"Incorrigibility Is Inconsistent with Youth": Exclusion of Three Strikes Offenders Is Inconsistent with the Goal of the Youth Offender Parole Hearing Process

EVA MARIE LONEY*

 J.D., University of California, Davis School of Law, 2019. I am deeply grateful for the helpful feedback of Elizabeth Chang.

ABSTRACT

In 2014, California enacted a parole procedure through which most offenders who committed crimes as young people become eligible for a special parole hearing after a certain number of years in prison. The Supreme Court's decisions in *Graham v. Florida* and *Miller v. Alabama* motivated California's decision to provide a way for youthful offenders to demonstrate rehabilitation and reenter society. This Article uses the Supreme Court's reasoning in these landmark cases to argue against the current exclusion of three-strikes offenders from California's youth offender parole mechanism. It argues that the exclusion of certain offenders based on a prior youthful criminal conviction is at odds with the rationale underpinning *Miller* and *Graham*. It also argues that the exclusion is incongruous with legislative history and is facially ambiguous, leading to potentially unfair repercussions for defendants similarly situated. This Article proceeds to address several arguments in opposition of extending youth offender parole hearing protection. It finishes by advocating for the abolishment of the exclusion and proposes a framework of considerations for judges faced with sentencing young defendants with prior strikes.

Table of Contents

INTRODUCTION 195
I. BACKGROUND 198
A. *Judicial Precedent: New Guidelines Around Juvenile Sentencing* 198
B. *California's Reaction: The Youth Offender Parole Hearing Statute* 200
C. *California's Three-Strikes Law* 203
II. ARGUMENTS 206
A. *The Three-Strikes Exclusion Commits the* Miller *Violation Section 3051 Purports to Remedy* 206
1. *The* Miller *Reasoning Should Apply to the Three-Strikes Exclusion* 207
2. *The California Supreme Court Expressly Left the Issue Open to Litigate* 208
3. *The Legislature's Exclusion of Three Strikes Offenders Oversteps* Miller*'s Discretionary Boundaries and Is Logically Flawed* 209

B. Legislative History Demonstrates Intent to Broaden the Eligible Class 214
1. Statutory Amendments Show Intent to Broaden Eligibility in General 215
2. Support for Elimination of the Exclusion....218
C. The Ambiguous Exclusionary Language Could Lead to Confusion for the Trial Judge and Discrepancies in Sentencing 220
1. The Statutory Language Is Ambiguous 220
2. The Ambiguity May Lead to Inconsistencies in Procedure at the Trial Court 223
3. The Trial Judge's Discretion Is Not an Adequate Safeguard Against Unconstitutional Sentences 225
III. SOLUTION 228
CONCLUSION....230

INTRODUCTION

In a trilogy of victories for proponents of reform to the juvenile justice system, the Supreme Court made grand strides in recent years to restrict unduly harsh juvenile punishment. The three landmark decisions--*Roper v. Simmons*,[1] *Graham v. Florida*,[2] and *Miller v. Alabama*[3]--departed from the Court's previous case-by-case analysis of the Eighth Amendment's prohibition on cruel and unusual punishment by passing several categorical bans on juvenile sentencing schemes. In so doing, the Court relied heavily on scientific studies on juvenile brain development showing that youth are inherently more impulsive, more susceptive to negative influences, and more transitory in personality traits than adults.[4] These findings supported the Court's conclusions in all three cases that youth are less culpable than adults and more capable of future reform.[5] Thus, prison sentences must not deny them an opportunity to demonstrate rehabilitation.[6]

---

1 Roper v. Simmons, 543 U.S. 551 (2004).
2 Graham v. Florida, 560 U.S. 48 (2010).
3 Miller v. Alabama, 567 U.S. 460 (2012).
4 *Miller*, 567 U.S. at 460; *Graham*, 560 U.S. at 48; *Roper*, 543 U.S. at 551.
5 *Miller*, 567 U.S. at 460; *Graham*, 560 U.S. at 48; *Roper*, 543 U.S. at 551.
6 *Miller*, 567 U.S. at 460; *Graham*, 560 U.S. at 48; *Roper*, 543 U.S. at 551.

In *Roper,* the Court eliminated the possibility of a death penalty sentence for an individual who committed their offense before turning eighteen.[7] It was the first time the Court wove scientific and psychological research about juvenile development into its analysis of the Eighth Amendment's prohibition of cruel and unusual punishment.[8] The Court relied heavily on the reasoning in *Roper* to conclude in *Graham* that the Eighth Amendment also prohibits sentencing juvenile non-homicide offenders to life without the possibility of parole ("LWOP").[9] In doing so, the Court held that the state must give non-homicide offenders "a meaningful opportunity to obtain release."[10] Two years later, the Court extended the same prohibition on LWOP to juvenile homicide offenders in *Miller*.[11] In an extension of *Roper*'s and *Graham*'s reasoning, the Court concluded that none of the determinative findings on children, including their transitory mental states and environmental vulnerabilities, were crime specific.[12]

An important California case further solidified these protections for juveniles in California. In *People v. Caballero*, the California Supreme Court extended the categorical bar on juvenile LWOP to juvenile sentences that are the "functional equivalent of life in prison without possibility of parole."[13] Thus, the ban in California extends to indeterminate sentences that do not provide the defendant a "meaningful opportunity for release" within their natural lifetime.[14]

In addition to judicial responses, many states, including California, also enacted legislation to codify these protections.[15] California's response

---

[7] *Roper*, 543 U.S. at 551.

[8] *See id.* at 569–71, 573 (citing scientific and psychological research about juvenile development to support the conclusion that courts should hold juveniles to a diminished level of culpability as compared to adults).

[9] *Graham*, 560 U.S. at 48, 52–57.

[10] *Id*. at 48, 52–57.

[11] *Miller*, 567 U.S. at 461.

[12] *Id*. at 460–61.

[13] People v. Caballero, 282 P.3d 291 (Cal. 2012).

[14] *Id.*

[15] *See* Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245, 257 (2016) (referring to DEL. CODE ANN. tit. 11, § 4204A(d)(1)-(2) (Supp. 2014), which provides for sentencing review of non-homicide juvenile offenders after they have served twenty years, and of homicide offenders after they have served thirty years; FLA. STAT. § 921.1402 (Lexis through 2017 Reg. Sess. And 2017 Special Sess. A), which creates resentencing hearings for juvenile offenders sentenced to fifteen years or more after they have served fifteen, twenty, or twenty-five years, depending on length of the original

took the form of S.B. 260, which became effective January 1, 2014, and established a youth offender parole hearing process that caps the maximum amount of time young offenders may be incarcerated before they are eligible for a parole hearing.[16] As it reads today, the statute allows most offenders who commit their "controlling offense" when they are twenty-five or younger the opportunity for review before a special parole board within twenty-five years of their offense.[17] The statute excludes several categories of offenders, including those sentenced under the three-strikes law,[18] of which this Article takes issue.

This Article argues that the exclusion of three-strikes offenders from California's youth offender parole hearing recourse is at least improper and at most unconstitutional by extension of the reasoning of *Roper*, *Graham*, *Miller*, and *Caballero*.[19] Part I describes the backdrop to S.B. 260[20] by further explaining how *Roper*, *Graham*, *Miller*, and *Caballero* reached their landmark conclusions. It then proceeds to describe the process by which California's S.B. 260 purports to afford a "meaningful opportunity for release" to young offenders through the youth offender parole hearing ("YOPH") process. Lastly, Part I provides a brief overview of California's three-strikes law. Part II advances several arguments challenging the constitutionality of the exclusion of three-strikes offenders, its incongruity with legislative history, and its facial ambiguity. Part II also rebuts the argument that enacting the three-strikes exclusion was an appropriate use of legislative power and the argument that judicial discretion is an appropriate safeguard against unconstitutionally lengthy sentences. Part III advocates for a revision of section 3051 to provide three-strike defendants with access to youth offender parole hearings. It also emphasizes discretionary tactics the trial judge may use to ensure sentences conform with the *Miller* guidelines. This Article concludes by briefly exploring the implementation

---

sentence; and W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014), which establishes parole eligibility for all juvenile offenders sentenced to over fifteen years when the individual has served fifteen years in custody) [hereinafter Caldwell, *Meaningful Opportunities*].

16 S.B. 260, 2013 Advanced Leg. Serv., Reg. Sess. (Cal. 2014).

17 CAL. PENAL CODE § 3051 (Deering, LEXIS through 2017 Sess.). "Controlling offense" is defined in the statute to means "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." *Id.* § 3051(2)(B).

18 *Id.* § 3051(h).

19 Hereinafter, I will refer to the reasoning of *Roper, Graham, Miller,* and *Caballero* as the "*Miller* reasoning" or "*Miller* framework," since *Miller* is the most recent and thus most evolved development of the analysis developed in *Roper* and *Graham*. Additionally, S.B. 260 cites directly to *Miller*.

20 S.B. 260 was codified at § 3051.

of the YOPH process and proposes several suggestions for developing future research and guidelines.

I. BACKGROUND

A. Judicial Precedent: New Guidelines Around Juvenile Sentencing

In *Roper v. Simmons*, the defendant committed murder at age seventeen and was sentenced to death.[21] The defendant filed a petition for post-conviction relief, arguing that the Constitution prohibits the execution of a juvenile who was under eighteen when he committed the crime.[22] The Missouri Supreme Court agreed and set aside the death penalty in favor of life without parole.[23] The United States Supreme Court affirmed, holding that the Eighth Amendment categorically forbids the imposition of the death penalty on juveniles.[24] A strong deference to scientific findings regarding the brain development of juveniles underpinned *Roper*'s holding.[25] The Court reasoned that immaturity causes youth to engage in impulsive decisions,[26] makes youth "more susceptive to negative influences … like peer pressure,"[27] and manifests itself in "transitory" personality traits.[28] The Court thus concluded that because a juvenile's identity is still unformed, even a youth who commits a heinous crime is not necessarily "irretrievably depraved," and it would be morally misguided to equate a minor's wrong-doings with those of an adult.[29] In light of a juvenile's diminished culpability, the state should not "extinguish his life and his potential to attain a mature understanding of his own humanity."[30]

The Court expanded upon *Roper*'s reasoning five years later in *Graham v. Florida*, holding that juveniles may not be sentenced to mandatory life without parole for non-homicide offenses.[31] In *Graham*, the trial court sentenced the sixteen-year-old defendant to life in prison when he participated in a robbery, in violation of his conditions of parole from a

---

21 Roper v. Simmons, 543 U.S. 551, 555 (2004).
22 *Id.* at 559–60.
23 *Id.* at 560.
24 *Id.* at 578–79.
25 *Id.* at 569–74.
26 *Id.* at 569.
27 *Id.*
28 *Id.* at 570.
29 *Id.*
30 *Id.* at 574.
31 Graham v. Florida, 560 U.S. 48, 58 (2010).

prior robbery.[32] On appeal, he challenged the constitutionality of the sentence under the Eighth Amendment.[33] In holding unconstitutional the juvenile LWOP sentence, the Court further expounded *Roper*'s discussion of the characteristics of adolescence, including lack of maturity, susceptibility to outside influences, and an unformed character.[34] The Court declared that while a state is not required to guarantee freedom to the juvenile offender, it must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[35] The Court emphasized that the individual states should adapt their own means to adequately provide this opportunity.[36]

Two years later, *Miller v. Alabama* took the *Roper* and *Graham* protections a step further by extending the categorical ban on juvenile LWOP to homicide offenders.[37] In *Miller*, two fourteen-year-olds were convicted of murder and sentenced to LWOP.[38] The Court decided that the *Graham* LWOP ban is applicable even to homicide offenses, reasoning that *Graham*'s determinations about the transitory mental traits and environmental vulnerabilities of youth are not crime specific.[39] Thus, even young people convicted of murder have diminished culpability as compared to adults and should have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[40] The Court held that the state cannot impose a mandatory LWOP sentence on a juvenile for any crime.[41] Rather, a judge or jury must have the opportunity to consider mitigating circumstances before imposing such an extreme sentence on a juvenile.[42]

The ambiguous "meaningful opportunity for release" framework established by this trilogy of cases has been the subject of debate in academic literature and the courts alike.[43] The first California case to

---

32 *Id.* at 52–57.

33 *Id.* at 58.

34 *Id*. *See also* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 604 (2012) [hereinafter Caldwell, *Adolescent Mistakes*].

35 *Graham*, 560 U.S. at 75.

36 *Id.*

37 Miller v. Alabama, 567 U.S. 460, 461 (2012).

38 *Id.*

39 *Id.*

40 *Id.* at 479.

41 *Id.*

42 *Id.*

43 Caldwell, *Meaningful Opportunities*, *supra* note 15, at 253.

address its substance was *People v. Caballero*.[44] There, the trial court sentenced a sixteen-year-old to 110 years to life for three counts of attempted murder related to a gang shoot-out.[45] The court extended the categorical bar established in *Graham* to apply to juvenile sentences that are the "*functional equivalent* of life in prison without possibility of parole."[46] The court held that such a sentencing scheme constituted cruel and unusual punishment in violation of the Eighth Amendment and the precedent established in *Graham* and *Miller*.[47] This ruling further broadened protections to juveniles in California whose sentences do not provide them with a "meaningful opportunity for release" within their natural lifetimes, regardless of whether the sentenced imposed is technically LWOP.[48]

B. California's Reaction: The Youth Offender Parole Hearing Statute

The aforementioned litigation spawned a litany of legislative action to bring state sentencing practices in conformance with *Roper*, *Graham*, and *Miller*.[49] California's response took the form of S.B. 260,[50] which became effective on January 1, 2014, and added sections 3051;[51] 3046, subdivision

---

[44] People v. Caballero, 282 P.3d 291 (Cal. 2012).

[45] *Id.* at 293.

[46] *Id.* at 295 (emphasis added).

[47] *Id.* at 295–96.

[48] *See id.* (equating a 110 years to life sentence with life without parole). Other states have reached opposite conclusions as to whether de facto life sentences trigger the "meaningful opportunity for release" requirement. *See* Caldwell, *Meaningful Opportunities*, *supra* note 15, at 253 (citing State v. Kasic, 265 P.3d 410, 414-15 (Ariz. Ct. App. 2011) (holding that *Graham* does not apply to a 139.75 year sentence since it is not LWOP), and State v. Brown, 118 So. 3d 332, 341 (La. 2013) (concluding that a seventy year sentence that would allow a juvenile defendant to be released at the age of eighty-six does not violate the Constitution because *Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime)).

[49] *See* Caldwell, *Meaningful Opportunities*, *supra* note 15, at 257 (referring to DEL. CODE ANN. tit. 11, § 4204A(d)(1)-(2) (Supp. 2014), which provides for sentencing review of non-homicide juvenile offenders after they have served twenty years, and of homicide offenders after they have served thirty years; FLA. STAT. § 921.1402 (Lexis through 2017 Reg. Sess. And 2017 Special Sess. A), which creates resentencing hearings for juvenile offenders sentenced to fifteen years or more after they have served fifteen, twenty, or twenty-five years, depending on length of the original sentence; and W. VA. CODE ANN. § 61-11-23(b) (LexisNexis 2014), which establishes parole eligibility for all juvenile offenders sentenced to over fifteen years when the individual has served fifteen years in custody).

[50] S.B. 260, 2013 Advanced Leg. Serv., Reg. Sess. (Cal. 2014).

[51] CAL. PENAL CODE § 3051.

(c);[52] and 4801, subdivision (c)[53] to the Penal Code. Directly quoting *Miller,* the bill purported "to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established."[54] The bill reiterated the *Miller* findings that only a small percentage of adolescents develop entrenched patterns of criminal behavior.[55] Furthermore, the authors pointed to scientific and psychological developments, concluding there are fundamental differences between juvenile and adult minds, including "parts of the brain involved in behavior control."[56]

To bring California law into compliance with *Miller*, S.B. 260 created a mechanism that caps the numbers of years that young offenders may be incarcerated before they are eligible for parole.[57] Within fifteen to twenty-five years of their controlling offense,[58] most young offenders are eligible for review before a youth offender parole hearing board.[59] The original bill established that such parole eligibility applies to those who committed their offense before attaining eighteen years of age.[60] A 2015 amendment increased the age threshold to twenty-three.[61] Additional amendments signed by Governor Brown in October 2017 further increased the age to twenty-five[62] and replaced the word "juvenile" in the statute with

---

52 *Id.* § 3046(c).

53 *Id.* § 4801(c).

54 S.B. 260, 2013 Advanced Leg. Serv., Reg. Sess. (Cal. 2014).

55 *Id.* (quoting Miller v. Alabama, 567 U.S. 460, 472 (2012)).

56 *Id.* (quoting Miller v. Alabama, 567 U.S. 460, 472 (2012)).

57 *Id.* ("The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* . . . and the decisions of the United States Supreme Court in *Graham v. Florida* . . . and *Miller v. Alabama*.").

58 CAL. PENAL CODE § 3051(b)(1)-(3); § 3051(2)(b) (defining "controlling offense" as the offense or enhancement for which any sentencing court imposed the longest term of imprisonment).

59 *Id.* § 3051.

60 *Id.* § 3051(a)(1).

61 S.B. 261, 2015 Reg. Sess. (Cal. 2015).

62 A.B. 1308, 2017 Reg. Sess. (Cal. 2017).

the word "youth,"[63] demonstrating a legislative intent to extend *Miller* protection beyond the eighteen-year-old "juvenile" cutoff.[64]

Upon review of a youth offender, the parole board shall consider the "diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual."[65] Additionally, the board may consider statements from the youth offender's community that can attest to his or her growth and maturity since the time of the crime.[66] The legislation provided eighteen months for the state to conduct hearings for individuals who retroactively became entitled to have their parole suitability considered at a youth offender parole hearing.[67]

Professor Beth Caldwell, an expert in criminal law and juvenile justice, conducted an empirical investigation of the law's implementation during its first six months.[68] As part of her research, Caldwell reviewed the transcripts of the first 107 youth-offender parole hearings.[69] She found that the parole grant rate was approximately eleven percent higher for people under the youth offender parole mechanism than for regular adult offenders seeking parole.[70] Additionally, Caldwell found that people granted parole under the YOPH procedure were released nearly ten years earlier than their adult counterparts.[71]

Subsection (h) of the statute lists four categories of youth offenders ineligible for the YOPH mechanism.[72] The first exclusion consists of individuals sentenced under the three-strikes law, of which this Article takes issue.[73] The second exclusion concerns individuals sentenced under

---

63 S.B. 394, 2017 Reg. Sess. (Cal. 2017).

64 *See infra* Part III.B.1 (discussing how regular statutory amendments extending youth offender parole eligibility to individuals up to age twenty-five demonstrate California's intent for *Miller* protections to have broad application).

65 CAL. PENAL CODE § 3051(f).

66 *Id.*

67 *Id.* § 3051(i).

68 *See* BETH CALDWELL, PROFESSOR OF LEGAL ANALYSIS, WRITING AND SKILLS, https://www.swlaw.edu/faculty/full-time/beth-c-caldwell (last visited Jan. 12, 2018) [hereinafter *Caldwell bio*]; Caldwell, *Meaningful Opportunities*, *supra* note 15, at 268.

69 Caldwell, *Meaningful Opportunities*, *supra* note 15, at 268.

70 *Id.* at 273.

71 *Id.* at 304.

72 CAL. PENAL CODE § 3051(h).

73 It is outside the scope of this paper to discuss in detail the impropriety of every exclusion. The California legislature is attuned to the impropriety of the LWOP exclusion

California's "one-strike law" for particular sex offenses.[74] Until October 2017, a third exclusion consisted of juveniles sentenced to LWOP.[75] S.B. 394 repealed that exclusion in direct response to a *Miller* violation.[76] The fourth exclusion deals with individuals that commit a crime after they turn twenty-six years old, and "for which malice aforethought is a necessary element or for which [they are] sentenced to life."[77] Until October 2017, the age threshold for this exclusion was twenty-three years old.[78] Interestingly, while the 2017 amendments significantly narrowed the YOPH exceptions, the three-strikes offender exclusion remains intact.

C. California's Three-Strikes Law

California's three-strikes law presents a tension between its own purported goal and the guidelines set forth by the *Miller* cases. Codified in California Penal Code section 667, the three-strikes law passed in 1994 is recognized as one of the most punitive three-strikes laws in the nation.[79] The stated goal of the law is to ensure "longer prison sentences and greater punishment" for serious recidivists, defined in the statute as those who have been previously convicted of serious and/or violent crimes.[80] Such "serious" and "violent" felonies are enumerated in California Penal Code sections 1192.7 and 667.5.[81] While most of the enumerated felonies contain

---

by eliminating it in a 2017 amendment to the statute. *See* S.B. 394, 2017 Reg. Sess. (Cal. 2017).

74 *Id.* (excluding people sentenced under section 667.71).

75 *Id.* (previously excluding juveniles sentenced to LWOP from the youth offender parole hearing procedure until amended by S.B. 394).

76 Until October 2017, California Penal Code section 3051, subsection (h) expressly excluded juveniles sentenced to LWOP. The new law requires that juveniles sentenced to LWOP receive a youth offender parole hearing within twenty-five years of their controlling offense. *Hearing on S.B. 394 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.). According to the authors of the bill, "SB 394 will remedy the now unconstitutional juvenile sentences of life without the possibility of parole . . . This is in line with the United States Supreme Court's suggestion of parole consideration as a remedy for a *Miller* violation." *Id.* (citing Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016)).

77 CAL. PENAL CODE § 3051(h) ("This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.").

78 A.B. 1308, 2017 Reg. Sess. (Cal. 2017).

79 *See* Caldwell, *Adolescent Mistakes, supra* note 34, at 586.

80 CAL. PENAL CODE § 667(b); *see, e.g.*, People v. Ramirez, 39 Cal. Rptr. 2d 374, 377 (Cal. Ct. App. 1995).

81 CAL. PENAL CODE § 1192.7 (serious felonies); § 667.5 (violent felonies).

elements of violence, some notably do not, distinguishing California's three-strikes law from the majority of other three-strikes laws in the nation.[82] For example, residential burglary, selling drugs to a minor, making criminal threats, and writing gang-related graffiti are all non-violent crimes that qualify as strikes under California's law.[83]

The practical effect of the law is that anyone convicted of a first-strike offense will receive a doubled prison sentence for a subsequent strike offense.[84] An individual convicted of a third-strike offense will receive an automatic sentence of twenty-five years to life.[85] Juveniles sixteen or older convicted of a serious or violent felony may be sentenced as adults under the three-strikes law.[86] Despite widespread criticism, the California Supreme Court has upheld the legality of juvenile strikes.[87]

Thus, there is tension between the three-strikes law and the YOPH process.[88] The three-strikes law, by its nature, is a punitive law that serves the penological goal of incapacitation by removing recidivists from society for a longer time than their non-recidivist counterparts.[89] This goal is directly at odds with the rehabilitative ideal of the youth offender parole process and the juvenile justice system in general.[90] The Court stated in *Miller*: "Deciding that a 'juvenile offender forever will be a danger to society would require 'mak[ing] a judgment that [he] is incorrigible'—but

---

82 Caldwell, *Adolescent Mistakes, supra* note 34, at 586.

83 *Id.* at 588–89.

84 CAL. PENAL CODE § 667(e)(1).

85 *Id.* § 667(e)(2).

86 *Id.* § 667(d)(3)(a) (Deering, LEXIS through 2017 Sess.).

87 *See, e.g.*, People v. Nguyen, 209 P.3d 946, 947 (Cal. 2009); People v. Davis, 64 Cal. Rptr. 2d 879, 880 (Cal. 1997). For a criticism of the use of juvenile strikes to enhance adult sentences, see Caldwell, *Adolescent Mistakes, supra* note 34, at 597–98, 610.

88 *See* Amanda K. Packel, Comment, *Juvenile Justice and the Punishment of Recidivists under California's Three Strikes Law*, 90 CALIF. L. REV. 1157 (2002) (arguing that the inclusion of juvenile adjudications as prior strikes under California's three-strikes law "sets up an inevitable clash" between the rehabilitative intent of the juvenile justice system and the punitive intent of the three-strikes law).

89 *See* Graham v. Florida, 560 U.S. 48, 72 (2010) (conceding that incapacitation is an important penological goal because recidivism is a serious risk to public safety); *see also In re* Panos, 178 Cal. Rptr. 3d 483, 485 (Cal. Ct. App. 1981) ("The apparent legislative purpose underlying the [three-strikes law] statute is to provide an additional punishment component 'for prior imprisoned recidivist offenders.'").

90 *See* Packel, *supra* note 88, at 1158 (arguing that the punitive intent of the three-strikes law is at odds with the goals of the juvenile justice system: "[R]ehabilitating juveniles and rescuing them from the harsh treatment and permanent consequences of criminal courts").

'incorrigibility is inconsistent with youth.'"[91] The YOPH process revolves around this rehabilitative ideal: that youth, even those who commit serious crimes, are more capable of change than adults and should be awarded the opportunity to demonstrate their reform.[92]

In sum, the California legislature created a predicament. Through the YOPH process, youth sentenced to lengthy terms can demonstrate they are fit to reenter society after a finite prison term—unless they committed a previous strike offense.[93] This exclusion of three strikers leads to disparate outcomes. An older defendant convicted of a serious crime is protected by the youth offender parole process, whereas a younger defendant with a lesser crime but prior strikes is not.[94] For example, a youth may rack up two juvenile strikes by committing residential burglary and vandalism in association with a gang.[95] If, at eighteen, he commits armed robbery, he faces a de facto twenty-five to life sentence because of his two priors.[96] And he could plausibly get an additional twenty years: ten years for carrying a firearm[97] and ten years because he committed the robbery in association with a street gang.[98] Thus, his minimum sentence before parole review

---

[91] U.S. v. Miller, 567 U.S. 460, 472–73 (quoting *Graham*, 560 U.S. at 72-73 (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. App. 1968))).

[92] S.B. 260, 2013 Advanced Leg. Serv., Reg. Sess. (Cal. 2014) (setting forth the goal of creating a parole eligibility mechanism whereby a person serving a sentence for a crime committed as a juvenile has the opportunity for release by showing she has been rehabilitated and matured); *see also Graham*, 560 U.S. at 74 (reiterating that juvenile LWOP cannot be justified by the goal of rehabilitation because it forswears altogether the rehabilitative ideal).

[93] *See* CAL. PENAL CODE § 3051 (affording youth offender parole eligibility to most youth who commit their controlling offense before turning twenty-six, with several exceptions noted in subsection (h)).

[94] *See id.*

[95] *See id.* § 667(d)(1) (providing that the three-strikes sentencing scheme applies to "first degree burglary when another person was present in the residence during the burglary"). Vandalism is converted to a felony-strike offense if it is committed for the benefit of a gang under California Penal Code section 186.22(d). *See id.* § 1192.7(c)(28) (defining any felony conviction under California Penal Code section 186.22 as a strike).

[96] *See id.* § 667(e)(2)(A)(ii).

[97] "The firearm *need not be operable or loaded* for this enhancement to apply." *Id.* § 12022.53(b). California Penal Code section 12022.53 provides for sentence enhancements for certain felonies when the perpetrator uses a gun in the commission of the crime. Specifically, the law adds ten years for "using" a gun, twenty years for firing a gun, and twenty-five to life for killing or seriously injuring another person with a gun. *Id.* It applies to a list of serious felonies, among which is robbery. *See id.* § 12022.53(a).

[98] California Penal Code section § 186.22 provides for sentence enhancements if the crime was committed "for the benefit of, at the direction of, or in association with any

would be forty-five years, assuming he was convicted only of one offense in relation to this crime. Because he is eighteen, *Miller*'s categorical bar on juvenile LWOP does not apply to him, even though he committed the prior offenses which caused the enhanced third-strike sentence as a juvenile.[99] Contrast this case with that of another defendant, as old as twenty-five. He committed first-degree murder but has no prior strikes. Under the youth offender parole procedure, he will have an opportunity within twenty-five years for review by a special parole board that will consider his "diminished culpability of youth" and any "subsequent growth and increased maturity" since the crime.[100] In sum, he is afforded all the protection of the YOPH process because he did not accrue a strike as a juvenile.[101] This Article takes issue with this dichotomy, arguing for the extension of the YOPH process to young offenders regardless of prior convictions.

II. ARGUMENTS

A. The Three-Strikes Exclusion Commits the Miller *Violation Section 3051 Purports to Remedy*

This section frames the three-strikes exclusion within the context of the *Miller* cases and explains how the *Miller* reasoning applies. Ultimately, it concludes that the exclusion is a hypocrisy because it commits the same constitutional violation California's YOPH process intended to remedy. It proceeds to discuss the California Supreme Court's decision to leave the issue open to future litigation. Lastly, it challenges a recent case that upheld a different exclusion under the statute.

Exclusion of three-strikes offenders from the YOPH process is a violation of the Eighth Amendment under *Miller*. This argument follows from the aforementioned case law concluding that the Eighth Amendment bars mandatory juvenile sentences that do not account for the inherent

---

criminal street gang." *See id.* § 186.22(b)(1). If the crime was a "violent felony" as defined in section 667.5 (including robbery), ten extra years must be imposed. *Id.*

99 *See* People v. Cervantes, 215 Cal. Rptr. 3d 174, 210 (Cal. Ct. App. 2017) (stating that, at that time, a fifty-to-life sentence imposed on a juvenile was under review by the California Supreme Court), *as modified* (Apr. 10, 2017), *disapproved of* People v. Superior Court (Lara), 410 P.3d 22 (Cal. 2018); People v. Windfield, 208 Cal. Rptr. 3d 47, 69 (Cal. Ct. App. 2016) (holding that "there is no precedent . . . that *Miller* applies to eighteen-year-olds).

100 CAL. PENAL CODE § 3051(f).

101 *Id.* § 3051(h) (excluding three-strikes offenders from the youth offender parole hearing eligibility).

differences between youth and adults.[102] Under *Miller*, the state must provide a meaningful opportunity for release within the juvenile's lifetime.[103] Notably, *Miller*'s protection extends only to juveniles, that is, to people under age eighteen.[104] The Court expressly established age eighteen as the bright-line cutoff from juvenile to adult.[105] California's YOPH statute extends *Miller* protection to most offenders younger than twenty-six,[106] which is consistent with scientific findings that cognitive brain development continues into the mid-twenties.[107]

The *Miller* violation exists where neither *Miller* (because the offender is eighteen or older) nor the statute (because of a prior strike exclusion) protect young adults from the functional equivalent of LWOP. This gap in protection should constitute a *Miller* violation because the fact that a *juvenile* offense bars opportunity to demonstrate rehabilitation is at odds with the Court's logic in *Miller.* In other words, California's categorical exclusion of three-strikes offenders from the YOPH process is logically inconsistent with the Court's strong presumption that youth are almost always capable of reform. Furthermore, *Miller* did not authorize the legislature to decide that some youth are presumptively incorrigible.

1. The Miller *Reasoning Should Apply to the Three-Strikes Exclusion*

The *Miller* line of cases addressed unconstitutional mandatory juvenile sentencing schemes.[108] The following analysis addresses the constitutionality of a provision that withholds *Miller* protection from young *adults* because of a prior *juvenile* conviction. Despite this distinction, the logic underpinning *Miller* applies.[109]

---

[102] Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2004); People v. Caballero, 282 P.3d 291 (Cal. 2012).

[103] *Miller*, 567 U.S. at 479.

[104] *See* People v. Windfield, 208 Cal. Rptr. 3d 47, 69 (Cal. Ct. App. 2016) (holding that "there is no precedent . . . that *Miller* applies to eighteen-year-olds).

[105] *Id.*

[106] CAL. PENAL CODE § 3051.

[107] The parts of the brain still in development affect judgment and decision-making and are highly relevant to criminal behavior. *Hearing on A.B. 1308 Before the Assemb. Appropriations Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Lorena Gonzalez Fletcher, Chair, Assemb. Appropriations Comm.).

[108] Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2004); People v. Caballero, 282 P.3d 291 (Cal. 2012).

[109] *Cf.* Caldwell, *Adolescent Mistakes, supra* note 34, at 614 (arguing that that "*Graham*'s framework should apply in assessing the constitutionality of third strike sentences

Before *Miller* and the enactment of the YOPH statute, Professor Beth Caldwell argued that the use of juvenile strikes to enhance adult sentences violates the Eighth Amendment and the spirit of *Graham*.[110] She proposed that the *Graham* framework applied to an adult sentence enhanced by a juvenile strike.[111] Courts regularly consider Eighth Amendment challenges to sentences imposed under habitual offender sentencing statutes.[112] When the Supreme Court reviews a sentence for a potential Eighth Amendment violation, the Court defines the offense as including the most recent offense as well as the prior strike that gave rise to the sentence enhancement.[113] Thus, Caldwell argued that *Graham* applies even to adult sentences where a juvenile strike is found, since the court considers it a part of the new offense.[114] In the same vein, the *Graham* reasoning should apply to assess the constitutionality of excluding adults ages eighteen to twenty-five from the youth offender parole mechanism because of prior juvenile strikes.[115] Here, not only is there a logical nexus between the juvenile conduct and the adult sentence, but the very *existence* of the juvenile conduct provides the basis for the exclusion. Thus, *Miller*'s reasoning should apply in the current analysis, leading to the conclusion that the exclusion violates the Eighth Amendment.

2. The California Supreme Court Expressly Left the Issue Open to Litigate

The California Supreme Court decided not to moot the issue of whether a YOPH ineligible defendant has a constitutional claim. In *People v. Franklin*, the defendant was sixteen when he shot and killed another teenager.[116] The jury convicted Franklin of first-degree murder and found true a firearm enhancement.[117] The trial court, obligated by statute, imposed two consecutive twenty-five-to-life sentences.[118] Franklin argued that his

enhanced on the basis of juvenile strikes because of the nexus between the juvenile conduct underlying the strike convictions and the sentence imposed for the third strike offense").

[110] Caldwell published this work before the *Miller* decision and enactment of S.B. 260. *Id*. at 610–11.

[111] *Id.*

[112] *Id.*

[113] *Id.* at 611.

[114] *Id.*

[115] *See* Graham v. Florida, 560 U.S. 48, 52–57 (2010) (holding unconstitutional the imposition of a life without parole sentence on a juvenile nonhomicide offender).

[116] People v. Franklin, 370 P.3d 1053, 1054 (Cal. 2016).

[117] *Id.*

[118] *Id.*

fifty-year-to-life sentence was the functional equivalent of LWOP, and thus a violation of the Eighth Amendment under *Graham*, *Miller*, and *Caballero*.[119] The court rejected his claim.[120] The court concluded that section 3051 mooted his constitutional challenge because the statute required that he receive a youth offender parole hearing during his twenty-fifth year of incarceration.[121] However, the court articulated this as a narrow holding:[122]

> Our mootness holding is limited to circumstances where, as here, *section 3051* entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy mandatory sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under *section 3051, subdivision (h)* . . . .[123]

The court thus implied that a defendant excluded from the YOPH process because of a prior juvenile strike may have a colorable constitutional claim under *Miller*.[124] This further strengthens the argument that the exclusion of three-strikes defendants from the statute can be assessed under the *Miller* lens.[125]

3. The Legislature's Exclusion of Three Strikes Offenders Oversteps Miller*'s Discretionary Boundaries and Is Logically Flawed*

Those who oppose extending YOPH eligibility to three-strikers may argue that the legislature was within its means in determining that some defendants deserve the harshest type of punishment.[126] After all, *Miller* does

---

[119] *Id.*

[120] *Id.*

[121] *Id.* at 1062 ("The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*."). Several other decisions affirmed *Franklin*'s holding. *See, e.g.*, People v. Scott, 208 Cal. Rptr. 3d 449, 451 (Cal. Ct. App. 2016); People v. Perez, 208 Cal. Rptr. 3d 34, 38 (Cal. Ct. App. 2016).

[122] *Franklin*, 370 P.3d at 1062.

[123] *Id.*

[124] *See id.* (leaving open-ended the question as to whether a YOPH ineligible defendant has a colorable constitutional claim under *Miller*).

[125] To be sure, the *Miller* Court was speaking about "*juvenile* offenders." That said, the implication of the Court's decision should be extended to adults younger than twenty-six who would otherwise be eligible for section 3051's recourse, since the juvenile strike is considered part of the current offense. *See supra* Part III.A.1.

[126] *See* People v. Bell, 208 Cal. Rptr. 3d 102, 112 (Cal. Ct. App. 2016).

not altogether foreclose juvenile LWOP.[127] And it is indisputable that the legislature has a well-accepted role in determining sentences.[128] In support of this argument, opponents will point to *People v. Bell*, which upheld the sex offender exclusion under rational basis review, expressing broad deference to the legislature.[129] The following analysis will refute the argument that enacting the exclusion was within the legislature's boundaries. This Part will explain why the exclusion of three strikers is an overreach of legislative power under *Miller*. It will also demonstrate how the reasoning underpinning *Bell*'s decision to uphold the sex offender exclusion is logically flawed and does not extrapolate to the three strikes context.

The juvenile defendant in *Bell* committed a series of non-homicide offenses, including a sex offense, and was sentenced to forty-three years to life.[130] Because he was sentenced for the sex offense under California's one-strike law, he was ineligible for a youth offender parole hearing.[131] Bell argued on appeal that excluding one-strike offenders from section 3051 was an equal protection violation because there could be no rational basis for treating him more severely than a juvenile who committed a far more serious crime.[132] The court applied rational basis to assess Bell's argument.[133] It emphasized that applying a stricter level of scrutiny would

---

127 Miller v. Alabama, 567 U.S. 460, 489 (2012).

128 *Bell*, 208 Cal. Rptr. 3d at 111.

129 *Id.* at 112–13.

130 *Id.* at 104.

131 *See id.* at 112.

132 *Id.* at 110. In *People v. Olivas*, 551 P.2d 375 (Cal. 1976), the California Supreme Court applied strict scrutiny "to strike down a sentencing scheme that allowed juvenile wards to be held in custody beyond the maximum term of imprisonment" because the case implicated the fundamental right of "personal liberty." In *Bell*, however, the court distinguished *Olivas* on the ground that "Olivas concerned only the maximum term for which a juvenile offender could be held, and was inapplicable where the issue was 'the method by which he may obtain release prior to expiration of the full term imposed.'" *Id.* at 110–11 (citation omitted). Citing *People v. Wilkinson*, the *Bell* court then concluded that a defendant does not have a fundamental interest in a specific term of punishment. *Id.* Thus, the court applied the more lenient rational-basis test, which requires there to be a rational basis for the disparate treatment of the two groups. *Id.* at 110. *See also* People v. Wilkinson, 94 P.3d 551, 571 (Cal. 2004) ("[U]nder the federal and state equal protection clauses the constitutionality of the statutory scheme at issue turns on whether there is a rational basis for the distinction it draws between persons prosecuted under [one law] and [another law]."). The rational-basis test allows the court to engage in a "rational speculation" as to the justifications for the legislature's decision, even if the assumption has no foundation in the record. *Bell*, 208 Cal. Rptr. 3d at 110.

133 *Id.* at 111.

be incompatible with the legislature's well-accepted authority to define crimes and specify punishment.[134] Ultimately, the court decided that the threat of recidivism provided a rational basis for the legislature's decision to exclude one-strike offenders.[135] The court supported its decision by noting that section 3051 also excludes three-strikes offenders, and because the three-strikes law is geared towards repeat offenders, the statutory scheme suggests the legislature had recidivism in mind when it excluded one-strike offenders.[136] Thus, the court held the exclusion was a permissible exercise of legislative discretion.[137]

It is undisputed that the *Miller* cases granted broad discretion to the legislature to establish a mechanism that conformed with the ban on mandatory juvenile LWOP.[138] Likewise, the "meaningful opportunity for release" guideline is undeniably vague and continues to be a topic of debate in legislatures and courts.[139] The *Bell* court misinterpreted *Miller*'s limits when it upheld the categorical exclusion.[140] Additionally, the *Bell* logic is flawed because it undercuts the presumptions about youth at the heart of *Miller*.[141] The following analysis will explain *Bell*'s error, and analogize the impropriety of the reasoning to the context of the three strikes exclusion.

---

[134] *Id.*

[135] *Id.* at 112–13.

[136] *Id.*

[137] *Id.*

[138] Graham v. Florida, 560 U.S. 48, 50 (2010) ("A State is not required to guarantee eventual freedom to [a juvenile nonhomicide offender], but must impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. *It is for the State, in the first instance, to explore the means and mechanisms for compliance*" (emphasis added)); People v. Caballero, 282 P.3d 291, 299 n.5 (Cal. 2012) ("We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity.").

[139] *Graham*, 560 U.S. at 123 (2010) (Thomas, J., dissenting) (predicting that this ambiguity "will no doubt embroil the Court for years," since the majority opinion did not define what such a "meaningful opportunity" entails, when it must occur, and what principles must govern review by parole boards); *see also*, Caldwell, *Meaningful Opportunities*, *supra* note 15, at 248 (noting the "meaningful opportunity to obtain release" standard continues to be a topic of debate).

[140] *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012).

[141] *See id.* at 477–78 (2012) ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the

Bell erred at the outset in its interpretation of *Miller*'s boundaries. Whether or not the legislature's decision to exclude certain defendants is rationally related to recidivism is irrelevant since *Miller* does not grant the legislature power to make that determination.[142] Though *Miller* permits the possibility of juvenile LWOP in some rare circumstances, the Court expressly grants this discretionary power to the judge.[143] "Although we do not foreclose a *sentencer's* ability to make that judgment [to impose LWOP] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[144] The Court foresees such situations being "uncommon . . . because of the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[145]

Thus, in adherence with the spirit of *Miller*, it is for the judge to determine on a case-by-case basis whether a young defendant deserves a sentence of LWOP.[146] Notably, this discretion is granted expressly in the case of *homicide offenses*, but not in non-homicide sex offenses or three strikes offenses that may not even contain elements of violence.[147] Thus, the legislature's categorical exclusion is a great overstep of *Miller*'s grant of discretionary power to the trial judge in the rare context of a particularly egregious homicide offender.[148] Though this Article takes particular issue with the three strikes exclusion, it follows this argument that every exclusion is an overreach of legislative power.

Even if it were within the purview of the legislature to enact the exclusion, *Bell*'s logic in supporting the recidivism theory is flawed. The court argues that the sex-offender exclusion is rationally related to the legislature's concern with recidivism, evidenced by the three strikes

---

conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.").

142 *See id.* at 479–80.

143 *See id*. at 480.

144 *Id.*

145 *Id.* at 479–80.

146 *Id.* at 480.

147 *See id*. (holding that that while the state may not impose mandatory LWOP, a judge may do so in "uncommon" homicide cases).

148 *See id.*

exclusion.[149] The presumption is that both exclusions deal with defendants likely to commit crimes again.[150] The "rational" decision to exclude recidivists is grounded in the presumption that repeat offenders have proven they are less capable of reform.[151] *Bell* implies that people who commit certain crimes are more likely to commit them again, thus they fall among the few "irreparable" offenders upon whom *Miller* permits the harshest type of punishment.[152] Therefore, *Bell* concludes it is rational to preemptively exclude them from section 3051.[153] Under *Miller*, however, it is wrong to assume youth are incapable of reform since they are susceptible to negative outside influences and the parts of their brains relevant to complex decision-making are still forming.[154] Thus, *Bell*'s presumption contradicts the guiding principles of the *Miller* cases.[155]

This reasoning is directly applicable to attack the three strikes exclusion. The three strikes law ensures that repeat offenders of certain crimes receive harsher punishments.[156] However, it does not follow that the

---

[149] People v. Bell, 208 Cal. Rptr. 3d 102, 112–13 (Cal. Ct. App. 2016).

[150] The *Bell* court rejected the defendant's arguments that sex offenders have a low recidivism rate. However, the same claim should be raised in the three-strikes context. Certain strike offenses have no basis for a threat of recidivism. For example, an offense committed for the benefit of a gang counts as a strike. Research shows that youth gang membership is usually transitory, with the majority of youths belonging to gangs for less than one year. Additionally, with rare exceptions, homicide is overwhelming a one-time event. *See* Richard Rosenfield et al., *Special Categories of Serious and Violent Offenders: Drug Dealers, Gang Members, Homicide Offenders, and Sex Offenders* 126, *in* FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION (Rolf Loeber & David P. Farrington eds., 2012).

[151] For a discussion of the purposes of recidivist sentence enhancements, see generally Julian V. Roberts, *The Role of Criminal Records in the Sentencing Process*, 22 CRIME & JUST. 303 (1997). Roberts explains that from a utilitarian perspective, the existence of a subsequent conviction is evidence the prior sentence "failed" to have the desired deterrent effect, presumably because it was too lenient. Thus, "recidivists should receive harsher sentences because they have not learned their lessons." *Id.* at 316–17.

[152] People v. Bell, 208 Cal. Rptr. 3d 102, 112–13 (Cal. Ct. App. 2016).

[153] *See id.*

[154] Miller v. Alabama, 567 U.S. 460, 461 (2012); *see* Roper v. Simmons, 543 U.S. 551, 570 (2004).

[155] Miller v. Alabama, 567 U.S. 460, 474 (2012) ("Imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2004); People v. Bell, 208 Cal. Rptr. 3d 102, 112-13 (Cal. Ct. App. 2016) (upholding the one-strike exclusion because of its "rational relationship" to the threat of recidivism among sex offenders).

[156] CAL. PENAL CODE § 667(e)(1).

law is a "catch all" for a kind of "serial criminal."[157] Furthermore, research indicates that certain strike offenses have no basis for a threat of recidivism.[158] For example, an offense committed for the benefit of a gang counts as a strike.[159] Youth gang membership is usually transitory, with the majority of youths belonging to gangs for less than one year.[160] These findings, coupled with *Miller*'s guidance on juvenile brain development, caution strongly against the presumption that a youth with a prior strike is incapable of rehabilitation.[161]

To conclude, the argument that the legislature was within its boundaries in excluding certain defendants fails on two fronts. Firstly, the exclusion is a legislative overreach because it exceeds the discretionary sentencing power *Miller* expressly granted to judges in rare homicide cases.[162] Secondly, the exclusion violates the spirit of *Miller* by categorically denying certain young defendants the opportunity to demonstrate maturity and reform. The *Bell* holding—that the one-strike exclusion had a rational relationship to fear of recidivism—undercuts *Miller*'s emphasis on the diminished culpability of youth and their heightened capacity for change.[163]

B. Legislative History Demonstrates Intent to Broaden the Eligible Class

As explained, this Article takes the position that the legislature lacks discretion to categorically impose the equivalent of LWOP through its categorical exclusions.[164] However, it is indisputable that *Miller* granted the legislature broad discretion and power to create a parole eligibility mechanism to conform with the Supreme Court rulings.[165] In light of this

---

[157] Despite its intent to incarcerate "career criminals," the law has not reduced violent crime in California. *See* Bettye Miller, *Three-strikes Law Fails to Reduce Crime*, UNIV. CAL., RIVERSIDE (Feb. 28, 2012), https://ucrtoday.ucr.edu/3557.

[158] *See* Rosenfield et al., *supra* note 150, at 126.

[159] *See id.*

[160] *See id.*

[161] *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (emphasizing scientific research showing the unlikelihood that young offenders develop entrenched patterns of criminal behavior).

[162] *See id.* at 480.

[163] *See id.* at 479.

[164] *See id.* at 480 (holding that that while the state may not impose mandatory LWOP, a judge may do so in "uncommon" homicide cases).

[165] Graham v. Florida, 560 U.S. 48, 50 (2010) ("A State is not required to guarantee eventual freedom to [a juvenile nonhomicide offender], but must impose a sentence that

broad discretion, a summary of recent amendments to California's statute shows legislative intent to increase youth offender parole eligibility to more young offenders.[166] These changes align with both the most recent scientific studies on brain development and society's evolving standards of morality.[167] Though the amendments left the three-strikes exclusion intact, they suggest that the legislature is expanding availability of the youth offender parole procedure, such that the three-strikes exclusion's elimination is not a logical stretch.[168] Secondly, a ballot initiative proposed in 2015 would have directly amended subsection (h) to afford eligibility to three-strike offenders,[169] showing elimination of the exclusion is not novel. Rather, it is clear that a broad range of experts, researchers, and advocates for criminal justice reform share this Article's sentiment.[170]

1. Statutory Amendments Show Intent to Broaden Eligibility in General

An overview of the statute's substantive amendments shows a clear intent to regularly broaden YOPH eligibility.[171] This supports abolishing

provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation. *It is for the State, in the first instance, to explore the means and mechanisms for compliance.*" (emphasis added)); People v. Caballero, 282 P.3d 291, 299 n.5 (Cal. 2012) ("We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity."); *see also* Caldwell, *Meaningful Opportunities*, *supra* note 15, at 248 (noting the "meaningful opportunity to obtain release" standard continues to be a topic of debate).

166 *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017); S.B. 394, 2017 Reg. Sess. (Cal. 2017); S.B. 261, 2015 Reg. Sess. (Cal. 2015).

167 *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017); S.B. 394, 2017 Reg. Sess. (Cal. 2017); *Graham*, 560 U.S. at 69 (Stevens, J., concurring) ("Standards of decency have evolved . . . They will never stop doing so.").

168 *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017); S.B. 394, 2017 Reg. Sess. (Cal. 2017); S.B. 261, 2015 Reg. Sess. (Cal. 2015).

169 *See* Brown v. Superior Court, 371 P.3d 223, 225 (Cal. 2016) (describing the 2015 Justice and Rehabilitation Act).

170 *See* Declaration of Elizabeth Calvin in Support of Opposition of Real Parties in Interest to Verified Petition for Writ of Mandate at 1, Brown v. California District Attorneys Ass'n, 2016 Cal. LEXIS 2796 [hereinafter Calvin Declaration]; Declaration of Scott Budnick in Support of Opposition of Real Parties in Interest to Verified Petition for Writ of Mandate at 1–2, Brown v. California District Attorneys Ass'n, 2016 Cal. LEXIS 2796 [hereinafter Budnick Declaration].

171 *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017) (raising YOPH eligibility from twenty-three to twenty-five years old); S.B. 394, 2017 Reg. Sess. (Cal. 2017) (extending YOPH eligibility to juvenile LWOP offenders and replacing the word "juvenile" with "youth" in

the exclusion to conform with the legislature's evident trend in extending YOPH access to more young defendants.[172]

In its original form, section 3051's YOPH recourse was available only to defendants who committed their "controlling offense" prior to attaining eighteen years of age.[173] Such a bright-line rule conformed explicitly to *Miller*'s prohibition of mandatory LWOP on juveniles.[174] However, just two years later, S.B. 261 broadened YOPH eligibility to defendants under age twenty-three.[175] Most recently, A.B. 1308 further expanded eligibility to defendants who committed their controlling offense when they were age twenty-five or younger.[176] The bill's authors point out that brain development continues well beyond the age of eighteen, into the mid-twenties.[177] The parts of the brain in development during those years affect judgment and decision-making in complex behavioral performance, highly relevant to criminal behavior.[178] The rationale behind A.B. 1308 is to bring parole procedure into conformance with these latest findings.[179] The authors and supporters point to the recent enactment of S.B. 260 (the original YOPH bill) and S.B. 261 in demonstrating the legislature and general public's "desire for rehabilitation over incarceration, specifically for juvenile offenders."[180] Additionally, they highlight the positive effects of these bills on rehabilitation:

> Since the passage of SB 260 and SB 261 motivation to focus on rehabilitation has increased. An offender is more likely to

California penal code section 3051); S.B. 261, 2015 Reg. Sess. (Cal. 2015) (raising the YOPH eligibility from eighteen to twenty-three years old).

172 *See id.*

173 CAL. PENAL CODE § 3051.

174 Miller v. Alabama, 567 U.S. 460, 479 (2012).

175 S.B. 261, 2015 Reg. Sess. (Cal. 2015).

176 A.B. 1308, 2017 Reg. Sess. (Cal. 2017). "California law recognizes the need to protect and provide special opportunities to young adults. Among other things, state law extends foster care services to age 21; sets Division of Juvenile Justice jurisdiction at age 23; and the Department of Corrections and Rehabilitation provides special opportunities and protections for young adults in prison up to age 25." *See Hearing on A.B. 1308 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.) (reasoning that new research on brain development supports extension of the youth offender parole mechanism to people twenty-five and under).

177 *Hearing on A.B. 1308 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.).

178 *Id.*

179 *Id.*

180 *Id.*

> enroll in school, drop out of a gang, or participate in positive programs if they can sit before a parole board sooner, if at all, and have a chance of being released.[181]

A related 2017 bill, S.B. 394, also amended section 3051 to extend YOPH eligibility to juveniles sentenced to LWOP.[182] Presently an excluded class under subsection (h), S.B. 394 provided juvenile LWOP'ers an opportunity to sit before a youth offender parole board after twenty-five years of incarceration.[183] According to the authors of the bill, "SB 394 will remedy the now unconstitutional juvenile sentences of life without the possibility of parole . . . This is in line with the United States Supreme Court's suggestion of parole consideration as a remedy for a *Miller* violation."[184] S.B. 394 also made a direct modification to the *Miller* language of the statute.[185] Subsection (f) of the pre-amended statute adopted *Miller*'s verbatim rule requiring consideration of "the diminished culpability of *juveniles* as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual."[186] S.B. 394 replaced the word "juvenile" with "youth" in subsection (f).[187] This revision suggests *Miller* protection should extend beyond age eighteen, in conformance with findings that brain development continues into the mid-twenties.[188] In October 2017, Governor Brown signed both A.B. 1308 and S.B. 394 into law.[189]

The *Miller* Court would surely qualify these substantive changes to the statute as "objective indicia of our society's moral standards and the trajectory of our moral 'evolution.'"[190] The Supreme Court regularly emphasizes that these "objective factors" should inform determination of

---

[181] *Hearing on A.B. 1308 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.)

[182] S.B. 394, 2017 Reg. Sess. (Cal. 2017).

[183] *Id.*

[184] Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016); S.B. 394, *Hearing on S.B. 394 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.).

[185] *See* S.B. 394, 2017 Reg. Sess. (Cal. 2017).

[186] CAL. PENAL CODE § 3051 (emphasis added).

[187] S.B. 394, 2017 Reg. Sess. (Cal. 2017).

[188] *Hearing on A.B. 1308 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.).

[189] S.B. 394, 2017 Reg. Sess. (Cal. 2017); A.B. 1308, 2017 Reg. Sess. (Cal. 2017).

[190] "When determining whether a punishment is cruel and unusual, this Court typically begins with "'objective indicia of society's standards, as expressed in legislative enactments and state practice.'" Miller v. Alabama, 567 U.S. 460, 494 (2012).

what constitutes cruel and unusual punishment "to the maximum extent possible."[191] In this vein, these substantive changes to the law reflect exactly the "evolving standards of decency" *Miller* pointed to in determining that juvenile LWOP constituted cruel and unusual punishment under the Eighth Amendment.[192] The changes reflect policy-makers' ability to square with both the latest scientific research and a societal trend that emphasizes rehabilitation over incarceration.[193] Practices considered acceptable as recently as 2017—i.e., barring juvenile LWOP'ers from the opportunity to sit before a youth offender parole board—are now accepted as *Miller* violations.[194] Furthermore, qualifying that *Miller*'s protections extend not just to *juveniles* but also to *youth* (that is, people over age eighteen), show that *Miller*'s reasoning and application must evolve to conform with society's changing standards.[195] S.B. 261, 1308 and 394 all demonstrate the legislature's commitment to provide more opportunities for youths to show rehabilitation, a reflection of changing times.[196] The three-strikes exclusion is inconsistent with these changes.

2. Support for Elimination of the Exclusion

A 2015 proposed ballot initiative, though short-lived in its relevant form, directly amended the youth offender parole process to extend eligibility to three strikes offenders.[197] Though ultimately enacted in a

---

[191] *Miller*, 567 U.S. at 494 (Alito, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)).

[192] Graham v. Florida, 560 U.S. 48, 58 (2010).

[193] *See Miller*, 567 U.S. at 473 ("Life without parole 'forswears altogether the rehabilitative ideal.'"); *Graham*, 560 U.S. at 69 ("'[P]sychology and brain science continue to show fundamental differences between juvenile and adult minds,' making their actions 'less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005))).

[194] *Hearing on S.B. 394 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.) ("SB 394 will remedy the now unconstitutional juvenile sentences of life without the possibility of parole . . . in line with the United States Supreme Court's suggestion of parole consideration as a remedy for a *Miller* violation.").

[195] *See* S.B. 394, 2017 Reg. Sess. (Cal. 2017) (replacing the word "juvenile" with "youth" in Cal. Pen. Code section 3051, subsection (f)); *Graham*, 560 U.S. at 69 (Stevens, J., concurring) ("Standards of decency have evolved . . . They will never stop doing so.").

[196] *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017) (raising YOPH eligibility from twenty-three to twenty-five years old); S.B. 394, 2017 Reg. Sess. (Cal. 2017) (extending YOPH eligibility to juvenile LWOP offenders and replacing the word "juvenile" with "youth" in California penal code section 3051); S.B. 261, 2015 Reg. Sess. (Cal. 2015) (raising the YOPH eligibility from eighteen to twenty-three years old).

[197] *See* Brown v. Superior Court, 371 P.3d 223, 225 (Cal. 2016).

heavily amended form with no bearing on section 3051,[198] the ballot measure's brief trajectory illustrates a sentiment in favor of extending YOPH eligibility to three strikers among a broad range of criminal justice experts, researchers, and attorneys.[199]

In February 2015, Elizabeth Calvin, Senior Advocate for Human Rights Watch, initiated exploration of a ballot measure to address a number of juvenile and criminal justice system issues.[200] Calvin formed a loose coalition of advocates, activists, lawyers, and researchers from a broad range of organizations.[201] On December 21, 2015, the coalition filed the "Justice and Rehabilitation Act."[202] The purpose of the initiative as drafted was to "increase opportunities for rehabilitation among children, youth, and adults and thereby promote public safety."[203] In relevant part, it provided that three strikes offenders would no longer be excluded from the youth offender parole process.[204]

Over the next month, the coalition sought input on the initiative.[205] They solicited feedback to improve the measure from experts on juvenile and adult justice, prosecutors, judges, public officials, sheriffs, and representatives of groups such as the Chief Probation Officers of California.[206] They also spoke with Governor Brown's staff about the measure as drafted and possible amendments to further advance the measure's rehabilitation and public safety goals.[207] These discussions led to significant revisions of the original measure.[208] Ultimately, the committee struck the youth offender parole amendment, replacing it with a

---

198 CAL. CONST. art. I, § 32 (codifying "The Public Safety and Rehabilitation Act of 2016," the amended version of "The Justice and Rehabilitation Act of 2015").

199 *See* Calvin Declaration, *supra* note 170.

200 *Id.*

201 *Id.*

202 *Brown*, 371 P.3d at 225. Margaret Prinzing and Harry Berezin are listed as the measure's proponents. Prinzing and Berezin were juvenile diversion proponents to the Attorney General's office. *See Capitol Update*, (Feb. 29, 2016), http://www.californiapolicechiefs.org/assets/capitol-updates/2.29%20Capitol%20Update.pdf/.

203 *See* Calvin Declaration, *supra* note 170.

204 *Brown*, 371 P.3d at 225.

205 *See* Calvin Declaration, *supra* note 170; Budnick Declaration, *supra* note 170.

206 *See id.*

207 *See Brown*, 371 P.3d at 225–26; Calvin Declaration, *supra* note 170; Budnick Declaration, *supra* note 170.

208 *Brown*, 371 P.3d at 225–26.

constitutional amendment that extended parole eligibility to all "non-violent" felony offenders.[209]

The content of the original ballot measure demonstrates that this Article's stance is shared by a broad range of lawyers, activists, and researchers, including the leading experts of Human Rights Watch and the Anti-Recidivism Coalition.[210] The measure's amendment also shows that criminal justice reformers were not ready in 2016 to extend youth offender parole eligibility to three strikers.[211] While opposition undoubtedly stemmed from policy concerns, it is plausible that other factors, such as the politics and strategy that influence political negotiation, worked against the amendment.[212] The original measure's failure does not suggest that its implementation in another year is impossible.

C. The Ambiguous Exclusionary Language Could Lead to Confusion for the Trial Judge and Discrepancies in Sentencing

The following analysis discusses the facial ambiguity of the statute, and demonstrates how uncertainty about whom the statute excludes could lead to grave discrepancies in sentencing and record-making in the trial court.[213] Additionally, this section contests the argument that under *People v. Cervantes*, the trial judge's discretion is an appropriate safeguard against unconstitutional sentences when section 3051 provides no remedy.[214] While this is a colorable argument in the narrow context of *Cervantes*, this section explains how it fails in the three-strikes context.

1. The Statutory Language Is Ambiguous

Section 3051 subsection (h) states that YOPH eligibility "shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive of Section 667 . . ."[215] Section 1170.12 and

---

[209] *Id.*

[210] *See* Calvin Declaration, *supra* note 170; Budnick Declaration, *supra* note 170.

[211] *See* Brown v. Superior Court, 371 P.3d 223, 225–26 (Cal. 2016); Calvin Declaration, *supra* note 170; Budnick Declaration, *supra* note 170.

[212] For example, some trace Governor Brown's support for the constitutional amendment (Prop 57) to his own personal regret for having passed harsh determinate sentencing laws during his term as governor during the 1970's. Some speculate that Governor Brown sought to make amends for his past policy mistakes through Prop 57. *See* George Skelton, *Old Brown Tries to Fix a Young Brown's Mistake*, L.A. TIMES, (Feb. 1, 2016, 12:05 AM), http://beta.latimes.com/local/politics/la-me-pol-sac-cap-20160201-column.html.

[213] *See Franklin*, 370 P.3d at 1055.

[214] *See* People v. Cervantes, 215 Cal. Rptr. 3d 174, 207–08 (Cal. Ct. App. 2017).

[215] CAL. PENAL CODE § 3051.

section 667 comprise the three strikes law.[216] Together the laws enumerate certain crimes and detail sentence enhancements for defendants convicted a second or a third time of such offenses.[217] When sentencing occurs "pursuant" to a statute, this means a person is sentenced under that particular statute.[218] However, it is unclear from the statutory language whether the exclusion applies to defendants convicted of a second or third strike, or only of a third strike. The difference has sharp repercussions. According to a September 2016 report from the Department of Corrections and Rehabilitation, there were 2,924 individuals between the ages of eighteen and twenty-four incarcerated for a second strike in California.[219] This number declines drastically to just ten individuals of the same age incarcerated for a third strike.[220] Notwithstanding the fact that the YOPH mechanism functions retroactively,[221] the number of current youth offenders alone demonstrates that almost 3,000 fewer youth are eligible if the statute is read broadly to exclude second strikers.[222]

Arguably, the silence on the breadth of the exclusion tends to support the broader reading: anyone sentenced "under" the law, whether for a second or third strike, is excluded from section 3051. Given the relatively recent passage of the law and the lack of litigation around the exclusion,

---

[216] *See id.* § 667.5(c); § 1170.12(c)(1-2).

[217] *Id.* § 1170.12(c)(1-2) (providing for a doubled sentence when defendant has one prior "violent" or "serious" felony, and an indeterminate life sentence when defendant has two or more "violent" or "serious" felonies); § 667.5(c) (enumerating "violent felonies" for the purpose of sentence enhancements); § 1192.7 (enumerating "serious felonies" for the purpose of sentence enhancements).

[218] People v. Bell, 208 Cal. Rptr. 3d 102, 109 (Cal. Ct. App. 2016) ("These provisions do not apply if the juvenile was sentenced . . . *under* the three strikes law." (emphasis added)).

[219] *See Second and Third Striker Felons in the Adult Institution Population*, DEP'T CORRECTIONS & REHABILITATION (2016).

[220] *See id.*

[221] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 724 (2016) (holding that the *Miller* ban on mandatory juvenile LWOP sentences applies retroactively).

[222] *See Second and Third Striker Felons in the Adult Institution Population*, *supra* note 219.

neither courts[223] nor scholars[224] have elucidated the ambiguity. The exclusion, where mentioned at all, is either quoted verbatim from the statutory language or states only that "three strikes offenders" are not eligible.[225] A Youth Offender Fact Sheet published by the Board of Parole Hearings provides no further guidance, stating only that the law disqualifies "[c]ases in which sentencing on the controlling offense occurs pursuant to Penal Code sections 1170.12, 667(b)-(i), or 667.61."[226]

At least one scholar interprets the exclusion more narrowly. Among her works, Professor Beth Caldwell has challenged the constitutionality of juvenile strikes and completed empirical research on the extent to which section 3051 gives youthful offenders a "meaningful opportunity for release."[227] In 2014, Caldwell launched Southwestern Law School's Youth

---

[223] *See, e.g.*, *In re* Trejo, 216 Cal. Rptr. 3d 855, 862 (Cal. Ct. App. 2017) ("Section 3051 expressly excludes certain inmates: 'This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667 ['Three Strikes'].'"); People v. Scott, 208 Cal. Rptr. 3d 449, 457 (Cal. Ct. App. 2016) ("[Section 3051] does not apply . . . to three strikes sentences."); People v. Bell, 208 Cal. Rptr. 3d 102, 109 (Cal. Ct. App. 2016) ("These provisions do not apply if the juvenile was sentenced . . . under the three strikes law."); People v. Perez, 208 Cal. Rptr. 3d 34, 38 (Cal. Ct. App. 2016) ("Section 3051 subdivision (h), excludes several categories of juvenile [sic] offenders, none of which are applicable here."); Brown v. Superior Court, 371 P.3d 223, 225 (Cal. 2016) (explaining that the Justice and Rehabilitation Act would amend section 3051 such that "'[t]hree Strikes' offenders would no longer be excluded from such parole eligibility review'").

[224] Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121 n.64 (2016) ("[T]he law . . . does not apply to juveniles sentenced under the Three-Strikes Law."); *see also* Elizabeth C. Kingston, *Validating* Montgomery*'s Recharacterization of* Miller*: An End to LWOP for Juveniles*, 38 U. LA VERNE L. REV. 23, 49–50 (summarizing section 3051 and mentioning only the LWOP exclusion, which is no longer applicable since the passage of S.B. 394); Kimberly Thomas & Paul Reingold, *Criminal Law: From Grace To Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 237 (2017) (briefly mentioning section 3051 without mention of the exclusions); Sarah Sloan, Note, *Why Parole Eligibility Isn't Enough: What Roper, Graham, and Miller Mean for Juvenile Offenders and Parole* 47 COLUM. HUM. RTS. L. REV. 243 n. 68 (2015) (briefly summarizing section 3051 without mention of the excluded categories); Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3476 (2014) (describing section 3051 without mention of the three-strikes exclusion).

[225] *See supra* notes 223–24.

[226] *Youth Offender Parole Factsheet*, ST. CAL. BOARD PAROLE HEARINGS (Dec. 4, 2015), http://www.cdcr.ca.gov/BOPH/docs/YOPH/Youth%20Offender%20Fact%20Sheet.pdf.

[227] *See* Caldwell, *Meaningful Opportunities*, *supra* note 15, at 266; Caldwell, *Adolescent Mistakes, supra* note 34, at 581.

Offender Parole Clinic, which trains students to provide pro bono representation to juvenile offenders.[228] In Caldwell's summary of the law as part of her research, she stated: "There are four exceptions that disqualify certain juvenile offenders from the YOPH process. First, anyone sentenced to a *third strike* is not eligible."[229] Professor Caldwell's area of expertise lies directly at the intersection of the three strikes law and the YOPH procedure, evidenced by a half-decade long dedication to the field.[230] Thus, this Article takes the position that her interpretation of the exclusion is the one that should provide guidance in resolving the ambiguity. And if her reading of the exclusion correctly reflects the legislature's intention, access to youth offender parole hearings would be available to 3,000 more young offenders, in addition to older adults incarcerated for youthful crimes.[231]

2. The Ambiguity May Lead to Inconsistencies in Procedure at the Trial Court

Ultimately, this Article argues for the abolishment of the three-strikes exclusion. Until that point, ambiguity as to which three strikes offenders are ineligible may lead to grave discrepancies in procedure at the trial court level. This is because a defendant eligible for a future YOPH must have an opportunity after trial and before sentencing to make a record for use at his future YOPH.[232]

Though the statute does not expressly require such a record composition, the law's language contemplates that information regarding the defendant's characteristics and circumstances at the time of the offense should guide the Board's consideration at the future hearing.[233] For example, section 3051, subdivision (f)(2) provides that individuals with personal connections to the defendant like "family members, friends, school personnel . . . and faith leaders" may submit statements for review by the board.[234] In *People v. Franklin,* the court reasoned that assembling such statements is easier when completed close in time to the crime, before memories fade, records get lost, and family and community members

---

228 *See Caldwell bio*, *supra* note 68.

229 Caldwell, *Meaningful Opportunities*, *supra* note 15, at 266.

230 *See Caldwell bio*, *supra* note 68.

231 *See Second and Third Striker Felons in the Adult Institution Population*, *supra* note 219.

232 *See* People v. Franklin, 370 P.3d 1053, 1055 (Cal. 2016) ("We remand this case so that the trial court may determine whether Franklin was afforded sufficient opportunity to make such a record at sentencing.").

233 *Id.* at 1064.

234 CAL. PENAL CODE § 3051(f)(2).

relocate or pass away.[235] Additionally, section 3051, subdivision (f)(1) provides that "psychological evaluations and risk assessment instruments" used by the Board to assess the youth offender's growth should take into account "subsequent growth and increased maturity of the individual."[236] *Franklin* concluded that this provision necessarily implicated the Board's consideration of information about the individual when he committed the crime.[237] The *Franklin* decision led to numerous other remands to allow defendants the opportunity to create a relevant record for their future hearing fifteen, twenty, or twenty-five years in the future.[238]

Following Professor Caldwell's reading of the exclusion, a judge would allow a second-strike offender the pre-sentencing opportunity to gather relevant declarations and evaluations from family members, friends, and counselors.[239] On the other hand, a judge adopting a broader interpretation of the exclusion would deny a second striker the opportunity to create such a record. Even if the court or the legislature were to clarify the ambiguity and allow the record-making retroactively, the relevance of the record-making diminishes with the passage of time for the reasons the *Franklin* highlighted: memories fade, records are lost, people die or move away.[240] Thus, in the five years since the statute's enactment, it is likely that many second strikers were erroneously denied the opportunity to create a record.

Record-making aside, the ambiguity is dangerous in that it leads to broader inconsistencies in the application of the statute. Depending on the trial judge's reading of the exclusion, two second-strike defendants of the

---

235 *Franklin*, 370 P.3d at 1064.

236 *Id.*

237 *Id.*

238 *See, e.g.*, People v. Mejia, 2017 Cal. App. Unpub. LEXIS 4370 1 (Cal. Ct. App. 2017) (remanding for the trial court to assess whether the defendant has a "sufficient opportunity" to create a record for his future youth offender parole hearing and, if not, grant him that opportunity); People v. Costella, 217 Cal. Rptr. 3d 343, 348–50 (Cal. Ct. App. 2017) (remanding pursuant to *Franklin* for the defendant to make a record for his future youth offender parole hearing); People v. Phung, 215 Cal. Rptr. 3d 252, 264 (Cal. Ct. App. 2017) (reiterating a trial court's obligation to give the defendant an opportunity to make an accurate record of the juvenile's characteristics and circumstances to guide the future Board in its obligation to give great weight to youth-related factors); People v. Jones, 213 Cal. Rptr. 3d 167, 192–93 (Cal. Ct. App. 2017) (remanding to the trial court to determine under *Franklin* whether the defendant was entitled to a hearing to present evidence relevant to his future youthful offender parole hearing).

239 *See* CAL. PENAL CODE § 3051(f)(2); Caldwell, *Meaningful Opportunities*, *supra* note 15, at 266.

240 *Franklin*, 370 P.3d at 1064.

same age and sentence duration may face drastically different futures.[241] While one would be able to fashion a new life for himself after serving a minimum of fifteen years, the other would face the equivalent of life without parole.[242] The statutory ambiguity, the lack of clarifying precedent, and the divergent interpretations of the exclusion all lend to its timely repeal. In the meantime, the resulting confusion may lead to gravely prejudicial repercussions for defendants similarly situated.

3. The Trial Judge's Discretion Is Not an Adequate Safeguard Against Unconstitutional Sentences

Opponents of eliminating the three strikes exclusion may propose that under *People v. Cervantes* the trial judge's discretion is an appropriate safeguard against unconstitutional sentences when section 3051 provides no remedy.[243] The following analysis concedes this is a colorable argument in the narrow context of a juvenile one-strike offender, as evidenced by *Cervantes*. However, the rebuttal that follows demonstrates how judicial discretion is a weaker safeguard against *Miller* violations in the three-strikes context. This is because the three-strikes law's mandated sentencing scheme greatly restricts a trial judge's discretion in giving a *Miller*-appropriate sentence.[244]

In *People v. Cervantes*, the fourteen-year-old defendant was convicted of various sex offenses, burglary, and attempted murder.[245] The trial court sentenced him to sixty-six years to life.[246] The defendant's sentence—pursuant to the one strike law for the sex offense—rendered him ineligible for a future youth offender parole hearing.[247] The court upheld the one strike exclusion without explaining its analysis.[248] Rather, it reiterated that the legislature determined that juveniles convicted of certain sex crimes may be kept in prison longer than twenty-five years before the opportunity for parole.[249] The court concluded, however, "[h]ow much longer remains

---

241 *See* CAL. PENAL CODE § 3051(h).

242 *See id.*

243 People v. Cervantes, 215 Cal. Rptr. 3d 174, 210 (Cal. Ct. App. 2017).

244 CAL. PENAL CODE § 1170.12(c)(1-2) (mandating a doubled sentence when defendant has one prior "violent" or "serious" felony, and an indeterminate life sentence when defendant has two or more "violent" or "serious" felonies).

245 *Cervantes*, 215 Cal. Rptr. 3d at 179.

246 *Id.*

247 *Id.* at 207–08.

248 *Id.*

249 *Id.*

a matter for individual trial judges to determine on a case-by-case basis."[250] Although the court took no issue with the categorical exclusion, it ultimately concluded that "it would be error of constitutional dimension under *Graham* and *Caballero* for a sentencing judge to write [the defendant] off as irredeemable at the time of initial sentencing."[251] The court thus remanded to give Cervantes a fitness hearing, allowing the "same opportunity to present a case for his rehabilitative potential, in much the same way that section 3051 does."[252]

People v. Cervantes implied that a sentence implicating a section 3051 ineligible defendant does not grant the judge a pass to commit a *Miller* violation.[253] This is apparent from the court's remand for a fitness hearing to accomplish what section 3051 would otherwise do.[254] Thus, the court implied that although the legislature is within its power to incarcerate some youths longer than twenty-five years before parole eligibility, the judge must still ensure the sentence allows them a "meaningful opportunity" for release under *Miller*.[255] In the context of a one-strike juvenile offender, circumstances lend more easily to this possibility.[256] All the evidence in the

---

[250] *Id.*

[251] *Id.*

[252] *Id.* The purpose of a fitness hearing is to determine if a minor should be adjudicated within the juvenile court, rather than the adult criminal court. In its evaluation, the court shall consider "any relevant factor," including but not limited to "the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication." CAL WEL. & INST. CODE § 707 (Deering, LEXIS through 2017 Sess.).

[253] It is up to the sentencing judge to determine how much longer to keep a section 3051 ineligible defendant in prison, but his sentence still must pass constitutional muster. *See* People v. Cervantes, 215 Cal. Rptr. 3d 174, 210 (Cal. Ct. App. 2017).

[254] *Id.*

[255] *Id.* The court provides that if Cervantes' case is tried again in adult court, his new sentence must allow him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See id.* at 211.

[256] Although the one-strike law mandates a minimum fifteen-to-life sentence for certain sex offenses, this unlikely causes a concern under *Miller*. *See, e.g.*, *id.* at 210 (calculating the defendant's age at time of parole eligibility to assess whether it fell within his natural lifetime, in adherence with *Miller*'s requirement that the juvenile defendant have a "meaningful opportunity for release" within his life). Additionally, a fitness hearing can only save a defendant from an unconstitutionally lengthy sentence insofar as he is a juvenile. This highlights again a stark gap in protection for adults between the ages of eighteen to twenty-five whose juvenile strike offense excludes them from youth offender

record, including the mitigating factors of youth and evidence of external pressures, can factor into the judge's sentencing determination.[257] Based on the record, the judge can comprehend the circumstances around the crime and the characteristics of the defendant at the time of the crime.[258] In adherence with the spirit of *Miller*, such evidence may lead a judge to render a more sympathetic disposition in light of the circumstances.[259]

The three-strikes law's harsh sentencing scheme provides little discretionary leeway for the judge, mitigating factors or not.[260] The law mandates dramatic sentence enhancements that stack against any other sentences or enhancements.[261] The practical effect of the law in many instances is exactly the kind of unduly lengthy sentence that *Miller* bars.[262] Thus, despite a judge's sympathy for a certain young defendant in light of "mitigating factors," she simply may not have the discretion *People v. Cervantes* suggests in granting a *Miller*-appropriate sentence.[263]

In conclusion, the ambiguous exclusionary language may lead to confusion and inconsistencies in the trial court. Even if the court or the legislature were to clarify that the exclusion should apply only to third strikers, thousands of second strikers have likely been prejudiced by the denial of the opportunity to create a record for a future hearing close in time to the crime.[264] Secondly, *Cervantes*' implication that the trial judge's discretion is an appropriate safeguard against a *Miller* violation does not apply in the three-strikes context, since the judge cannot make fact-specific

---

parole protection. *See* CAL WEL. & INST. CODE § 707 (providing for a fitness hearing for juveniles under sixteen convicted of certain felonies).

[257] Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

[258] *Id.*

[259] *See id.*

[260] CAL. PENAL CODE § 1170.12(c)(1-2) (mandating a doubled sentence when defendant has one prior "violent" or "serious" felony, and an indeterminate life sentence when defendant has two or more "violent" or "serious" felonies).

[261] *Id.* § 1170.12(c)(2)(B) (providing the indeterminate life sentence mandated for a third strike offense must run consecutively with any other term of imprisonment).

[262] *See* People v. Cervantes, 215 Cal. Rptr. 3d 174, 180 (Cal. Ct. App. 2017) (holding the juvenile defendant's sentence of sixty years before parole eligibility was constitutionally infirm under *Graham* and *Caballero*).

[263] Reluctantly imposing a sentence of fifty-years-to-life on the juvenile defendant, the court explained: "The sentence is the sentence that's prescribed by law, not one that the Court chooses." *See* People v. Franklin, 370 P.3d 1053, 1056 (Cal. 2016).

[264] *See* People v. Cervantes, 215 Cal. Rptr. 3d 174, 207-08 (Cal. Ct. App. 2017).

considerations about the previous offenses and the three-strikes law may functionally mandate an unconstitutional sentence.[265]

III. SOLUTION

Given its likely violation of *Miller*, inconsistency with legislative intent and facial ambiguity, the California legislature should amend section 3051 such that three-strikes offenders are eligible for a future youth offender parole hearing. This solution would remedy the potential constitutional violation and create clarity for judges and defendants alike. Needless to say, such a solution does not guarantee release.[266] Indeed, the majority of youth offender parole hearings result in denials, and those granted parole still spend decades in prison before release.[267] However, in line with Supreme Court precedent, scientific research, and society's "evolving standards of decency," the amendment would simply allow people who committed more than one crime at a young age the chance to demonstrate their reform in light of maturity.[268]

A second, more conservative option, would be to amend the statute to clarify that three strikers will be categorically eligible for a youth offender parole hearing after twenty-five years. Such an amendment would be directly in line with S.B. 394, which expanded eligibility to the YOPH process to the previously excluded class of juvenile LWOP'ers after twenty-

---

[265] *See id.*; *see also* People v. Houck, 77 Cal. Rptr. 2d 837, 839–40 (Cal. Ct. App. 1998).

[266] *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) ("'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'").

[267] *See Youth Offender Parole Hearings, Hearing on A.B. 1308 Before the Senate*, 2017 Reg. Sess. (Cal. 2017) (statement of Human Rights Watch, co-source); Kate Wheeling, *Are California's Youth Offender Parole Hearings Working?*, PAC. STANDARD, (Jun. 2, 2016), https://psmag.com/news/are-californias-youth-offender-parole-hearings-working.

[268] *See Miller*, 567 U.S. at 489; *Graham*, 560 U.S. at 58 (2010) (reiterating that an assessment of cruel and unusual punishment under the Eighth Amendment considers the "evolving standards of decency that mark the progress of a maturing society"); Brief for American Psychological Association et al. as *Amici Curiae* at 3, Graham, v. Florida, 560 U.S. 48, 58 (2010) (No. 08-7412) ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions"); *id.* at 4 ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance"); Brief for J. Lawrence Aber et al. as *Amici Curiae* at 12–28, Graham v. Florida, 560 U.S. 48, 58 (2010) (No. 08-7412) (discussing post-*Graham* studies); *id.* at 26–27 ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency.").

five years in prison.[269] S.B. 394 responded expressly to the exclusion as a *Miller* violation.[270] In light of these recent advances, extension of the same recourse to three strikers is not a logical stretch.

Until legislation can take effect, trial judges must use their discretion to ensure that a youthful defendant has a "meaningful opportunity to obtain release" during their life.[271] As mentioned, sentencing schemes are sometimes mandated by statute in such a way that *Miller* violations may be inevitable.[272] However, one way a judge can preempt a *Miller* violation is by "striking" a prior strike.[273] Arguably, a defendant whose prior strike is "struck" remains 3051 eligible since their sentence is not "pursuant to" the three-strikes law.[274]

Another solution would be the creation of guidelines for judges tasked with sentencing young defendants with juvenile strikes. Such a framework would assist the judge in determining a sentence that balances achievement of the penological goals of punishment with the greatest rehabilitative potential for the young offender.[275] It would require the judge to make a holistic assessment of the youth, based upon circumstances surrounding the current offense as well as the prior juvenile strike. While such a framework must take care not to "re-adjudicate" the prior conviction, the defendant should be allowed to share psychological reports and testimonials from the previous proceeding.[276] This record may address

---

269 S.B. 394, 2017 Reg. Sess. (Cal. 2017).

270 *Hearing on S.B. 394 Before the Assemb. Pub. Safety Comm.*, 2017 Reg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Chair, Assemb. Pub. Safety Comm.) ("SB 394 will remedy the now unconstitutional juvenile sentences of life without the possibility of parole . . . in line with the United States Supreme Court's suggestion of parole consideration as a remedy for a *Miller* violation.").

271 *See Miller*, 567 U.S. at 479; People v. Cornejo, 202 Cal. Rptr. 3d 804, 821 (Cal. Ct. App. 2016) (holding that California Penal Code section 3051 does not substitute for the sentencing court's constitutionally required consideration of all individual characteristics of the offender); People v. Solis, 168 Cal. Rptr. 3d 814 (Cal. Ct. App. 2014) (noting that California Penal Code section 3051 is a safety net, not a cure-all, for juvenile sentences that violate the Eighth Amendment, thus it was proper for the court to reduce defendant's sentence from fifty to twenty-five years).

272 *See* People v. Franklin, 370 P.3d 1053, 1056 (Cal. 2016).

273 People v. Superior Court (Romero), 917 P.2d 628, 629 (Cal. 1996) (holding that judges can strike prior convictions).

274 *See* CAL. PENAL CODE § 3051(h).

275 *Miller*, 567 U.S. at 461 (noting precedent emphasizes that the attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes).

276 *See id.*

Miller-type factors that speak to his hallmark features of youth, including his failure to appreciate consequences, the way familial or other external pressures may have influenced criminal behavior, and his capacity (or lack thereof) to work with police officers, prosecutors, and his own attorney.[277] Such a framework would respect the likelihood that judges are not experts in juvenile psychology. It would allow them to use the discretionary power they have to make confident and consistent determinations when confronted with a defendant with a juvenile strike.

In sum, both lawmakers and judges must uphold post-*Miller* obligations. The legislature must pass laws that do not erroneously deny constitutional protection to youths with prior strikes.[278] Until section 3051's correction, judges should ensure sentences pass constitutional muster by dismissing a strike, if need be.[279] Additionally, asking a trial judge to consider *Miller*-type factors when sentencing a prior-strike youth may lead to more fair and consistent outcomes for a youth otherwise denied YOPH procedure.

CONCLUSION

The *Miller* cases and California's Youth Offender Parole Hearing process demonstrate great advances in juvenile justice reform. This Article, however, undertakes only a narrow critique of a system demanding broader changes. Allowing three-strikes offenders eligibility for youth offender parole hearings chips away at one injustice against thousands of people incarcerated for youthful mistakes.[280] It is a logical extension of protection in light of S.B. 394 and A.B. 1308's expansion of coverage.[281] Still, the law requires more structure and research around its impact in order to ensure its effective and consistent implementation.

The YOPH mechanism has proven thus far to be a "cautious and moderate adjustment to the parole process."[282] According to Human Rights

---

[277] *Id.* at 423–24 (describing the "hallmark features of youth" and noting that the features that distinguish youth from adults also significantly handicap them in criminal proceedings).

[278] *See* People v. Bell, 208 Cal. Rptr. 3d 102, 111 (Cal. Ct. App. 2016) (granting deference to the legislature's decision given their traditional role in determining punishment and sentences).

[279] *See* People v. Superior Court (Romero), 917 P.2d 628, 629 (Cal. 1996) (holding that judges can strike prior convictions).

[280] *See Second and Third Striker Felons in the Adult Institution Population, supra* note 219.

[281] *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017); S.B. 394, 2017 Reg. Sess. (Cal. 2017).

[282] *Youth Offender Parole Hearings, Hearing on A.B. 1308 Before the Senate.*, 2017 Reg. Sess. (Cal. 2017) (statement of Human Rights Watch, co-source).

Watch, the most recent studies show that seventy-four percent of youth offender parole hearings result in denials.[283] And while youth offenders typically qualify for parole a decade earlier than adult offenders,[284] they still spend an average of twenty-seven years in prison before the grant of parole.[285] The Supreme Court has made clear that a person incarcerated as a youth must have a "meaningful" chance to lead a full life if they are released.[286] The Court left the door open for scholars and advocates to press whether or not a former felon in their forties or fifties, incarcerated since the cusp of adulthood, really has a "meaningful" chance to reconnect with aging family, begin a career, and start a family of their own.[287] According to Professor Caldwell, the law is a "step in the right direction, . . . but doesn't go far enough."[288]

Furthermore, guidelines should be created to help resolve ambiguity around how the parole board must recognize and adequately give "great weight" to the "hallmark features of youth."[289] There are currently no parameters around what the parole boards must consider in assessing a youth offender's fitness to re-enter society.[290] The lack of definition around this standard has arguably led to erroneous denials.[291] For example, in Professor Caldwell's study of the first 107 youth parole hearings, she flagged that many commissioners reported denying parole based on the nature of commitment of the offense.[292] This is problematic because it overlooks the diminished culpability of youth and minimizes the individual's maturation since the offense.[293] Furthermore, California's tool

---

283 *Id.*

284 *See* Caldwell, *Meaningful Opportunities*, *supra* note 15, at 248 ("In the first six months of S.B. 260's implementation, youth offenders who were granted parole had an average age of 40.7, which is 9.2 years younger than the average age of lifers who were granted parole in California in 2010.").

285 Wheeling, *supra* note 267.

286 *See* Miller v. Alabama, 567 U.S. 460, 479 (2012).

287 Wheeling, *supra* note 267.

288 *Id.*

289 *See* CAL. PENAL CODE § 4801(c) (stating that reviewers of youth offenders eligible for parole "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law"); Caldwell, *Meaningful Opportunities*, *supra* note 15, at 292–93.

290 Caldwell, *Meaningful Opportunities*, *supra* note 15, at 292–93.

291 *Id.*

292 *Id.* at 295.

293 *See* CAL. PENAL CODE § 4801(c); Miller v. Alabama, 567 U.S. 460, 471 (2012); Caldwell, *Meaningful Opportunities*, *supra* note 15, at 296.

for assessing the future risk of parole-eligible inmates considers young age a risk factor for re-offense, rather than a mitigating one.[294] In her research, Professor Caldwell flagged the irony in purportedly giving "great weight" to youthful features, while using criteria established for the review of adult offenders.[295] Though the youth offender parole process is itself young, these procedural inadequacies highlight the need to articulate exactly how the parole board's consideration of young offenders should be different than their review of adult offenders. Professor Caldwell suggests, for example, giving diminished weight to the circumstances around the crime and more weight to signs of rehabilitation over time.[296] Additionally, the board should consider disciplinary infractions, especially those that occur towards the beginning of the prison term, in light of adolescent development research highlighting the dangers young people face upon entering adult prisons and their efforts to protect themselves within these dangerous systems.[297]

Surely, the current process is not without its flaws. However, California's changes reflect "the evolving standards of decency that mark the progress of a growing society."[298] California Penal Code section 3051 is a positive stride toward conformance with *Miller*'s protections for youth, and S.B. 394 and A.B. 1308 demonstrate that policy is headed in the right direction.[299] The next step is recognition that young three-strikes offenders deserve a "meaningful opportunity" for another chance.[300] After all, "incorrigibility is inconsistent with youth," and the law should reflect the same.[301]

---

294 Wheeling, *supra* note 267.

295 *Id.*

296 Caldwell, *Meaningful Opportunities*, *supra* note 15, at 293.

297 *Id.*

298 Trop v. Dulles, 356 U.S. 86, 101 (1958).

299 *See* A.B. 1308, 2017 Reg. Sess. (Cal. 2017); S.B. 394, 2017 Reg. Sess. (Cal. 2017); Miller v. Alabama, 567 U.S. 460 (2012).

300 *See Miller*, 567 U.S. at 479.

301 Graham v. Florida, 560 U.S. 48, 47–48 (2010).