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## Precedent as a Policy Map: What *Miller v. Alabama* Tells Us about Emerging Adults and the Direction of Contemporary Youth Services

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# Precedent as a Policy Map: What *Miller v. Alabama* Tells Us About Emerging Adults and the Direction of Contemporary Youth Services

Clark Peters\*

## I. INTRODUCTION

Important court decisions alter legal policies and reflect the political context in which those decisions were made. Legal scholarship typically focuses on the interpretation of precedent – the cases from which a new decision draws its support or departs – and how a decision might change the trajectory of developing legal doctrine. This Article takes a somewhat different approach, examining what *Miller v. Alabama*<sup>1</sup> reveals about the state of juvenile offender policy in the United States and how the decision may influence the path taken by advocates, policymakers, and practitioners. The Article also explores what *Miller* will mean for issues beyond the sentencing of juveniles for serious violent crimes.

To illuminate the role that *Miller* plays with regard to the wider realm of youth policy, I will employ the analytic approach of Professor John Kingdon, whose influential book *Agendas, Alternatives, and Public Policies* (*Agendas*) provides a framework for understanding how ideas move from mere proposals to effectuated policy.<sup>2</sup> His approach emerges from the pluralist tradition, which emphasizes government processes and the role of political influence in affecting policy choices.<sup>3</sup> In posing Kingdon's central question – “How does an idea's time come?”<sup>4</sup> – to the *Miller* decision, this Article employs Kingdon's theoretical framework in two ways. First, Kingdon's framework is used to identify the factors, both political and scientific, that

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1. 132 S. Ct. 2455 (2012).

2. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2003).

3. See generally ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMIC, AND WELFARE: PLANNING AND POLITICO-ECONOMIC SYSTEMS RESOLVED INTO BASIC SOCIAL PROCESS* (1976); E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* (1960).

4. KINGDON, *supra* note 2, at 1.

helped set the stage for the decision. Second, the Article explores how the identification and articulation of those factors will influence how we understand and deal with young offenders and disadvantaged emerging adults in the coming years.

## II. KINGDON'S AGENDA-SETTING FRAMEWORK

In articulating his framework, Kingdon draws on a colorful metaphor first developed by Professors Michael Cohen, James March, and Johan Olsen in their article “A Garbage Can Model of Organizational Choice.”<sup>5</sup> Kingdon's version of the “garbage can model” identifies three related “streams” that influence the topics that gain the attention of the public and their political representatives.<sup>6</sup> The “problem stream” describes how problems arise and are articulated by actors who have a stake in addressing the problem.<sup>7</sup> The “political stream” deals with changing governmental and electoral circumstances.<sup>8</sup> The political environment is influenced by shifting power among parties and factions, as well as external events – such as economic conditions or particularly heinous crimes – that may make legislative bodies amenable to policies that would be otherwise disregarded.<sup>9</sup> Finally, the “policy stream” involves the development of policy proposals themselves, how they are developed, and by whom.<sup>10</sup>

Central to Kingdon's approach is the idea that these streams are distinct; they occupy space in the “garbage can” and join together to determine the agendas of formal governmental actors.<sup>11</sup> The nature and path of these streams are only loosely coupled with each other.<sup>12</sup> Consequently, policies developed to address one problem may at times be paired with a different problem.<sup>13</sup> Alignment of the three streams provides an opening, or a “policy window,” that allows reforms to be adopted.<sup>14</sup> Kingdon provides an example using a case study of the rise of health maintenance organizations in the 1970s, a reform that sought to address the rising costs of medical care.<sup>15</sup> He details how prepaid medical care, which “had been established and well-known for years,” was repackaged in order to inject market dynamics into the

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5. KINGDON, *supra* note 2, at 19 (referencing Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1, 1-25 (1972)).

6. *See id.*

7. *See id.*

8. *See id.* at 20.

9. *See id.* at 168-69.

10. *See id.* at 116.

11. *See id.* at 19.

12. *See id.* at 173.

13. *See id.*

14. *See id.* at 20.

15. *See id.* at 5-6.

provision of medical care, presumably lowering costs.<sup>16</sup> In this case, the problem of spiraling costs joined with a novel approach that was congruent with the economic principles that held sway in the Nixon administration.<sup>17</sup> In *Agendas*, Kingdon provided two additional case studies: the failure to establish national health insurance during the Carter administration, and the successful deregulation of the aviation, trucking, and railroad industries during the 1980s.<sup>18</sup> Other authors have applied a similar approach to describe a wide range of policy reforms.<sup>19</sup>

While Kingdon did not apply his approach to courts, these bodies inhabit the space that is germane to the policymaking process he examines.<sup>20</sup> While the Supreme Court of the United States is not an elected body, Kingdon's framework nonetheless can help us understand the importance of how the Court frames a problem, how its deliberations reflect the political context, and how available policy "solutions" are deployed. Most importantly, as with other reforms Kingdon examined,<sup>21</sup> the three streams that aligned for the majority decision in *Miller* illuminate the future direction that policy will take: in this case, reforms directed at intervening in the lives of juvenile offenders. Subsections A, B, and C apply Kingdon's framework to the *Miller* decision and explore the nature of these streams.

#### A. *The Problem Stream: The Emergence of "Emerging Adults"*

Kingdon's framework tells us that problems that gain political attention take shape in large measure through actors who first define them, giving the problems meaning not entirely dictated by presenting circumstances. The form that a problem ultimately takes has important implications for both the kinds of solutions that might be matched with it, as well as the constituencies who will take notice and respond. Here, articulating the problem of justice at the core of *Miller* will not only help identify the "solution" – in this case, the limited holding of the Court – but will also influence how the problem and

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16. *Id.* at 6.

17. *See id.*

18. *See id.* at 6-12.

19. *See, e.g.,* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS (1984) (addressing the rapid adoption of laws to address child maltreatment in the 1970s); M.A. Saint-Germain & R.A. Calamia, *Three Strikes and You're In: A Streams and Windows Model of Incremental Policy Change*, 24 J. CRIM. JUST. 57 (1996) (examining the spread of "Three Strikes" legislation in the 1990s); H. Luke Shaefer, *State Minimum Wage Laws: Examining the Case of Illinois*, 10 J. POVERTY 67 (2007) (analyzing state increases in the minimum wage in the early 2000s).

20. *See* KINGDON, *supra* note 2, at 20.

21. *See id.* at 5-15.

resultant policy will be understood in the future.<sup>22</sup> It is here that the *Miller* Court's use of psychological, sociological, and biological evidence to justify its decision speaks to the arrival of a new understanding of extended adolescence.<sup>23</sup> In recent decades, sociologists and psychologists have begun to embrace a new developmental stage of "emerging adulthood," initially articulated by Professor Jeffrey Arnett.<sup>24</sup> Arnett and others<sup>25</sup> note that many young people are delaying traditional markers of adulthood, including marriage, parenthood, education, and career identification.<sup>26</sup> This new post-adolescent period of identity exploration, instability, and self-focus, Arnett argues, has implications for public policy.<sup>27</sup>

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22. See *id.* at 198 ("Once a particular problem is defined and pressing, whole classes of approaches are favored over others, and some alternatives are highlighted while others fall from view.").

23. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464-66 (2012).

24. Jeffrey J. Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOL. 469, 469 (2000) [hereinafter Arnett, *Theory of Development*]. The term is in the process of being embraced by governmental entities as well. See SUBSTANCE ABUSE & MENTAL HEALTH ADMIN., DEP'T OF HEALTH & HUMAN SERVS., THE HEALTHY TRANSITIONS INITIATIVE (2009), available at [http://www.samhsa.gov/Grants/2009/sm\\_09\\_008.doc](http://www.samhsa.gov/Grants/2009/sm_09_008.doc) (employing the term in targeting the needs of young people aged 16-25).

25. See generally Frank F. Furstenberg, Jr. et. al, *Between Adolescence and Adulthood: Expectations about the Timing of Adulthood* (Network on Transitions to Adulthood & Pub. Policy, Working Paper No. 1, 2003), available at <http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/between.pdf>; MACARTHUR RESEARCH NETWORK ON TRANSITIONS TO ADULthood, ADOLESCENCE AND THE TRANSITION TO ADULthood: RETHINKING PUBLIC POLICY FOR A NEW CENTURY (2005), available at [http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/Conference\\_Summary\\_Final.pdf](http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/Conference_Summary_Final.pdf); Laura Wray-Lake et. al, *Young People's Changing Meaning of Work*, POL'Y BRIEF (MacArthur Found. Research Network on Transitions to Adulthood & Pub. Policy, Philadelphia, Pa.), Sept. 2009, available at <http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/views-on-work.pdf>; see also *Publications*, MACARTHUR NETWORK ON TRANSITIONS TO ADULthood, <http://transitions.s410.sureserver.com/publications/> (last visited Oct. 26, 2013).

26. See Arnett, *Theory of Development*, *supra* note 24, at 469.

27. See JEFFREY J. ARNETT, EMERGING ADULthood: THE WINDING ROAD FROM LATE TEENS THROUGH THE TWENTIES 4 (2004). In an influential essay, Stanford Law professor Michael Wald (along with student Tia Martinez) argued for the need to create state-supported systems to reduce the number of young adults who fail to achieve stable employment. See Michael Wald & Tia Martinez, *Connected by 25: Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Old* 3 (William & Flora Hewlett Found. Working Paper, 2003), available at <http://www.hewlett.org/uploads/files/ConnectedBy25.pdf>. While the authors identify a particular target age, they conceded the somewhat arbitrary nature of the choice. *Id.* at 3. The authors wrote:

Age 25 is an arbitrary line. Life does not end at 25. We have picked achieving connection by 25 because this is an age when most young adults have

In supporting its decision, the Court cites the scientific evidence of *Roper v. Simmons* and *Graham v. Florida*.<sup>28</sup> Acknowledging the malleable nature of the intellectual and cognitive capacities of juveniles, the Court noted that the development of these capacities is also inexorable; juveniles are susceptible to delays stemming from environmental influences beyond the control of the young person.<sup>29</sup> The Court may have been aware of the growing body of literature that indicates that vulnerable youths – including those with certain disabilities and those who face maltreatment – face educational and developmental delays.<sup>30</sup> One of the defendants in the case, Evan Miller, “had been in and out of foster care”<sup>31</sup> throughout his life. Justice Elena Kagan, writing for the majority, emphasized the need to take into account evidence of this “neglectful and violent family background [and] . . . physical abuse.”<sup>32</sup> Given the impressionable nature of children, she found that this evidence was “‘particularly relevant’ – more so than it would have been in the case of an adult offender.”<sup>33</sup> Consequently, the problem stream of the *Miller* opinion involves recognizing the emergent nature of young adults as evidenced by

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achieved self-sufficiency and established their own households. It also is likely that there are significant development differences between younger adults and those over 25 that are relevant in the design of programs.

*Id.* at 26 n.2.

28. *See Miller v. Alabama*, 132 S. Ct. 2455, 2464-65 (2012) (citing *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)). The Court noted:

In *Roper*, we cited studies showing that [o]nly a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, we noted that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds – for example, in parts of the brain involved in behavior control. We reasoned that those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child’s moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.

*Id.* (citations omitted) (internal quotations marks omitted).

29. *Id.* at 2458.

30. *Id.* at 2468.

31. *Id.* at 2469.

32. *Id.* at 2467.

33. *Id.* “We held: ‘[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered’ in assessing his culpability.” *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)). The transition may be especially challenging for youths with disabilities. *See Robert Blum et al., Moving into Adulthood for Youth with Disabilities and Serious Health Concerns*, POL’Y BRIEF (MacArthur Found. Research Network on Transitions to Adulthood & Pub. Policy, Philadelphia, Pa.), July 2005, available at <http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/blum-disabilities-final.pdf>.

common sense, the nature of brain development, and the vulnerability of youths as they mature.

### *B. The Policy Stream: Competing Policy Responses*

Kingdon's framework defines the policy stream as providing the available solutions that could be paired with problems as they arise and take shape. The actual "solution" provided by the *Miller* Court is naturally limited in scope to the availability of mandatory life without parole sentences for juvenile offenders. The Court, obligated to focus on the case at hand, arrived at a solution that involved carving out two exceptions regarding state authority to legislate sentencing: states must afford individualized sentences to (1) juveniles in cases involving (2) life without the possibility of parole.<sup>34</sup> This narrow ruling addressed the identified injustice at hand and avoided broader policy mandates – such as denying life without parole for juveniles outright, or outlining the nature of inquiry required to sentence juveniles – beyond the scope of the circumstances presented. However, as with other applications of the Kingdon model, the actual policy solution is less profound than the problem and political streams aligned with it.<sup>35</sup>

### *C. The Political Stream: Embracing Emerging Adults*

The Kingdon framework contends that varying political attitudes make certain periods more favorable to both recognizing defined problems and being amenable to proposed solutions. The Court's discussion of the political stream in *Miller* is explicit, framed under the Eighth Amendment jurisprudence regarding "the evolving standards of decency that mark the progress of a maturing society."<sup>36</sup> The Court explicitly denies that such analysis is historical in nature, and grounds it instead in contemporary notions of fairness.<sup>37</sup> The majority notes that the Court's decision rests in part on "common sense – on what 'any parent knows'"<sup>38</sup> regarding the nature of childhood and developing minds. While this shared wisdom has presumably been part of our understanding for many years, it is only with additional scientific support that it seems to have the strength to support the decision. The *Miller* Court breaks no new ground in applying scientific discoveries; science has informed court decisions for many years.<sup>39</sup> While the Court tends to deny entering the politi-

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34. *Miller*, 132 S. Ct. at 2475.

35. See, e.g., KINGDON, *supra* note 2, at 210-12 (discussing, within in the context of Kingdon's model, President Reagan's 1981 budget).

36. *Miller*, 132 S. Ct. at 2463.

37. See *id.*

38. *Id.* at 2464.

39. See, e.g., Julie M. Morgan & Diana Pullin, *Social Science and the Courts: Challenges and Strategies for Bridging Gaps Between Law and Research*, 39 EDUC. RES. 515 (2010).

cal fray implicating its decisions, the *Miller* decision reflects current political discourse. Contemporary discourse regarding crime and delinquency policy does not emphasize increased criminal penalties as it has in the past. In *Agendas*, Kingdon notes that the political priorities of proponents and adversaries affect the flow of the relevant streams in his framework.<sup>40</sup> In recent years, conservative political actors have deemphasized criminal justice reform, and instead focused on other hot-button topics, such as immigration and same-sex marriage. To the extent that conservatives are concerned with corrections, they address the substantial costs of maintaining the high rate of incarceration in the United States.<sup>41</sup> Indeed, most of the political spectrum accepts the need to embrace a reduction in prison costs.<sup>42</sup> Recent system-level reforms emphasize instilling market-like incentives to drive costs down,<sup>43</sup> reminiscent of the health maintenance organization case study Kingdon explored.<sup>44</sup>

### III. THE POLITICAL AND SCIENTIFIC IMPLICATIONS OF *MILLER* FOR THE YOUTH-SERVING FIELD

Kingdon's analysis provides a framework for understanding the context of *Miller* and how it reinforces a certain set of notions that can illuminate emergent trends in juvenile policy. Beyond juveniles, the implications of *Miller* are somewhat more speculative, but Kingdon's framework provides some guidance on what to expect on the path ahead. First, it is likely that the United States will continue its punitive approach to adult corrections. By resting on the distinct nature of juvenile development, *Miller* stands to reinforce the notion that adults are beyond rehabilitation.<sup>45</sup> While other political forces, such as state fiscal pressures, may open a different window through which to guide criminal justice reform, this decision suggests that the rehabilitative ideal will remain dormant for adults for the time being.<sup>46</sup>

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40. See KINGDON, *supra* note 2, at 204-05.

41. See, e.g., NICOLE D. PORTER, ON THE CHOPPING BLOCK: STATE PRISON CLOSINGS (2012), available at <http://sentencingproject.org/doc/publications/On%20the%20Chopping%20Block%202012.pdf>.

42. *Id.*

43. Reforms in Texas, Ohio, and Illinois create incentives to retain offenders in community-based settings, rewarding those counties that reduce the number of placements in state-funded juvenile correctional facilities. See (Jimroglou, 2013a) (Texas); (Jimroglou, 2013b) (Ohio); *Redeploy Illinois*, ILL. DEP'T OF HUMAN SERVS., <http://www.dhs.state.il.us/page.aspx?item=31991> (last visited Oct. 26, 2013).

44. See KINGDON, *supra* note 2, at 5-6.

45. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

46. See F.A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1979).



The second implication for justice policy concerns the conceptualization of youths as poor decision makers.<sup>47</sup> To the extent that juvenile brains continue to develop well into a person's twenties – thus rendering their executive functioning inferior to that of adults<sup>48</sup> – the Court's decision may undermine efforts to recognize the autonomy of youths. Such autonomy is especially important in judicial settings that involve young people, such as juvenile courts adjudicating maltreatment or delinquency cases. The American Bar Association has approved the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, which emphasizes client-directed representation in dependency court and eschews a "best-interests" model of representation.<sup>49</sup> The Fostering Connections to Success and Increasing Adoptions Act of 2008 requires that youths who will age out of foster care be involved in the development of their plan to transition to life without state support.<sup>50</sup> While many scholars have emphasized the need to recognize the importance of involving youths in decisions concerning their cases, the *Miller* decision may invite a greater level of paternalism through the *parens patriae* doctrine and possibly erode youth involvement that is critical to successfully intervening in the lives of troubled young people.<sup>51</sup> Several scholars, however, see no conflict between recognizing the prolonged period of brain development and efforts to recognize youths' autonomy; Professor Emily Buss, for example, emphasizes the difference between the peer-influenced rash decisions that characterize most offending and the more deliberative process afforded to youths in legal settings.<sup>52</sup>

Finally, the *Miller* decision remains focused at the individual level, emphasizing brain development and varying trajectories towards maturity for juveniles.<sup>53</sup> To the extent that environmental factors – such as economic disadvantage, inferior public schools, or maltreatment by caregivers – are acknowledged, they are implicated only insofar as they affect that individu-

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47. See *Miller*, 132 S. Ct. at 2464.

48. See *id.*

49. MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & DEPENDENCY PROCEEDINGS (2011), available at [http://apps.americanbar.org/litigation/committees/childrights/docs/aba\\_model\\_act\\_2011.pdf](http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf).

50. See Angelique Day & Maribeth Preston, *Reevaluating the Government's Role in Parenting Older Foster Care Youth: An Analysis of the Fostering Connections to Success and Increasing Adoptions Act of 2008 and its Implementation in California and Michigan*, 17 U.C. DAVIS J. JUV. & POL'Y 1, 4 (2013).

51. See generally *Resources for Your Work: Engaging Young People*, JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, <http://jimcaseyyouth.org/browse-resources/engaging-young-people> (last visited Oct. 26, 2013).

52. See Emily Buss, *Juvenile Court for Young Adults? How Ongoing Court Involvement Can Enhance Foster Youths' Chances for Success*, 48 FAM. CT. REV. 262 (2010).

53. See *Miller*, 132 S. Ct. at 2464-65.

al's development.<sup>54</sup> Consequently, the Court does not address the pernicious realities of, for example, poverty and racism, which are associated with involvement in the criminal justice system and – like *Miller* – are strongly grounded in social and behavioral science.

While the *Miller* decision may strike some as overly lenient towards juvenile offenders, Kingdon's approach emphasizes that policy is made in the "garbage can" of ideas and influences, and that a policy solution is ultimately selected from many alternatives.<sup>55</sup> After adoption and implementation of a policy, it may be difficult to identify the alternatives that were available for consideration by the Court. As it is hard to think broadly about domestic criminal justice policy, it is helpful to look abroad to give a sense of the range of alternative policy responses. In 1993, well into the rise of punitive criminal justice reforms in the United States, a particularly notorious murder took place in Liverpool, England.<sup>56</sup> Two-year-old James Bulger was tortured and slain at the hands of two boys, both ten years old.<sup>57</sup> Video captured the older boys escorting James, who offered no resistance, by hand out of a local mall.<sup>58</sup>

The case created an uproar in the country, but the juvenile justice system in the United Kingdom remained committed to rehabilitation.<sup>59</sup> The young offenders were provided new identities, as there was concern for their safety were they to be found out, and enrolled in what would be characterized as boarding schools in the United States.<sup>60</sup> While it is safe to assume that these offenders would have received far less generous treatment here,<sup>61</sup> the response to the Bulger murder highlights that the range of potential responses to serious juvenile offenses is wider than those considered in *Miller*.

#### IV. CONCLUSION

The long-recognized tension between the Court's role as arbiter of individual-level cases and as a policymaking body is beyond the scope of this Article.<sup>62</sup> Even in this relatively narrow case, however, we can recognize how the elements of extant policies regarding juvenile offenders are part of the context that influenced the Court's decision. By applying Kingdon's framework, we can distill the important components of the Court's decision

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54. *See id.* at 2467.

55. *See* KINGDON, *supra* note 2, at 71.

56. *See generally* BLAKE MORRISON, AS IF: A CRIME, A TRIAL, A QUESTION OF CHILDHOOD (1997).

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See, e.g.,* *Miller v. Alabama*, 132 S. Ct. 2455, 2462-63 (2012).

62. *See, e.g.,* Walter V. Schaefer, *Precedent and Policy* 34 U. CHI. L. REV. 1 (1966).

in *Miller* and how it will influence how we understand emerging adults, address offending, and intervene in their lives. The political stream, reflected in the discussion on evolving standards of decency and strengthened by recent precedent on juvenile sentencing, converged with two other streams that Kingdon identifies as critical for meaningful, practical change. The problem stream implicates a growing understanding of the protracted nature of adolescent and post-adolescent development in contemporary society. The policy stream, while narrow in the specific holding of *Miller*, has implications beyond the case. For the youth-serving field, *Miller* opens the door for reforms that accommodate the growing understanding of the nature of “emerging adults.” Meanwhile, *Miller* may also close other doors to policies that emphasize rehabilitation of adult offenders, or policies that acknowledge how environmental and structural disadvantages contribute to criminal activity.