
REVISIONING JUVENILE JUSTICE: IMPLICATIONS OF THE NEW CHILD PROTECTION MOVEMENT

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INTRODUCTION

Current discussions about juvenile justice reveal a profound sense of dissatisfaction. Many Americans believe that the country is in the midst of a youth crime epidemic¹ and advocate swift implementation of “get tough” policies in order to remove young offenders from society.²

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1. See Paul Marcotte, *Criminal Kids*, ABA J., Apr. 1990, at 61, 63 (“Nearly every poll you read shows that people think juvenile crime is exploding.”) (quoting Robert Shepherd, Jr., director of the Youth Advocacy Clinic at the University of Richmond School of Law).

2. During the 1980s imprisonment rates rose dramatically. One commentator aptly described the “get tough on crime” phenomenon by saying that, “[a]t the present rate of growth, we will all be in prison in twenty-five years.” Steven Duke, *Clinton and Crime*, 10 YALE J. ON REG. 575, 576 (1993).

This punitive approach to juvenile crime continues to gain adherents,³ despite mounting evidence that disputes the premise that juvenile crime is proliferating.⁴

The best evidence contradicts a popular belief that juvenile crime is exploding. Not only has juvenile crime *not* risen for the past two decades,⁵ but several indicators suggest that the rate of juvenile crime has actually declined. Over the past decade, the total percentage of juvenile arrests has dropped,⁶ including arrests for serious crimes.⁷

Despite these statistics, children are under attack from all sides. As society gets tougher on youth, several jurisdictions have shifted away from juvenile justice systems based on rehabilitation and moved toward punitive models.⁸ As a result of the "criminalizing" of the juvenile

3. Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991) [hereinafter Forst & Blomquist, *Cracking Down*].

4. See *infra* notes 5-7 and accompanying text. Such an overstatement of juvenile crime statistics is paralleled only by the current understatement of youth victimization statistics. The number of youth who are victims of violence, including those murdered, continues to rise sharply. MICHAEL A. JONES & BARRY KRISBERG, *IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY*, 1-2, 19 (1994). Recent crime statistics reveal that there are many more young victims of violent crimes than youths committing violent crimes. *Id.* at 18-20 (noting that there are 14 youth victims of violent crimes for every youth arrested for a violent crime).

Equally shocking, while most Americans believe that children are primarily victimized by strangers and street gangs, the evidence actually indicates that parents and guardians are responsible for most of the increased victimization of children and youth. *Id.*

5. JONES & KRISBERG, *supra* note 4, at 8-20; see also Marcotte, *supra* note 1, at 63 ("[I]n reality, serious juvenile crime is about the same or lower than it was 10 or 15 years ago . . .").

6. In 1982, 18% of all arrests involved juveniles. JONES & KRISBERG, *supra* note 4, at 10. By 1992, however, this percentage had dropped to 16%. *Id.*

7. Between 1982 and 1992, the percentage of serious crimes attributed to juveniles decreased from 31% to 29%. *Id.*; see also Marcotte, *supra* note 1, at 63 ("In 1987, the number of youths held for the most serious, violent offenses — murder, manslaughter, robbery, aggravated assault — [was] down eight percent from 1985 and eleven percent from 1983 . . .").

8. See Richard Lawrence, *Reexamining Community Corrections Models*, 37 CRIME & DELINQ. 449 (1991) (arguing that the emphasis on offender rehabilitation has been replaced by focuses on punishment and community protection); Marcotte, *supra* note 1, at 62-63 (describing the "criminalization" of the Delaware, California, Vermont, Illinois, Montana, Georgia, Mississippi, and New York juvenile systems). See generally BARRY C. FELD, *JUSTICE FOR CHILDREN*, 262-95 (1993) [hereinafter FELD, *JUSTICE FOR CHILDREN*]; Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment*,

justice system, children are increasingly removed from the juvenile justice system to the adult criminal courts.⁹

Some children are sentenced to adult correctional facilities and detention centers, despite federal and state prohibitions against such practices.¹⁰ Others are placed in nonpenal settings such as psychiatric

Treatment, and the Difference it Makes, 68 B.U.L. REV. 821, 841-42 (1988) [hereinafter Feld, *Principle of Offense*]; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 708-10 (1991) [hereinafter Feld, *Juvenile Court*]; Forst & Blomquist, *Cracking Down*, *supra* note 3; Martin L. Forst et al., *Punishment, Accountability and the New Juvenile Justice*, 43 JUV. & FAM. CT. J. no. 1, at 1.

9. For a review of the general move toward criminalizing the juvenile court system, see Feld, *Juvenile Court*, *supra* note 8, at 708-10 (reviewing four developments which have led to the criminalizing of the juvenile court: removal of status offenders, waiver of serious offenders to the adult system, increased punitiveness in sentencing delinquents, and more formal procedures). See also JONES & KRISBERG, *supra* note 4, at 21-35 (detailing how the juvenile court system has gotten tougher on youth). See generally FELD, *JUSTICE FOR CHILDREN*, *supra* note 8, at 262-95; IRA M. SCHWARTZ, *(IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD* (1989) [hereinafter SCHWARTZ, *(IN)JUSTICE*]; Barry C. Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality*, 36 CRIME & DELINQ. 443 (1990) [hereinafter Feld, *Punitive Juvenile Court*]; National Council on Crime and Delinquency, *Policy Statement on Children in Jails*, 32 CRIME & DELINQ. 395 (1986); Ira M. Schwartz et al., *The Jailing of Juveniles in Minnesota: A Case Study*, 34 CRIME & DELINQ. 133 (1988); Mark Soler, *Litigation on Behalf of Children in Adult Jails*, 34 CRIME & DELINQ. 190 (1988).

Indeed, some commentators even advocate dismantling the juvenile courts. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C.L. REV. 1083, 1121-32 (1991) (arguing that abolishing the juvenile court will lead to increased protection, by making jury trials available, achieving effective assistance of counsel, and meeting the dispositional needs of juveniles); Travis Hirschi & Michael Gottfredson, *Rethinking the Juvenile Justice System*, 39 CRIME & DELINQ. 262, 269 (1993) (arguing that the juvenile court should be replaced by the adult criminal justice system).

10. For example, the practice of placing of juveniles in adult facilities was recently castigated by the Nebraska legislature. Juvenile Services Act, NEB. REV. STAT. § 43-2403 (Supp. 1990) (“[I]ncarceration of juveniles in adult jails, lockups, and correctional facilities is contrary to the best interests and well-being of juveniles and frequently inconsistent with state and federal law requiring intervention by the least restrictive method.”). The practice itself, however, has been well documented. See generally Forst & Blomquist, *Cracking Down*, *supra* note 3, at 323. One report, based on data from the federal government’s Juvenile Detention and Correctional Facility Census, reported that admission of committed juveniles to adult detention centers increased by 600% between 1977 and 1986. Ira M. Schwartz et al., *Business as Usual: Juvenile Justice During the 1980s*, 5 NOTRE DAME J.L., ETHICS & PUB. POL’Y 377, 383-87 (1991). Such statistics underscore the concern that detention facilities are inappropriately used as dispositional options for adjudicated juveniles. *Id.* Even status offenders continue to be warehoused in secure correctional

hospitals or foster homes.¹¹ Even those who have not committed any offenses are sometimes incarcerated in adult jails, simply because they are victims and the state has no alternative placement available.¹² Those who are not removed from the juvenile justice system do not necessarily fair better than their counterparts. Juvenile courts are as punitive, and in some cases more so, than criminal courts.¹³

In the face of the prevailing punitive, remove-from-family ethos, there is a growing consensus among policy makers that the family is the most effective vehicle for dealing with troubled youth.¹⁴ The progress of this burgeoning movement is illustrated by the recent promulgation of several state Family Preservation or Family Policy Acts. These acts highlight the importance of families and prefer forms of state intervention that keep children in their homes.¹⁵ This community-based, family-

facilities. *Status Offenders: Risks and Remedies, Hearing Before the Subcommittee on Juvenile Justice of the Senate Comm. on the Judiciary*, 102nd Cong., 1st Sess. 64-75 (1991) (statement of Gary B. Melton on Behalf of the American Psychological Association) [hereinafter *Melton Statement*]; see *id.* at 71 (noting that "thousands of children and youth charged with status offenses are confined each day in secure detention facilities — youth jails").

11. See *Melton Statement*, *supra* note 10, at 72-73. See generally Beverly Balos & Ira M. Schwartz, *Psychiatric and Chemical Dependency Treatment of Minors: The Myth of Voluntary Treatments and the Capacity to Consent*, 92 DICK. L. REV. 631 (1988); Marilyn Jackson-Beeck et al., *Trends and Issues in Juveniles Confinement for Psychiatric and Chemical Dependency Treatment*, 10 INT'L. J.L. & PSYCH. 153 (1987); Ira M. Schwartz, *Hospitalization of Adolescents for Psychiatric and Substance Abuse Treatment: Legal and Ethical Issues*, 10 J. ADOL. HEALTH CARE 1 (1989).

12. *Melton Statement*, *supra* note 10, at 71 ("[H]undreds are confined each day without even the pretense of a status offense. They are acknowledged to be incarcerated simply because they are victims, and an alternative emergency placement is unavailable.")

13. See JONES & KRISBERG, *supra* note 4, at 4, 19-36; see also *id.* at 4, 24-26 (noting that conviction rates in juvenile courts tend to surpass those in adult criminal courts).

14. Several new statutes may be interpreted to extend in-home family preservation efforts to juvenile delinquents. For example, Nebraska's new family policy statute covers judicial action taken in light of law violations. NEB. REV. STAT. § 43-532(2) (1993). It commands: "[E]very reasonable effort shall be made to provide [required governmental] assistance in the least intrusive and least restrictive method consistent with the needs of the child and to deliver such assistance as close to the home community of the child . . . requiring assistance as possible." *Id.* Similar statutes exist in the following states: Florida, Pennsylvania, Arkansas, Maryland, Minnesota, Kentucky, Louisiana, New Jersey, Montana, Missouri, and Arizona. See *infra* part IV.

15. Indeed, some statutes expressly find that intensive family preservation efforts should be made to keep juvenile delinquents in their homes. These states include Tennessee, New Mexico, Colorado, Nevada, North Carolina and West Virginia. See *infra*

focused approach is momentous and reflects a general transformation in the administration of child protective services.

A close reading of the new child welfare provisions reveals language that essentially covers the entire range of governmental and legal actions aimed at families.¹⁶ States have not, however, wholeheartedly committed to including delinquent youth in the new family preservation effort.¹⁷ Admittedly, in-home dispositions should not be made in three instances: 1) when a youth has committed an especially heinous crime; 2) when a youth is a chronic and serious offender; or 3) when a youth is dangerous to himself or others.¹⁸ However, because

part IV.B.

16. For example, Nebraska's family preservation statute "declare[s] a family policy [designed] to guide the actions of state government in dealing with the problems and crises involving children and families." NEB. REV. STAT. § 43-532(1) (1993). It further states:

The policy set forth in this subsection shall be (a) interpreted in conjunction with all relevant laws, rules, and regulations of the state and shall apply to all children and families who have need of services or who, by their circumstances or actions, have violated the laws, rules, or regulations of the state and are found to be in need of treatment or rehabilitation and (b) implemented through the cooperative efforts of state, county, and municipal governments, legislative, judicial, and executive branches of government, and other public and private resources.

Id. § 43-532(2).

17. *See infra* Part IV.

18. For example, NEB. REV. STAT. § 43-532(3) (1993) states a legislative preference for keeping troubled children in their homes or communities, unless issues of safety are implicated. § 43-532(3) (stating that the statute "shall not be construed to mean that a child shall be left in the home when it is clearly shown that continued residence in the home places the child at greater risk than removal from the home does"). This provision, added as an amendment in 1989, indicates the legislature's concern for safety issues (e.g., the safety of a child in his or her home in the wake of abuse or neglect allegations). There is no reason to assume that the legislature intended for juveniles who pose risks to public safety to remain at home.

Many juvenile justice professionals prefer to remove potentially dangerous juveniles from their homes. The authors caution against predicating out-of-home placements on predictions of future dangerousness. Such predictions tend to be wrong more often than right. *See, e.g.,* Charles Patrick Ewing, *Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes*, 15 LAW & HUM. BEHAV. 139, 141-46 (1991). Nevertheless, the legal system functions as if "there is nothing inherently unattainable about a prediction of future dangerousness." *See* Schall v. Martin, 467 U.S. 253, 278 (1984) (stating that one ground for detention prior to adjudication hearing is the likelihood of the juvenile's future dangerousness); *see also* United States v. Salerno, 481 U.S. 739 (1987) (holding that preventive detention of criminal defendant based on a prediction of dangerousness is constitutional); Barefoot v. Estelle, 463 U.S. 880 (1983) (permitting considerations of future dangerousness as part of death penalty determination).

most juveniles within the juvenile justice system have not committed serious crimes and have not previously committed serious felonies,¹⁹ out-of-home dispositions should occur relatively infrequently. Unfortunately, out-of-home placements continue.²⁰

The new family policy statutes provide an opportunity for policy makers to rethink the current direction of juvenile justice. Applying the family preservation movement to the juvenile justice context would entail redirecting efforts from punishment to rehabilitation, the very *raison d'être* of the juvenile court.²¹ As a result, youth would be rehabilitated

19. In a recent national survey, the U.S. Department of Justice reported that only 6% of youth referred to juvenile courts for criminal law violations were charged with violent crimes. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP UPDATE ON STATISTICS 2 (1989); see also INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO DISPOSITIONS 34 (1980); JONES & KRISBERG, *supra* note 4, at 10 (noting that property offenses represented 85% of all juvenile arrests for serious crimes in 1992; murder and rape combined represented less than half of one percent of all juvenile arrests in that same year).

20. How many youth are sent to institutions, on a national level, remains unknown. Paul Lerman, *Counting Youth in Institutions: Bringing the United States Up To Date*, 37 CRIME & DELINQUENCY 465, 465 (1991); PAUL LERMAN, COUNTING YOUTH IN TROUBLE LIVING AWAY FROM HOME: RECENT TRENDS AND COUNTING PROBLEMS (Center for the Study of Youth Policy 1990); Jackson-Beeck, et al., *supra* note 11, at 153. There have been attempts to collect national data on the number of children in institutions. *Eg.*, *Children in Care Data Collection Act of 1990*, H.R. 5627, 101st Cong., 1st Sess. (1990).

Additionally, essentially no reliable national statistics exist for out-of-home placements. One national study found that 22% of violent offense cases and 11% of nonviolent offense cases resulted in youth being placed outside the home. OJJDP UPDATE ON STATISTICS, *supra* note 19, at 3. However, states vary in use of out-of-home placement. In some states, as few as 10% and in others more than 40% of youth charged with a violent crime were placed out of the home. *Id.*

21. See Richard G. Wiebush, *Juvenile Intensive Supervision: The Impact on Felony Offenders Diverted From Institutional Placement*, 39 CRIME & DELINQ. 68, 68-69 (1993) (examining the feasibility of using intensive supervision programs for serious juvenile offenders); Dan McCallair, *Reaffirming Rehabilitation in Juvenile Justice*, 25 YOUTH & SOCIETY 104, 104-05 (1993); see also W. Wesley Johnson et al., *The Goals of Community-Based Corrections: An Analysis of State Legal Codes*, 18 AM. J. CRIM. JUST. 79, 89 (1993) (reviewing legislative mandates and concluding that "the rehabilitative ideal continues to survive").

The difference between criminal and juvenile courts has been that the former punishes while the latter rehabilitates. This distinction has been given the Supreme Court's imprimatur. See *In re Gault*, 387 U.S. 1, 14-17 (1967) (recapitulating the history of the juvenile justice system's separate function); see also *United States v. R.L.C.*, 112 S. Ct. 1329, 1343 (1992) (O'Connor, J., dissenting) (noting that the focus of juvenile sentencing proceedings is still on treatment); *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971)

within their families and communities instead of being incarcerated in adult jails or institutionalized.

This Article examines the soundness of the new family and community based juvenile justice system. Part I examines the punitive zeitgeist that has developed within the juvenile justice system. Part II then examines juveniles' legal rights to in-home services and concludes that while juveniles may not have an affirmative right to in-home services, they do have liberty interests that protect against unnecessary removals from their homes. Part III details the reasons for directing efforts and resources to support family-based services for delinquent youth. This section explores the problems with current out-of-home placements, policy concerns favoring in-home placements, and the cost-benefit effectiveness of in-home placement programs. Part IV then provides an overview of the new family preservation statutes. These statutes highlight the often self-defeating effect of "defamilization" and state legislatures' interests in nonpunitive approaches to children who require state intervention. Finally, Part V concludes that the new child protection movement should not ignore delinquent youth and cautions against creating the type of boilerplate statutes that have historically plagued the juvenile justice system.²²

(White, J., concurring) (discussing the differences between the juvenile justice system's focus on rehabilitation and timely reunification with the offender's family, and the criminal justice system's focus on punishment and retribution); *In re Gault*, 387 U.S. at 79 (Stewart, J., dissenting) (noting that the object of the juvenile court is to correct conditions, while the purpose of the criminal court is convict and punish for criminal action).

22. For example, all states already provide for in-home placements of juvenile offenders as dispositional alternatives. See ALA. CODE § 12-15-71 (Supp. 1994); ALASKA STAT. § 47.10.080 (Supp. 1994); ARIZ. REV. STAT. ANN. § 8-241 (Supp. 1994); ARK. CODE ANN. § 9-27-330(3)(B) (Michie 1993); CAL. WELF. & INST. CODE § 840-42 (West 1984 & Supp. 1995); COL. REV. STAT. ANN. § 19-2-703(1)(f) (West 1990 & Supp. 1994); CONN. GEN. STAT. ANN. § 46b-140(a) (West Supp. 1994); DEL. CODE ANN. tit. 10, § 937(b)(2) (1975); D.C. CODE ANN. § 16-2320(a)(1) (1989); FLA. STAT. ANN. § 39.054(1)(a)(1) (West Supp. 1995); GA. CODE ANN. § 15-11-35 (1994); HAW. REV. STAT. § 571-48(1)(A) (1985); IDAHO CODE § 16-1814 (Supp. 1994); ILL. REV. STAT. ch. 705, para. 3-24(1)(b) (Smith-Hurd 1992); IND. CODE ANN. § 31-6-4-15.4(3) (Burns Supp. 1994); IOWA CODE ANN. § 232.101 (West 1994); KAN. STAT. ANN. § 38-1601 (1993); KY. REV. STAT. ANN. § 635.060 (Baldwin Supp. 1994); LA. CHILDRENS' CODE, art. 897 (felony offenses) (West 1995); LA. CHILDREN'S CODE, art. 899 (misdemeanor offenses) (West 1995); ME. REV. STAT. ANN. tit. 34-A, § 7002 (West 1988 & Supp. 1994); MD. CODE ANN., CTS. & JUD. PROC. § 3-820(c)(1) (1989); MASS. GEN. LAWS ANN. ch. 119, § 58 (West 1993); MICH. COMP. LAWS ANN. § 712A.18(1)(b) (West Supp. 1994); MINN. STAT. ANN. § 260.185 (1)(b) (West Supp. 1995); MISS. CODE ANN., § 43-21-605(1)(b), 43-23-17(a) (1981 & Supp. 1994); MO. REV. STAT. § 211.181(1) (1994); MONT. CODE

I. RETHINKING THE GET TOUGH ZEITGEIST: THE NEW CHILD PROTECTION MOVEMENT

The ethos in family and child welfare services continues to move toward family preservation and family support.²³ This movement toward collaboration, coordination, and integration of services aimed at preserving family integrity appears in virtually every domain of child and family services.²⁴ One of the most remarkable aspects of this new approach to child welfare, however, is the apparent exclusion of juvenile offenders.²⁵

ANN. § 41-5-523(1) (1993); NEB. REV. STAT. § 43-246(4) (1993); NEV. REV. STAT. § 62.211(1)(a) (1991); N.H. REV. STAT. ANN. § 169-B:19.I(a) (1994); N.J. STAT. ANN. § 2A:4A-43(b)(2) (West Supp. 1994); N.M. STAT. ANN. § 32A-2-19.B(3) (Michie 1993); N.Y. JUD. LAW § 352.2.2(b) (McKinney Supp. 1995); N.C. GEN. STAT. § 7A-647 (Supp. 1994); N.D. CENT. CODE § 27-20-31.1 (Supp. 1993); OHIO REV. CODE ANN. § 2151.355(A)(1) (Anderson 1994); OKLA. STAT. ANN. tit. 10, 1116.A.1 (Supp. 1995); OR. REV. STAT. § 419.507(1)(a) (1987); PA. STAT. ANN. tit. 42, § 6352(a) (West Supp. 1994); R.I. GEN. LAWS § 14-1-32 (1994); S.C. CODE ANN. § 20-7-1330(a) (Law. Co-op Supp. 1993); S.D. CODIFIED LAWS ANN. § 26-7A-90 (Supp. 1994); TENN. CODE ANN. § 37-1-129(e)(2) (1991); TEX. FAM. CODE ANN. § 54.04(d)(1)(A) (West 1986); UTAH CODE ANN. § 78-3a-39(2)(b) (Supp. 1994); VT. STAT. ANN., tit. 33, § 5529(a)(1) (Supp. 1994); VA. CODE ANN. § 16.1-278.A.2 (Michie 1988); WASH. ANN. REV. CODE § 13.34.130(1)(a) (West Supp. 1995); W. VA. CODE § 49-5-13(b)(2) (1992); WIS. STAT. ANN. § 48.34(2m) (1987); WYO. STAT. ANN. § 14-6-229(b)(iv) (1994). However, this alternative is hardly taken seriously.

23. For a description of the rise and current status of the family preservation movement, see Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. OF CONTEMP. LEGAL ISSUES 1 (1995) [hereinafter Levesque, *The Failures of Foster Care Reform*]. For the most eloquent and detailed proposal for child protection, see U.S. DEPT. OF HEALTH AND HUMAN SERVS., NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN (1993); see also PROTECTING CHILDREN FROM ABUSE AND NEGLECT (Gary B. Melton & Frank D. Barry, eds., 1994) (containing a series of essays detailing effective child maltreatment prevention and treatment models and offering concrete strategies to create a society-wide safety net for children).

24. Gary B. Melton, *Is There a Place for Children in the New World Order?*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 491, 514 (1993) [hereinafter Melton, *New World Order*].

25. Despite this exclusion, it is important to note that family preservation efforts directed towards early childhood intervention have shown promise in preventing juvenile delinquency. See Edward Zigler et al., *Early Childhood Intervention: A Promising Preventative for Juvenile Delinquency*, 47 AM. PSYCHOLOGIST 997, 999-1004 (1992) (reviewing six major longitudinal studies of early childhood intervention programs and suggesting that they help reduce future delinquency); see also Kevin N. Wright & Karen E. Wright, *A Policy Maker's Guide to Controlling Delinquency and Crime Through Family Interventions*, 11 JUST. Q. 189, 192-201 (1994) (arguing that programs aimed at

States' decisions to exclude troubled youth from the new family preservation statutes originate in the "get tough" attitude that prevails in the current fight against crime. Those in charge of the juvenile justice system do not want to appear "soft" on crime.²⁶ They remain captive to public misperceptions of violent youth²⁷ and to increasingly strict legal edicts.²⁸ Conforming to the punitive ethos, juvenile court judges continue to remove delinquents from their homes and warehouse them in correctional facilities and nonpenal settings such as psychiatric hospitals or foster homes.²⁹ Few judges utilize in-home placement alternatives for nondangerous juveniles.³⁰

II. EXTENDING THE FAMILY PRESERVATION MOVEMENT TO JUVENILE JUSTICE: FEDERAL JURISPRUDENTIAL AND LEGISLATIVE BASES

Several obstacles block extending the family preservation movement to the juvenile justice system. The Supreme Court has long held that individuals have no general right to services in community settings, and that states have "no constitutional duty to provide substantive services within [their] borders."³¹ Moreover, children have essentially no federal legislative right to services.³² However, these obstacles are not

strengthening families will also reduce the factors in children's lives that place them at higher risk for delinquency and later criminality).

26. Several commentators have noted the constraint that "fear of scandal" imposes on juvenile court dispositions. Fear of scrutiny increases pressures to impose maximum restraints on offenders; anything less exposes the court to criticism, especially when recurrence of serious illegal activity inevitably creates the impression that previous dispositions were too lenient. See Feld, *The Principle of Offense*, *supra* note 8, at 886; Feld, *Juvenile Court*, *supra* note 8, at 714; see also Margaret Bortner, *Traditional Rhetoric, Organizational Realities: Removal of Juveniles to Adult Court*, 32 CRIME & DELINQ. 53, 68-70 (1986).

27. See *supra* notes 4-7 and accompanying text.

28. See generally, Feld, *Juvenile Court*, *supra* note 8 (reviewing four developments which have led to the criminalizing of the juvenile court: removal of status offenders, waiver of serious offenders to the adult system, increased punitiveness in sentencing delinquents, and more formal procedures).

29. See *supra* note 11 and accompanying text.

30. See *supra* note 22 and accompanying text.

31. *Youngberg v. Romero*, 457 U.S. 307, 317 (1982). For an examination of the right to services in a community setting, see Michael L. Perlin, *Law and the Delivery of Mental Health Services in the Community*, 64 AM. J. ORTHOPSYCHIATRY 194, 194-205 (1994).

32. The Supreme Court recently reaffirmed the lack of federal right to services in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992) (denying children supervised by a state child welfare

determinative. Despite the apparent lack of constitutional and federal legislative rights to services, states remain free to expand federal rights.³³ More importantly, although "affirmative" rights may not force states to extend the family protection movement to the juvenile justice system, "negative" rights remain a viable tool.³⁴

The United States is increasingly taking children's negative rights seriously.³⁵ In the context of institutional confinement, these rights include the freedom of movement, association, and communication.³⁶ For example, the Supreme Court has stated that children, like adults,

agency a private cause of action under the Adoption Assistance and Child Welfare Act of 1980 to compel state administration of federally mandated services on grounds that children under its supervision, as well as children in foster care, lack adequate standing to bring suit to enforce the Act's provisions); see Levesque, *Failures of Foster Care Reform*, *supra* note 23, at 20-22; see also Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L. J. 193, 232-35 (1994) [hereinafter Levesque, *Children's Rights Grow Up*] (concluding that "the Constitution imposes no affirmative duty on the government to safeguard any children's rights — even the paramount right to life itself" and noting that the federal legislature has yet to remedy this limitation by imposing affirmative obligations on states).

33. For example, several lower courts have held that there is a right to treatment for institutionalized juveniles. See, e.g., *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Pena v. New York State Division for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), *rev'd* 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977), *remanded*, 562 F.2d 993 (5th Cir. 1977), *reh'g*, 569 F. Supp. 332 (E.D. Tex. 1983); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).

34. See Levesque, *Children's Rights Grow Up*, *supra* note 32, at 227-35 (detailing the distinction between positive and negative rights and the growth and current statement of children's rights, both internationally and domestically).

35. See generally Levesque, *Children's Rights Grow Up*, *supra* note 32; Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L L. 237 (1995) [hereinafter Levesque, *American Adolescents?*]; Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989); Gary B. Melton, *Promoting Children's Dignity through Mental Health Services*, in UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: IMPACT ON UNITED STATES LAW (Cynthia P. Cohen & Howard A. Davidson, eds. 1990) [hereinafter Melton, *Promoting Children's Dignity*]; Gary B. Melton, *Socialization in the Global Community: Respect for the Dignity of Children*, 46 AM. PSYCHOLOGIST 66 (1991).

36. Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 797 (1988) (arguing that children have a right not to be confined and that confinement constitutes a severe restriction of individual liberty).

have a "substantial liberty interest in not being confined unnecessarily for medical treatment."³⁷ The same liberty interests are at stake in delinquency proceedings.³⁸ Taking these rights seriously requires confinement of juvenile offenders to be viewed as a last resort.

Federal legislative action has expanded the bundle of rights implicated when children are removed from home. Federal law mandates using the least restrictive measures to remedy juvenile problems prior to removing children from their homes.³⁹ In addition, several state statutes governing the institutionalization of minors mandate consideration of the least restrictive alternatives before removing children from their homes.⁴⁰ Proper respect for a juvenile's rights requires the consideration of the least restrictive alternatives before infringing upon his liberty and freedom to stay in his home and community.

In addition to constitutional and legislative mandates that protect the dignity and rights of juveniles, parental and family rights weigh heavily in favor of in-home solutions to juvenile justice problems.⁴¹ Although the balancing of the child's, parent's, and state's interests places a substantial priority on the child's best interests,⁴² the Supreme Court has clearly stated that parents have primacy in child-rearing.⁴³ The Court

37. *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

38. *In re Gault*, 387 U.S. 1, 12-13 (1967). There is no bar to extending constitutional protections to children because "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13.

39. See Levesque, *The Failures of Foster Care Reform*, *supra* note 23, at 13-20 (detailing the federal manifestation of this trend). The most obvious federal mandate derives from the Adoption Assistance and Child Welfare Act of 1980. For a detailed analysis of the Act, its failures and recommendations for reform, see *id.* at 13-22.

40. Weithorn, *supra* note 36, at 796-97.

41. See Gary B. Melton, *Law and Random Events: The State of Child Mental Health Policy*, 10 INT'L J. OF L. & PSYCHIATRY 81, 86 (1987) [hereinafter Melton, *Child Mental Health Policy*] (noting that a trend toward family autonomy is one of many trends involved in the reevaluation of children's rights).

42. See *Prince v Massachusetts*, 321 U.S. 158, 166 (1944). For an elaborate explanation of children's rights, see generally Levesque, *Children's Rights Grow Up*, *supra* note 32, at 202-08 (examining the balancing of interests when children's rights are involved).

43. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Pierce v Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the right of parents to "direct the upbringing and education of children under their control," free from unreasonable interference by the state).

has further found that parents' liberty interests in the care, custody, and management of their children are of fundamental importance.⁴⁴ The Court has affirmed that state intervention directed toward the family should focus on rehabilitation and recognize that "parents retain a vital interest in preventing the irretrievable destruction of *their family life*."⁴⁵ Indeed, the Court has specifically stated that the family *as a unit* is to be allocated a recognized interest.⁴⁶

III. REASONS FOR ADOPTING IN-HOME SOLUTIONS FOR JUVENILE JUSTICE

A. *Treatment Rationales*

Besides looking to constitutional and legislative innovations in child welfare to support a move toward in-home solutions, the traditional nature of the juvenile court supports rehabilitation rather than punishment. Although juvenile courts have increasingly moved toward punishment of "wayward youth,"⁴⁷ rehabilitation and treatment continue to be major goals.⁴⁸ Indeed, the ultimate goal of *juvenile* court intervention remains rehabilitating minors and returning them to their families.⁴⁹

44. See, e.g., *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (stating that previous cases have "made plain beyond the need for multiple citation" that the parental rights deserve deference "absent a powerful countervailing interest").

45. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (emphasis added); see also *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (holding a state intervention into parental notification rights unconstitutional); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) (recognizing parents' interests in preserving the integrity of family); Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem With the Direction of Welfare Reform*, 15 HAM. J. PUB. L. & PUB. POL'Y 1, 23-31 (detailing the importance and tenacity of the family paradigm in American law).

46. *Prince v. Massachusetts*, 321 U.S. at 165 (detailing the "sacred private interests" of parents' household); see also Roger J. R. Levesque, *The Supreme Court, U.S. Constitution, and Family Life*, Paper Presented to the Second International Interdisciplinary Study Group on Ideologies of Children's Rights, May 14, 1994, Charleston, South Carolina 4-7 (examining the Supreme Court's ideology of family life).

47. See *supra* notes 8-9 and accompanying text.

48. See *supra* note 21 and accompanying text.

49. See *supra* notes 8-9 and accompanying text. It is necessary to focus on rehabilitation, because very little attention and few federal, state, or local dollars, have been targeted toward prevention. *Juvenile Justice: A New Focus on Prevention: Hearing Before the Subcomm. of the Senate Comm. on the Judiciary on Juvenile Justice*, 102nd Cong., 2d Sess. 3 (1992) (opening statement of Sen. Kohl) [hereinafter *Kohl Testimony*].

In addition to clashing with the traditional goals of the juvenile courts, current out-of-home placements are outdated. Placing children in foster care⁵⁰ and using psychiatric hospitalization are no longer viable options.⁵¹ Perhaps more alarming, society has yet to feel the destructive effect of the distorted messages out-of-home placements send juveniles about themselves, their families, and the justice system.⁵² Taking rehabilitation and treatment seriously entails making meaningful attempts to provide effective services when and where they are most needed: when troubled youth have been identified and, where appropriate, in their own families or communities.

Although several states' statutes now reflect the general move toward noninstitutional placements for juvenile offenders,⁵³ few

50. See generally Levesque, *Failures of Foster Care*, *supra* note 23 (documenting the extent and roots of the current foster care crisis).

51. Psychiatric hospitalization of juvenile offenders is often a gross misuse of the mental health system. See Weithorn, *supra* note 36, at 783-95 (arguing that most adolescents in inpatient psychiatric facilities are inappropriately institutionalized and that the treatment is less effective and more costly than are community-based alternatives); see also 131 CONG. REC. 15,141 (1985) (testimony of Ira M. Schwartz, senior fellow at the Humphrey Institute of Public Affairs, at the University of Minnesota, Before the Select Comm. on Children, Youth and Families) (stating that adolescent admission rates to private psychiatric facilities increased by nearly 350% between 1980 and 1984; and 40% were unnecessarily admitted or admitted for too long); Evelyn C. Knaverhause, Comment, *The Federal Circle Game: The Precarious Constitutional Status of Status Offenders*, 7 COOLEY L. REV. 31, 47-48 (1990) (stating that too many children who do not need care are admitted to psychiatric facilities, while too few of the children in need receive necessary care).

52. See Ainsworth, *supra* note 9, at 1119-21 (1991) (arguing that as the juvenile courts lose legitimacy, the legal socialization of youth breaks down; if juveniles see the system as unjust, they will not adopt the system's rule as their own). For general discussions of the role that symbolism plays in juvenile law, see Gary B. Melton, *The Clashing of Symbols: Prelude to Child and Family Policy*, 42 AM. PSYCHOLOGIST 345 (1987); Melton, *Child Mental Health Policy*, *supra* note 41; Gary B. Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851 (1988).

53. For example, in 1990, the Nebraska Unicameral Legislature passed the Juvenile Services Act. NEB. REV. STAT. §§ 43-2401 to -2414 (1993 & Supp. 1994). The Act provides aid (financial and otherwise) to communities that are willing to develop local facilities and programs to achieve several objectives, including: the least restrictive and most effective intervention necessary for delinquent juveniles, alternatives to secure detention, and alternatives to geographically remote and more restrictive institutionalization. *Id.* §§ 43-2403(b), (d) & (e).

The program reflects a national trend, as reflected in the Juvenile Justice Standards promulgated by the Institute for Judicial Administration and the American Bar Association. The authors stated a clear preference to maintain juveniles at home whenever possible.

programs actually allow in-home placements for nondangerous juveniles. Despite the paucity of existing programs, sound reasons exist for taking more seriously the burgeoning movement away from punishment and diverting resources to family and community based programs.

A major obstacle in treating troubled youth has been the belief that their families are necessarily dysfunctional.⁵⁴ This notion has led to the unfortunate conclusion that delinquent youth should not remain in their homes. However, there is no reason to believe that juvenile justice intervention should serve purposes different from any other treatment: either returning clients home or placing them in suitable community settings.

Additionally, the perception that delinquent youth are essentially dysfunctional and in need of "defamilization"⁵⁵ simply ignores the fact that youth are as heterogeneous as their families.⁵⁶ Moreover, because juvenile crime necessarily results from individual, family, and environ-

"Removal from home is the most severe disposition authorized for adjudicated juveniles. As such, it should be reserved for the most serious or repetitive offenses, and rarely if ever, used for younger juveniles." INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS RELATING TO DISPOSITIONS 62 (1980); see also Schwartz, et al., *supra* note 10, at 378-81.

54. Marvin D. Free, Jr., *Clarifying the Relationship Between the Broken Home and Juvenile Delinquency: A Critique of the Current Literature*, 12 *DEVIANT BEHAV.* 109, 161 (1991) (stating that although "the literature fails to provide evidence supportive of a relationship between the broken home and serious delinquency . . . and that no conclusions can be drawn about the impact of the broken home on recidivism," there are still links between the nonintact home and status offenses, such as running away, truancy, and discipline problems in school); Katherine M. Wood, *The Family of the Juvenile Delinquent*, 41 *JUV. & FAM. CT. J. No. 1*, at 19, 20 (1990) ("Few view the family as possibly capable of a partnership role in the rehabilitative plan for the youth. Indeed, the family is frequently made the scape goat.").

55. Wood, *supra* note 54, at 19-20; see also *Down These Mean Streets: Violence by and Against America's Children: Hearing Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 1st Sess. 51, 53 (1989) (statement of Deborah Meier, Principal, Central Park East Secondary School in New York City) ("[T]he punitive reluctant quality of our public welfare programs has to be changed . . ."); Robert W. Sweet, Jr., *Strengthening Our Families, Fortifying Our Nation*, 42 *JUV. & FAM. CT. J. No. 3*, at 1 (1991) (discussing the prevailing perception that delinquent youth are dysfunctional).

56. The juvenile justice system has traditionally failed to distinguish between individuals and instead "lump[s] together children of very different stripes and patterns." LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 414 (1993); see also *id.* at 163-66, 413-17, 426-27 (examining the tendency to lump bad and bad-off children together).

mental factors,⁵⁷ it is unwise to attempt to prevent juvenile crime by removing juveniles from the conditions to which they will eventually return.⁵⁸ Because families and communities contribute significantly to juveniles' troubling behavior, family counseling remains the most effective method for treating juvenile offenders.⁵⁹ Indeed,

57. Although people are quick to blame the individual for wrongdoings, overwhelming evidence suggests that delinquent behavior is associated with characteristics of the social systems in which adolescents are embedded. A growing body of research indicates that antisocial behavior is related to important characteristics of the individual youth, family, peer system, school system, and community. See generally SCOTT W. HENGGELER, *DELINQUENCY IN ADOLESCENCE* (1989) [hereinafter HENGGELER, *DELINQUENCY*]; ALAN E. KAZDIN, *CONDUCT DISORDERS IN CHILDHOOD AND ADOLESCENCE* (1987); Magda Stouthamer-Loeber & Rolf Loeber, *The Use of Prediction Data in Understanding Delinquency*, 6 *BEHAV. SCI. & L.* 333 (1988).

58. "Little evidence supports the long-term efficacy of [incarceration or foster care] placements." Scott W. Henggeler et al., *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 *J. CONSULTING & CLINICAL PSYCHOLOGY* 953, 954 (1992) [hereinafter Henggeler et al., *Family Preservation*]. Recent studies show that in-home programs, even for serious offenders, are at least as effective as programs committing youths to the state. William H. Barton & Jeffrey A. Butts, *Viable Options: Intensive Supervision Programs for Juvenile Delinquents*, 36 *CRIME & DELINQ.* 238, 251 (1990).

As a result, services to children and families are likely to be effective "when they are delivered in 'natural' settings like the home and the school, and when they are not confined to measured units of service (e.g., fifty minutes of psychotherapy) but instead are delivered when and where people need them." Melton, *New World Order*, *supra* note 24, at 496. See generally SCOTT W. HENGGELER & CHARLES M. BORDUIN, *FAMILY THERAPY AND BEYOND: A MULTISYSTEMIC APPROACH TO TREATING THE BEHAVIOR PROBLEMS OF CHILDREN AND ADOLESCENTS* (1990); Gary B. Melton, *It's Time for Neighborhood Research and Action*, 16 *CHILD ABUSE & NEGLECT* 909 (1992).

59. Experts agree that family-based intervention represents the most promising treatment for adolescents with antisocial behavior. See Albert R. Roberts & Michael J. Camasso, *The Effect of Juvenile Offender Treatment Programs on Recidivism: A Meta-Analysis of 46 Studies*, 5 *NOTRE DAME J. L., ETHICS & PUB. POL'Y* 421, 437-38 (1991) ("The primary finding of this quantitative meta-analysis of 46 studies is that one treatment modality with adjudicated delinquents, family counseling, does appear . . . effective in reducing recidivism for at least one year post-treatment."). Likewise, family intervention has received wide endorsement as a locus for preventive intervention, especially primary intervention. See Alan E. Kazdin, *Treatment of Antisocial Behavior in Children: Current Status and Future Directions*, 102 *PSYCHOLOGICAL BULL.*, 187 (1987) (examining the present status of treatment for antisocial child behavior and identifying new alternative approaches based on contemporary outcome research). See generally HENGGELER, *DELINQUENCY*, *supra* note 57; Donald A. Gordon & Jack Arbuthnot, *Individual, Group, and Family Interventions*, in *HANDBOOK OF JUVENILE DELINQUENCY* 290, 304 (Herbert C. Quay ed., 1987); Pamela S. Howitt & Eugene Arthur Moore, *Pay Now So You Won't Pay Later: The Effectiveness of Prevention Programming in the Fight to Reduce Delinquency*, 44 *JUV. & FAM. CT. J. No. 2*, at 57 (1993) (describing community based

multisystemic family preservation⁶⁰ efforts conducted in community settings have been extremely effective in reducing the institutionalization and attenuating the criminal activity of even serious offenders.⁶¹ These developments in social service delivery are significant. They support not only the new family-focused, community-based approach, but also the proposition that it is not impossible to rehabilitate delinquents.⁶²

B. *Economic Arguments*

A most intriguing characteristic of juvenile justice agencies is their general failure to conduct cost-benefit analyses.⁶³ Despite the establish-

prevention programs and suggesting that they are one strategy to reduce the chance of costly judicial intervention).

60. Multisystemic therapy (MST) addresses multiple correlates of delinquency that have been demonstrated to characterize the family, peer, and educational settings of delinquent youth. MST is intensive (the average duration of treatment is approximately 30 hours of direct contact over three months) and time limited (services range from 2 to 4 months) and directed toward familial and extrafamilial systems. See generally HENGGELER & BORDUIN, *supra* note 58.

61. Henggeler et al., *Family Preservation*, *supra* note 58, at 954. These benefits are even more pronounced after 2.4 years of intervention. David A. Haapala & Jill M. Kinney, *Avoiding Out-of-Home Placement of High-Risk Status Offenders Through the Use of Intensive Home-Based Family Preservation Services*, 15 CRIM. JUST. & BEHAV. 334 (1988); Scott W. Henggeler et al., *Family Preservation Using Multisystemic Treatment: Long-Term Follow-up to a Clinical Trial with Serious Juvenile Offenders*, 2 J. CHILD & FAM. STUD. 283 (1993). Such intervention has been particularly effective with adolescent sexual offenders and inner-city juvenile delinquents. See generally U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP MODEL PROGRAMS 1990, 3 (1992) (examining the efficacy of Targeted Outreach); Charles M. Borduin et al., *Multisystemic Treatment of Adolescent Sexual Offenders*, 34 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 105 (1990); Haapala & Kinney, *supra*, at 345 (reporting that out of 678 high-risk status offenders who received homebuilders services, 592 (87%) avoided out-of-home placement during a 12-month follow-up period); Scott W. Henggeler et al., *Multisystemic Treatment of Juvenile Offenders: Effects on Adolescent Behavior and Family Interaction*, 22 DEVELOPMENTAL PSYCHOLOGY 132 (1986) (concluding that the multisystemic approach is a promising model of behavior disorders and treatment). For a recent listing of major research on alternatives to institutionalization for serious juvenile offenders, see JONES & KRISBERG, *supra* note 4, at 36-40.

62. The juvenile justice system has historically been plagued by the premature conclusion that "nothing works" in apparently futile attempts to rehabilitate youth. See Theodore N. Ferdinand, *History Overtakes the Juvenile Justice System*, 37 CRIME & DELINQ. 204 (1991) (offering a concise historical survey of the juvenile justice system's failure to rehabilitate youth and reasons for these failures).

63. Cf. Albert R. Roberts & Michael J. Camasso, *Juvenile Offender Treatment Programs and Cost-Benefit Analysis*, 42 JUV. & FAM. CT.J. No. 1, at 37, 45 ("In view of the millions of dollars spent annually to protect society, punish, care for, and rehabilitate

ment's disregard for economic analysis, research demonstrates that the cost of serving juveniles in their homes is considerably lower than the cost of serving them through institutionalization.⁶⁴ One estimate, which compares in-home placement programs that utilize intensive supervision of youths with institutionalization, reports that in-home programs cost approximately one-third as much as institutionalization.⁶⁵ Other research shows that placements in mental health facilities are even more expensive.⁶⁶ A number of recent studies have demonstrated the effectiveness and economic advantages of intense, in-home family preservation efforts.⁶⁷ Such future monetary savings and averted criminal justice costs demand consideration of policies aimed at helping young offenders in their family environments.⁶⁸

C. *International Developments*

When examining youths' rights to stay in their own families and communities during rehabilitation efforts, policy makers must remember that children are entitled to a decent, stable home environment. That entitlement is a human right memorialized in international declarations

juvenile offenders, it is surprising that hardly any cost-benefit analysis studies have been conducted by juvenile justice agencies.”).

64. *Id.*

65. Barton & Butts, *supra* note 58 (suggesting that, notwithstanding the economic benefits, policy reasons favor in-home rehabilitation over out-of-home rehabilitation services). Barton and Butts present results of a five-year study in Michigan that compared groups of juveniles randomly assigned to either in-home, intensive supervision, or commitment. *Id.* at 238-39, 251.

66. See SCHWARTZ, (IN)JUSTICE, *supra* note 9, at 132-48.

67. Henggeler et al., *Family Preservation*, *supra* note 58, at 959; see also BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 160-61 (1993) (describing Massachusetts' experience in removing thousands of youngsters from training schools and placing them in community programs and comparing the \$170 spent per day for youths in secure treatment to \$23 per day for youth in nonresidential outreach and tracking programs). Another recent study reported that, even without intensive family preservation efforts, serious felony offenders who are not institutionalized but still under intensive supervision, fair as well as others who were institutionalized. Wiebush, *supra* note 21, at 83-86. Moreover, these programs become more cost-effective as the programs increased in size. *Id.*

68. See Kohl Testimony, *supra* note 50; Roberts & Camasso, *supra* note 63, at 42-45; see also MARK H. MOORE, FROM CHILDREN TO CITIZENS: VOL I. THE MANDATE FOR JUVENILE JUSTICE 171, 171-88 (1987).

and conventions,⁶⁹ and its significance is reflected in the United Nations' declaration of 1994 as the International Year of the Family. That year highlighted the importance of the family and its role in promoting healthy behavior.⁷⁰

In addition to recognizing the rights and duties of children and families, the United Nations recently adopted The Riyadh Guidelines, which are aimed at delinquency prevention.⁷¹ These guidelines demonstrate the international community's renewed focus on families⁷² and communities,⁷³ and its continued belief that young people should be institutionalized only as a last resort.⁷⁴ This new international ethos in juvenile justice reflects recent changes several countries have made in their approaches to juvenile justice.⁷⁵

69. See Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1448 (1989). The Convention establishes children's rights to: a family environment, "a full and decent life," and "a standard of living adequate to the child's physical, mental, spiritual, moral and social development." *Id.* at preamble, Art. 23, art. 27; see also Levesque, *Children's Rights Grow Up*, *supra* note 32, at 212-17 (detailing the substantive language of the Convention).

70. See generally Levesque, *American Adolescents*, *supra* note 35, at 278 n.203.

71. United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), Dec. 14, 1990 resol. 45/112 in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 346-55.

72. *Id.* at 348. Section IV(A)(12) of the Riyadh Guidelines states:

Since the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children.

Id.

73. *Id.* at 351, § IV(C)(32) ("Community-based services and programs which respond to the special needs, problems, interests and concerns of young persons and which offer appropriate counselling and guidance to young persons and their families should be developed, or strengthened where they exist.").

74. *Id.* at 352, § V(46) ("The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance.").

75. A frequently cited example of these international changes is the recent approach taken by New Zealand. New Zealand's Children, Young Persons and Their Families Act of 1989 provides a new mandate for juvenile justice that emphasizes the following principles: involving families in juvenile justice decisions; keeping children in their homes; strengthening and maintaining child-family relationships; and promoting the development of the child in the family. See Allison Morris & Gabrielle M. Maxwell, *Juvenile Justice in New Zealand: A New Paradigm*, 26 AUSTL. & N.Z. J. CRIMINOLOGY 72, 72-73, 75-78,

The international movement has important repercussions for American policy. The United States' traditional hostility toward human rights treaties is fading, as demonstrated by the United States' recent ratification of the International Covenant on Civil and Political Rights.⁷⁶ By ratifying the covenant, the United States demonstrated its willingness to comply with internationally developed norms and, more importantly, to protect families and juveniles. The Covenant on Civil and Political Rights explicitly protects families⁷⁷ and proposes a justice system that contains special procedures for juveniles designed to "promot[e] their rehabilitation."⁷⁸

D. *General Policy Considerations*

Finally, public policy goals demand that policy makers consider the human benefits of avoiding institutionalization. Even if the costs and general efficacy of the punitive, out-of-home-community and rehabilitative, in-home-community options were equivalent, and if states ignored the rights and treatment needs of children, basic values would dictate a preference for in-home rehabilitation. Obvious social benefits derive from programs that reduce crime because of the high human costs of victimization. It is just as important, however, to avoid the unnecessary social cost that may arise from an out-dated, inefficient rehabilitation system. Wise public policy demands supporting family integrity, minimizing restrictions on liberty, and limiting intrusions on the privacy

84-89 (1992) (explaining the importance of these provisions).

76. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States adopted and ratified the Covenant in 1992. See White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992).

77. International Covenant on Civil and Political Rights, *supra* note 76, Art. 23 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

78. *Id.* Art. 14(4) ("In the case of juvenile persons, the procedure shall be such as will take account of their ages and the desirability of promoting rehabilitation."). Note, however, that the United States placed a reservation on article 14(4), which reserved the right to treat juveniles as adults in "exceptional circumstances." S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 13-14 (1992); see also David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1183-84, 1195 (1993) (detailing the significance of the United States' ratification, as well as the reservation placed on the juvenile justice provisions).

of youths and their families.⁷⁹ The soundness of this philosophy is reflected in an important line of research which documents the intuitively obvious necessity of establishing a justice system that both its participants and society perceive as "just."⁸⁰

IV. THE STATUS OF JUVENILE JUSTICE IN STATE FAMILY PRESERVATION MOVEMENTS

All fifty states provide for in-home placement of juvenile offenders, typically as a statutory dispositional alternative open to the juvenile courts.⁸¹ Over half of the juvenile court acts, by their own terms, "shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in the child's own home, the care, guidance and control that will best serve the child's welfare and the best interest of the state."⁸² These provisions, however, are merely boilerplate guidelines, duplicating the language of the Uniform Juvenile Court Act.⁸³ They are not substantive directives that order juvenile

79. See Henggeler et al., *Family Preservation*, *supra* note 58, at 959; see also Melton, *New World Order*, *supra* note 24, at 514-15 (arguing that the family preservation movement adopts a focus that compliments the widely accepted societal values of protecting family integrity).

80. For an authoritative analysis of the importance of certain forms of procedures in the justice system which help encourage certain behaviors, see generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). See also E. Allan Lind & P. Christopher Earley, *Procedural Justice and Culture*, 27 *INT'L J. PSYCHOLOGY* 227, 227-40 (1992) (succinctly reviewing the "procedural justice literature," the manner in which people evaluate the fairness of social decision-making procedures, and demonstrating its cross-cultural significance).

81. See *supra* note 22 and accompanying text.

82. IOWA CODE ANN. § 232.1 (West 1994); see also, e.g., NEB. REV. STAT. § 43-246(4) (1993). The Nebraska Juvenile Code is to be construed:

To achieve [its purpose] in the juvenile's own home whenever possible, separating the juvenile from his or her parent when necessary for his or her welfare or in the interest of public safety and, when temporary separation is necessary, to consider the developmental needs of the individual juvenile in all placements and to assure every reasonable effort to reunite the juvenile and his or her family.

Id.

83. The act is to be read "to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interests of public safety." UNIFORM JUVENILE COURT ACT § 1(3), 9A U.L.A. 4 (1987). The Act has been adopted in full by only three states — Georgia, North Dakota, and Pennsylvania. *Id.* at 1.

One state, however, incorporated the Uniform Act's focus on community empowerment and has become a model. The objectives of Oregon's Community Juvenile Services Acts

courts to utilize existing community- and home-based resources.

Although juvenile codes often do not contain substantive directives mandating the use of home- and community-based resources, a large number of state statutes express preferences for in-home treatment of troubled youth and for family preservation.⁸⁴ Unfortunately, these statutes are a recent phenomenon and remain uninterpreted by appellate courts. The relative inattention given to these statutes provides us with

are as follows:

- (1) The family unit shall be preserved;
- (2) Intervention shall be limited to those actions which are necessary and utilize the least restrictive and most effective and appropriate resources;
- (3) The family shall be encouraged to participate actively in whatever treatment is afforded a child;
- (4) Treatment in the community, rather than commitment to a state juvenile training school, shall be provided whenever possible; and
- (5) Communities shall be encouraged and assisted in the development of alternatives to secure temporary custody for children who are not eligible for secure detention.

OR. REV. STAT. § 417.410 (1987). The program has improved juvenile justice by decreasing the number of at-risk youth who enter the system. See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP JUVENILE JUSTICE BULLETIN (1990). The focus, however, has typically been on community involvement by providing more shelters, specialized foster care, runaway projects, and services for street youth. *Juvenile Justice: A New Focus on Prevention: Hearing Before the Subcomm. of the Senate Comm. on the Judiciary on Juvenile Justice*, 102nd Cong., 2d Sess. 32, 36 (1992) (testimony of Thomas R. English, Executive Director of the Oregon Council on Crime and Delinquency).

84. This Article will not discuss family preservation acts which explicitly excluded delinquent youth. See, e.g., Alabama's Individual and Family Support Program, ALA. CODE §§ 38-9A-1 to -8 (Supp. 1994) (applying only to families and persons with a developmental disability); Arizona's Family Support Program, ARIZ. REV. STAT. ANN. § 36-596.51-.57 (1993) (applying only to families with developmentally disabled children); Louisiana's Community and Family Support System Act, LA. REV. STAT. § 28:821-.824 (West Supp. 1995) (providing in home and family services for persons with developmental disabilities); Maine's Family Support Services Act, ME. REV. STAT. ANN. tit. 34-B, § 1802 (West Supp. 1994) (focusing on providing in-home, family based services for children with disabilities); The Oklahoma Family Support Act, OKLA. STAT. ANN. tit. 56, § 603 (West 1992) (preventing or delaying "out-of-home placement of children with severe developmental disabilities"); Wisconsin's Family Support Program, WIS. STAT. ANN. § 46.985 (West 1987 & Supp. 1993) (focusing on enabling the parents of disabled children to care for their disabled children in their homes rather than placing the children in institutions or other out-of-home placements).

Nor will the Article discuss recent family support statutes aimed primarily at the special needs of families with infants and toddlers. See, e.g., Illinois' Early Intervention Services System Act, ILL. ANN. STAT. ch. 325, para. 20 (Smith-Hurd 1993); Mississippi's Early Intervention Act for Infants and Toddlers, MISS. CODE ANN. § 41-87-1 to -19 (1993); Rhode Island's Family Support Program, R.I. GEN. LAWS. § 42-72.2-1 to .2-6 (1993).

the opportunity to explore how they may be used to revise the juvenile justice system.

A. *Statutes Arguably Including Delinquent Youth*

Many states' family preservation statutes, while not expressly extending in-home services to those in the juvenile justice system, arguably apply to delinquent youth. For instance, while Florida's statute, on its face, appears limited to children already in foster or shelter care,⁸⁵ it also explicitly states that the program will provide "[e]ffective treatment to address [the] physical, social, and emotional needs" of all families.⁸⁶ These needs arguably could result from delinquent behavior.⁸⁷ Similarly, other statutes offer home-based services when parents lack the ability to control their children.⁸⁸ Such uncontrollable behavior might include juvenile delinquency. Still other statutes apply "to all children and families who have need of services, or who, by their circumstances or actions, have violated the laws, rules, or regulations of

85. FLA. STAT. ANN. § 409.803 (West 1993) (enumerating the services provided to "children in shelter and foster care," or to "facilities which provide such care," but not to delinquent children removed from their homes).

86. *Id.* § 409.802.

87. *See* 1993 FLA. LAWS ch. 200. In 1993, a Florida House Bill revamped the juvenile justice system by creating the Community Juvenile Justice System Act of 1993, which states the legislature's intent that institutional resources and community-based resources be managed to facilitate a community-based continuum of care. *Id.* Although the statute targets the community, the statute also aims to preserve, rehabilitate, and reunite families by providing home-based care. *Id.* The bill explicitly states that it is the "policy of the state to provide a family-centered constellation of services [and that the] primary goal of these services in the preservation of families." *Id.*; *see also* VA. CODE ANN. § 66-26 to -35 (Michie 1991 & Supp. 1994) (developing and supervising delinquency prevention programs).

88. *See, e.g.*, ARK. CODE ANN. § 9-16-106(a) (Michie 1993); KY. REV. STAT. ANN. § 200.590(1)(c) (Baldwin 1991); PA. STAT. ANN. tit. 62, § 2174(a)-(b) (Supp. 1994).

The Kentucky statute also expressly states that the "implementation of family preservation services shall be limited to those situations where protection can be assured for children, families, and the community." KY. REV. STAT. ANN. § 200.590(3) (Baldwin 1991). Likewise, the statute strictly prohibits family services when "children are at risk of recurring sexual abuse perpetrated by a member of their immediate household who remains in close physical proximity to the victim or whose continued safety from recurring abuse cannot be reasonably assured;" and to "families in which one or more adults in the immediate household are drug or alcohol dependent and not in active treatment for such dependency." *Id.* § 200.590(2)(a), (b).

the state and are found to be in need of treatment or rehabilitation
⁸⁹

The goals of the family preservation statutes vary from state to state.⁹⁰ Some attempt to pre-empt juvenile and family problems.⁹¹ Others strive to serve the best interests of the children⁹² and the

89. NEB. REV. STAT. § 43-532(2) (1993).

90. See, e.g., ARIZ. REV. STAT. ANN. § 8-546.A.5 (Supp. 1994) (developing a protective services program which seeks "to prevent dependency, abuse and exploitation of children" and provides "social services to stabilize family life, and to preserve the family unit . . ."); FLA. STAT. ANN. § 409.801 (West 1993) ("The primary goal of the Legislature is to protect, preserve, and enhance the stability and quality of Florida's families . . . [and] to prevent family dysfunction and the loss of family independence."); MD. ANN. CODE. art. 49D §§ 2(a), 38(a) (1994) ("promot[ing] a stable, safe, and healthy environment for children and families, thereby increasing self-sufficiency and family preservation" and calling for "family preservation services that [promote] the integrity of the family and avoid inappropriate out-of-home placements" because inappropriate out-of-home placements have the deleterious effect of "increas[ing] costs to the State and diminish[ing] the ability of a parent to care adequately for the child"); MINN. STAT. ANN. § 256F.01 (West 1992) (outlining a state policy "to assure that all children, regardless of minority racial or ethnic heritage, live in families that offer a safe, permanent relationship with nurturing parents or caretakers," and directing public social services toward "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family if it is desirable and possible"); MONT. CODE ANN. § 41-7-102(1) (1993) (aiming "to support and preserve the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children"); NEB. REV. STAT. § 43-535 (1993) (declaring that "the family is the backbone of Nebraska and its is in the best interest of Nebraska to solidify, preserve, strengthen, and maintain the family unit"); N.J. STAT. ANN. § 30:4C-74.a (West Supp. 1994) ("The obligation of the State to preserve the sanctity of the family and prevent the placement of children outside the home should be fulfilled in the context of a clear and consistent policy which emphasizes the strengthening of families through the application of intensive family preservation services . . .").

91. See MO. REV. STAT. § 210.002.2(4) (1994) (directing state agencies to "[f]ocus resources on social and health problems as they begin to manifest themselves, rather than waiting for chronic and severe patterns of illness, criminality, and dependency to develop"); MONT. CODE ANN. § 41-7-102(2)(a)(ii) (1993) (promoting a policy directed toward "assisting vulnerable families before crises emerge by providing specialized services to strengthen and preserve families experiencing problems before they become acute and by providing early intervention and family support services").

92. The Nebraska Act plans to obtain the following objectives:

- (a) Preservation of the family unit whenever the best interests of the juvenile require it,
- (b) Limitation on intervention to those actions which are necessary and the utilization of the least restrictive yet most effective and appropriate resources;
- (c) Encouragement of active family participation in whatever treatment is afforded

community⁹³ by improving parenting skills⁹⁴ and providing services in the least restrictive environment.⁹⁵ The ultimate goal is family preservation,⁹⁶ reunification,⁹⁷ or permanent alternative placement.⁹⁸

Pennsylvania's Family Preservation Act of 1989⁹⁹ provides the most powerful statement against out-of-home placement. The Act bluntly states that the family is a "basic institution in society"¹⁰⁰ and that out-of-home placements sever unique bonds and leave "emotional scars on . . . children which may never fully heal."¹⁰¹ Notwithstanding

a juvenile whenever the best interests of the juvenile require it;

(d) Treatment in the community rather than commitment to a youth rehabilitation and treatment center whenever the best interests of the juvenile require it; and

(e) Encouragement of and assistance to communities in the development of alternatives to secure temporary custody for juveniles who do not require secure detention.

NEB. REV. STAT. §§ 43-2403(4)(a)-(e); *see also* N.J. STAT. ANN. § 30:4C-74(c) (West Supp. 1994).

93. *See* MONT. CODE ANN. § 41-7-102(2)(a)(i) (1993) (establishing children and family services that provide a "community network [which] offers a range of family support services, activities, and programs designed to promote family well-being"); NEB. REV. STAT. § 43-532(1) (1993) (recognizing "that children develop their unique potential in relation to a caring social unit, usually the family, and other nurturing environments, especially the schools and community").

94. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-546.A.5 (1994); ARK. CODE ANN. §§ 9-16-102(3)(B)-(C) (Michie 1993).

95. *See* KY. REV. STAT. ANN. § 200.595(3) (Baldwin 1994) ("No family preservation services program shall compel any family member to engage in any activity or refrain from any activity which is not reasonably related to remedying a condition or conditions that gave rise to or which could reasonably give rise to any finding of child abuse, neglect or dependency"); *see also* NEB. REV. STAT. §§ 43-532(1), -2403(a)-(e) (1993).

96. *E.g.*, NEB. REV. STAT. § 43-2403(4)(a).

97. *See, e.g.*, FLA. STAT. ANN. §§ 409.801 - 409.803 (West 1993 & Supp. 1995) (offering a range of services to children in order to facilitate reunification); MINN. STAT. ANN. § 256F.01(2)-(4) (West 1992); NEB. REV. STAT. § 43-246(4) (1993) (requiring that reasonable efforts be made in order to achieve reunification); *id.* § 45-533(4) (requiring reuniting the juvenile in a time frame appropriate to the juvenile's age and developmental needs).

98. In Minnesota, when restoring families is not possible or appropriate, state agencies will attempt to place children in suitable adoptive homes and ensure adequate care of children when they cannot be placed for adoption. MINN. STAT. ANN. § 256F.01(2)-(4) (West 1992).

99. PA. STAT. ANN. tit. 62, §§ 2171-2175 (Supp. 1994).

100. *Id.* § 2172(a)(1).

101. *Id.* § 2172(a)(3).

the deep commitment of foster parents, the Pennsylvania legislature explained "that children are better off emotionally when their needs can be met by their biological parents."¹⁰²

The services provided under the family preservation statutes also differ from state to state. These services range from parenting classes¹⁰³ to a "continuum of care"¹⁰⁴ in the "least restrictive environment."¹⁰⁵ Some programs provide "direct therapeutic services"¹⁰⁶ or individualized treatment¹⁰⁷ based on specifically outlined service criteria.¹⁰⁸

The scope of rights afforded under general family preservation statutes varies widely. In many statutes, family preservation initiatives begin when a child is in immediate or imminent risk of out-of-home

102. *Id.* § 2171(a)(4).

103. *See supra* note 94 and accompanying text.

104. While Maryland's family preservation statute calls for home-based treatment, *see supra* note 90, it is not clear what services will ultimately be involved, because the new policy is only in the planning phase. According to § 38(b)(3), the plan shall include:

- (i) A schedule for phasing in family preservation services with a goal that, as resources are made available, all families determined to be suitable for these services after July 1, 1995 shall receive them;
- (ii) Descriptions of the types of children and families who shall receive family preservation services;
- (iii) Descriptions of the types of family preservation services available;
- (iv) Descriptions of the situations in which the family preservation services available would not be appropriate.

MD. ANN. CODE § 38(b)(3) (1994).

Regardless of the form the family preservation program takes, it must "provide a continuum of care that is family and child oriented . . . [and] which gives priority to children and families most at risk." *Id.* § 2(b)(2).

105. *See supra* note 95 and accompanying text.

106. The Arkansas legislation "provides direct therapeutic services to families in accordance with family preservation models as prescribed by policy." ARK. CODE ANN. § 9-16-102(3)(B) (Michie 1993).

107. *See, e.g.*, LA. REV. STAT. ANN. § 46:287.2.A(3) (West Supp. 1994); N.J. STAT. ANN. § 30:4C-77 (West Supp. 1994).

108. The New Jersey Act states that family preservation is based on the principles that: 1) children's safety is always the first concern; 2) "children should be raised by their own families whenever possible;" and 3) "intervention should build on family strengths and be responsive to family needs." N.J. STAT. ANN. §§ 30:4C-74.C(1)-(3) (West Supp. 1994). The act also outlines certain criteria for family preservation programs. The criteria concern family preservation services, the development of manuals, the development of a Family Preservation Services Coordinating Unit, and annual reports documenting costs, the number of participating families, and effectiveness. *Id.* §§ 30:4C-77 to -81.

placement.¹⁰⁹ Others do not establish any entitlement to services, leaving the question of what to do to preserve families to the political and budgetary process.¹¹⁰ The strongest statutes, establish "bills of rights,"¹¹¹ which provide considerable protections for families,¹¹² limit the intrusiveness of preservation efforts,¹¹³ and establish childrens' rights to permanent lifetime relationships¹¹⁴ that preserve their racial or ethnic heritage.¹¹⁵

109. See, e.g., ARK. CODE ANN. § 9-16-106(a) (Michie 1993); KY. REV. STAT. ANN. § 200.580 (Baldwin 1991); LA. REV. STAT. ANN. § 46:287.2.A (West Supp. 1995); PA. STAT. ANN. tit. 62, § 2174(e)(2) (Supp. 1994).

110. Louisiana's statute explicitly states that it does not "create an entitlement [to family preservation or in-home services] nor [does it] . . . create judicial authority to order the provision of family preservation services . . ." LA. REV. STAT. ANN. § 46:287.2.C (West Supp. 1995). Subject to the availability of funds, the Louisiana legislature bestowed discretionary authority upon the Department of Social Services to implement family preservation services according to its own plan and time frame. *Id.* § 46:287.2.B; see also *id.* §§ 46:287.5 .A-D.

Similarly, Montana's statute explicitly states that it should "not be construed to require a service or particular level of services or to grant a right of action to enforce this section or other law." MONT. CODE ANN. § 41-7-102(3) (1993).

111. See, e.g., ARK. CODE ANN. §§ 9-16-107(b)-(c) (1992); KY. REV. STAT. ANN. § 200.595 (Baldwin 1991).

112. For example, Kentucky's family preservation statute provides that: Acceptance of family preservation services shall not be considered an admission of any allegation that initiated the investigation of the family, nor shall refusal of family preservation services be considered as evidence in any proceeding except where the issue is whether the Cabinet for Human Resources has made reasonable efforts to prevent removal of a child. KY. REV. STAT. ANN. § 200.595(2) (Baldwin 1991); see also *id.* § 200.595(3) ("No family preservation services program shall compel any family member to engage in any activity or refrain from any activity which is not reasonably related to remedying a condition or conditions that gave rise or which could reasonably give rise to any finding of child abuse, neglect or dependency.").

113. See *supra* notes 98 and 114 and accompanying text.

114. The Minnesota Family Preservation Act outlines a state policy "to assure that all children, regardless of minority racial or ethnic heritage, live in families that offer a safe, permanent relationship with nurturing parents or caretakers." MINN. STAT. ANN. § 256F.01 (West 1992). To ensure that children are able to establish lifetime relationships, the Act requires that public social services be directed toward "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family if it is desirable and possible." *Id.* § 256F.02.

115. The Minnesota statute includes a statement which explicitly requires that prevention and family reunification services to minorities "must reflect and support family models that are accepted within the culture of the particular minority." *Id.* § 256F.03

B. Statutes Expressly Including Delinquent Youth

Seven states¹¹⁶ have passed family preservation statutes that explicitly extend in-home services to families with children in the juvenile justice system.¹¹⁷ While differing in scope and application, these statutes share the common goal of preventing family dissolution.¹¹⁸ To achieve this goal, the statutes require a variety of home-

subd. 8; *see also* Minnesota Indian Family Preservation Act, MINN. STAT. ANN. § 257.35-.3579 (West 1992 & Supp. 1995).

116. Colorado, Georgia, Nevada, New Mexico, North Carolina, Tennessee and West Virginia. The Georgia legislature enacted a family preservation statute. However, the Georgia Family Preservation and Child Protection Act contained a sunset provision, effective January 1, 1993. The legislature did not renew the Act and all provisions were repealed. GA. CODE ANN. §§ 49-5-200 to 49-5-209 (1994), *repealed by* 1990 Ga. Law 1986. § 2.

117. *See* COLO. REV. STAT. ANN. § 26-5.5-104(2)(b) (West Supp. 1994) (stating that intensive preservation efforts will be available to all appropriate families involved in the child welfare, mental health, and *juvenile justice* systems); NEV. REV. STAT. § 232.400(3) (1993) (requiring the newly-formed Division of Child and Family Services to “develop standards for carrying out programs aimed toward the prevention of delinquent acts of children” and programs for their treatment); N.M. STAT. ANN. §§ 32A-17-3.A to -3.E (Michie 1993) (including delinquent children in definition of those at risk for out-of-home placement, thereby qualifying their families for in-home services); N.C. GEN. STAT. § 143B-150.6(b) (1993) (extending eligibility for in-home services to “children ages 0-17 years who are at risk of imminent separation through placement in public welfare, mental health, or *juvenile justice* systems”) (emphasis added); TENN. CODE ANN. § 37-3-602(1)(D) (1991) (stating that a risk of out-of-home placement may result from dependency, abuse, or neglect, emotional disturbance, family conflict or a *delinquency adjudication*); W.VA. CODE §§ 49-2D-3, -2D-6 (1992) (requiring a hearing to determine whether “reasonable efforts have been made to stabilize and maintain the family situation” prior to removing a child because of “abuse, neglect, dependency or *delinquency* or any emotional and behavioral problems”) (emphasis added).

118. *See, e.g.*, COLO. REV. STAT. ANN. § 26-5.5-102(1)(a) (West Supp. 1994) (“Maintaining a family structure to the greatest degree possible is one of the fundamental goals that all state agencies must observe . . .”); *id.* § 26-5.5-102(1)(d) (viewing family preservation services as “an opportunity to initiate the systemic reforms of children, youth, and families [sic] public services by providing services that are family-focused, outcome-driven, and cost-efficient . . .”); N.M. STAT. ANN. § 32A-17-4.B(3) (Michie 1993) (striving to solve “practical problems that contribute to family stress, so as to affect improved parental performance and enhanced functioning of the family unit”); N.C. GEN. STAT. § 143B-150.5(b) (1993) (attempting “to keep the family unit intact by providing intensive family-centered services that help create, within the family, positive, long-term changes in the home environment”); TENN. CODE ANN. § 37-3-603(a) (1991) (requiring the delivery of services which are “reasonably expected to avoid out-of-home placement and also afford effective protection of the child, the family, and the community”); W. VA. CODE § 49-2D-1 (1994) (finding a need to “assist dysfunctional families by providing

based services to prevent the unnecessary removal of delinquent children.

The procedural protections afforded to children vary under these family preservation statutes. In New Mexico, for example, the in-home services requirement begins when a "child may reasonably be expected to face out-of-home placement."¹¹⁹ Other states, however, do not require home-based services until an actual or imminent risk of out-of-home placement develops.¹²⁰ Additionally, most states do not guarantee children procedural due process protections. While many states require that rehabilitation occur in the "least restrictive environment,"¹²¹ only West Virginia requires a hearing to ensure that all reasonable efforts have been made to stabilize the family before a child may be placed outside the home.¹²²

The actual services provided to children and families differ from state to state. Most states require short-term, intensive, home-based services.¹²³ Many statutes do not specify the exact services to be provided, while others outline comprehensive service packages. For example, New Mexico's statute authorizes services ranging from

nurture and care to such families' children as an alternative to removing children from such families").

119. N.M. STAT. ANN. § 32A-17-2 (Michie 1993).

120. See, e.g., N.C. GEN. STAT. § 143B-150.6(b) (1993); TENN. CODE ANN. § 37-3-603(a) (1991).

121. COLO. REV. STAT. ANN. § 26-5.5-102 (West Supp. 1994) ("[t]he state's intervention in family dynamics should not exceed that which is necessary to rectify the cause for intervention."). The principle of "least restrictive environment" is implicit in this codification of restraint. See also NEV. REV. STAT. ANN. § 232.400(1)(c) (Michie 1991) (specifying that when out-of-home placement is unavoidable, children are to be placed in the "least restrictive environment available which is appropriate to their needs").

122. W. VA. CODE § 49-2D-3 (1992). The required hearing is waived if the child is in "imminent danger of serious bodily or emotional injury or death." *Id.*

123. See N.M. STAT. ANN. § 32A-17-2 (Michie 1993) (specifying the provision of "short-term, intensive services provided to a family whose child may reasonably be expected to face out-of-home placement"); N.C. GEN. STAT. § 143B-150.5(b) (1993) (requiring "intensive family-centered services that help create, within the family, positive, long-term changes in the home environment"); TENN. CODE ANN. § 37-3-602(2) (1991) (describing the required services as "short-term, highly intensive services" designed to aid a family by keeping it intact and caring for the child at home); cf. W.VA. CODE § 49-2D-2(b) (1992) (requiring either intensive, short-term "home-based family preservation services" or "[h]ome-based, longer term after care following intensive intervention" intended to stabilize and maintain the natural or surrogate family in order to prevent the placement of children in substitute care).

emergency cash grants to basic support services.¹²⁴ Other statutes establish a floor of minimal services,¹²⁵ and some merely call for the development of program standards.¹²⁶ Tennessee is alone in establishing follow-up mechanisms to evaluate the cost-effectiveness and success of keeping children at home.¹²⁷

While not uniform, statutes that explicitly provide for family preservation in the juvenile justice system embrace the family preservation movement by recognizing the similarity between nonviolent juvenile offenders and other child welfare clients. By focusing on rehabilitation, not punishment, these statutes are models for the appropriate integration of juvenile offenders into the family preservation movement.

IV. REVISIONING JUVENILE JUSTICE

This Article examined a new movement in child welfare and illustrated its applicability to the juvenile justice system. After examining several theoretical and practical considerations, this Article proposed that extending the new family preservation movement to juvenile justice

124. New Mexico's statute authorizes a comprehensive package of services, including "child care, education and training, emergency cash grants, state and federally funded public assistance or any other basic support or social service appropriate for the family." N.M. STAT. ANN. § 32A-17-4.B(4) (Michie 1993). These services are limited "to the extent of available resources." *Id.*

125. See COLO. REV. STAT. Ann. § 26-5.5-104(3) (West Supp. 1994) (enumerating minimal services and when they are to be provided).

126. Nevada centralized child and family services to accomplish the following goals:

- (1) The diagnosis and assessment of the needs of particular children and families, including those in need of multiple services;
- (2) The referral of children and families to appropriate services; and
- (3) The management and monitoring of cases in which the children and families are referred to multiple services.

NEV. REV. STAT. § 232.400(2)(a) (Michie 1993). The purposes of the new centralized service system is to "[m]aintain the integrity of families" and "[e]nsure that children are not unnecessarily removed from their homes." *Id.* § 232.400(2)(b) (1)-(2). Nevada directed its efforts toward family preservation, rehabilitation, and reunification. *Id.* § 232.400(1)(b).

127. TENN. CODE ANN. § 37-3-604 (1991) (requiring evaluation of the effectiveness of the programs after one, two and three years). Georgia also required follow-up studies to report the number of families receiving services, the number of children in out-of-home placement, the cost of providing out-of-home services, and the number of children who remain with their families after one, two and three years. GA. CODE ANN. § 49-5-202(f) (1990), *repealed by* 1990 Ga. Laws p. 1986, §2. The reports from the pilot projects were to be used to consider the feasibility of state-wide implementation.

would help alleviate the "youth problem." The new family preservation statutes provide a legal context for pursuing these innovative dispositional strategies. Several statutes target delinquent children as a group that needs family-focused and community-based attention.¹²⁸ Including delinquent youth in the family preservation movement is momentous. Legal rules and policies relating to social services and juvenile justice remain within state jurisdiction, with the federal government providing some minimal standards and guidelines.¹²⁹ Any widespread shift away from current, punitive models of juvenile justice must begin in state legislatures. By explicitly expanding the scope of the family preservation movement, several states have initiated an important shift.

Despite the promise these family preservation statutes show, however, they may become useless. These statutes could become yet another much-heralded event in child welfare that eventually proves ineffective. It has become cliché to suggest that policy makers and professionals representing the law, social services, and mental health *must* work together to develop integrated, in-home programs for children in trouble.¹³⁰ As we have seen, the coordination of services that result in effective, in-home rehabilitation practices is no longer just good public policy — increasingly, it is becoming the law.

128. See *supra* part IV.B. Other statutes indirectly include delinquent youth through provisions aimed at families with children in conflict or families that have trouble controlling their children. See *supra* part IV.A.

129. See *supra* part II.

130. See, e.g., Mark Soler & Carole Shauffer, *Fighting Fragmentation: Coordination of Services for Children and Families*, 69 NEB. L. REV. 278 (1990). For a discussion of the types of problems likely to be encountered in integrating services across agencies and disciplines, see Brian Sarata & Dave Provorse, *Trying to Remodel the Children and Youth Service System: Observations About Barriers and Opportunities*, 9 BEHAV. SCI. & L. 143 (1991) (discussing the intergovernmental planning process that occurred as one of the primary steps in implementing the Family Policy Act in Nebraska).

Attorneys have an ethical obligation to inform juvenile courts of the need for in-home dispositional alternatives. See John L. Roche, *Juvenile Court Dispositional Alternatives: Imposing a Duty on the Defense*, 27 SANTA CLARA L. REV. 279, 283-86 (1987). Even though the new statutes may not have much "bite," the presence of these laws facilitate successful negotiation for outcomes that otherwise might not have been available. See generally Robert D. Cooter, et al, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (evaluating divorce law as a framework for negotiation).