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How Long Is Too Long? - Why a Method Proposed by a Panel of the United States Court of Appeals for the Third Circuit for Determining the Constitutionality of De Facto Life without Parole Imposed upon Juvenile Offenders Was Grounded in Logic but Missed the Mark

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How Long Is Too Long?—Why a Method Proposed by a Panel of the United States Court of Appeals for the Third Circuit for Determining the Constitutionality of De Facto Life Without Parole Imposed upon Juvenile Offenders Was Grounded in Logic but Missed the Mark.

Dominic A. Carrola*

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I. INTRODUCTION: COURTS AS CREATURES OF LOGIC

In one of his most vigorous dissents, the late United States Supreme Court Justice Antonin Scalia wrote: “one of the benefits of leaving regulation . . . to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.”1 This premise takes on special relevance in Eighth

* At the time of writing this article, Carrola was a Juris Doctorate candidate at the Duquesne University School of Law. He graduated in May 2019 and, this article was edited in Spring 2020, at which time Carrola was an Assistant District Attorney with the District Attorney’s Office of Washington County, Pennsylvania. Any opinions expressed herein are personal to Carrola and do not reflect those held by the Washington County District Attorney’s Office. Carrola thanks Legal Research and Writing Professor Julia M. Glencer for her painstaking assistance in editing this article and for strengthening its theme through exhaustive questioning and testing of its foundational premises.

1. Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting); see also Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (“Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to
Amendment sentencing jurisprudence into which the United States Supreme Court has invited the concept of “proportionality.” Proportionality requires some degree of correlation between an offense and a punishment and between an offender and a punishment. The trouble with this approach is the lack of guidelines to aid courts in making this determination. As was once observed by Supreme Court Chief Justice Warren E. Burger:

[...] are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic “repeater” who has demonstrated that he will not abide by the law. The simple truth is that “[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed.”

Making matters worse, the Supreme Court has essentially adopted its “own judgment” as one of the elements by which it tests the constitutionality of punishments: “[f]or the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” In extreme and obvious cases, courts can successfully meet the constitutional requirement of proportionality in sentencing by exercising their own judgment. But in close-call situations, courts are placed in the unhappy position of making bright-line policy decisions that are incapable of being sourced in logic. Such unbridled logic culminates in a bottomless pit: “[n]or does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under eighteen, in what other kinds of cases will the Court find jurors deficient?”

The area of juvenile sentencing jurisprudence has been particularly fraught with logical difficulties as demonstrated by United...
"States v. Grant," a recent decision by a panel of the United States Court of Appeals for the Third Circuit. The case evidences what happens when judges substitute logical reasoning for what is properly an exercise of bright-line policy determinations. The case involved Corey Grant, a homicide offender who was convicted in 1992 for various crimes that he committed when he was sixteen years old. The trial court had found that Grant would “never be fit to reenter society" and had sentenced him to life in prison without the possibility of parole (LWOP), on November 10, 1992. The Third Circuit affirmed the conviction on August 23, 1993. It seemed the story was over.

But then, the United States Supreme Court handed down a trilogy of opinions that had the effect of throwing Grant a lifeline: Graham v. Florida, Miller v. Alabama, and Montgomery v. Louisiana. These three cases invalidated life imprisonment without the possibility of parole as a constitutionally valid punishment for certain classes of juvenile offenders. The actual holdings of these three opinions are narrower than—and therefore, do not accomplish—the prophylactic mandate which they evoke. For this reason, courts, as creatures of logic, are sorely tempted to extend the protections granted by these opinions. And, in Grant, the Third Circuit decided it was logical to do just that. The impenetrable question before the Grant court was, given that a juvenile offender sentenced to imprisonment must be given a “meaningful opportunity to obtain release,” how many years of imprisonment is too many years? In answering this question, the Third Circuit panel made a bright-line policy determination of its own. Under the panel’s holding, a juvenile offender is constitutionally required to be afforded an opportunity for release from prison before the age of sixty-five.

10. Id. at 134.
11. Id.
17. See Graham, 560 U.S. at 61-62; Miller, 567 U.S. at 479; Montgomery, 136 S. Ct. at 736.
20. Grant, 887 F.3d at 151-52.
If this was “Solomonic wisdom” on display, then Solomonic wisdom certainly has a chameleonic quality.\textsuperscript{21} Perhaps second-guessing is a natural byproduct that occurs when courts dabble in policy making. Once a court is un-moored from the legislative decision, it is hard to decide between the many untapped and, at times, competing potentials. Tellingly, the Third Circuit did not leave its \textit{Grant} opinion untouched for even a year. The opinion was filed on April 9, 2018.\textsuperscript{22} Merely six months later, on October 4, 2018, the Third Circuit vacated the panel’s opinion and judgment announced in \textit{Grant} and scheduled rehearing en banc for February 20, 2019.\textsuperscript{23} The purpose of this article will be to recommend a course of action to the Third Circuit in view of prior Eighth Amendment doctrine.

This article will begin by covering the history of proportionality in Eighth Amendment sentencing jurisprudence and examine how it blossomed into \textit{Graham},\textsuperscript{24} \textit{Miller},\textsuperscript{25} and \textit{Montgomery}.\textsuperscript{26} Then, it will examine \textit{Grant} against the backdrop of these cases and attempt to demonstrate how the Third Circuit’s dilemma is a symptom of the uncertainty manufactured by the Supreme Court’s own jurisprudence. Finally, it will make the argument that whatever the Third Circuit ultimately holds, it must send a clear message to the Supreme Court that the mandates of \textit{Graham}, \textit{Miller}, and \textit{Montgomery} are unworkable and that unwavering guidance is needed. This article will also suggest two provisional fixes which the Third Circuit might adopt until the Supreme Court or Congress speaks.\textsuperscript{27}

II. \textbf{PROPORTIONALITY AND THE CATEGORICAL PROHIBITION}

Proportionality has persistently clung to the Supreme Court’s Eighth Amendment sentencing jurisprudence. But perhaps the Court was not always earnest about it. In any case, as early as 1892, at least one Justice contemplated that “[t]he [Eighth Amendment] inhibition is directed, not only against punishments [which inflict torture], but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses

\begin{enumerate}
\item[22.] \textit{Grant}, 887 F.3d at 131.
\item[23.] United States v. Grant, 905 F.3d 285 (3d Cir. 2018) (mem.) (granting rehearing en banc).
\item[24.] \textit{Graham}, 560 U.S. at 48.
\item[26.] \textit{Montgomery v. Louisiana}, 136 S. Ct. 718 (2016).
\item[27.] How the Supreme Court should ultimately fix the problem (should certiorari be sought and granted) is outside the scope of this article, which seeks to press upon readers the untenable nature of the current state of affairs and proposes some stopgap measures that the Third Circuit could adopt after rehearing.
The Court itself first harnessed the concept of proportionality in its Eighth Amendment jurisprudence by placing categorical prohibitions on capital punishment imposed for certain classes of crimes and on certain classes of offenders.\textsuperscript{29}

The first cases instituting categorical prohibitions on the death penalty did so with respect to certain types of offenses. In \textit{Coker v. Georgia},\textsuperscript{30} the Supreme Court held that the punishment of death is disproportionate, and therefore categorically prohibited, for the crime of rape.\textsuperscript{31} The Supreme Court engaged in a two-part analysis, first seeking “objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape of an adult woman,”\textsuperscript{32} and second, bringing its own judgement to bear on the question.\textsuperscript{33} The Court’s holding hinged upon the distinction it drew between the finality of murder (for which the death penalty was permissible) and the temporary nature of rape (for which it held the death penalty impermissible).\textsuperscript{34} The dissent voiced concern that the Court’s holding barred the state “from guaranteeing its citizens that they [would] suffer no further attacks by this habitual rapist.”\textsuperscript{35} The dissent’s concerns were particularly poignant in \textit{Coker}, where the perpetrator had already been serving consecutive life terms for three prior rapes when he managed to escape from prison and commit the crime that was then before the Court.\textsuperscript{36} Over the next three decades, the Supreme Court would continue to apply categorical prohibitions on capital punishment for certain crimes.\textsuperscript{37}

The first case to institute a categorical prohibition on the death penalty with respect to a certain class of offenders was \textit{Thompson v. Oklahoma}.\textsuperscript{38} In that case, there was no claim “that the punishment would [have been] excessive if the crime had been committed by an adult.”\textsuperscript{39} But the crime was perpetrated by a fifteen-year-old boy.\textsuperscript{40}

\textsuperscript{28} O’Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) (emphasis added).
\textsuperscript{30} 433 U.S. 584 (1977).
\textsuperscript{31} \textit{Id.} at 592, 597.
\textsuperscript{32} \textit{Id.} at 593.
\textsuperscript{33} \textit{Id.} at 597.
\textsuperscript{34} \textit{Id.} at 598 (“The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”).
\textsuperscript{35} \textit{Id.} at 605-06 (Burger, C.J., dissenting).
\textsuperscript{36} \textit{Id.} at 605 (Burger, C.J., dissenting).
\textsuperscript{38} 487 U.S. 815, 838 (1988).
\textsuperscript{39} \textit{Id.} at 819.
\textsuperscript{40} \textit{Id.}
and the Court accepted the premise that “some offenders are simply too young to be put to death.” The boy, along with three older friends, had mercilessly beaten his brother-in-law before shooting him twice, slashing his throat, chest, and abdomen, and throwing the victim’s body into a river. The boy was later heard to brazenly take personal credit for the lethal acts. Each participant was convicted and received a death sentence.

The Thompson Court opined that “[i]nexperience, less education, and less intelligence make [teenagers] less able to evaluate the consequences of [their] conduct.” “[Y]outh,” the Court remarked in a phrase that would become a mainstay of its juvenile sentencing jurisprudence, “is more than a chronological fact.” In Thompson, the Court first coined the phrase “categorical prohibition” and then instituted such a categorical prohibition on capital punishment for offenders under sixteen years of age. The Court relied in part on the “proposition” that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” In Thompson, the Court pointedly refused to extend the prohibition to juveniles between the ages of sixteen and eighteen. That shoe would not drop until nearly seventeen years later.

As these cases demonstrate, by the early 1980s proportionality in the form of categorical prohibitions on capital punishment was well-established. Whether, and how, proportionality would be applied

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41. Id. at 828-29.
42. Id. at 819.
43. See id. at 860-61 (Scalia, J., dissenting). As Justice Scalia’s dissenting opinion highlighted, the record provided that Thompson had bragged about the murder to his girlfriend, mother, and others. Id. One witness recounted that “she [had] asked Thompson the source of some hair adhering to a pair of boots he was carrying [and he] replied that was where he had kicked Charles Keene in the head.” Id. at 860. Another witness had “told Thompson that a friend had seen Keene dancing in a local bar, [to which] Thompson remarked that that would be hard to do with a bullet in his head.” Id. at 861. Finally, “one of Thompson’s codefendants admitted that after Keene had been shot twice in the head Thompson had cut Keene so the fish could eat his body.” Id.
44. Id. at 819 (majority opinion).
45. Id. at 835.
46. Id. at 834 (quotations omitted) (emphasis added).
47. Id. at 821.
48. Id. at 838.
49. Id. at 835 (footnote omitted) (citing Eddings v. Oklahoma, 455 U.S. 104, 117 (1982), where the Court vacated and remanded a juvenile’s death sentence because state courts refused to consider mitigating circumstances).
50. Id. at 838.
52. See, e.g., Enmund v. Florida, 458 U.S. 782, 788 (1982) (describing the Eighth Amendment prohibition as being “directed, in part, against all punishments which by their excessive length or severity are greatly disproportional to the offenses charged”) (quotations omitted) (emphasis added).
in the context of prison sentences remained uncertain.\textsuperscript{53} This was so despite the fact that the Court, nearly seventy years earlier, had referenced proportionality in a case holding unconstitutional a species of imprisonment.\textsuperscript{54} Specifically, in \textit{Weems v. United States}, a form of punishment levied against those convicted of defrauding the Government of the Philippine Islands—then under American rule—was challenged.\textsuperscript{55} The punishment, called \textit{cadena temporal}, was essentially a term of imprisonment complemented by chains and painful labor.\textsuperscript{56} In its analysis, the \textit{Weems} Court contrasted the relative severity of \textit{cadena temporal} against more innocuous punishments prescribed for similar crimes\textsuperscript{57} and stated that “it is a precept of justice that punishment for crime should be graduated and \textit{proportioned} to offense.”\textsuperscript{58} Over a decade later, the Court would once again allude to proportionality while invalidating a punishment, this time with regard to a statute which criminalized drug addiction and imposed a mandatory minimum term of ninety days’ imprisonment.\textsuperscript{59} As if an after-thought to its analysis, the Court remarked: “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”\textsuperscript{60}

Despite these early and continued references to proportionality in the context of imprisonment, the Court then had to wrestle with whether proportionality was suited to analyzing the constitutionality of prison sentences. In \textit{Rummel v. Estelle}, the Court reasoned that its “decisions applying the prohibition of cruel and unusual punishments to capital cases [were] of limited assistance” in deciding the constitutionality of a sentence of imprisonment because such a sentence, “no matter how long,” differs in kind from a sentence of death.\textsuperscript{61} The \textit{Rummel} Court noted that unlike the categor-
ical prohibitions it had placed on death, bright lines would be considerably harder to draw "between one term of years and a shorter or longer term of years."62

These difficulties were overcome in Solem v. Helm three years later.63 There, the Court overturned an LWOP sentence as applied to a nonviolent, repeat, non-juvenile offender.64 In passing sentence, the trial court had found that the offender:

certainly earned [the] sentence and [had] certainly proven that [he was] a habitual criminal and the record would indicate that [he was] beyond rehabilitation and that the only prudent thing to do [was] to lock [him] up for the rest of [his] natural life, so [he would not] have further victims.65

Nonetheless, the Supreme Court cited what it described as its long recognition of proportionality66 and the lack of historic support for an exception for imprisonment,67 holding that the proportionality principle applied to all criminal sentences.68 The dissent sarcastically resurrected the line-drawing concerns forecasted in Rummel: “[t]oday [the Court] holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly ‘nonviolent’ felony. How about the eighth ‘nonviolent’ felony? The ninth? The twelfth?”69 But the battle had been won: as a result of Solem, as-applied constitutional challenges70 could be raised against prison sentences.71 Essentially, this meant that courts could now invalidate individual prison sentences on proportionality grounds, but courts could not yet apply general cate-

62. Id. at 275.
64. Id. at 280.
65. Id. at 282-83 (citation omitted) (quotations omitted).
66. Id. at 286-87 (citing Weems v. United States, 217 U.S. 349, 349 (1910)).
67. Id. at 288-89.
68. Id. at 290.
69. Id. at 314 (Burger, C.J., dissenting). Contrary sentiment among the Court’s members would survive Solem. See Harmelin v. Michigan, 501 U.S. 957, 984 (1991) (plurality) (arguing that an alternative perspective of the Court’s prior jurisprudence was to view the Court as "tre[at]ing [the proportionality] line of authority as an aspect of [its] death penalty jurisprudence").
70. An as-applied challenge is one that challenges a law only “as-applied” to a particular set of facts. See Richard H. Fallon, Jr., Commentary, As-Applied and Facial Challenges and Third-Party Standing, 113 HARv. L. REV. 1321, 1337 (2000). In contrast, a facial challenge seeks to invalidate a law altogether and not just in a particular context, “as-applied” to a particular plaintiff. See id. (explaining the distinction between as-applied and facial challenges).
gorical prohibitions to “shield entire classes of offenses and offenders” from prison sentences as was the practice in the realm of capital punishment.\textsuperscript{72}

III. ADVANCING A CONSTITUTIONAL RIGHT FOR JUVENILES

The Supreme Court applied a categorical prohibition to a non-death penalty punishment for the first time in \textit{Graham},\textsuperscript{73} foreclosing LWOP for juvenile, non-homicide offenders.\textsuperscript{74} The Court reached this result by applying the two-part test it had historically reserved for capital cases.\textsuperscript{75} Under this test, the Court considers:

\begin{quote}
[(1)] objective indicia of society’s standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. . . . [And, (2)] guided by the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.\textsuperscript{76}
\end{quote}

Under the first prong of this analysis, the \textit{Graham} Court concluded that a national consensus existed against LWOP for juvenile non-homicide offenders even though many states had not actually legislated against it.\textsuperscript{77} What was significant in the Court’s view was that LWOP was \textit{rarely} imposed on juvenile non-homicide offenders.\textsuperscript{78} The Court’s approximate logic was that even though many states were statutorily authorized to impose LWOP on juvenile non-homicide offenders, it was seldom done, and \textit{that} made it cruel and unusual punishment when it \textit{was} imposed.\textsuperscript{79}

\begin{itemize}
  \item \textsuperscript{72} Id. at 101.
  \item \textsuperscript{73} Id. at 61-62 (majority opinion).
  \item \textsuperscript{74} Id. at 74.
  \item \textsuperscript{75} See id. at 61.
  \item \textsuperscript{76} Id. at 61 (citations omitted) (quotations omitted).
  \item \textsuperscript{77} Id. at 64; see also id. at 62 ("Although these statutory schemes contain no explicit prohibition on sentences of [LWOP] for juvenile non-homicide offenders, those sentences are most infrequent.").
  \item \textsuperscript{78} Id. at 62-67; see also id. at 67 ("Similarly, the many [s]tates that allow [LWOP] for juvenile non-homicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate. The sentencing practice now under consideration is exceedingly rare.").
  \item \textsuperscript{79} Id. at 66 (concluding that "[LWOP] for juveniles convicted of non-homicide crimes is as rare as other sentencing practices found to be cruel and unusual"). The dissent parried: "I cannot agree with the Court that . . . citizens should be constitutionally disabled from using this sentencing practice merely because they have not done so more frequently. If anything,
Under the second prong, the Court dusted off its reasoning from *Roper v. Simmons*, in which the Court had extended a categorical prohibition on capital punishment to all juvenile offenders under the age of eighteen. In *Roper*, the Court expounded on the peculiarity of juvenile offenders, (a subject which it had first broached in *Thompson*):

[it] is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that states should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the state can exact forfeiture of some of the most basic liberties, but the state cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

the rarity of this penalty's use underscores just how judicious sentencing judges and juries across the country have been invoking it. *Id.* at 112-13 (Thomas, J., dissenting).

80. *Id.* at 68 (majority opinion). The *Roper* Court was presented with a particularly blood-chilling set of facts. *Roper v. Simmons*, 543 U.S. 556 (2005). The seventeen-year-old defendant had broken into a home without apparent reason, took the lone occupant hostage, bound her hands and feet with electrical wire, wrapped her entire face with duct tape, and threw her into a river where she drowned. *Id.* at 556-67. The prosecutor had used Simmons's youth against him, suggesting that it was an aggravating circumstance rather than a mitigating one. *Id.* at 558 ("Age .... Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.") (quoting the prosecutor's rebuttal without providing a direct supporting citation).

81. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (logicizing that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"). The Court had also, on one other occasion prior to *Roper*, refused to extend the prohibition to capital punishment of juvenile murderers who were sixteen or seventeen at the time of their crime. See *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), abrogated by *Roper*, 543 U.S. at 574-75.

82. *Roper*, 543 U.S. at 573-74 (citations omitted).
The Court further built on this reasoning in *Graham*, noting that “psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”

But the categorical prohibition in *Graham*, unlike the one in *Roper*, was to be levied against a non-death penalty punishment. Thus, the Court would need extra justification to make the leap. To aid in this endeavor, the Court broke down the distinction it had previously drawn between death and other punishments. It noted that, although a sentence of LWOP does not result in an execution, “the sentence [like death,] alters the offender’s life by a forfeiture that is irrevocable.” The Court found this result to be particularly severe when applied to juveniles because juveniles are, by definition, younger than non-juveniles and have a longer time to serve. Additionally, the Court distinguished a non-homicide juvenile offender’s scienter with a mathematical formula: “a juvenile offender who did not kill . . . has a twice diminished moral culpability [once by the] age of the offender and [once by] the nature of the crime . . . .”

Summarizing all of this logic led the *Graham* Court to reject the penological justification of incapacitation: “[t]o justify [LWOP] on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible . . . . [And] incorrigibility is inconsistent with youth.” In the Court’s view, to impose the sentence of LWOP on a

83. *Graham*, 560 U.S. at 68.
84. *Id.* at 74.
85. *Id.* at 69.
86. *Id.*
87. *Id.* at 70 (noting that “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender”).
89. *Graham*, 560 U.S. at 72-73 (quotation omitted); see also *id.* at 79 ("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.").
juvenile required a finding that the juvenile’s crimes “demonstrate[d] an irretrievably depraved character.” The Court described this as a “subjective judgment” which sentencing courts would be unable to make with sufficient accuracy.

Thus, the Graham Court’s categorical ban prevented sentencing judges from making this determination “at the outset,” such that juveniles would have “a chance to demonstrate maturity and reform.” Moreover, the Court agreed with the observation of one amicus that “defendants serving [LWOP] are often denied access to vocational training and other rehabilitative services that are available to other inmates[, and juvenile offenders] are most in need of and receptive to rehabilitation.” This, in the Court’s view, made the punishment of LWOP for juvenile non-homicide offenders “all the more” disproportionate. As the Court opined: “[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . [LWOP] gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.”

Despite such broad justification, the Graham Court included a failsafe, presumably to limit its holding:

[a] [s]tate is not required to guarantee eventual freedom to a juvenile . . . [non-homicide offender as long as it gives] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation . . . . It bears emphasis, however, that while the Eighth Amendment prohibits a [s]tate from imposing [LWOP] on a juvenile non-[h]omicide offender, it does not require the [s]tate to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth

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90. Id. at 76 (quotation omitted).
91. Id. at 76 (“Nothing in Florida’s laws prevents its courts from sentencing a juvenile non-[h]omicide offender to life without parole based on a subjective judgment that the defendant’s crimes demonstrate an irretrievably depraved character. This is inconsistent with the Eighth Amendment.”) (citation omitted) (quotation omitted) (emphasis added).
92. Id. at 77 (“[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.”).
93. Id. at 75.
94. Id. at 79.
95. Id. at 74 (citing the Brief for the Sentencing Project as Amicus Curiae Supporting Petitioners at 11-13, Graham, 560 U.S. 48 (No. 08-74121)).
96. Id. at 74.
97. Id. at 79.
Amendment does not foreclose the possibility that persons convicted of non-[homicide crimes committed before adulthood will remain behind bars for life.\textsuperscript{98}

Its broad policy boiled down, all \textit{Graham} really proscribed was a sentencing judge from making the subjective decision at sentencing that a non-homicide juvenile offender's crimes reflect an "irretrievably depraved character" worthy of LWOP.\textsuperscript{99}

Roughly two years later the Court took its next step in \textit{Miller},\textsuperscript{100} striking down \textit{mandatory} LWOP sentences for juvenile murderers, relying in part\textsuperscript{101} on its reasoning in \textit{Graham}.\textsuperscript{102} What bothered the \textit{Miller} Court about mandatory sentencing statutory schemes is that they did not leave the sentencing authority "any discretion to impose a \textit{different} punishment."\textsuperscript{103} While the Court acknowledged that \textit{Graham}'s categorical prohibition applied only to juvenile non-homicide offenders,\textsuperscript{104} and reiterated that a state "is not required to guarantee eventual freedom,"\textsuperscript{105} the Court considered "none of what it said about children... [in \textit{Graham} to be] crime specific."\textsuperscript{106} Thus, it was imperative that a judge passing sentence on a juvenile homicide offender at least have the \textit{opportunity} to consider mitigating factors, including the offender's youth, before imposing LWOP.\textsuperscript{107} A statute that unwaveringly mandated LWOP would not provide any allowance for such an opportunity and was therefore inconsistent with what the Court had expounded in \textit{Roper} and \textit{Graham}.\textsuperscript{108} However, the \textit{Miller} Court "[did] not foreclose a sentencer's ability" to \textit{determine} that a murder committed by a juvenile "reflects irreparable corruption" and sentence the juvenile to LWOP.\textsuperscript{109} The Court did note, though, that LWOP would likely be uncommonly imposed

\begin{itemize}
  \item \textsuperscript{98} \textit{Id.} at 75.
  \item \textsuperscript{99} \textit{Id.} at 76.
  \item \textsuperscript{100} \textit{Miller v. Alabama}, 567 U.S. 460 (2012).
  \item \textsuperscript{101} The \textit{Miller} Court also relied upon a second line of precedent pertaining to the constitutionality of mandatory sentencing schemes in general. See \textit{id.} at 470, 475-76. That case law is outside the scope of this article.
  \item \textsuperscript{102} See \textit{id.} at 474, 479.
  \item \textsuperscript{103} \textit{Id.} at 465 (emphasis added); \textit{id.} at 474 (observing that "these laws prohibit a sentencing authority from assessing whether... [LWOP] proportionately punishes a juvenile offender").
  \item \textsuperscript{104} \textit{Id.} at 473.
  \item \textsuperscript{105} \textit{Id.} at 479.
  \item \textsuperscript{106} \textit{Id.} at 473.
  \item \textsuperscript{107} \textit{Id.} at 480.
  \item \textsuperscript{108} \textit{Id.} at 479; see also \textit{id.} at 474 ("That contravenes \textit{Graham}'s (and also \textit{Roper}'s) foundational principle: that imposition of a [s]tate's most severe penalties on juvenile offenders cannot proceed as though they were not children.").
  \item \textsuperscript{109} \textit{Id.} at 479-80 (quotatio omitted); see also \textit{id.} at 480 ("[W]e do not foreclose a sentencer's ability to make that judgment in homicide cases... ").
\end{itemize}
due to “the great difficulty” attendant to distinguishing between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Conversely, the Miller Court highlighted the various other “options” discretionary sentencing would allow: “a judge or jury could choose, rather than [LWOP], a lifetime prison term with the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence . . . while still not thinking [LWOP] appropriate.”

In essence, the Miller Court only held that a judge or jury passing sentence on a juvenile homicide offender must be permitted to give consideration to mitigating factors, including the offender’s youth, before imposing LWOP. At the time of its decision, the Miller Court did not consider its holding to be implementing any categorical prohibition. As the Court stated, “[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth . . . .” The Supreme Court would later revise this interpretation in its most recent chapter of its juvenile-sentencing jurisprudence: Montgomery.

The issue squarely before the Court in Montgomery was tangential to its holdings in Graham and Miller, i.e., whether Miller was “retroactive to juvenile offenders whose convictions and sentences were final when Miller was decided.” This issue invoked the procedural/substantive distinction enunciated in Teague v. Lane, which controls whether a newly-announced right protects against violations that occurred in proceedings before that right was announced. Violations of substantive rights are reviewable, even if the violation occurred before the right was announced, but violations of procedural rights are not so reviewable. The Montgomery Court recast the right in Miller as a substantive right so that it did

110. Id. at 479-80 (quotation omitted).
111. Id. at 489.
112. Id. at 479; see also id. at 480 (“Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against [LWOP].”) (footnote omitted).
113. See id. at 479 (“We do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on [LWOP] . . . .”)
114. Id. at 483.
116. Id. at 725.
118. Montgomery, 136 S. Ct. at 728.
119. Id.
indeed apply retroactively.\(^\text{120}\) While the Court agreed that \textit{Miller} had a procedural component,\(^\text{121}\) it rejected the proposition that that procedural component foreclosed the existence of a substantive right.\(^\text{122}\) Acknowledging that \textit{Miller} did not “bar a punishment for all juvenile offenders,”\(^\text{123}\) as was the case in \textit{Roper} and \textit{Graham}, the Court noted that \textit{Miller} “did bar [LWOP] . . . for all but the rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility.”\(^\text{124}\) Essentially, the Court was indicating its recognition of “juvenile offenders . . . whose crimes reflect permanent incorrigibility” as its own class.\(^\text{125}\) Thus, it was clear that, in the Court’s own estimation, \textit{Miller} did indeed announce a categorical prohibition, one that banned LWOP for a certain class.\(^\text{126}\) That class included “all but the rarest of juvenile offenders . . . whose crimes reflect[ed] permanent incorrigibility.”\(^\text{127}\) As the Court explained: “[t]he fact that [LWOP] could be a proportionate sentence for . . . [that] kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.”\(^\text{128}\) This dichotomy among what was previously a unified class (juvenile offenders) shed light on exactly what kind of juvenile offenders could be constitutionally sentenced to LWOP. \textit{Miller}, the Court noted, “did not foreclose a sentencer’s ability to impose [LWOP] on a juvenile [offender] . . . [as long as that juvenile offender’s crimes] reflect[ed] irreparable corruption.”\(^\text{129}\) Indeed, “a lifetime in prison [was] disproportionate . . . for all but the rarest of children.”\(^\text{130}\) However, the Court left it to the states to determine how exactly to distinguish the incorrigible children from the non-incorrigible ones.\(^\text{131}\) The Court suggested that

\(^{120}\) \textit{Id.} at 732, 736.

\(^{121}\) \textit{Id.} at 734 (noting that \textit{Miller}’s procedural component “requires a sentencer to consider a juvenile offender’s youth and attendant characteristics” before imposing a proportionate sentence).

\(^{122}\) \textit{Id.} at 735.

\(^{123}\) \textit{Id.} at 734.

\(^{124}\) \textit{Id.} (emphasis added).

\(^{125}\) \textit{Id.}; see also Eighth Amendment-Retroactivity of New Constitutional Rules—Juvenile Sentencing—\textit{Montgomery} v. \textit{Louisiana}, 130 HARV. L. REV. 377, 384-85 (2016) (suggesting that \textit{Montgomery} is prone to “criticisms of ‘sleight of hand’” by its designation of \textit{Miller} as protecting non-incorrigible juveniles) (citation omitted).

\(^{126}\) \textit{Montgomery}, 136 S. Ct. at 734.

\(^{127}\) \textit{Id.}

\(^{128}\) \textit{Id.}

\(^{129}\) \textit{Id.} at 726 (quotation omitted).

\(^{130}\) \textit{Id.}

\(^{131}\) \textit{Id.} at 735 (offering state sovereignty as the reason that the \textit{Miller} Court did not require trial courts to make a finding of fact regarding a child’s incorrigibility: “When a new substantive rule of constitutional law is established, this Court is careful to limit the scope
states need not leave the retroactive application of this constitutionally-protected distinction to the courts. If, for instance, parole consideration was extended to these offenders, a resentencing hearing was unnecessary: “[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.” Contrariwise, “[t]hose prisoners . . . [showing] an inability to reform [would] continue to serve life sentences.” This distinction was well-illustrated by the Montgomery Court’s detailed description of the plight of the petitioner immediately before it:

[p]etitioner has discussed in his submissions to this Court his evolution from a troubled, misguided youth to a model member of the prison community. Petitioner states that he helped establish an inmate boxing team, of which he later became a trainer and coach. He alleges that he has contributed his time and labor to the prison’s silkscreen department and that he strives to offer advice and serve as a role model to other inmates.

The Montgomery Court perceived this distinction as honoring what it termed the “central intuition” of Miller: “that children who commit even heinous crimes are capable of change.”

IV. GRANT: THE SEARCH FOR A LIMITING PRINCIPLE

This troubled world of Supreme Court jurisprudence set the stage for the Third Circuit panel’s decision in Grant. Although Grant’s

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of any attendant procedural requirement to avoid intruding more than necessary upon the states’ sovereign administration of their criminal justice systems”).

132. Id. at 736 (stating that considering the offender for parole could satisfy Miller in lieu of resentencing).

133. Id.

134. Id.

135. Id.

136. Id.; see Carly Loomis-Gustafson, Comment, Adjusting the Bright-Line Age of Accountability Within the Criminal Justice System: Raising the Age of Majority to Age 21 Based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders, 55 Duq. L. REV. 221 (2017) ( canvassing modern scientific research of juvenile neurological development and arguing for a higher age than that established by Roper and Graham).

137. United States v. Grant, 887 F.3d 131 (3d Cir. 2018). The case was before Joseph A. Greenaway, Jr. and Robert E. Cowen, Circuit Judges, and John R. Padova, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation. Id. at 134 n.1.
staying force was short-lived, it built upon prior Supreme Court precedent in a momentous way. *Grant* also portends future steps in the realm of Eighth Amendment juvenile sentencing and, for this reason, it is worthy of attention.

The *Grant* panel began its analysis by noting that “[t]he Supreme Court ha[d] long grappled with the societal bounds of imposing the most severe punishments[,]”138 and recounted seriatim the holdings and rationales of *Roper*, *Graham*, *Miller*, and *Montgomery*.139 The panel recognized its task as determining “whether the logic of [those] cases . . . foreclos[ed] [what was termed a] de facto LWOP for juvenile offenders whose crimes do not reflect irreparable corruption.”140 Grant was a juvenile homicide offender.141 His first sentence, under sentencing guidelines effective in 1992, was mandatory LWOP.142 Mandatory LWOP for juvenile homicide offenders was then held to be unconstitutional in *Miller*, and Grant was awarded a new sentence.143 At this second sentencing, the new sentencing judge remarked that the “record sufficiently evidenced that [Grant] was not incorrigible.”144 Under *Miller*, as later interpreted by the Court in *Montgomery*, this finding of non-incorrigibility meant that Grant *could not* receive an LWOP sentence.145 Thus, the sentencing judge sentenced him to a sixty-five year sentence without parole instead.146

This result is not proscribed by *Miller*. Nonetheless, Grant challenged it on the ground that it defeated his “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,” which the Supreme Court had promised in *Miller*.147 In short, Grant argued that his prison sentence exceeded his life expectancy (as “diminish[ed]” by the effects of prison),148 and even if it did not,

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138. Id. at 137.
139. Id. at 138-42. Unsurprisingly, the panel amplified the policy of protecting non-incorrigible juveniles rather than heeding the Supreme Court’s previously imposed bright lines. Id.
140. Id. at 138 (emphasis added) (quotation omitted).
141. Id. at 136.
142. Id.; see also *Grant* v. United States, No. 12-6844 (JLL), 2014 WL 5843847, at *1 (D.N.J. Nov. 12, 2014).
143. *Grant*, 887 F.3d at 136.
144. Id. at 137 (citation omitted).
146. *Grant*, 887 F.3d at 137.
147. Id. at 134 (quotation omitted).
148. Id. at 142. Grant, under the second sentence he received, would not be eligible for release until age seventy-two. Id. Grant argued that decades of prison reduce life expectancy and that, factoring the effects of prison into his life expectancy, reduced it to age seventy-two. Id. Thus, according to Grant, he had no meaningful opportunity for release. Id. The government, for its part, disputed Grant’s calculation and argued that Grant’s real life ex-
that “a meaningful opportunity for release must afford him an opportunity for personal fulfillment.” He supported these contentions with “various mortality estimates and social scientific studies.”

The Third Circuit, agreeing with Grant, concluded that a “de facto” life sentence, defined by the panel as “[a] term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform,” violates the Eighth Amendment because it deprives juvenile offenders of their “meaningful opportunity” for release, and that “the Supreme Court’s concerns about the diminished penological justification for LWOP sentences for juvenile offenders apply with equal strength to de facto LWOP sentences.” The panel also made clear that its holding “extend[ed]” to sentences of juvenile non-homicide offenders because, under Graham, such offenders are non-incorrigible “by definition.”

Even the government had agreed in principle that a sentence exceeding a non-incorrigible juvenile offender’s life expectancy unconstitutionally deprived that offender of their meaningful opportunity for release.

This conclusion is well-grounded in reason and seems to follow logically from the Supreme Court’s precedent. Once the Supreme Court had promised a meaningful opportunity for release, it defies logic to conclude that all that is prohibited is LWOP. A 254-year prison sentence, for instance, defeats a meaningful opportunity for release just as soundly as does LWOP. Or, as the Third Circuit reasoned, “[the] distinctive attributes [of juveniles] are equally relevant regardless of the formal distinction between de facto and de jure LWOP sentences.”

“A de facto LWOP sentence cannot possibly provide a meaningful opportunity for release because it relegates the juvenile offender to spending the rest of his or her life expectancy was 76.7. Release sometime before death, the government contended, is all that Miller required. “Some years,” or in this case, 4.7 years (76.7 minus 72) outside prison walls was enough. Id. at 147.

149. Id. at 147.
150. Id. at 147; see also id. at 142.
151. Id. at 142.
152. Id (quotation omitted).
153. Id. A sentence that lasts for the life of the convict by its express terms is a de jure life sentence. In contrast, a de facto life sentence is a term-of-years sentence that is so long that it is likely to extend beyond the life of the convict. As astute courts have noted, the convict dies in prison either way.

154. Id. at 142 n.7.
155. Id. at 142 n.8 (recounting that the government argued that Grant’s sentence was permissible because it did not exceed his life expectancy); see also id. at 147.
156. See Moore v. Biter, 725 F.3d 1184, 1191 (9th Cir. 2013) (holding that a 254-year prison sentence precluded a meaningful opportunity for release).
157. Grant, 887 F.3d at 144.
behind prison bars and prohibits him or her from ever reentering society.”

Predictably, the Third Circuit was not the first circuit court of appeals to take a step beyond the Supreme Court. The panel noted in Grant that the United States Court of Appeals for the Seventh Circuit had previously concluded: “[t]he ‘children are different’ passage ... from [Miller] cannot logically be limited to de jure life sentences as distinct from sentences denominated in numbers of years yet highly likely to result in imprisonment for life.”

This decision is an easy one to make where a sentence is so long that it obviously precludes a meaningful opportunity for release. This is so whether it is the United States Court of Appeals for the Tenth Circuit striking down 131.75 years in prison without the possibility of parole, the United States Court of Appeals for the Ninth Circuit striking down 127 years and two-months in prison without the possibility of parole, or the Seventh Circuit striking down two consecutive fifty-year prison terms without opportunity for release. In all of these cases, it was all but certain that the juvenile offenders would die in prison. Yet, however valid and compelling this logic might be, it cuts against the literal rules of Graham, Miller, and Montgomery, which hold only that a meaningful opportunity for release prohibits LWOP. Once circuit courts blaze beyond these narrow confines, they are not only freed (or rather unmoored) from any “semantic classifications” imposed by legislatures, but are also beyond the purview of Graham, Miller, and Montgomery. When the prison sentence under consideration is ex-

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158. Id. at 145.
159. Id. (emphasis added) (quoting McKinley v. Butler, 809 F.3d 908, 911 (7th Cir. 2016); accord Moore, 725 F.3d at 1194; Budder v. Addison, 851 F.3d 1047, 1056 (10th Cir. 2017).
160. Budder, 851 F.3d at 1050; see also id. at 1056 (“The Constitution’s protections do not depend upon a legislature’s semantic classifications. Limiting the Court’s holding by this linguistic distinction would allow states to subvert the requirements of the Constitution by merely sentencing their offenders to terms of 100 years instead of ‘life.’”) (emphasis added) (footnote omitted).
161. See Moore, 725 F.3d at 1186 (“Because Moore would have to live to be 144 years old to be eligible for parole, his chance for parole is zero.”).
162. McKinley, 809 F.3d at 909; see also id. at 911 (“[I]t is such a long term of years (especially given the unavailability of early release) as to be—unless there is a radical increase, at present unforeseeable, in longevity within the next 100 years—a de facto life sentence, and so the logic of Miller applies.”) (emphasis added).
163. See Budder, 851 F.3d at 1056; Moore, 725 F.3d at 1186; McKinley, 809 F.3d at 911.
165. Budder, 851 F.3d at 1056.
treme, the *Graham*, *Miller*, and *Montgomery* meaningful-opportunity-for-release standard provides adequate guidance by which circuit courts may vacate the sentence. But when the prison sentence under consideration *not so obviously* deprives a juvenile offender of his meaningful opportunity for release, the constitutional question now turns upon semantics. The Tenth Circuit was correct when it observed that these semantics are no longer sourced in statutory boundaries. But a determination that was previously determined by statutory semantics now turns upon a determination which depends upon the efficacy of some studies predicting the life expectancy of the juvenile offender. The semantics of legislative schemes have been exchanged for the semantics of the logic of courts. This is shaky ground on which to rest a constitutional guarantee.

Whether Grant would be released at some point before his death was (and still is) a close call. Thus, the Third Circuit, in dealing with a sentence that did not obviously deprive Grant of his opportunity for release, endeavored to set forth a limiting principle to guide courts’ discretion. As a starting point, a meaningful opportunity for release must mean that the sentence is something less than a “de facto” life sentence. The panel referred back to the broad language of *Graham* as:

> the essence of what a “meaningful opportunity for release” is: . . an opportunity for release at a point of time in [the non-incorrigible juvenile offender’s] life that still affords “fulfillment outside prison walls,” “reconciliation with society,” “hope,” and “the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”

This “mandate,” the Third Circuit provided, “encompasses more than mere physical release at a point just before . . . life is expected to end.” In other words, the Third Circuit recognized that the

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166. *See, e.g.*, *Graham*, 560 U.S. at 75.
167. *Budder*, 851 F.3d at 1056.
168. *See Grant*, 887 F.3d at 147. The court noted that Grant relied on “various” mortality estimates and social scientific studies to establish his life expectancy. *Id.* The government countered that Grant was erroneously measuring his life expectancy from birth and contended that his life expectancy was longer when appropriately measured from his present age (then forty-four). *Id.*
169. *See id.* (noting that according to the various statistics presented, Grant could conceivably live to age 72 or even 76.7).
170. *See id.*
171. *Id.* at 144.
172. *Id.* at 147 (quoting *Graham v. Florida*, 560 U.S. 48, 79 (2010)).
173. *Id.*
rationale compelling the Supreme Court’s prior holdings was broader than those holdings themselves. Thus, the panel discarded the government’s proffered hope-for-some-years-outside-prison-walls standard as “too narrow in light of the [Supreme] Court’s statements.”\textsuperscript{174} But the hunt for an alternate, workable benchmark by which ‘meaningful opportunity for release’ might be measured was an elusive one.

To accomplish its objective (i.e., defining ‘meaningful opportunity’), the Third Circuit began by instituting what it termed a “legal framework.”\textsuperscript{175} Under this framework, sentencing judges would first be required to factually determine the juvenile offender’s life expectancy to ensure that a juvenile offender would not be sentenced to a term-of-years that exceeded the juvenile offender’s life expectancy.\textsuperscript{176} Having established a base determination that did not really get it any closer to its principle objective, the Third Circuit engaged in the following soliloquy:

\begin{quote}

at what age is one still able to meaningfully reenter society after release from prison? Is there a principled reason for why, say, a juvenile offender can properly reenter society at age fifty but not at age sixty? At age sixty but not at age seventy? We believe not. . . . [W]e are not aware of any widely accepted studies to support such precise line drawing on a principled basis in the prison release context.\textsuperscript{177}

\end{quote}

This conundrum is not new. In fact, it is a reincarnation of the dilemma presaged by Chief Justice Burger in his dissent to \textit{Solem}, where the Supreme Court first unmistakably applied the concept of proportionality to prison sentences some thirty-five years earlier:

\begin{quote}

[t]oday [the Court] holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly “nonviolent” felony. How about the eighth “nonviolent” felony? The ninth? The twelfth?\textsuperscript{178}

\end{quote}

\begin{footnotes}
\item[174] \textit{Id.} at 148 (emphasis added) (noting, however, that the Supreme Court has expressly declined to guarantee juvenile offenders release from prison).
\item[175] \textit{Id.}
\item[176] \textit{Id.} at 149. Such a determination in itself, the \textit{Grant} panel noted, was fraught with dilemmas. \textit{Id.} at 149-50 (quoting United States v. Mathurin, 868 F.3d 921, 932 (11th Cir. 2017) (noting the equal protection issues that would arise were sentences tailored to expectancy data because life expectancies vary according to race and sex). To avoid this constitutional quagmire, the panel mandated individualized evidentiary hearings to determine each juvenile offender’s life expectancy. \textit{Id.}
\item[177] \textit{Id.} at 150.
\end{footnotes}
Regardless of whether proportionality is an aid to Eighth Amendment capital punishment jurisprudence, proportionality in the realm of prison sentences presents judges with an amorphous standard that can produce radical results. The Third Circuit’s attempt to place a principled limit on a term-of-years sentence bears this out: in Grant, the court adopted “a rebuttable presumption that a non-incorrigible juvenile offender should be afforded an opportunity for release before the national age of retirement.” 179 Three observations are instructive in light of this result.

First, consider how the panel arrived at this place. The panel found it “clear” that “society accepts the age of retirement as a transitional life stage where an individual permanently leaves the work force after having contributed to society over the course of his or her working life.” 180 What is not particularly convincing about the panel’s pronouncement is that a term in prison can be fruitfully analogized to a lifelong career. Recognizing the difficulty of announcing the “precise national age of retirement” with certainty, 181 the panel declined to “definitively determin[e] [that] issue.” 182 Instead, the panel was content to consider sixty-five as an “adequate approximation” and leave the precise determination to sentencing courts. 183 Perhaps, in light of this holding, the panel’s assessment that it “goes no further” than prior Supreme Court holdings is not particularly convincing. 184 The Supreme Court, after all, had never contemplated measuring the meaningful-opportunity-for-release standard by a person’s age of retirement.

Second, consider what the panel’s proffered rule does not mean. Although the panel defined the constitutional right—meaningful opportunity for release before the national age of retirement—it seemingly did not extend that right to all non-incorrigible offenders. 185 This is because it is only a “rebuttable presumption.” 186 Thus, under Grant, a non-homicide offender under Graham (non-incorrigible by default) 187 and a non-incorrigible homicide offender under Miller, could presumably still be deprived of a meaningful opportunity for release before retirement age. Because this right does

179. Grant, 887 F.3d at 152 (emphasis added).
180. Id. at 150 (emphasis omitted) (citation omitted).
181. Id. at 151.
182. Id. at 152.
183. Id. at 151-52.
184. Id. at 148.
185. Id. at 152 (“We do not, however, categorically foreclose the possibility that a district judge may sentence a non-incorrigible juvenile offender beyond the national age of retirement . . . .”).
186. Id. at 152.
187. Id. at 142 n.7.
not necessarily apply evenly to all non-incorrigible offenders, it might very well be understood as inconsistent with both *Graham* and *Miller* which *required* a meaningful opportunity for all members of both classes of non-incorrigible juvenile offenders.\(^{188}\) This inconsistency can presumably be resolved by reading *Grant* to still require that meaningful opportunity for release occurs sometime *after* the age of retirement. This contingency would arise where a non-incorrigible juvenile offender, although capable of reform, still warranted a greater sentence under other sentencing factors.\(^{189}\) Moreover, provided that a sentencing judge determines that a homicide juvenile offender is incorrigible in the first instance, the protection against a term of years past the age of retirement (even up to LWOP) slips away and *Grant*, for all of its own hortatory language, provides no more certain protection than *Miller*.\(^{190}\) Thus, the holding in *Grant* is somewhat ambiguous. It can be viewed as a gargantuan leap ahead of the Supreme Court’s own jurisprudence, or because it is so hemmed in, as a diminutive one. So perhaps the panel was justified in its perception that this holding did not transgress the Supreme Court’s prior jurisprudence.\(^{191}\)

Finally, consider whether the panel’s “age of retirement” rule accomplished what the panel intended and whether it is actually consistent with *Graham, Miller*, and *Montgomery*. The holdings of those three cases transformed LWOP imposed upon juvenile offenders into a constitutional issue and, by doing so, largely took it “from the realm of democratic decision.”\(^{192}\) Once the Third Circuit panel accepted the premise that the spirit of these three cases abolished not only *de jure* but also *de facto* LWOP sentences,\(^{193}\) it followed inexorably that courts would have to define what constituted a *de facto* LWOP sentence. Thus, the burden falls on courts, rather than legislatures, to determine how many years of incarceration imposed upon juveniles for specific offenses is *too many years*, such that it deprives the juvenile offenders of their constitutional right to a

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\(^{189}\) *Grant*, 887 F.3d at 152 (citing to the factors in 18 U.S.C. § 3553 (2012), which include “the nature and circumstances of the offense and the history and characteristics of the defendant,” and forecasting that instances where such factors counsel a sentence beyond the national age of retirement “will be rare and unusual”).

\(^{190}\) *Id.* at 153.

\(^{191}\) *Id.* at 148.


\(^{193}\) *Grant*, 887 F.3d at 142.
“meaningful opportunity to obtain release.”194 In effect, by following this path, the panel may have extricated juveniles from being subject to a legislature’s “semantic classifications,”195 but the result it reached delivers juveniles to instead be ensnared by a semantic classification of the panel’s own invention.

Indeed, the “age of retirement” rule, requiring the meaningful opportunity for release to come before the age of sixty-five, is no less arbitrary than any rule that could be imposed by a legislature.196 After all, the age-of-retirement rule could, in some circumstances, encourage sentencing judges to pass a longer sentence than they otherwise would by relying on Graham, Miller, and Montgomery alone. Consider that by capping the maximum sentence in this way, a seventeen-year-old offender receiving the maximum possible sentence under Grant’s proposed rule would receive a shorter sentence than a fourteen-year-old offender receiving the maximum possible sentence (e.g., compare forty-eight years’ imprisonment without the possibility of parole ($14 + 48 = 62$), with fifty-one years’ imprisonment without the possibility of parole ($14 + 51 = 65$)). Under Grant this outcome is constitutionally sound but perhaps a future Third Circuit panel or the court en banc would disagree. Perhaps a future Third Circuit or the court en banc would regard it as logically perverse, a mere stopgap provision levied simply because the earlier holding had to draw the line somewhere (and perhaps the Third Circuit has already decided this by granting rehearing and vacating the panel’s opinion). But if this is true, was the panel’s sixty-five-year-old bright-line rule simply kicking the can down the road, until a future court has the opportunity to follow logic further into the semantic wormhole, and draw a new constitutional line in a completely new place? If so, the constitutional right to a meaningful opportunity for release is certainly chameleonic in nature, meaning one thing today and a different thing tomorrow. Perhaps the observation that “[l]iberty finds no refuge in a jurisprudence of doubt”197 is nowhere more apt than in the context of imprisonment, the literal deprivation of a person’s physical freedom.

196. Grant, 887 F.3d at 150-51.
V. CONCLUSION: WAITING FOR THE SUPREME COURT (OF FOR CONGRESS)

In the interests of clarity and consistency, it is imperative that the Third Circuit en banc resists the invitation to wade into the quagmire of Eighth Amendment juvenile sentencing logic for two main reasons.

First, it is the prerogative of the Supreme Court to advance its own constitutional bright lines. As a plurality of the Supreme Court enunciated in *Hein v. Freedom From Religion Foundation, Inc.*, “a necessary concomitant of the doctrine of *stare decisis* [is] that a precedent is not always expanded to the limit of its logic.” 198 For instance, the Supreme Court in *Kennedy v. Louisiana* disapproved of expansively reading a prior case, *Coker v. Georgia*, to "state a broad rule" reaching beyond its specific holding. 199 In *Coker*, the Court held that the Eighth Amendment prohibited capital punishment for the rape of an adult woman. 200 In *Kennedy*, the Court was faced with deciding whether the Eighth Amendment prohibited capital punishment for the rape of a child. 201 Although the Court answered that question in the affirmative, the Court emphatically rejected the argument that *Coker* had already answered that question despite noting the seemingly "logical" merit that that argument possessed. 202 The *Kennedy* Court acknowledged that confined to one particular passage, "Coker's analysis . . . [was] susceptible of a reading that would prohibit making child rape a capital offense." 203 However, the Court emphasized that “Coker’s holding was narrower than some of its language read in isolation.” 204

The same is true of *Graham*, *Miller*, and *Montgomery*. In each of these three cases where the Supreme Court has invalidated legislative bright lines, the Court has necessarily redrawn those lines in accordance with the constitutional mandate. Ultimately, it is the prerogative of the Supreme Court to set the bright lines by which all other courts must abide. 205 Thus, the Third Circuit should adopt the Eighth Circuit’s position, and abide by the narrow holdings of those three cases. 206 Under this approach, *Graham* would only pro-

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201. *Kennedy*, 554 U.S. at 413.
202. See *id.* at 426-27.
203. *Id.* at 428.
204. *Id.*
hibit LWOP (and nothing else) for juvenile non-homicide offenders, \(^{207}\) Miller would only prohibit mandatory LWOP (and not discretionary LWOP) \(^{208}\) for juvenile homicide offenders, \(^{209}\) and Montgomery would only prohibit discretionary LWOP with respect to non-incorrigible homicide offenders. \(^{210}\) While such a restrictive approach would exclude any of these cases’ more expansive language from being operative, it would also neatly comport with the three cases’ express holdings. \(^{211}\) It is these holdings that should be controlling rather than what is simply dicta. \(^{212}\) Such a result would also comport with fundamental fairness. Because different federal courts could and do come to different conclusions, juvenile offenders could be subject to differing standards as to what constitutes a meaningful opportunity for release where term-of-year sentences approach, but do not equate to, \textit{de facto} LWOP sentences. \(^{213}\) Thus, unless and until the Supreme Court weighs in, the Third Circuit should adhere to the express holdings of Graham, Miller, and Montgomery and leave any logical advancement or subsequent line-drawing to the Supreme Court. \(^{214}\) Indeed, the Third Circuit panel itself recognized this obligation, and the

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\(^{208}\) This issue is currently on certiorari before the Supreme Court. See Malvo v. Mathena, 893 F.3d 265 (4th Cir. 2018), \textit{cert. granted}, No. 18-217, 2019 WL 1231751, at *1 (U.S. Mar. 18, 2019).


\(^{211}\) See, e.g., Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 33 (2006) ("[T]he duty of a court of appeals [is] to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them."); see also Rodriguez de Quijas v. Shearson/Amer. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions.").

\(^{212}\) See Kennedy v. Louisiana, 554 U.S. 407, 428-29 (2008) (responding to the argument that it was "possible" that Coker be understood to "state a broad rule" covering child rape: "Coker's holding was narrower than some of its language read in isolation... The opinion does not speak to the constitutionality of the death penalty for child rape, an issue not then before the Court.").

\(^{213}\) "What kind of Equal Justice under Law is it that—without so much as a '[s]orry about that'—gives as the basis for [subjecting] one person [to a sentence] arguments explicitly rejected in refusing to [subject] another?" Roper v. Simmons, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting).

\(^{214}\) Although appellate courts defer to Supreme Court dicta as a general matter, see \textit{In re Pre-Filled Propane Tank Antitrust Litig.}, 800 F.3d 1059, 1064 (8th Cir. 2017), \textit{cert. denied sub nom.}, Ferrellgas Partners, LP v. Morgan-Larson, LLC, 138 S. Ct. 647 (2018), such deference can go too far. See id. (stating that "[a]lthough panels have held that federal courts are 'bound' by Supreme Court dicta, this goes too far"). Where a federal court must decide between either (1) following a clear holding of the Supreme Court, or (2) giving effect to Supreme Court dicta that would have the effect of obliterating the bright line previously set by the clear holding, the federal court should stick with the clear holding. This is especially true where the lives of juvenile offenders hang in the balance.
court en banc should also heed it.215 Dissimilar to the result in Coker, the Supreme Court could very well decide that the holdings in Graham, Miller, and Montgomery are the absolute limit of the constitutional requirement, hortatory language notwithstanding.216 But for now, the bright lines set forth in those cases are the Court’s last word.217

Second, it is ultimately Congress, rather than the courts, that has the ability to implement the solution that is needed to satisfy the constitutional requirements of Graham, Miller, and Montgomery. In Frothingham v. Mellon, the Supreme Court enunciated the general rule that federal taxpayers lack standing to challenge a federal statute’s constitutionality.218 When the Supreme Court subsequently decided Flast v. Cohen, there had been “confusion” as to whether Frothingham had announced an absolute constitutional bar to taxpayer standing or “simply impos[ed] a rule of [judicial] self-restraint.”219 The Flast Court decided that it was the latter.220

Expressing concern in his dissent, Mr. Justice John Marshall Harlan II wrote the following:

[i]t seems to me clear that public actions, whatever the constitutional provisions on which they are premised, may involve important hazards for the continued effectiveness of the federal judiciary... [T]here surely can be little doubt that they strain the judicial function and press to the limit judicial authority. There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government. It is not, I submit, enough to say that the present members of the Court would not seize these opportunities for abuse, for such actions would, even without conscious abuse, go far toward the final transformation in the Council of Revision which, despite Madison’s support, was rejected by the Constitutional Convention... We

215. United States v. Grant, 887 F.3d 131, 148 (3d Cir. 2018) (stating “we are bound to follow the mandate of the Supreme Court...”) (quotation omitted).
216. See Kennedy, 554 U.S. at 428.
217. See id.
218. 262 U.S. 447 (1923).
220. Id. at 93. Interestingly, it was precisely this exception to the general rule of no taxpayer standing that the Supreme Court was unwilling to advance in Hein. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 590 (2007). Confronted with the argument that it was “arbitrary’ to distinguish between money spent pursuant to congressional mandate and expenditures made in the course of executive discretion,” id. at 609, the plurality responded that “a necessary concomitant of stare decisis is that a precedent is not always expanded to the limit of its logic.” Id. at 615.
must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of the Government "are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."  

The lesson from Flast is instructive in the present context. Criminal sentencing laws are at the heart of the legislative function. As multiple Supreme Court justices have observed, the Constitution makes for a clumsy tool when it comes to fine-tuning legislative schemes. To acknowledge this maxim is not to diminish the judiciary's significant role in overseeing the constitutionality of criminal justice. It is merely to state that not every criminal sentencing question should be injected with Eighth Amendment significance. In order to sustain the viability of the system, courts must be willing to rely on coordinate branches of government as co-equal "guardians of the liberties."  

The verity of this premise is even stronger when the simplest solution in a given context is a legislative one. Such is the case here: providing parole eligibility for all juvenile offenders would comfortably and easily satisfy the requirements of Graham, Miller, and Montgomery. Of course, for this solution to be viable, Congress would have to re-establish a federal parole system. With such a system, it would be difficult to argue under Graham, Miller, and Montgomery that any term-of-years prison sentence, no matter how long, deprives a juvenile offender of a meaningful opportunity for release as long as that juvenile offender is eligible for parole. The

221. Flast, 392 U.S. at 130-31 (Harlan, J., dissenting) (footnote omitted) (citation omitted).

222. See Miller v. Alabama, 567 U.S. 468, 515 (2012) (Thomas, J., dissenting) (stating that "questions of sentencing policy [are] to be determined by Congress and the state legislatures . . . [because] d[etermining the length of imprisonment that is appropriate for a particular offense and a particular offender inevitably involves a balancing of interests").

223. See Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) ("Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right."); see also Manson v. Brathwaite, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (citation omitted) ("I am persuaded that this rule-making function can be performed more effectively by the legislative process than by a somewhat clumsy judicial fiat, and that the Federal Constitution does not foreclose experimentation by the [s]tates in the development of such rules."); Miller, 567 U.S. at 515 (Thomas, J., dissenting) (recognizing that "[t]he Eighth Amendment imposes certain limits on the sentences that may be imposed in criminal cases, but for the most part it leaves questions of sentencing policy to be determined by Congress and the state legislatures . . .").

224. See Miller, 567 U.S. at 514-15 (Thomas, J., dissenting).

225. Flast, 392 U.S. at 131 (Harlan, J., dissenting) (quotation omitted).

Supreme Court has twice now suggested the expediency of this option in this context. The Court first entertained the option in *Miller*\(^{227}\) and elaborated on its potential in *Montgomery*: “[a]llowing those offenders to be considered for parole ensures that juvenile[.] . . . [offenders] will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.”\(^{228}\) Although the difficulty of how far into a sentence the Constitution requires a juvenile offender be considered for parole would remain, this approach would alleviate the strain on sentencing courts in attempting to ferret out the requirements of *Graham, Miller,* and *Montgomery* with respect to each offender.\(^{229}\) If by its references in *Miller* and *Montgomery*, the Supreme Court is signaling to Congress that congressional action is required, then the federal judiciary should be unified in this resolve.

In summary, the Third Circuit should exercise forbearance and decline to wade through the quagmire of Eighth Amendment logic. Not only will this permit time for congressional action, it will also respect the constitutional bright lines which the Supreme Court has already drawn. For no bright line can be perfectly drawn and somewhere the quixotic pursuit of perfect logic must die.

\(^{227}\) *Miller,* 567 U.S. at 489.

\(^{228}\) *Montgomery* v. Louisiana, 136 S. Ct. 718, 736 (2016).

\(^{229}\) *Id.*; see also *United States* v. *Grant,* 887 F.3d 131, 149 (3d Cir. 2018) (rejecting the approach of formulating specific sentences tailored to each individual offender’s life expectations as unworkable).