retributive practices is to provide closure or comfort to victims' loved ones,[168] about 61% of victims' family members themselves prefer to see more rehabilitative and preventive practices from the criminal justice system, rather than a myopic focus on revenge.[169] Though some, understandably, are fixated on vengeance at the time of their loved one's death, many have walked back those feelings over time.[170] It is also worth noting that, due to the cyclical nature of violence and poverty, many family members of victims also have other family members serving life-without-parole sentences—a fact not adequately acknowledged by politicians and prosecutors.[171]

Incapacitation is the fourth goal of punishment. Its purpose is simply to remove dangerous people from society.[172] Though life-without-parole certainly functions to remove people from society, not all individuals serving the sentence are dangerous. Indeed, there are numerous studies that show people "age out" of criminal activity.[173] Accordingly, the strongest predictor of future criminal activity is age.[174] Older individuals are less likely to commit future crimes, especially homicide offenses.[175]

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[167] Enmund v. Florida, 458 U.S. 782, 801 (1982).

[168] Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 237–38 (2001).

[169] COZZENS & GROTE, *supra* note 55, at 35.

[170] CRIME SURVIVORS SPEAK, ALLIANCE FOR SAFETY & JUST. 16 (2016), https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf.

[171] *Id.*

[172] Dubber, *supra* note 159, at 214–15.

[173] *Id.*

[174] COZZENS & GROTE, *supra* note 55, at 19.

[175] *Id.*

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At a time when commutations occurred somewhat regularly, only 2.5% of those who received commutations were subsequently incarcerated.[176] This number drops to 1% among those fifty years or older.[177] Thus, the continued incarceration of the elderly offers little benefit to public safety.

It is clear, then, that many of those serving time for second-degree murder are no longer a threat to society. Moreover, because life-without-parole sentences for second-degree murder are imposed mandatorily, there will likely be many cases where individuals who are not dangerous to society even at the time of their conviction are nevertheless sentenced to life-without-parole. The goal of incapacitation is not met where non-dangerous individuals are incarcerated; thus, any punishment that continues to incarcerate demonstrably rehabilitated offenders cannot be said to further this goal.

Because the sentence of life-without-parole for second-degree murder meets no legitimate penological goals, it should not be the mandated punishment for felony murder. In fact, it is time that Pennsylvania forswear the excessively harsh and overly imposed sentence altogether and work towards more restorative and effective practices.

6. Prominent Pennsylvania Cases

Unsurprisingly, the harshness of Pennsylvania's felony murder rule, coupled with its frequent imposition, has led to a slew of controversial cases. Consider, as an example, the case of Avis Lee.[178] In November 1979, when she was just eighteen years old, Lee accompanied her brother Dale Madden to the Oakland neighborhood of Pittsburgh, where Madden planned to commit a robbery.[179] Madden instructed Lee to act as a lookout, while he attempted to rob an individual on the street, Robert Walker.[180] Walker attempted to strike Madden, at which point Madden pulled out a gun and fired, killing Walker.[181] Immediately afterwards, Lee boarded a bus and

[176] *Id.* at 18.

[177] *Id.* at 19.

[178] Reply Brief for Appellant at 8–9, Commonwealth v. Lee, 2017 WL 6629309 (W.D. Pa. 2016) (No. 198005128).

[179] *Id.* at 9.

[180] *Id.*

[181] *Id.*

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informed the bus driver that a man was hurt.[182] The bus driver then informed the police.[183] As a result of this incident, Lee was convicted of second-degree murder for her role as a lookout during an attempted robbery.[184] She was accordingly sentenced to life-without-parole without any consideration of her intent to kill, her personal character, or the circumstances of the crime.[185]

Lee's childhood was marred by virtually every trauma imaginable, including extreme poverty, homelessness, sexual abuse, alcoholism, drug abuse and the loss of several loved ones.[186] Of course, none of this information was considered by the court when her mandatory life-without-parole sentence was imposed for a murder she did not commit.[187] Disappointingly, the Pennsylvania Supreme Court recently denied her Petition for Allowance of Appeal, which argued that the right established in *Miller v. Alabama*—which prohibited mandatory life-without-parole sentences for juveniles[188]—was broad enough to also apply to those who were sentenced to life-without-parole as young adults, as she was.[189] Lee was eighteen at the time of the crime and has been in prison for thirty-nine years.[190]

A second, highly contentious case is that of the Evans brothers.[191] Wyatt and Reid Evans accompanied their friend, Marc Blackwell, to attempt to steal a

[182] *Id.* at 9–10.

[183] *Id.*

[184] *Id.* at 10.

[185] *Id.* at 12–13.

[186] *Id.* at 38–44.

[187] *Id.* at 12–13.

[188] Miller v. Alabama, 567 U.S. 460, 489 (2012).

[189] Reply Brief for Appellant, *supra* note 178, at 15; *The Fight to Free Avis Lee Continues Despite the Denial of Appeal by the Pennsylvania Supreme Court*, ABOLITIONIST L. CTR. (Oct. 21, 2019), https://abolitionistlawcenter.org/2019/10/21/the-fight-to-free-avis-lee-continues-despite-the-denial-of-appeal-by-the-pennsylvania-supreme-court/.

[190] Reply Brief for Appellant, *supra* note 178, at 9. Lee is currently in the process of challenging her conviction, asserting that the constitutional right guaranteed by *Miller* applies to her and other young defendants. *See* Commonwealth v. Lee, 206 A.3d 1, 20 n.11 (Pa. Super. Ct. 2019) (en banc) (affirming Lee's case but urging the Pennsylvania Supreme Court to review it).

[191] Melamed, *supra* note 14.

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vehicle.[192] Blackwell brought a sawed-off shotgun with him.[193] All three knew that the shotgun was not loaded and did not work anyway, but they brought it for the purpose of intimidation.[194] Blackwell pointed it at sixty-eight-year-old Leonard Leichter and ordered him into the back of his vehicle.[195] Blackwell and Wyatt Evans dropped Leichter off a mile and a half away near a pay phone so he could call for help.[196] Reid Evans followed them in a separate vehicle.[197] All of this occurred within the span of fifteen minutes.[198] A few hours later, Leichter died of a heart attack.[199] For his role in the crime, Blackwell was charged with third-degree unintentional murder, and sentenced to 37.5–75 years.[200] He was recently granted parole and now lives with his wife in Delaware County.[201] For their far less significant role in the crime, the Evans brothers received a mandatory life-without-parole sentence for second-degree murder.[202] They have been in prison for thirty-seven years.[203]

A third example is the case of George Trudel.[204] In 1986, Trudel and his friend became involved in a neighborhood fight in Philadelphia, during which his friend stabbed another individual, who later died from his wounds.[205] Trudel was labeled an accomplice, and was convicted of second-degree murder and sentenced to life-without-parole at age twenty.[206] His friend, who actually committed the killing, was

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[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *See id.*

[205] *See id.*

[206] *Id.*

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released after serving just seven years.[207] Trudel, in comparison, has spent thirty-one years in prison.[208] He recently received a sentence commutation in May 2019, joining the mere handful of individuals who have been fortunate enough to receive a commutation since the 1990s.[209]

This is only a small sample of the vast injustices produced by Pennsylvania's felony murder rule. Activists throughout the state have rallied behind cases such as these for years.[210] As mentioned, commutations are rare, so little hope exists for even the most unjust of these cases. But—even if commutations should increase in frequency—Pennsylvania courts and legislatures ought to address one of the main sources of the problem: Pennsylvania's felony murder rule, and the mandatory life-without-parole sentence attached to it. Without modifications to current Pennsylvania law, the list of controversial cases will only grow longer, and the only way out for the vast majority of these individuals will be death.

V. POTENTIAL SOLUTIONS

The most obvious and effective solution to the many problems posed by the felony murder rule is to abolish it altogether. At the very least, Pennsylvania should follow other states in placing additional limits on who can be charged with second-degree murder, by excluding those who did not actually commit the murder, or by requiring an intent to kill.[211] Alternatively, the mandatory minimum sentence for felony murder could be reduced to something more reasonable than life-without-parole. Texas, for instance, has a minimum requirement of five years.[212]

Another approach could involve abolishing life-without-parole sentencing by prohibiting the total preclusion of parole eligibility. In Pennsylvania, a great deal of

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[207] *Id.*

[208] *Id.*

[209] Samantha Melamed, *Gov. Tom Wolf Releases 8 Lifers, More Than Any Other Pa. Governor in Decades*, PHILA. INQUIRER (May 6, 2019), https://www.inquirer.com/news/commutation-life-sentences-philadelphia-pennsylvania-tom-wolf-george-trudel-20190506.html.

[210] *See* Charles Thompson, *Advocates Call for Changes to How Pa. Commutes Life Prison Sentences*, PENNLIVE, https://www.pennlive.com/midstate/2014/08/criminal_justice_reform_advoca.html (last updated Jan. 5, 2019); Samantha Melamed, *Advocates Cite New Study in Calling for Earlier Parole Eligibility for Pa. Lifers*, PHILA. INQUIRER (Sept. 25, 2018), https://www.post-gazette.com/news/politics-state/2018/09/25/pa-abolitionist-law-project-life-sentences-reform-racial-disparities-koch-brothers/stories/201809180097.

[211] CAL. PENAL CODE § 189 (Deering 2019); COLO. REV. STAT. § 18-3-102 (2019).

[212] TEX. PENAL CODE § 12.32 (2019).

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momentum has been building in communities calling for this particular solution.[213] In June 2015, the Coalition to Abolish Death by Incarceration (CADBI), a now statewide organization, was founded in Philadelphia, Pennsylvania.[214] The group has three central demands: (1) parole eligibility after no more than fifteen years; (2) presumptive parole: people are paroled at their eligibility date, unless the prison administration can prove serious unresolved disciplinary infractions; and (3) a maximum sentencing law that prevents the Commonwealth from incarcerating people for indefinite periods of time.[215] To address the first demand, State Representative Jason Dawkins and State Senator Sharif Street introduced identical bills in 2017 that would require parole eligibility for anyone after having served fifteen years.[216] Ultimately, the bill was pulled prior to the vote to get it out of the Judiciary Committee over concerns that it may be one vote short of being approved.[217] However, State Senator Street has recently reintroduced a similar bill that grants parole eligibility after twenty-five years for those convicted of felony murder and thirty-five years for those convicted of first-degree murder.[218] The bill was referred to the judiciary on November 12, 2019.[219]

VI. CONCLUSION

In our society, we expect that individuals will be punished for crimes they commit or intend to commit, not for the actions or intentions of others. An analysis of Article I, Section 13 of the Pennsylvania Constitution, using the four *Edmunds* factors, demonstrates that the imposition of a mandatory life-without-parole sentence for felony murder as its currently defined in the state ought to be prohibited by the provision. All four factors—(1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania case-law; (3) related case-law from other states; and (4) policy considerations, including unique issues of state

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[213] *The Coalition to Abolish Death by Incarceration*, DECARCERATE PA, https://decarceratepa.info/CADBI (last visited Dec. 18, 2018).

[214] *Id.*

[215] *Id.*

[216] Sarah Anne Hughes, *2,700 Philadelphians Are Serving Life Without Parole. Will They Get a Chance at Redemption?*, BILLY PENN (Oct. 3, 2018), https://billypenn.com/2018/10/03/2700-philadelphians-are-serving-life-without-parole-will-they-get-a-chance-at-redemption/.

[217] *Id.*

[218] S.B. 942, 2019–2020 Gen. Assemb., Reg. Sess. (Pa. 2019).

[219] *Id.*

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and local concern, and applicability within modern Pennsylvania jurisprudence—overwhelmingly support this position.[220] The current felony murder scheme in Pennsylvania fails to consider individual culpability, does not serve any legitimate penological goals, and often imposes a punishment that is vastly disproportionate to the severity of the offender's actions. A sentence so severe and bearing much in common with capital punishment in terms of its permanency should not be imposed mandatorily for *any* crime, and certainly not for a crime that requires neither an intent to harm nor the infliction of harm.

Felony murder is a relic from the common law era and has no place in current murder jurisprudence. Its continued existence is an affront to modern notions of fairness and justice. Pennsylvania is particularly harsh in mandating a life-without-parole sentence for the crime, even where the convicted individual's participation was minimal. The sheer number of people serving such sentences in Pennsylvania makes the issue all the more urgent for the state to remedy. Waiting for mandates from the United States Supreme Court or action from the legislature would irreparably damage countless more lives. This is far too high a price for maintaining a doctrine so blatantly unjust. Instead, Pennsylvania courts must step up and call the punishment what it undeniably is: cruel.

[220] Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

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http://lawreview.law.pitt.edu