

## **Part 1 JJ Code**

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## PREFACE

The purpose of the *Tribal Legal Code Resource: Tribal Juvenile Laws* is to assist tribal nations in drafting and/or revising their juvenile statutes (a.k.a. “ordinances,” “codes,” or “code provisions”) as part of the development and/or reform of their juvenile justice systems. Such system and law design should reflect the vision and values of the tribal community to be served. This resource is intended to be used as a part of policy and planning discussions and includes sample statutory language with critical commentary. This resource is also intended to assist with the blending of the vision and values of the Native community and to reinforce the tribal community’s commitment to, and protection of, their youth.

*In revising or developing a juvenile code or system, the grown-ups must acknowledge that they have not given their children a world consistent with Native traditional values. Much has gone into that “failure,” but in our Native hearts we know it is our failure and not theirs. The effort made in working on the juvenile code and system must be dedicated to righting that failure; to restoring to Native children the benefit of dedicated adults in our nations, who take responsibility for the world they have entered and lead.*

*The children of our Tribal Nations must be given the opportunity to assume their rightful places. We will not shield them from responsibility or from the consequences of their actions, nor will we excuse bad behavior, theirs or ours. This code, this juvenile system, should help us, adults and children, to remember our respective places in the world, and remind us that we have a personal responsibility to ourselves, our families, our clans, our communities, and our world and all that share that world. We are Native people with shared beliefs and responsibilities; they are not now nor were they ever optional. —Chief Judge Abby Abinanti (Yurok)*

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DRAFT - EDC Webinar

## **PART I: OVERVIEW**

### **CHAPTER 1**

#### **HOW TO START A CODE DEVELOPMENT PROJECT**

##### **[1.1] Introduction**

Tribal nations are increasingly reassuming responsibility for their children after an era in which their nations' powers and resources were limited for a variety of reasons, many of which were not within their control. Never have Tribal Nations denied their responsibility to their children, but now they are determined to assume and/or take back control of guiding them into adulthood. It is also increasingly evident that Native youth benefit from responsible Native adult guidance, as opposed to the guidance of those who are not familiar with the strengths of Native people or with a Native vision for the future of Tribal Nations.

Tribal Nations are sovereign governments. Many tribes have asserted exclusive or concurrent criminal jurisdiction and/or civil jurisdiction over "crimes" committed by Native youth enrolled in a tribe, or living on or near tribal lands. Tribal leaders and parents are painfully aware that Native youth have embraced or have been caught up in negative activities and behaviors—many that would not have occurred in a prior era. Today, responding appropriately to the unacceptable behavior of Native youth requires that Tribal Nations accept responsibility by drafting or revising juvenile justice codes.

This resource was developed to provide a starting point for drafting or revising tribal juvenile justice laws and to acquaint the drafters with the basic elements of many juvenile justice systems. In the course of drafting such a code the drafters will need to make decisions about the values that will guide their work with their youth.

This resource highlights federal and state law considerations and includes sample provisions from model tribal and state juvenile codes<sup>1</sup> and existing tribal juvenile codes.<sup>2</sup> Critical commentary on sample statutory provisions and exercises are provided to assist drafters in refining their thinking as they design the juvenile justice system best suited to their individual communities.

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<sup>1</sup>This includes relevant excerpts from the National Indian Justice Center's (NIJC) Juvenile Justice Code and the Uniform Juvenile Court Act of 1968 (drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1968—which influenced the drafting of many state juvenile statutes and the NIJC Model Code). We note also that at the time of first publication, the University of Washington's Native American Law Center issued its recently completed Model Tribal Juvenile Code, drafted as part of the John D. and Catherine T. MacArthur Foundation's Models for Change initiative. We were unable to review the provisions of this comprehensive model in time for publication of this resource. We encourage tribal law drafters to additionally review and consider the provisions of the University of Washington's model code.

<sup>2</sup>This includes relevant excerpts from the juvenile codes of the Absentee-Shawnee, Eastern Band of Cherokee, Confederated Salish and Kootenai Tribes, Kalispel, Oglala Sioux, Pascua Yaqui, Sault Ste. Marie, Warm Springs, White Mountain Apache, and Zuni tribes.

## **[1.2] WHAT THIS RESOURCE GUIDE CAN DO**

This resource is designed to assist tribal communities in drafting laws to address youth misconduct and to assist youths and their families.

This resource is also designed to encourage the participation and commitment of the immediate family, extended family, and entities within the wider tribal community with an interest in the welfare of youth. Juvenile system and law reform may be accomplished with or without attorney input. Attorneys often have, unless they are well grounded in the values of the drafting community, a built-in bias for the justice system that they have studied and worked in. In many instances, this bias has been debilitating to drafters who seek a model that is not a mirror of the state or federal system. The best results come from a full community discussion of competing values, so that approaches or options are designed to meet as many needs as possible consistent with community values. Attorneys may be of assistance in the final drafting of the law, after important decisions are made by the community.

This resource is designed to guide tribal communities through the discussions necessary to create a juvenile justice code for their communities. This resource is NOT intended to be used as a template or a model code, but rather to be used as a guide by tribal communities to create a unique code tailored to each individual tribal community.

If you are a member of a tribal council, or if you are a tribal community member who has started thinking about creating or revising a juvenile justice code, then you are ready to begin. The first decision is “shall we do this? Shall we create a code or revise our existing code?” If the answer is yes, then using this resource as a road map for discussions will get you where you want to go.

## **[1.3] WHAT THIS RESOURCE GUIDE CANNOT DO**

This resource cannot make anyone into an expert in juvenile justice, nor does it focus in depth on the substantive issues, for example, what causes delinquent conduct. It cannot “fix” your children, your families, or your community. Many questions and concerns in these areas will not be addressed in this resource.

The more your tribe, its members, and the communities of interest involve themselves in these discussions, the greater the chances of having this code become a springboard to wider solutions. The work of establishing a code is limited in scope, but essential to the creation of a responsive juvenile justice system.

## **[1.4] A NOTE ON TERMINOLOGY**

Tribal governments use a variety of terms to describe their laws, including *statutes*, *ordinances*, and *codes*. Generally, the term *code* refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a *statute* or *ordinance*. In this resource

guide, the terms will be used interchangeably in order to be relevant to a wide variety of audiences.

When using this guide, and throughout the drafting process, it is a good idea to keep at least one dictionary by your side. We recommend using one or more of the following:

- A general dictionary, such as *Merriam-Webster's Collegiate Dictionary*
- A law dictionary, such as *Black's Law Dictionary*
- A law dictionary for nonlawyers, such as *Law Dictionary for Non-Lawyers* by Daniel Oran

A glossary is provided in the appendix of this document to define legal terms, as those terms are used in this resource.

***Point of Discussion: English language and tribal law***

- How many people in our community speak our traditional language?
- Does English always reflect our tribal community values accurately?
- Are there legal terms in our traditional language that might be important to use in our tribal laws?

If a number of people in the community speak the traditional language or feel that using traditional language is important, then it may be useful to include traditional language/terms in tribal laws and programs. The community may more readily accept the program or laws if they are representative of the culture.

## **[1.5] HOW TO USE THIS RESOURCE GUIDE**

There are two principle parts in this guide:

- **Part 1: Overview**
- **Part 2: Workbook**

The overview portion of the resource guide provides a wealth of information on tribal juvenile justice systems, trends, and cultural awareness. It is recommended that all members of the code revision working group read the overview section or participate in a presentation that includes the information contained in the overview, so that the working group can start with some common understandings.

The workbook portion of the resource guide is designed to be used as a tool for a facilitator of the code revision working group. Each of the workbook sections is divided into four main parts:

1. Overview
2. Tribal Code Examples
3. Tribal Code Commentary
4. Exercises

Each section of the workbook relates to key sections of a juvenile code. The overview briefly discusses the code section, often referring back to a section in the Overview for additional information. The Tribal Code Examples section provides a review of how other tribes have dealt with the topic in their juvenile code. The code examples are followed by a section called Tribal Code Commentary that discusses the tribal code examples and explains key provisions or differences between examples given. The fourth section, Exercises, is designed to help your community find the provisions that meet your needs. It will:

Guide you look at the current code, justice systems, and situations that relate to the particular code section covered in the chapter.

Provide questions and sometimes additional material for consideration and discussion by your working group.

The workbook section is meant to ensure that your tribe will have a juvenile code that truly fits the needs, resources, and values of your unique community.

## **[1.6] TEAM SELECTION AND GUIDELINES**

Much thought should go into selecting your code drafting team, for they will be the first line of drafters and must be willing to commit the time and energy needed for this very demanding project. The following is a list of people/agencies that may be useful in drafting this code.

- Survivors of the juvenile system, including family members
- Tribal prosecutor or one who serves in the role of juvenile prosecutor
- Tribal law enforcement
- Tribal juvenile probation officer
- Social Services, including Child Protection or Indian Child Welfare workers
- Substance abuse treatment provider
- Mental health treatment provider
- Medical care personnel
- Domestic violence advocates and batterer treatment provider
- School personnel
- Education department
- Corrections personnel
- Youth council representative
- Defense advocates or attorneys
- Elders
- Cultural mentor/leader
- Tribal court judges including personnel in alternative judicial systems
- Any services used for transition, job training, and so forth
- Tribal council members
- Any state or federal agency interacting with Native youth relative to offenses

Indian country has been besieged with the need for code development and/or revisions in recent years. Historically, as tribal nations developed codes and courts to dispense justice, a very common practice was to simply adopt state code and change the name to a tribal name, often times not even making the name switches throughout the document. As time has gone by many of those “change the name codes” have proven to be inadequate to address the needs of tribal people and current code drafters are increasingly seeking to draft documents that reflect their tribal needs and values.

This history has created a knowledge base that allows us, the drafters of this resource, to make some suggestions for you to consider as you begin the process. The tips set out in the following text come from the successful efforts of other tribal nations.

**1. The primary work should be done by individuals known throughout the community as “problem solvers.”**

This work will not successfully reach the goal of producing a juvenile justice code if it becomes a process of finger pointing and blaming others for weakness in the current law or approach. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions, both long term and short term, to problems.

**2. There should be equal representation from various tribal agencies and advocacy programs.**  
Equal representation is important. The code development process should not be the “property” of any one agency or group.

**3. The work should be completed in a setting of mutual respect.**

The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner.

**4. The agenda should be focused upon areas of mutual concern or shared interest.**

Try to focus on areas of common interest instead of differences. A shared vision such as meaningful consequences designed to address the needs of the offender, the victim, and the community to ensure a healthy community can create confidence and trust.

**5. The participants should be willing to examine not just the way things are, but also be willing to explore ways of improving the law.**

All participants must be willing to talk about and explore new ways to address the needs of youth in their community. This is a process where different people will have differing views and it is a time when it is possible to listen and learn from each other.

**6. The participants should be willing to be creative and persistent.**

To be successful, each person involved must be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think outside the box.

**7. The participants must be willing to share the burden.**

This means sharing resources, training, technical assistance, and limited available funding. Alternate the locations of meetings so that the burden of hosting and/or travel does not fall on the same people.

**8. All agencies should be allowed input into drafting prior to finalization of the draft.**

All tribal agencies involved should have a chance to review the draft code before it is considered completed. Because each agency will have to use the final product people should be familiar and in agreement if at all possible.

**9. Consider traditional/cultural strategies and the adaption of those values to modern issues and practices.**

We are all aware that times have changed. That does not necessarily mean that values have or should change. What it does mean is that we need to do the work of updating the application of those values to today's problems.

**10. Expect to spend a great deal of time together.**

Try to be aware of applicable cultural practices, including making sure that meals are provided for lengthy meetings. Make sure that everyone is as comfortable as possible. Note that there are now substantial restrictions on the use of federal funds for food. The safest practice is to use nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.

## **[1.7] HOW TO ORGANIZE TO CREATE A JUVENILE CODE**

There are several approaches to organize to start work on a juvenile code. The key is to pick one that your initial team or council thinks will be successful. Some groups have decided to do the drafting in a "retreat" format, where the "team" spends several days in a row working through the process to create a working draft. Others have established representative working groups focusing on different areas with a timeline and regular meetings scheduled to develop a draft. Another approach is to have a core group create a draft for wider circulation to representative groups and individuals, including a process for community input. Any of these approaches can use a facilitator and all should include a recorder to keep track of the work.

There is no right way or better way. The best way is the one that reflects the preference of your community. Remember, this is a very difficult and important process and taking the time to do the job right is essential. Do not rush the process. Do not cut short the input process. The code should be a document that reflects the needs and vision of the community it serves. It is not a standalone product and should not be developed as such.

It is important to ascertain if there are any funds available to assist in the development of the code. In-kind contributions can be important and significant: for instance, a meeting place; supply support (copying, mailing, paper, pens); any part-time staff assignment for research, note keeping, and creating drafts; covering mileage costs or providing transportation; and/or providing a meal.



***Point of Discussion: How do we create a realistic timeline?***

Consider the resources in your community, including:

- How large is our tribal nation (population and territory)?
- How many people will be involved in writing the code?
- Do we have a budget for training and/or facilitators?
- Who can provide staffing to ensure record keeping and communication?
- What level of community input will we seek?

Answering these questions prior to beginning code development can assist your community to properly prepare and manage expectations of how quickly the work can be accomplished.

It is important that all members of the team or working group be provided with a binder of existing documents that they agree to review and study before beginning their work together, including but not necessarily limited to:

- Tribal constitution and/or bylaws.
- Any existing controlling or impacting tribal/federal/state juvenile justice codes.
- All related tribal codes (family/dependency/placement/probate).
- Lay-friendly summary of Western scientific research on the human brain and adolescent development.\*
- Any written stories from the community concerning corrective actions involving youth in a cultural context.
- Any oral stories concerning traditional corrective actions involving youth.
- Any anthropological documentation or historical records, regarding rearing/disciplining youth, about your tribe or other tribes with whom you share cultural or linguistic ties.
- Copies of any tribal court opinions related or relevant to youths in the community.
- Any existing tribal juvenile code.

\*For further information see: The Teen Brain: It's Just Not Grown Up Yet, National Public Radio <http://www.npr.org/templates/story/story.php?storyId=124119468>

The Teen Brain, Harvard Magazine  
<http://harvardmagazine.com/2008/09/the-teen-brain.html>

Teenage Brains, National Geographic  
<http://ngm.nationalgeographic.com/2011/10/teenage-brains/dobbs-text>

**When developing your code development team, DO ...**

***Point of Discussion: What are the benefits of using a team approach?***

Writing a strong, high-quality law is not the only benefit of working with a multidisciplinary team. Other possibilities include:

- Educating more community members about youth issues;
  - Sharing ownership of the problem and responsibility to solve it; and
  - Communicating about tribal values.
- 
- Select code development team members with various viewpoints who have demonstrated interest, expertise, or experience with the juvenile justice system or issues related to youth.
  - Select, if possible, members of all the disciplines who are involved in the juvenile justice system.
  - Select team members who are “survivors” of the current juvenile system, including their family members.
  - Make sure the selection process includes elders and cultural leaders. Select, if possible, a team member(s) who is currently in the juvenile system, including family members.
  - Design a process that invites broad-based participation in identifying issues and making recommendations. If possible, the process should be one of consensus, as that is more likely to ensure widespread acceptance and is more in keeping with many traditional resolution practices.
  - Proceed in phases with set time frames/meeting times, including a study phase in which juvenile code issues that are important to the community are identified before drafting provisions.
  - Assign manageable tasks to team members or subcommittees, to be accomplished within clear time frames.
  - Emphasize person-to-person communication. Develop a communication plan that ensures everyone in the work group is kept informed of the process and project status.
  - If experiencing an impasse or disagreement in the work group, consider having an expert<sup>3</sup> address the issues, presenting a pro and con discussion for consideration.

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<sup>3</sup> Local experts might include for example, school officials who could discuss their disciplinary policies, juvenile intake/probation officers who could describe the existing juvenile intake and monitoring process, presenting officers or prosecutors who could describe what types of cases they tend to prosecute, judges who could talk about existing juvenile court processes and the realities of available dispositions, and school, law enforcement, and justice system

## **DON'T ...**

- Select code development members based *only* on their positions within the tribal judicial system.
- Overlook the current science on adolescent brain development.
- Disregard the importance of traditional beliefs, values, approaches, and/or customary law.
- Devote resources to drafting before consensus is reached concerning priority issues and recommendations.
- Be discouraged by lack of participation or lack of progress.
- Delay too long before dividing the work of the team into tasks that can be accomplished within the time frames established.
- Get bogged down in what you cannot accomplish, or resources you do not currently have but need or want.
- Let difficult or divisive issues be resolved by forcing a change in the law or maneuvering to avoid public meeting and discussion that would provide a wider range of opinions.

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personnel from other jurisdictions implementing model processes (loop them in by phone), e.g., pre-court diversions from school or law enforcement to teen court, family conferencing at juvenile court intake, diversions to therapeutic dockets like wellness court, circle sentencing, family mediation, peacemaking, etc.

## **[1.8] PROBLEM EVALUATION/NEEDS ASSESSMENT**

As a starting point it is important to know what the needs and the options available in the community are.

- How many tribal children, adolescents, and young adults are living in your nation?
- How many tribal children, adolescents, and young adults are in the juvenile system?
- What options are currently available for tribal children, adolescents, and young adults for assessment and treatment?

Fact gathering is necessary before starting the actual work of drafting a new code. The need for legal, historical, cultural, and scientific research is described in the previous section. However, it is also necessary to do some basic fact gathering. The following information will be helpful:

- How many children up to age ten are enrolled members, or may be eligible for enrollment (some tribes have set ages for becoming enrolled)?\*
- How many adolescents ages ten to seventeen are enrolled members or may be eligible for enrollment?\*
- How many young adults ages eighteen to twenty-five are enrolled members or may be eligible for enrollment?\*
- How many of the children, adolescents, and young adults in the above age ranges are members of other tribes residing on reservation?
- How many of the children, adolescents, and young adults in the above age ranges, are children of members, but not eligible for membership?
- How many enrolled children, adolescents, and young adults (of any Indian nation) living in your Nation are currently involved with the delinquency system either on or off the reservation? Keep separate statistics for your nation and other tribal nations and on- and off-reservation actions.
- Provide an estimate of the number of all children, adolescents, and young adults who are enrolled (age break down) and who are involved in the dependency system (include adolescent and young adult parents).
- List the location and type of every placement option used for tribal and/or Indian children, adolescents, and young adults including nontribal reservation residents.
- Identify schools on reservation or off reservation used for children, adolescents, and young adults. (If possible school-based services should be identified for each school.)
- Identify all mental health assessment options (particularly interested in ability to trauma assess, dual diagnosis, and ongoing treatment options).
- Identify all health facilities that can do assessments regarding sexual abuse and can assess whether the individual is of danger to his or her self and/or others. (A full assessment would include a suicide assessment and immediate acting out potential.)
- Identify any and all hotlines that are applicable or could be applicable.

- Identify all inpatient/outpatient options (on and off reservation) for treatment of substance abuse for children, adolescents, and young adults.
- Make note of distance to all inpatient/outpatient options off reservation.
- Identify any case managers in any system currently with tribal children, adolescents, and/or young adults in their caseload: domestic violence, substance abuse, and social services, including those with transitional caseloads.
- The team should visit the nearest commonly accessed juvenile and dependency courts to view hearings, that include, where relevant, tribal, state and federal courts. The team when observing should pay particular attention to what “parts” are necessary and what parts could change, for example, must a judge sit on a bench with a robe or can she sit at a table.
- The team should tour commonly used treatment and detention facilities and group homes. The team needs to decide whether these facilities and approaches are the ones it is comfortable with for tribal children, adolescents, young adults, and their families.
- Probation officers and police officers, who are assigned to these individuals, should be contacted to determine what resources they can bring to the table.
- All children’s, adolescent, and young adult programming available should be listed, either tribal or community based.

As a starting point, it is important to know what options are available. At this juncture you may need to remind the team not to get bogged down in feeling bad about any perceived lack of resources. Every community has to start somewhere. Part of the process of developing a juvenile code will be to raise community awareness of the issues affecting tribal youth. The team can continue to work on other system improvements after developing the code.

It will become clear early on that the issues of juvenile justice are impacted not just by the law, but are also impacted by systems, including the tribal and local community system available to guide children to adulthood. Tribal people once had intact systems and community supports for successfully raising and mentoring youth, and we can again if we have the will, or develop the will, to recreate these systems and supports.

***We can again develop a community and system that will support our youth on their path to adulthood.***

\*Currently, even state juvenile justice systems are being reformed to take into account new scientific research with respect to the development of the human brain. The human brain is now understood to have different capacities and abilities depending upon whether it belongs to a child, an adolescent, or a young adult. Juvenile justice system reformers recommend an approximation with age as follows: that a “child” includes individuals up to age ten; that an “adolescent” includes individuals from ten to seventeen; and that a “young adult” includes individuals from eighteen to twenty-five. This brain development research has implications for tribal statutory drafting where the implication is that children ten and younger should be presumed to fall within the tribe’s dependency law (e.g., with respect to child maltreatment);

adolescents should be presumed to fall within the tribe’s juvenile law (e.g., with respect to status offenses, delinquent acts, and related families-in-need-of-services [FINS] matters); and tribes should consider extending the tribal court’s juvenile jurisdiction, to be exercised at the discretion of the judge, up to age twenty-five. (See page 18 for more information).

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## CHAPTER 2

### PRELIMINARY CHOICES TO GUIDE CODE DEVELOPMENT

#### [2.1] INTRODUCTION

It is important, once your team is selected and a development process adopted, that several questions be discussed thoroughly. Resolution of these questions will shape the development of the code provisions. Your team must feel comfortable with the foundation of the code before drafting the laws that will focus the tribe's response to problems and concerns with their youth, families, and community.

The team may choose to hold community meetings to resolve philosophical approaches if they are not clear as to community preferences or if they believe that the community has not fully considered the various options. The issues can be divided: first, between organizational issues; for example, what to include within the proposed juvenile justice laws: Do we wish to reform our laws for children and adolescents (including child maltreatment, placement, status offenses, and delinquent acts)? Do we want to focus primarily on status offenders or youth who commit what would be crimes if they were adults? Do we want to use a status offense model or a FINS model? Which population is best served with the out-of-court resources available? Second, those issues that shape the response of the people to the concerns presented by the behavior of youth, including philosophical approaches; for example, is the code to be guided by principles derived from cultural values, restorative justice, punishment/retribution, or rehabilitation? Will the new law be informed by the science on adolescent brain development? Is there a way to combine of approaches (traditional approaches no doubt provided for a youth's stages of development)? See Chapter 30: "Integrating Culture, Customs, Traditions, and Generally Accepted Practices."

Other issues that need to be resolved include issues that impact all community members, such as:

- Should these courtroom actions be open or closed to the public?
- Should certain youth, by virtue of age or the act, be deemed not suited for the juvenile process?
- At what age, if any, should violent offending youth be transferred to adult criminal court (or should such provisions be removed from existing law)?
- What precourt or diversion programs or activities exist for youth?
- What mechanisms are available to presenting officers and prosecutors to reach agreements with youth and their families to obtain remedial/rehabilitative services and/or to participate in precourt or diversion programs or activities?
- Should some youth be emancipated before the age of majority (identify the age of majority)?
- Should the juvenile court retain jurisdiction over some young adults until age twenty-five?

- When should notice of court proceedings and mandates to participate be required for family, extended family, and/or ceremonial relatives?
- When should traditional authorities be recognized to weigh in on or decide matters?
- When should traditional healers or ceremonies be used?
- Should identified traditional dispositions be mandated in the law or left up to the judge to be decided case by case?
- Should identified traditional or more Western reparations be mandated in the law or left up to the judge to be decided case by case?
- What process has been established to authorize and assist a judge in learning about the applicable custom or tradition where he or she does not know it?
- Should there be a youth’s bill of rights?
- Should there be a bill of duties and obligations owed to youth by the tribe and the family/extended family, and so forth?
- Should all juvenile records be destroyed at a certain point or just certain juvenile records?

This chapter describes the issues that should be resolved prior to the drafting of a tribe’s juvenile code.

## **[2.2] PHILOSOPHICAL CHOICES**

### **A. HABILITATION AND REHABILITATION—IDENTIFYING AND MEETING THE NEEDS OF TODAY’S NATIVE YOUTH AND THEIR FAMILIES**

A philosophical choice is defined as a reasoned or sensible choice. Many tribes today are seeking to promote the welfare of their youth by committing to a “habilitative” and “rehabilitative” juvenile justice system—where the goal is to help youth become capable and/or to bring youth back to a healthy condition. In designing juvenile justice laws, it is critical to learn about what is happening to youth, particularly within the given tribal community. This includes learning about current crises; listening to youth and their families; learning about existing youth services, programs, and activities; recognizing deficits; and seeking to reform relevant portions of the justice, case-management, treatment, educational systems, and so forth. This process should include an exploration of various therapeutic justice models that are often incorporated in precourt, post court, or court diversion processes. We know that nationally, Native youth are experiencing high rates of substance use/abuse, mental health problems, and suicide. By prioritizing an effort to study the local welfare and justice statistics of our youth, and by committing to design, fund, and implement habilitation and rehabilitation services, programs, and activities for tribal youth and their families, tribes seek to meet cultural and traditional duties and obligations to youth.



## B. TRIBAL CULTURAL VALUES

Many people—tribal and nontribal—discuss the desire to have a culturally responsive juvenile system. Several factors have to be considered. First, people are often referring to values that shaped practices in the past. It is important to note that there is a significant difference between practices (a.k.a. “traditions”) and values (a.k.a. “legal norms”). While older practices may not be workable or relevant in today’s world, the values may be very relevant. For instance, a tribe may have as a value a certain behavior standard; for instance, a value of not stealing/borrowing another’s horse. That value would require the redressing practice of including extended family involvement in discipline for a boy who stole/borrowed a horse without permission. The remedy could require that the boy and his family (uncles) care for the horses of the wronged party for a period of time and/or that the boy and his family replace the horse of the other family, if the horse died as a result of the boy’s misbehavior.

The value placed on the support and involvement of the boy’s family, could be incorporated into the tribal juvenile system so that the boy learns that his behavior reflects not just on him but also on his family. A tribe could determine that the family unit is responsible for redressing a wrong committed by a youth. If they did, that particular code would set out the redressing practice of dispositional conditions that required involvement of a defined family, including extended family. In a situation in which the youth’s extended family is not willing or unable to participate, and in which the behavior is not with a horse but, for example, a car, then the issue becomes how can or should that value be adapted when he does not have extended family participation and/or how can it be adapted when the theft involved or the wrong behavior involved is not as parallel. (Parallel meaning where everyone in the last century was sure to have both extended family and a horse the same cannot be said today for extended families or cars.)

If there is a desire to have a culturally relevant code then the working group must determine:

- What the values (legal norms) of the community were at a time that the group wishes to model (no stealing);
- Whether there was family involvement in redress;
- What corrective practice(s) (traditions) existed; and
- How can those values (legal norms) be adapted to the circumstances of today?

It is important to realize that certain behaviors did not exist, for example, methamphetamine abuse. With new behaviors and problems the culture must adapt. For instance, all horse-involved tribes at one point were pre-horse; they adapted once the horse was incorporated into their daily life. The adaptation is possible if the discussion focuses on the value (and sometimes the practice is also relevant).

Some tribes have found it useful to hold community meetings and/or to establish a culture-bearer/elders committee to work simultaneously with their law drafting committee. This group or committee could be tasked with “finding” and discussing the nuances of the cultural values relevant to current problems, e.g. methamphetamine abuse. This discussion could focus on

the following initial questions that would be relevant to the rehabilitation and accountability of substance users:

- What are the values with respect to youth (how do we value them)?
- What are the values with respect to physical and spiritual renewal leading to healing and recovery?
- What duties and obligations are owed to youth and by whom?
- What values should be taught to youth re: self-respect, honoring self, positive beliefs, etc.?
- What are the values re: how youth should manage their thoughts, emotions, and physical reactions?
- Who are the traditional healers and mentors?
- What are the traditional healing practices, activities, and ceremonies re: healthy relationships, parenting, rites of passage for youth, etc.
- What are the traditions and values surrounding restitution to and reconciliation with persons harmed by the youth's conduct?

The law drafting committee would then identify the relevant value and the framework they believe best represents the cultural foundation they wish to adapt to the present circumstances. Once the value and cultural foundation is identified, the “modernization” work can be done. Be aware that adaptation may be needed, for instance, if the traditional institution is weakened or nonexistent (e.g., a functional extended family does not exist). A model could be created that reflects the institution – mentors, counselors, probation officers, caseworkers, or other volunteers or personnel might be given roles similar to those of extended family members (e.g., mentors, sponsors, cultural educators, and/or to work with professionals to culturally modify evidence-based treatment methods, particularly in the areas of substance abuse and trauma counseling). Additionally, or alternatively, better efforts to identify and involve actual extended family members could be required under the tribal code.

### C. RESTORATIVE JUSTICE

Practices and programs from peacemaking courts to family conferencing have been called restorative justice. Strictly speaking, these programs are encompassed in restorative justice, though they do not represent the whole restorative justice approach. Restorative justice involves certain principles and practices as set forth in the following text. Not all alternatives to “standard” practices are necessarily restorative, and it is essential that practitioners not contribute to the confusion in this area. It is also important to understand that certain practices and programs can embrace principles of restorative justice without adopting the entire approach.

Please see Chapter 32: “Peacemaking Court” for further information.

Restorative justice very specifically requires that the harms and needs of the victim be addressed, and that the offender is held accountable for their act and for righting the harms. The victims, offenders, and community must be involved in this process.

The process recognizes that some offenses are simply not repairable, in that there is no way of repairing the harm or of going back. In those cases, the healing is the effort to put right acts, as in aiding the victim's journey toward their life after the event. The offenders must realize and acknowledge the effect of their actions on others, and they must take responsibility for those actions. Likewise the community must address any contributions to harms that are attributable, even in part, to the community as a whole; for example, failure to intervene when children are raised in homes by parents or parental figures that are rendered harmful by virtue of untreated substance abuse. Traumatized children will often emerge as victimizers, not realizing the link between harmed and becoming the harmer.

Restorative justice, unlike nonrestorative justice systems, often includes a direct meeting between the victim and the offender, when they negotiate with each other on how to make things right. However, the inability to have a direct meeting does NOT invalidate the ability to adhere to restorative justice principles. Encounters, direct or indirect, may not be possible, or in certain circumstances may not be appropriate or desired. For example, cases where the perpetrator has a high potential for violence against others (including the intake officer, mediator, or peacemaker, etc.), cases where there is a likelihood of traumatizing, victimizing, or re-traumatizing/victimizing the victim (in child abuse or domestic violence situations), and/or where the victim does not consent (however the choice should always remain with the victim as to whether to participate in restorative justice process). There are degrees of encounter, for example, a letter, a video, a video exchange, or a person may stand in for the victim at the victim's request. Restorative justice is not necessarily an alternative to prison; rather it may be used in conjunction with incarceration to more fully address the issues of the community and the victim.

Another significant difference between restorative and a retributive system is the use of fines. The state or tribe is often seen as the victim and a fine imposed for a violation in a punitive system of the law. Restorative justice first seeks restitution to the victim, not imposition of fines. In some cases the restitution may be to the tribe but only where the tribe is the "victim" and the money then goes to redress the wrong done.

A final word on restorative justice: it is not an all or nothing choice. Each tribe can decide how and if these principles should apply to their community. They may also try out approaches to determine if they wish to choose an alternative to the now accepted concept that crime is a violation of the law and the tribe. One such alternative is that crime is a violation of people and relationships. If the second approach is chosen then the redress must heal the harm done to the community as a whole. Those different approaches will guide the development of the law. For further information on restorative justice, please see: <http://www.restorativejustice.org/>, <http://www.edutopia.org/blog/restorative-justice-resources-matt-davis>, and <http://peacealliance.org/cms/assets/uploads/2013/05/National-Programs-Factsheet.pdf>.

## D. FEDERAL/STATE APPROACH

Most tribes are acutely aware of the retributive (sanctioning/punishing) quality of federal and state systems. Actually, most tribes have modeled their criminal justice systems, including juvenile systems after federal and state systems. Now that tribes have the ability to more directly control their justice systems, tribal people are examining the effectiveness and desirability of the retributive approach. These discussions are often contextualized by tribes seeking to examine historical values and practices that were previously effective in moderating unacceptable behaviors. In part because of Natives' disproportionate representation in federal and state facilities, the tribes have vast experiential knowledge in the workings of a retributive system. Fifty percent of the youth incarcerated in the federal juvenile system are tribal.<sup>4</sup>

There are significant overlaps between the approaches (restorative and retributive), particularly in the definition of "wrongs." The systems agree that community precepts must be maintained. It is in the responses that they differ. In one system violations create guilt and punishment; in the traditional tribal system or restorative system, violations create obligations and require an effort to put things as right as possible.

## E. COMBINATIONS

Many tribes have operational juvenile justice systems. Some may be seeking to create a juvenile justice system. In either instance, it is possible for a tribe to design a system that takes the strengths of each philosophy and creates a new system. Strengths in this instance are defined as practices a tribal community agrees are capable of creating the outcomes envisioned. In the first analysis, the tribe in all likelihood is not happy with its current approach or they would not be considering this resource.

Many tribes are not happy with current outcomes, including continued law breaking, alienation of young tribal members, and the warehousing of young tribal adults. The tribes fear the loss of a generation(s) to the various justice/corrective systems, which are infrequently returning Native youth as productive tribal citizens. It is the tribal communities who are invested in these youths, and it is these communities that must develop particular and unique tribal strategies.

The tribes have the advantage of a "manageable" system, one that by size can be responsive to the unique needs of each community. Imposed systems, particularly ones with bad performance records for all youth and specifically for tribal youth, should not be continued. However, it is equally important to note the strengths of each and every alternative before a community chooses a juvenile system for its youth. Knowing that outcome is the most important factor (outcome for the victim, the community, and the youth), each community must be flexible in approach and implementation.

## **[2.3] SEPARATE OR COMBINED CODES**

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<sup>4</sup>William Adams and Julie Samuels, Tribal Youth in the Federal Justice System, May 2011, p. ix.

Reference to “juveniles” is found in several areas of the law. The initial question for each tribe is whether they want to combine all references to youth in one code with various chapters (areas of concern) or separate the areas into separate codes. Remember that the new science of brain development argues for a distinction between a child (0–10 years), an adolescent (11–17 years), and a young adult (18–25 years). The primary areas are discussed in the following text.

## A. DEPENDENCY CODES

Dependency codes are also referred to as child welfare codes and address the issues of parental/guardian/caretaker abuse and/or neglect. Although they are seen as children’s codes, they most often address the deficiencies of adults in caring and providing for children. Keep in mind, however, that these codes also apply to youth who are parents. Offenders either admit to allegations or the court determines that a child in their care has been mistreated. The mistreatment is abuse that the parent or caretaker should have and/or could have avoided if they had been parenting “properly.” In recent years there has been increasing emphasis on the needs of children who are “placed” in a system because of the “fault” of others, but then are seriously impacted and in fact abused and/or neglected by the system designed to protect them from parental/caretaker abuse. Graduates of the various dependency systems have been found to have tremendous hurdles to surmount if they are to catch up with their nondependent peers.

Native children are overrepresented in state dependency systems. That overrepresentation was instrumental in the passage of the 1978 Indian Child Welfare Act (ICWA), which created federal standards for the states that seek to make Native children dependents. Many tribes include a chapter or section in their tribal codes addressing how the tribe will interact with the state court system via ICWA on behalf of their tribal members who find themselves involved in state court proceedings. ICWA creates party status for tribes in state court actions regarding Native children, and creates unique rights for tribes and tribal citizens. ICWA also creates a status termed *Indian custodianship*, which has all the attributes of a voluntary guardianship, featuring a simplified creation and dissolution process.

For further information on ICWA, please see:

<http://www.tribal-institute.org/lists/icwa.htm>

<http://www.narf.org/icwa/index.htm>

[http://www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/](http://www.nicwa.org/Indian_Child_Welfare_Act/)

The dependency system, whether tribal or nontribal, at its very best offers help and support to struggling families. Tribal communities have, along with Congress and several state courts, seen the system at its worst when dealing with Native families. That, unfortunately, does not mean the system isn’t needed; rather, it places a very high burden on states and tribes to craft approaches and ensure resources that, at the very least do no further harm, and hopefully do not punish struggling parents/caretakers and innocent children.

Tribal dependency codes establish a community minimum standard of care for tribal children. They need to be closely evaluated in terms of community values and resources. Particular attention needs to be paid to why decisions are made, who is offering what type of help, and how help is given and offered. Tribes need to be aware of the impact of decisions and the pros and cons of approaches.

## **B. DELINQUENCY CODES**

This resource specifically addresses the “delinquency” code. However the term *delinquency* is often a misnomer, in that tribes tend to lump a number of distinctive types of statutes together and call them a “delinquency code.” These include provisions governing “status offenses” (e.g., behavior that is prohibited only by virtue of the age of the person alleged to be a wrongdoer, including but not limited to underage driving of vehicles, purchasing and/or consuming alcohol, purchasing and/or smoking cigarettes/cigars, curfew violations, and truancy); “delinquent acts” (conduct that would be a crime if committed by an adult); “crimes” (treating the youth as an adult and effectively putting him or her in the adult criminal process); and FINS (identifying youth misconduct and assessing family needs and ordering remedial services) or some variant. All of these types of statutes address the behavior of youth; some also address the behavior and needs of parents.

Most states and some tribes incorporate adult criminal codes by reference into their delinquency codes. They cite the adult criminal code violations and note that if a minor commits the offense, it is a youth crime.

The major differences between the adult criminal and juvenile codes are the penalty sections. Youth are subject to “dispositional alternatives” as opposed to a criminal “sentence,” although both youth and adults may be subject to probation where a violation could result in detention (youth in a secure juvenile detention facility and adults in jail or prison).

Note also, that there is a big difference in punishment between tribal and federal jurisdiction over felony behavior. A federal conviction adds years to the terms of incarceration versus a tribal conviction for the “same” offense. If juvenile felony behavior is involved, the “offender” is charged in federal court and incarcerated in the federal system, where currently more than half of the incarcerated youth offenders come from Indian Country.

#### About Federal Incarceration of “Indian Country” Youth

According to the Urban Institute’s Final Report on Tribal Youth in the Federal Justice System, Indian Country juveniles made up 53% of the juveniles committed to the U.S. Bureau of Prisons between 1999 and 2008. Indian Country juveniles committed during this period tended to be male American Indians convicted of a violent offense (assault, sexual abuse, murder/manslaughter being the top three) and sentenced in one of the same five judicial districts (Arizona, Montana, North Dakota, South Dakota, and New Mexico). The Indian Country juveniles were on average 15 years old when the offense was committed and served on average sixteen months before serving approximately 81% of their sentence). The average time served doubled from 12 months in 1999 to 25 months by 2008.

Most were committed to the custody of the Bureau of Prisons by probation confinement conditions. The majority of juveniles with adult status were committed for the first time either by a U.S. District Court (48%) or were supervision violators (31%).

For the full report go to <http://www.urban.org/uploadedpdf/412369-Tribal-Youth-in-the-Federal-Justice-System.pdf>

“Historically, the federal juvenile population has consisted predominately of Native American males with an extensive history of drug and/or alcohol use/abuse, and violent behavior. These juveniles tend to be older in age, generally between 17 to 20 years of age, and are typically sentenced for sex-related offenses.”

[http://www.bop.gov/inmates/custody\\_and\\_care/juveniles.jsp](http://www.bop.gov/inmates/custody_and_care/juveniles.jsp)

In a PL 280 state, a youth may be processed by either the state or tribal justice systems, but often by the state system where the tribe does not choose to exercise its concurrent jurisdiction, often due to a deficit of resources.

Public Law 83- 280 (commonly referred to as Public Law 280 or PL 280) was a transfer of legal authority (jurisdiction) from the federal government to state governments that significantly changed the division of legal authority among tribal, federal, and state governments. Congress gave six states (five states initially - California, Minnesota, Nebraska, Oregon, and Wisconsin; and then Alaska upon statehood) extensive criminal and civil jurisdiction over tribal lands within the affected states (the so-called "mandatory states"). Public Law 280 also permitted the other states to acquire jurisdiction at their option.

Public Law 280 has generally brought about:

- (1) An increased role for state criminal justice systems in "Indian country" (a term which is specifically defined in federal statutes);
- (2) A virtual elimination of the special federal criminal justice role (and a consequent diminishment of the special relationship between Indian Nations and the federal government);
- (3) Numerous obstacles to individual Nations in their development of tribal criminal justice systems; and
- (4) An increased and confusing state role in civil related matters (including tribal juvenile justice).

For further information on "PL 280 states" please see:  
<http://www.tribal-institute.org/lists/pl280.htm>

Juvenile prosecution is generally limited by the Indian Civil Rights Act (ICRA), and includes offenses that are misdemeanors or felonies charged as a misdemeanor, which limits the penalty possibility to misdemeanor recourses. ICRA limits punishment possibilities so that any actual prosecution is deemed a misdemeanor by virtue of the limited potential for fine/incarceration.

For further information on the Indian Civil Rights Act, please see:  
<http://www.tribal-institute.org/lists/icra.htm>

Some tribal juvenile codes make an effort to segregate status offenses and delinquent acts (acts that would be crimes if the offender were an adult). The rationale for this is that status offenders (e.g., truants) should not be housed or treated with youth who may be exhibiting more serious antisocial behavior. There is a growing body of literature that points out that incarceration of status and low-level offenders often creates an enhanced offender who has been exposed not to socially accepted youth practices but to the opposite. All humans, youth in particular, mirror the behavior of the dominant group, and in an incarceration model it is important not to further reinforce the negative behavior model.



The FINS model is designed to assist first-time, status, and low-level offenders and their families by assessing their needs and referring or ordering them to remedial or rehabilitative services, programs, and activities.

For more information on the FINS model, please see Chapter 21: “Status Offenses/Family in Need of Services: Nondelinquency Proceedings General”; Chapter 22: “Nondelinquency Proceedings—FINS Interim Care”; Chapter 24: “Nondelinquency Proceedings—FINS Referral to Juvenile Counselor”; Chapter 25: “Nondelinquency Proceedings—FINS Breakdown in Parent–Child Relationship”; Chapter 26: “Nondelinquency Proceedings—FINS Consent Decrees”; and Chapter 27: “Nondelinquency Proceedings—FINS Dispositions.”

### C. PROBATE CODES

Generally speaking, probate codes offer guidance in the creation of nondependency guardianships. Guardianships are created for a variety of reasons, including parental unfitness; unavailability (including parents absent due to temporary or permanent medical problems, death, military service commitments, jail, or school); and family preferences and/or convenience. The guardianships may be over the person and/or the property of a minor. Who qualifies as a “minor” is defined in the code, typically anyone under the age of 18 years of age.

The probate code may cover the issue of inheritance with or without a will. Family members are defined, including the concept of termination of parental rights and adoption. (This would only apply in the event of death without a specific will designation.) If a child inherits property/money, the responsibility of managing the child’s property is set out in the probate code.

The probate code may also cover the concerns of a youth who is incompetent. Incompetency can arise from the mere fact of being a youth, or from some actual inability to care appropriately for himself or herself, requiring a commitment to a facility for care.

### D. FAMILY LAW CODES

A family law code is the other possible intersection of children with the law. This law applies to the children that come before the court because their parents or guardians either have not established parental rights or the grown-ups wish to change their relationship to each other, which necessarily alters their relationship to their children. These rights are played out in custody disputes that include issues of child support and may also touch on the child’s contact with parents and extended family.

Married or unmarried parents have similar rights, and these rights must be addressed if the parties cannot agree, and the code must have overall guiding principles; for example, parents should have equal custodial rights; parents must be able to provide age-appropriate supervision, care, and guidance; and parents must be afforded contact regardless of the ability of parent to provide ongoing care. There are questions about what principles should guide the decisions in

family court (e.g., what to do when a parent is incarcerated), what coparenting skills/emphasis are essential, and so forth. Family codes set forth the philosophy of parenting, and that parenting philosophy should be consistent with the philosophy outlined in the juvenile justice laws. Protecting the parenting of children and securing family relationships is essential to the youth's success. The codes that address children, adolescents, young adults, and their families, need to philosophically interface with and support each other.

Tribes are beginning to establish tribal child support divisions that are increasingly developing realistic child support guidelines, including in-kind contributions. The overall emphasis is on child support "supporting" coparent involvement.

## E. CONCLUSIONS

It is readily apparent that any particular family could find itself simultaneously embroiled in more than one of the areas set out above. They could be in four different courts, with four sets of requirements, with four different judges and court dates. Additionally, a family could find itself with a similar result from differing courts, for example, guardianship of a child could be determined in each of the courts, as each code could have a procedure for the establishment of a guardianship.

Each tribe must seek clarity of issues and approaches. One approach is to combine all possible statutes affecting juveniles into one all-encompassing code. Another approach, one increasingly favored, is that one judge be responsible for all of the possible matters involving families and children. These families would have their matters consolidated, so that the court system is working to support an overall approach, not frustrating families as they try to meet the goals of different professionals. This approach requires the court to be internally organized so that such case management is possible. It requires that treatment services, social services, probation, and the family law system have the ability to interact and collaborate.

### **[2.4] COLLABORATIVE JUSTICE COURTS IN THE JUVENILE COURT SYSTEMS**

The kind of approach previously outlined has also been termed collaborative courts (sometimes called problem-solving courts, and in the juvenile system sometimes referred to as diversionary courts). They are part of a larger movement to make courts more responsive to the needs of users. This has evolved partially as a convenience to the courts and more particularly to supportive services that seek to consolidate their appearances to conserve resources. Additionally, users of the services have found that exposure to a similar community can offer further support to their individual efforts. This section describes a number of different types of collaborative courts emerging in the juvenile court system.

The calendaring (scheduling) of matters in clusters has also been a trend in recent years. Cluster calendaring is also used in dependency; however, consistent with the focus of this commentary, the following discussion is limited to delinquency.

## A. WELLNESS COURTS

Wellness courts represent a movement in nontribal circles generally called drug courts. Most tribes prefer the designation *wellness* as opposed to *drug*, wishing to place an emphasis on the positive approach they are seeking to institute. They feature a team approach with the team being headed by the judicial officer, and the treatment team consisting of counselors, therapists, case managers, and others who are working with the individual to establish a treatment plan for substance abuse, including after care. A critical component of this approach is regular and formal contact with the court. The objective is to encourage the offender's to form a personal relationship with the team, and especially with the judicial officer.

The court encourages the personal progress of each participant. Consequences for missing court are part of the contact, but the consequences (at least initially) are increased involvement in wellness activities, not penalization. This is a court and/or calendar that benefits from having the involved individuals support each other as peers, as well as from non-court-based activities for individual, family, and community support.

Please see Chapter 31: "Wellness Court."

## B. MENTAL HEALTH COURTS

Mental health courts have been tried on a limited basis and require a sophisticated support team. The basic structure of the court, requiring frequent contact and team meetings, mirrors the collaborative court approach of wellness courts. The requirements as to medication, treatment goals, and so forth, are often structured to aid the participant to avoid further nonproductive contact with the justice system.

Referrals to this court usually evolve from criminal contact by the "defendant" and this court can operate as a diversion court. The object is to assist the defendant to moderate and regulate their mental health needs with the goal of avoiding criminal contact. The individual's contact with the criminal justice system is often seen as resulting from untreated mental health concerns.

## C. TRUANCY COURTS

Truancy courts are often combined with delinquency and/or dependency courts depending on the age of the truant. Truancy among young children is most often seen as the responsibility of parents and guardians. Among adolescents, truancy may or may not be the responsibility of the parent or guardian. Additionally, the courts may respond to truancy citations (violations that charge the parent or guardian and/or youth as the offender) to parent/guardians and/or the youth.

The main goal of these courts is to reduce truancy, improve the school performance of the youth, and support their continued education. The court can and will explore the issues of the youth, attempting to identify the reasons the youth is habitually truant and possible remedies.

It may also look at the school's support system and determine where there may be deficits. Both the school and the youth are required to participate in truancy court and remediation plans may involve the youth, family, and the school support team.

Please see Chapter 28: "Nondelinquency Proceedings—Truancy Provisions."

#### D. PEER OR TEEN COURTS

Peer and/or teen courts are generally considered diversion courts, also called collaborative courts. They feature frequent contact with the court, a treatment team approach, and, upon successful completion, a dropping of all offenses so no juvenile offense record is created. Peer courts most often hear either low-level misdemeanor community offenses or school behavior referrals. Generally, because the process involves a minor, the youth's parent or guardian must agree to the referral to peer courts. Confidentiality is required. Adults supervise the courts but all of the roles of the court are performed by teens. The youth are trained (coached) in their roles, by those adults who assist the functioning of the teen court and by their peers. The peer courts offer an opportunity to divert the offender from the juvenile system, as well as a learning experience for the teens filling the necessary roles. Successful completion of the process, including sentencing requirements, most often results in a dismissal of the complaint or dismissal prior to the filing of the complaint.

A common feature of this particular court is that the successful defendant is then required to participate in future court proceedings as a juror or in another court role.

Please see Chapter 33: "Teen Court."

#### E. YOUTH DOMESTIC VIOLENCE COURTS

Youth domestic violence courts operate like adult domestic violence courts, with the use of restraining orders and a heavy concentration on intervention and treatment with the batterers. This is seen as an early intervention approach that attempts to interrupt the development of a lifetime of battering by the youth.

Cultural responses are often incorporated into this approach to educate the youth on proper roles and responsibilities. Behavior alteration is seen as a primary focus. This kind of court may involve a family approach if the court sees the violence is a carryover from the family of origin.

#### F. GANG COURTS OR GUN COURTS

Gang courts or gun courts are diversion courts, but are often more punitive than is the norm for collaborative courts, with the diversion aspect coming only after an admission of guilt and responsibility but prior to sentencing. Sentencing is diverted so long as the youth is in compliance with program requirements.

This kind of court normally requires a very structured plan, including stay-away orders from individuals and activities, curfews, school, job, treatment (groups), and mentoring. Heavy supervision by a case manager and/or probation officer is generally a significant component of this court. Entry into the program may also involve a commitment to tattoo removal for specific gang tattoos. Significant failure to follow the plan can result in very onerous consequences for the offender, often including incarceration for corrective purposes or longer-term incarceration viewed as punitive consequences.

These courts are often the courts of last chance before significant incarceration. They require heavy monitoring by the judicial officer and by the “treatment team.”

## G. GIRLS’ COURTS

The number of girls being arrested has continued to increase in the last decade. Courts and probation officers have noted that girls’ problems and responses and their overall ability to engage in traditional probation services are markedly different than those of boys. Increasingly probation departments are moving toward developing separate girls’ services. Even for shared problems, for example, substance abuse, girls require a different approach than boys.

The focus here should be on the number of girls involved in juvenile justice systems, the problems presented, and the potential referrals. If a specific tribe notes a significant influx of girls into the delinquency system, it is essential that the justice system planners consider this to be a specific and separate problem area to be addressed by a specific approach and treatment team that is familiar or willing to become familiar with “girls’ issues.”

## **[2.5] SPECIAL ISSUES**

Additional issues do not necessarily fit neatly into any category but need to be considered in the creation or revision of a systems model. They are considerations that will impact not only the systems, but also the children and families that are required to appear in these systems.

### A. ENROLLMENT

It is the responsibility of every branch of the court to ensure that all youth who appear before the court are enrolled if they are eligible for enrollment. It is a basic citizenship right and the responsibility for youth enrollment must be placed upon adults. If enrollment has not been accomplished it should be required. Much of the future reciprocal responsibilities of the youth and the tribal community flow from this status, and as such it is a primary requirement. As long as enrollment does not flow automatically as a birthright but requires affirmative action, that action is the responsibility of the responsible adults in a youth’s life.

See Chapter 6: “Subject Matter Jurisdiction.”

### B. MINORITY STATUS AND EMANCIPATION

Each tribe must decide at what age their members will become adults, no longer subject to the special protection of the law afforded by their minority status (meaning under age). The accepted standard for the population of this country currently is eighteen. Note: the state and federal systems that interact with the tribes have selected eighteen, but some systems are recognizing that young adults are not able to function without continuing support during the transition period to young adulthood. This realization may eventually influence a change in recognition of the child/adult line. This is particularly true of children with little family support; for example, foster care graduates. Tribes have historically deemed children of age at different demarcations, some of them being functional (when a child might be ready to participate in ceremonies or to engage in subsistence activities) and some being status (the mere fact of reaching a certain age). The need to interact with state and federal systems requirements may compromise a tribe's ability to make an independent call as to all status issues.

This type of decision and the rationale for the decision must come from the history and norms of the tribe, the community's sense of responsibility, and the ability of their youth. Tribes should also review and consider current research on the brain and adolescent development, which recognizes that the brain is not fully developed in many young adults until they are around twenty-five years of age.

Emancipation is an issue that often enters into this discussion. Emancipation in this context means to release a child from parental care and responsibility. Many codes list criteria for such a release, for example, a certain age (if the youth is not yet at the age of adulthood); demonstrated ability to financially care for themselves; a residence; graduation from high school; and the desire to enlist in the armed services and/or marriage.

Please see Chapter 6: "Subject Matter Jurisdiction."

### C. SHOULD COURTROOMS BE OPEN OR CLOSED?

For any or all of the courts noted previously, there is a question of whether they should be closed to the public and confidential, with only needed staff and participants allowed in court? This is a public policy consideration. Non-Indian courts have long struggled and continue to struggle with the issues of closed versus open courtrooms. In brief the arguments are as follows. The proponents of open courtrooms claim that the public has a right to know and a right to oversee the workings of justice. Those opposed to open courtrooms claim that family business is family business and privacy protects a youth from public scrutiny. Closed courts allow the family to have the time and space to work on their issues in private. Additionally, research on adolescent brain development would argue in favor of a closed court policy to protect against stigmatizing youth (and thus further harming them) who are simultaneously working through a difficult circumstances and development stages.

There is also a possibility of partially open courtrooms. This involves setting up protocols for both matters that are open and matters that are closed to public viewing. The issue of open

court rooms for certain offenses are community issues and need to be resolved with community input.

Please see Chapter 11: “Rights in Juvenile Proceedings.”

#### D. EXPUNGEMENT AND DESTRUCTION OF JUVENILE RECORDS

Expungement and destruction of juvenile records helps to shield the youth, whether before or after reaching majority age, from the long-term impact of a criminal record. A criminal record often becomes an issue when a youth enlists in the armed services, seeks a professional license, seeks employment, or applies to school and is required to disclose any past criminal record.

There are rules (federal/state) providing a procedure for expungement of a juvenile record. In drafting a juvenile code attention should be paid to these issues, and the options should be discussed and resolved according to community standards, keeping in mind how long-term impacts may or may not serve the community as a whole. The inability of a youth to transcend early mistakes may seriously impact their lives. It is essential to determine whether the long-term impact of juvenile court records is in the interest of the individuals (offender/victims), families, and communities being served by the juvenile system.

Please see Chapter 10: “Juvenile Court Records.”

#### E. TRANSFER TO ADULT COURT

Transferring delinquency cases to adult court is an increasingly common approach in state systems. During the 1980’s and 1990’s violent youth crime rates rose and the media often depicted teenagers as members of violent street gangs or as “super predators.” The public, when polled, thought the juvenile court’s lenient treatment of young offenders contributed to the problem. In response, state lawmakers changed the laws to subject youth who commit serious crimes to adult criminal court jurisdiction. The goals of this policy were to protect the public and to punish the offenders. More recent studies by scholars researching state juvenile justice system policies and laws, have argued that many states passed increasingly punitive laws in response to “moral panics” – where the public, the media, and politicians reinforced each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat posed by a particular group of individuals, here predatory youth, who threatened the moral order.<sup>5</sup>

Alarming, this state approach is being adopted by some tribes even in the face of empirical evidence indicating that it does not help the offending youth or serve the protection needs of the community. It is a reactive response to youth violence concerns, as it is increasingly the younger violent offenders who are normally subject to such an approach. Punitive responses, while seemingly comforting to the public in the short run, need to be rationally examined for

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<sup>5</sup> See for example Chapter 4, Why Crime is Different, in Rethinking Juvenile Justice, by Elizabeth S. Scott & Laurence Steinberg, Harvard University Press (2008).

effectiveness. If they are found to be effective, then there is some basis for discussion, otherwise this approach is misguided.

We note that University of Washington’s Native American Law Center in its recently completed Model Tribal Juvenile Code, drafted as part of the John D. and Catherine T. MacArthur Foundation’s Models for Change initiative, completely omits provisions transferring juvenile cases to adult criminal court, even for serious offenses. The purpose and policy section at 1.01.110 (d) reads:

*This article shall be construed and interpreted to fulfill the following purposes: to remove from children committing delinquent acts the legal consequences of criminal behavior, and to substitute therefore programs of supervision, treatment, and rehabilitation which: (1) hold them accountable for their actions; (2) provide for the safety and protection of the community; and (3) promote the development of competencies which will enable them to become responsible and productive members of the community.*



## CHAPTER 3

### WHAT IS NEEDED—ASSESSING RESOURCES

#### [3.1] AGE/OFFENSE APPROPRIATE

The issues presented to a tribe when considering whether to create a juvenile justice code require a multipart analysis. Initially the team must consider the magnitude and dimensions of the juvenile justice problem in the community. Then the team must consider whether the community has the ability and willingness to work with youth who find themselves in trouble, as well as working with the families of those troubled youth.

The team must also decide at what age certain defined behavior(s) become potentially “criminal,” as opposed to a problem requiring parental and/or family intervention. A growing area of concern is determining when a behavior problem requires school intervention as opposed to law enforcement attention. Criminalization of school behavior at all ages has upset many parents, but that must be balanced with the concerns of school teachers and administrators who fear that out-of-control students are interrupting education and posing a threat to others in the school environment.

It is possible for a team to progress into a full juvenile justice system in a piecemeal manner. For instance, a community after reviewing key issues may decide to start only with status offenses as outlined in the previous chapter, or may seek to work only with those offenses that would be considered misdemeanors if committed by adults. Assuming responsibility for felony offenders, even considering the restrictions of the Indian Civil Rights Act, requires development of a complex system, including treatment and detention that is often very costly. Many tribes have opted to limit their response to juvenile felony violators to reentry programs (reentry is not addressed in this iteration of the Juvenile Code Resource. This topic could be covered in a section of a juvenile code, it could also be the subject of a separate tribal reentry statute) that help the youth transition from felony treatment or incarceration back into the community.

Decisions around the scope of a juvenile system should be driven by perceived problems and potential resources. Juvenile justice systems have a tremendous need for resources; they are not and cannot be expected to become self-sufficient overnight. The hope is that by judicious use of specialized resources addressing the problems of tribal youth at an early stage, the negative influences on and in the community can be eliminated and these youth can be transformed into community resources.

#### [3.2] SYSTEM SUPPORT/COLLABORATION

The juvenile justice system is made up of various entities with multiple needs (for example: the courts, attorneys and lay advocates, law enforcement, probation, case workers, social and behavioral services, residential and detention facilities). It is essential that each part of the system is created with the understanding that it is related to, but not controlling of, all other

segments of the system. The most effective systems are those where there is understanding and collaboration. All parts of the system must be, in general, committed to the same goals if the system is to be effective. All players must buy in to the philosophical underpinnings of the system or the system will work against itself, thereby decreasing effectiveness, and in general frustrating workers and users of the system.

## A. LAW ENFORCEMENT

A respected police department with officers who perceive themselves as community protectors is essential. They are the face of justice for much of the community. To be effective in their role as law enforcement officers the officers must be seen as protectors. They must be integral members of the community. They must be persons who have personal reputations for fairness and who support the needs of community youth, elders, and families. The more grounded they are in the tribal culture and the community, the more effectively they will carry out their obligations.

Professionally, it is essential that tribal law enforcement officers are equally competent to state and local police officials, and are also perceived to be so by the community. Their ongoing competency is critical, and it is recommended that they avail themselves to federal officer and other training opportunities, as possible. Continued training should be mandatory. Part of their job responsibilities should include being a member of the communities they serve. Some jurisdictions use officers as prosecutors or presenters in juvenile court. Though this seems a quick fix to filling the role of prosecutor, it is not ideal, because the role of prosecutor is time consuming and pulls the officer out of the field, leaving the community without the active presence of officers on patrol.

Additionally, law enforcement must have modern equipment. It is unacceptable to have a force that does not have the ability to protect themselves and their community. The law enforcement department can be expensive, but it is a critical branch of tribal government.

## B. PROSECUTOR (a.k.a. PRESENTING OFFICER)

The juvenile justice system must have a person designated to review the reports that are forwarded to the system for possible dependency, delinquency, and/or criminal filing, which may include diversionary filings. The minimum requirements for this position include advocate-level abilities, for example, advanced competency in reading and writing, coupled with the ability to communicate verbally at an advanced level and a good working knowledge of the community and the culture of the community.

The prosecutor must see their role as integral to the system and be willing to participate as a community member. The most effective prosecutors are those who are not just seen as aligned with law enforcement but also seen as aligned with justice and fairness (including therapeutic goals). They need to be able to represent the interests of law enforcement, victims, and the community, while not losing sight of the very real fact that the “wrongdoer” is also a member of community and many are also “victims” in their own right.

See Chapter 17: “Presenting Officer/Prosecutor and Consent Decrees.”

### C. ATTORNEYS/LAY ADVOCATES

Consistent with the federal Indian Civil Rights Act, the tribal juvenile justice system must allow youth in the juvenile or dependency court to have legal counsel (an attorney or a lay advocate at their own expense). The minimum requirements for this position vary under tribal law given the tribe’s choice of sentencing power. However, juvenile matters are unlikely to result in the secure detention of a juvenile of a duration of longer than one year, that would trigger federal law requirements that a tribe pay for a licensed attorney for a youth involved in juvenile court. However, many tribes are opting to pay for licensed attorneys for youth, in any case, to protect the rights and interests of youth in the tribal juvenile justice system. Nevertheless, many tribes continued to allow lay advocates to practice in their justice systems. The requirements for such practice varies under tribal law and can range from the mere payment of a fee with approval to practice by the Chief Judge to passage of a tribal or state bar exam.

Lawyers and lay advocates will need to educate themselves about the purposes and role of defense counsel in therapeutic court dockets such as wellness [drug] court for the purpose of successfully habilitating or rehabilitating their clients. Many other types of diversion and community-based programs will have similar requirements. Lawyers and advocates will also need to familiarize themselves with existing programs and should be encouraged to participate in the development of new programs.

### D. JUVENILE JUDGE

The juvenile court judge is required to further the tribe’s juvenile justice policy and the purposes of the juvenile code. In more modern codes these tasks are about supervising and coordinating treatment and other services and monitoring and responding to youth and family compliance and/or noncompliance. Only in extreme cases will the judge adjudicate (hold a trial for) a youth to be a delinquent (to find him or her guilty of committing a juvenile offense) – and to sentence that youth to secure detention.

The tribe’s juvenile code purposes may include some or all of the following: (1) securing the care, protection, and mental and physical welfare of youth; (2) preserving and retaining the unity of the family; (3) to remove from children committing delinquent acts the legal consequences of criminal behavior, and to substitute programs of supervision, treatment, and rehabilitation; (4) to ensure that the rights of the parties are recognized and protected; and (5) to coordinate services for youth and their families with an emphasis on prevention, early intervention, diversion, and community-based alternatives.<sup>6</sup>

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<sup>6</sup> Taken and summarized from Section 1.01.110 (d) Purpose & Policy of the University of Washington, Native American Law Center’s Model Tribal Juvenile Code.

Judges who have not previously worked in juvenile court will need to educate themselves with respect to the rehabilitative focus (as opposed to the criminal court’s primarily fact-finding and punitive focus) of the juvenile justice system, the preferred use of diversion programs, and particularly therapeutic diversion programs (e.g., wellness [drug] court). Juvenile judges are essential leaders in the co-development and operations of therapeutic dockets and community-based programs (including tribal-school efforts to respond to truancy). They will need to understand their new and unusual role as reform team leader, collaborating team leader in justice system operations, parental figure, mentor, sponsor, and supporter of the success of tribal youth.

## E. PROBATION DEPARTMENT

Probation officers are generally required to “enforce” terms that the court imposes on youth. Behavior requirements often arise when an adolescent or young adult is released pending adjudication or postdispositional requirements imposed on the youth (the youth must complete requirements as part of their obligation to the court for admissions, findings, or convictions). Occasionally these requirements may be imposed as diversion requirements, meaning that if the youth and his or her family comply with certain requests the matter will not be officially filed or brought to court. Diversionary supervision is usually less intensive, and may be referred to case managers (described in the following text).

Probation officers should complete course work in their area of concern at the junior or other college. If there is not an available candidate with the academic credits/training then it is essential that the probation officer have competency at the advocate level (advanced competency in reading and writing, coupled with the ability to communicate verbally at an advanced level and a good working knowledge of the community and culture of the community).

The probation officer must assist the youth and their family in determining what services would benefit the youth and family to address the problems noted; assisting in the assessment of services; providing ongoing monitoring and encouragement for the youth; and providing a progress report on the youth for the court.

Probation officers often interact with the youth when he or she is referred or first brought in (sometimes detained or arrested and sometimes taken into protective custody). If detained or arrested, they initially determine if the youth is releasable, and under what conditions. They also interview the youth, family, and community (victim) at an appropriate presentencing point. The interview summary report will become part of the probation officer’s report to the court.

Perhaps the most important facet of probation officers’ responsibilities is their partnership with the youth and his or her family. They must align with the youth while meeting their quasi-law enforcement responsibilities. They monitor compliance and ensure that compliance is progressing. Under many juvenile justice processes, probation officers oversee youth and family compliance with pretrial, diversion, and posttrial programs and services. Good probation

officers are akin culturally to clan and/or aunt and uncle relatives. They are a loving, nonjudgmental presence that can help determine community standards and assist a wrongdoer to right his/her wrongs.

### **About Family Group Decision-making**

Consider Having your Juvenile Intake or Probation Officers use a "Family Group Decision Making Process"

Family Group Decision Making (FGDM) recognizes the importance of involving family groups in decision making about children who need protection or care, and it can be initiated by service providers and/or community organizations whenever a critical decision about a child or youth is required. In FGDM processes, a trained coordinator who is independent of the case brings together the family group and the service providers to create and carry out a plan to safeguard children and other family members. FGDM processes position the family group to lead decision making, and the statutory authorities agree to support family group plans that adequately address agency concerns. The statutory authorities also organize service providers from governmental and non-governmental agencies to access resources for implementing the plans. FGDM processes are not conflict-resolution approaches, therapeutic interventions or forums for ratifying professionally crafted decisions. Rather, FGDM processes actively seek the collaboration and leadership of family groups in crafting and implementing plans that meet the child's/youth's needs.

Taken from University of Colorado, Kempe Center, National Center of Family Group Decision Making, go to

<http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/FGDM/Pages/FGDM.aspx>

For more information the purposes, values and processes of Family Group Decision Making, go to the Kempe Center,

<http://www.ucdenver.edu/academics/colleges/medicalschoo/departments/pediatrics/subs/can/FGDM/Documents/FGDM%20Web%20Pages/About%20FGDM/FGDM%20Purpose%20Values%20and%20Processes.pdf>

### **F. CASE MANAGERS/COMMUNITY WORKERS**

Generally in the juvenile justice system case managers are used for certain "dockets" or "calendars" (court actions are grouped by type, e.g., children's court [dependency], juvenile court [status, delinquency, and FINS], family court [paternity, divorce, and probate], criminal court, and wellness court [drug court], etc.). Case managers develop an expertise in the services needed for their area of specialty. For instance a wellness court worker would have access to and be acquainted with substance abuse and mental health treatment and treatment-associated resources.

Case managers, in addition to their specialty knowledge, need the advocate skills outlined. This knowledge is combined with their community and cultural awareness and their ability to align with the youth and their families. The partnership responsibilities outlined in the probation officers section are equally applicable to case managers.

## G. FACILITIES—TREATMENT AND ELECTRONIC DETENTION

There is a significant lack of juvenile facilities in Indian country for youth. All but a few tribes are too small in population to support a full range of facilities required to address the divergent needs of a stressed youth population. Additionally, serious offenders are either housed in state or federal facilities because of the jurisdictional composite imposed on reservations.

Tribal juvenile systems need to designate a liaison officer to work with youth that are housed in off-reservation facilities, whether they are treatment or locked facilities. The liaison officer may be a case manager, but his or her responsibility would include maintaining contact with the youth and his or her family during the period of treatment or incarceration. The liaison officer should develop a transition plan for the return of the minor to the community. It is possible for tribal systems to partner with other systems off reservation when the primary purpose of out-of-home placement is for treatment. Partnering can involve locating culturally appropriate treatment and ensuring that monitoring and support is there for the youth. It is important that any period of separation from the community and family does not end up feeling to the youth like they have been thrown away.

Additionally, tribal/state/federal agreements can be put in place to exercise concurrent jurisdiction, under which the tribe constructs agreements supporting dispositional alternatives that feature wraparound services. An example of concurrent jurisdiction would be allowing a youth to opt for treatment in a tribal or Native facility. A treatment failure would result in a period of time at a locked nontribal facility.

Another alternative is to impose electronic monitoring. This requires a careful assessment, and should not be widely used as the success of the monitoring requires a level of commitment that youth without substantial family support may not have. The monitoring program can be a global positioning system (GPS) and/or a drug or alcohol monitoring system. This approach has been very effective with youth who have support and who have the external/internal resources to help them comply. Many jurisdictions have statutes that allow for such monitoring by classifying the monitoring as “detention.”

See Chapter 9: “Relations with Other Agencies and Courts.”

## H. HOUSING NEEDS

Many youth find themselves in an impossible situation with parents who are unable to parent on a full-time basis due to parental incapacity. When this occurs, if a youth has a caring adult parental alternative, who provides housing and supports the youth’s need for care, the tribe

needs to be able to carefully evaluate that alternative and support where reasonable. Although group homes, residential schools, and so forth may be less than desirable, adolescents and young adults may prefer those alternatives. It is preferable that these placements be achieved without designating youth as dependents or delinquents. It is important to realize that alternatives do not have to be limited to those developed in the dominant society. Even considering giving adolescents the right to partial emancipation or any other designation that supports their semi independence, may be a good option at times.

Labeling does not further these solutions. Parents and youth will often turn away from alternatives not wishing to be stigmatized by terms such as *delinquency* or *dependency*. Any structured supportive alternative may be preferable to youth who are essentially homeless.

## I. MENTAL HEALTH ASSESSMENT AND TREATMENT

There is a tremendous need to have competent mental health services available for tribal youth and their families. Trauma, both historical and individual, is in recent years being understood as a cause of negative behavior in tribal youth.

Juvenile justice systems need to assess the nature and degree of trauma in tribal youth, families, and communities, particularly as Native communities have been ground zero to much trauma.

Traumatic events may include the following:

- 1) Abuse or assault: physical, emotional, sexual
- 2) Exposure to family violence/intimate partner violence
- 3) Accidents that cause injury and/or death to family and/or close friends
- 4) Deliberate harm by others; torture; abuse; abuse of power
- 5) Harm by others in the line of duty
- 6) Negative consequences of economic policies, poverty
- 7) Homelessness, being a refugee
- 8) Human caused and natural disasters
- 9) Living under occupation or in conditions of servitude or slavery
- 10) Mass violence: assaults, massacres, genocide, wars
- 11) Neglect by others of those cannot care for themselves
- 12) Serious illness
- 13) Structural violence (social structures and institutions that deprive people of their rights and ability to meet basic needs)
- 14) Sudden loss of loved ones, status, identity, possessions, home, territory
- 15) Sudden changing of the rules, expectations or norms
- 16) Surgical, dental, and medical procedures, including difficult births
- 17) Witnessing death or injury

Of particular importance in Indian country is historical trauma, which is the “cumulative emotional and psychological wounding over the lifespan and across generations emanating

from massive group trauma.”<sup>7</sup> This trauma is pervasive throughout Indian country. Mental health providers have researched historical interactions that have negatively impacted tribal communities to understand the root causes of current behaviors.

Understanding the impact of trauma in Indian country is essential. Untreated trauma results in reenactment behaviors, those that turn unhealed trauma energy against the self or others. Upon analysis, untreated trauma can be identified as the basis for much “deviant behavior.” It is important to identify the source of such behavior if treatment or resolution of the behavior is one of the objectives of bringing youth into the juvenile justice system.

To recap, careful assessment of potential trauma must be part of any examination of a youth’s presenting behavior. If trauma is found, then the treatment plan must incorporate trauma-based responses.

Please see Chapter 29: “Trauma Sensitive Statutory Provisions” and Chapter 24: “Nondelinquency Proceedings—FINS Referral to Juvenile Counselor.”

## J. SCHOOLS

Youth committing delinquent acts in a community often have academic histories that are riddled with problematic behavior, including truancy, social problems (acting out), and significant issues with academic performance. Tribal youth must be educated to be good tribal citizens and competent parents, and to be able to participate successfully in the work force. Failure in school often foreshadows a lack of success as young adults and is a common factor among the prison population.

It is essential that any juvenile justice system place a heavy emphasis on the academic performance of potential and actual offenders. This may include academic testing and remediation. Between 69 and 85 percent of the prison population shows a failure to graduate high school. (These figures are not Native specific.) Most professionals working with youth predict that a lower prison population could be supported by a higher high school graduation rate. If tribes wish to do better than our state neighbors they must not ignore the implication of the relationship between high school success and criminal involvement. School issues must be given primary attention to avoid the long-term impact of educational shortcomings. Another issue that communities should resolve is the presence of law enforcement at school sites and the use of law enforcement for disciplinary intervention with troubled and problematic students. The recent specter of elementary children being hauled off in hand cuffs for admittedly bad behavior or tantrums has caused many parents and educators to call for a review of the trend to arrest children exhibiting problem behaviors. Frustrated school administrators fearing damage to facilities and injury to staff and other students are increasingly calling on law enforcement, when parents do not respond to less drastic requests.

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<sup>7</sup> Dr. Maria Yellow Horse Braveheart, The historical trauma response among natives and its relationship with substance abuse: a Lakota illustration. January – March 2003, p. 8.



However, the consequences of criminalizing children must be seriously considered. Other options must be fully explored as the long-term impact on the individual child and the attendant “cost” to the community is potentially very high.

#### K. CULTURAL RESOURCES

The juvenile court should strongly consider establishing a cultural division inside the court. This entity or position would be responsible for establishing individualized cultural reengagement or engagement plans for youth. The court should have the ability to provide mentors for youth, with activities that are supportive of the participant developing values consistent with those of the tribal community. These activities should be individualized and feature both group and one-on-one services. Language class involvement has proven successful in increasing youth self-esteem in many communities.

It is not enough to talk about making culturally relevant systems. Such a system requires a commitment and a visible presence. It is very important, particularly for a juvenile justice system that official promises and talk match up with the reality presented to youth and their families. Our youth are the future and they have seen state and federal officials talk about how important youth are while NOT allocating resources to youth needs. Tribes have talked about the importance of culture, the importance of those values being the guiding principles for our youth; and it is incumbent on tribes to dedicate whatever resources are necessary to demonstrate their commitment to Native culture.

See Chapter 30: “Integrating Culture, Customs, Traditions, and Generally Accepted Practices.”

#### L. TRANSITIONAL SUPPORTS, INCLUDING HOUSING

Life skills are essential for tribal youth. Parents and parental figures need to model life skills and/or ensure that they are taught to youth. It is important that youth involved in the juvenile justice system acquire such life skills, without them they cannot be successful. If youth cannot support themselves, as in providing for their own food and shelter, getting and holding a job, and engaging in future planning, then they should not be allowed to age out of the juvenile system. It is not about an age requirement, it is really about youth being able to meet the requirements of caring for themselves.

It is possible to assist college or certificate programmed students, with housing while they are in their programs. However, vacations, breaks, and graduations must be considered. Supervised youth hostel facilities or living stipends to assist in transitions are a possible solution. Transitional supportive housing for young adults is a problem that needs to be addressed along with all the other housing concerns of reservations. Housing for this age group should be supportive and have on-site services that will assist youth in their primary concerns of job search, budgeting, planning, and so forth.

#### M. SUPPORT FOR PARENTS

Parents may need assistance ranging from visitation support (if the child or adolescent is housed away from the community), directed parenting assistance (e.g., how to parent an adolescent, a special needs adolescent, or an adolescent parent), and respite care. Some parents need assistance in applying for programs for their children (scholarship, financial aid applications, public aid programs, program admissions forms, etc.). It is essentially impossible for youth to succeed without adult assistance, and the adult assistance needed increasingly requires substantial knowledge.

A frequent concern is that a youth may be manifesting a family problem and the “real” issues are in the family, or lodged in family-based dysfunctional behaviors. If the youth’s behavior is a symptom of the family’s issues then the issues can become quite complicated. Many juvenile systems allow for cross-referrals and it may be appropriate to institute dependency proceedings. On occasion it is appropriate to combine the two matters and treat the family issues with the delinquency behavior.

There is also the issue of parents who may lack physical and/or mental capacity without assistance to parent their children. These parents may be able to parent, or partially parent with supportive services, and very careful plans have to be made to provide such ongoing support.

Please see Chapter 25: “Nondelinquency Proceedings—FINS Breakdown in Parent–Child Relationship.”

#### N. VICTIM SERVICES

Although most if not all tribes have adopted the approach of the dominant society that crimes are against the tribe as in “People vs. Defendant” or “Tribe vs. Defendant,” it has historically been the position of most tribal cultures that the person wronged is not the tribe, rather it is the person(s) harmed by the action or inaction. In recent decades the state and federal governments have looked to the concept of adding the victim to the equation of justice, not just as a witness, but rather as a party who may participate in the court process, and have their concerns redressed directly.

Victims are being allowed to directly address the court(s) in terms of sentencing, address the perpetrators in terms of harm caused, and so forth, and seek restitution for property destruction, physical harms, or the costs associated with those harms.

In addition, restorative justice and/or programs incorporating the concepts of restorative justice have increasingly come into favor, allowing victims’ concerns to be addressed directly by wrongdoer. This may or may not include direct interaction of the parties, and the negotiation of a plan to make the matter right between or among them.

#### O. RESTORATIVE EFFORTS—ACTIVITIES

The previous chapter discussed in summary fashion the approaches of restorative justice. These concepts are culturally familiar and comfortable to most tribes and should be considered as available to youth and their families. Restorative justice practices are designed to restore harmony to the community; repair, as much as is possible, the relationships of the parties; and allow the return of the youth to good standing in the community.

Restorative justice is ideally suited for communities that historically and currently are somewhat insular or isolated. The system creators or those tasked with improving the juvenile justice system should review these concepts and consider whether and how to incorporate them into their tribe's system.

#### WHAT IS FAMILY GROUP CONFERENCING?\*

A Family Group Conference (FGC) is a facilitated group dialogue and decision-making process in which a young person who has done harm is encouraged and supported to be directly accountable to the person who was harmed. The focus is on doing right, not on punishment. Typically, participants in a FGC include a young person accused of a crime, his/her family, the persons who were harmed and their supporters, and a trained facilitator. Depending on the severity of the crime, a member of law enforcement might also be present. Ideally, an FGC results in a consensus based plan for repairing the harm to the extent possible. When the young person completes the plan, filed charges are dropped. The participants also try to understand why the offending happened and tailor the plan to help prevent future wrongdoing.

FGC can also be used in lieu of traditional school discipline processes which would otherwise result in suspensions or expulsions for more serious negative behavior on school campuses. Ideally, a single restorative system of youth accountability which addresses both school needs and juvenile charges would result when youth commit crimes on school campuses.

#### HISTORY OF FAMILY GROUP CONFERENCING

Family Group Conferencing is the national model for addressing youthful wrongdoing in New Zealand. The Maori – New Zealand's indigenous people – spoke out against the disproportionate incarceration of their youth and advocated for FGC as a more effective model for dealing with youth crime. In 1989, the New Zealand government passed the Children, Young Persons, and Their Families Act which adopted a national model for using FGC in all youth crimes other than murder and manslaughter. Since 1989, youth incarceration has been rendered virtually obsolete, juvenile detention facilities have been closed, recidivism rates have plummeted, and victim satisfaction rates are high.

Taken from Community Works website at

<http://www.communityworkswest.org/index.php/about-us/4-programs/programs/43-rgc>

### **[3.3] DISPOSITIONAL ALTERNATIVES**

The system must have at its disposal the ability to impose consequences that are appropriate for the youth offender, the family, the victim(s) and the community. The consequences must fit the gravity of the offense and the real needs of the youth to learn and incorporate behavior changes. The alternatives must be tailored to the offense and the offender. A certain amount of attention should be given to graduating those consequences to allow the offender to modify or correct his or her behavior with limited consequences. Increasing the consequences is usually associated with increased restriction of freedom of movement, but should also be associated with increased services as in treatment service requirements.

What follows is a listing of possible alternative services for the youth. These services may be tribally established, be contracted for, or be provided by neighboring local, state, or federal governments or nonprofits. If the consequences are imposed from outside the tribe, it is important to remember that continued connection of the youth with their tribe and their family is extremely important to their eventual ability to absorb the “lesson.” In all likelihood, and assuming eventual release, the youth will return to the tribe. He or she may have continuing problems if the underlying issues are unaddressed. The youth may then re-introduce his or her problems to the community.

#### **A. PLACEMENT OPTIONS—OUT OF HOME DETENTION, TREATMENT, AND FOSTER CARE**

After youth have been subject to punitive measures, they are returned to their home, maintained in their home, or face an out-of-home placement. Less serious offenders may have the opportunity to address mental health concerns and/or substance use/abuse issues during inpatient care. Indian Health Services and specific tribal agencies may offer access to some facilities. It is important that each tribal juvenile justice system’s personnel become familiar with the available tribal and neighboring local, state, or federal options. In situations in which there is concurrent jurisdiction and/or intergovernmental agreements, additional placements may be available to youth and some of these facilities may be open to providing culturally relevant supportive services. In all cases there is also a need for after-care services. Planning for those services is essential and should begin before a youth is released from a facility.

If the youth needs an increased level of supervision or would benefit from services and opportunities available from an out-of-home placement, but does not require out of family placement, then foster care/a guardianship/an Indian custodianship is a possible placement option. This could include extended family placements and/or placement with an unrelated adult who is known to the youth and/or the family and who is able to offer a suitable home. A case manager or probation officer will need to supervise and monitor such placements, depending on the offense and the level of supervision needed.

Serious offenders will be housed in locked or semilocked facilities. Those offenders also require ongoing supportive contact and transitional services.

## **B. HOME DETENTION**

Home detention is basically house arrest with limited access to supervised activities, including school and school-related activities. It may include an ankle monitor with GPS and/or substance-use monitoring. It may also include access to counseling (individual or specialized, e.g., domestic violence, antitheft, driving skills), outpatient treatment programs (featuring frequent and random drug/alcohol testing), and employment.

Home detention is often seen as an opportunity for youth to demonstrate their willingness to work with service providers and to show they can discipline themselves with support to avoid bad behavior. This requires parents or adult figures who will support the needs and demands of the supervision and who will place the agreement to report noncompliance at the top of their parenting list.

## **C. SCHOOL PLACEMENTS**

This kind of placement can be as simple as requiring a student to reengage in school through the continuation of school or a GED program. It may require a boarding school or other specialized academic program, depending on the needs of the youth in question.

Sometimes youth can find it very beneficial to have a “change of scenery” with a chance to start over where their past does not have to be confronted on a regular basis. The essential importance of this requirement to continue education is that youth **MUST** achieve, as much as possible, education competency and success to avoid further and continued involvement with the criminal system.

## **D. SPECIALIZED PROGRAMS, CLASSES, AND MENTORS**

Specialized programs and classes can be developed on reservation or found in the surrounding communities. They may address certain behaviors, giving the youth tools and information designed to assist them to avoid pitfalls or to acquire needed skills for success.

These classes include but are not necessarily limited to the following:

- 1) Antitheft
- 2) Graffiti abatement
- 3) Alcohol and substance abuse education
- 4) Driving classes
- 5) Cultural how-to classes—including producing items and/or attending community events
- 6) Cultural classes on historical and traditional knowledge
- 7) Domestic violence classes
- 8) Life skills classes
- 9) Peer counseling
- 10) Youth fellowship classes, so that youth are exposed to positive activities

An important part of these programs may be the partnership with teams of youth to accomplish projects. These can overlap into the provision of services to the community. Additionally, mentors in the model of teaming an adult with a youth, are very successful. Mentors should be viewed as fulfilling the role of an adult advisor much as an aunt or uncle may do and can supplement ongoing support.

#### E. PROTECTIVE ORDERS

Protective orders are designed to keep youth away from person(s), places, and activities. They require that the youth refrain from any contact in a very particular manner. They may allow for some contact under a supervised situation, for example, therapeutic contact with a parent. Protective orders may also be used to keep others from contacting the youth, if the youth is being harassed or otherwise disturbed in an unlawful manner.

These orders are generally for a limited duration and are very specific, often stating the required distance between the youth and persons or places. They are sought for the purpose of protection of the youth or protection from the youth, and can be reviewed by the court for changed circumstances. Violations of these orders are often considered separate criminal offenses. Protective orders should be used wisely and uniformly adhered to so that further criminal involvement is avoided.

#### F. CONCLUSION

The “parts” described are required to operate an effective and responsive juvenile justice system. The tribal court must share the responsibility to oversee the development of the system and to ensure that its staff’s vision, mission, and competency meets the demands of this youth focused and necessarily collaborative and integrated system.

## CHAPTER 4

### OFFENSES DISCUSSION

#### [4.1] INTRODUCTION

Earlier chapters have reviewed the preliminary considerations a team needs to work through before adopting a juvenile code or undertaking revisions/updates for a code. Once the decision has been made to move forward with the project, the actual drafting can occur. The code must consider designating some or all of the following categories of youth behavior as prohibited behavior:

- 1) Criminal behavior—society (tribal and nontribal) basically agrees on the definition of many crimes and has deemed certain actions to be criminal in nature, for example: assault, battery, robbery, burglary, hunting, fishing, and so forth.  
Please see Chapter 8: “Transfer to Tribal Criminal Court.”
- 2) Status offenses—those offenses that, if committed by an adult, would not be a crime, for example: driving under age, possession of firearms, and truancy.  
Please see Chapter 23: “Nondelinquency Proceedings—Standalone Status Offenses.”
- 3) Any behavior or offenses particular to a given community that could involve regalia or cultural offenses.

\* A fourth category of behavior may be considered to be a red flag warranting some juvenile justice system involvement, as opposed to prohibited behavior. This category would include behavior indicating that a youth and his family are in need of services (a.k.a. FINS). That particular behavior does not rise to the level of criminal behavior, including but not limited to the commission of defined status offenses.

Please see Chapter 7: “Juvenile Offenses”; Chapter 21: “Status Offenses/Family In Need of Services (FINS): Nondelinquency Proceedings General.”

Additionally, another class of offenses must be considered or acknowledged by the juvenile code. Those include the management of sex offenders in Indian country. Youth and adult offenders, as well as youth and adults with histories of victimizing children and adolescents, must be accounted for in any scheme of laws seeking to protect the community. Protected areas or zones are increasingly being considered as a management tool for law enforcement. Management and treatment of sex offenders, youth or adults, are very complex topics. These topics cannot be fully addressed here, but they are of extreme importance. Further, any offense that can result in a designation of “sex offender” for a youth, requiring sex offender registration, must be carefully administered. Definition of these offenses is a serious issue, especially for the purposes of work with juveniles. Any youth conduct that would be deemed a sex offense requiring registration must be seriously studied. This is an area of evolving knowledge. Criminal, mental health, and treatment experts must be consulted when a tribe is considering criminalizing juvenile sexual behavior.

## [4.2] INCORPORATION OF CRIMINAL CODE(S)

Drafters may look to neighboring tribal, state, and federal juvenile laws. It will be important to keep in mind the previous discussions regarding tribal, federal, and state jurisdiction; characterizations of misdemeanors versus felonies; the actual consequence possibilities under the federal law through Indian Civil Rights Act and *Oliphant* with current Tribal Law and Order Act (TLOA) amendments and recent Violence Against Women Act (VAWA) 2013 amendments; and existing treatment or other facility limitations. Foreign codes will offer definitions of offenses (the necessary elements that make up each crime); outline proof required; often identify graduated offenses (for example, theft from petty to grand as determined by amount of loss); and have an established statutory scheme that has the advantage of prolonged, and thus tested, usage.

Please see Chapter 9: “Relations with Other Agencies and Courts.”

*Oliphant v. Suquamish Indian Tribe*, 15 U.S. 191, 208 holding that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non-Indian for crimes committed in Indian country.

TLOA: Signed into law July 29, 2010 TLOA helps to address crime in tribal communities and enhances tribes’ authority to prosecute and punish criminals. However, tribes are required to provide certain due process requirements. For further information, please see:

<http://www.justice.gov/tribal/tloa.html>

<http://tloa.ncai.org/>

VAWA 2013 Reauthorization: Among its provisions, Title IX of VAWA of 2013 authorized “special domestic violence criminal jurisdiction.” This jurisdiction authorizes tribes to criminally prosecute non-Indians for the crimes of domestic violence, dating violence, and the violation of protection orders. However, in order for tribes to utilize this criminal jurisdiction, tribes must provide certain enumerated due process protections, including most of the protections required in TLOA. For further information, please see:

[http://www.tribal-institute.org/lists/vawa\\_2013.htm](http://www.tribal-institute.org/lists/vawa_2013.htm)

<http://www.justice.gov/tribal/vawa-tribal.html>

<http://www.justice.gov/tribal/vawa-pilot-2013.html>

<http://www.niwrc.org/>

Most state juvenile laws also have a full listing and definitions of status offenses. The important concept to remember is that as aggravating as the conduct underlying these offenses may be, this conduct is not generally criminal in nature, but is more reflective of immaturity and lack of supervision, and/or representative of underlying treatable concerns.

Given current research and findings regarding the human brain, we now know that much of this conduct is characteristic of a normal phase in adolescent brain development. Punishments and consequences that do not consider why youth are engaging in negative conduct are not likely to



further therapeutic outcomes that change the behavior. If the negative behavior continues it can be a precursor to more serious negative or criminal behavior. Parental involvement or parental figure involvement, if available, is often able with support to address negative behaviors. It is important that the “system” have an understanding of the developmental phases of children, adolescents, and young adults. Blaming as opposed to problem solving is generally counterproductive for this group of youth “offenders.”

Please see Chapter 7: “Juvenile Offenses.”

Drafters also need to look to other identified local concerns. These concerns might include issues like elder or vulnerable (developmentally or otherwise vulnerable) youth/adult abuse, issues related to the need for restraining orders in dating relationships, or youth who are parents. Decisions will need to be made as to which court/docket/calendar should handle various types of needs or misconduct. For instance, are youth/underage parents more properly heard in juvenile court? Or should all juvenile matters be determined by family court? Certain or repeated violations of restraining orders can be determined to be criminal in nature.

Charging decisions can become very significant, that is why in earlier chapters the issue of determining a consistent philosophy and a team approach is recommended. How an incident is petitioned or charged will determine the approach taken by the system, the consequences or alternatives available, and the support accessible to the youth and/or their family. Additionally, drafters need to be aware of “stealth” consequences, for example, eviction if a youth is found to be in public housing with illegal drugs. This consequence is serious for not just the youth but also the entire family and it might be more appropriate and/or helpful to find another approach to resolution of a perceived problem of a family’s youthful members.

The penalty portion of the juvenile code must reflect value decisions about what target populations should be subject to such penalties in terms of age, gender, conduct, youth needs, and available resources, the jurisdictional limitations and/or availability of negotiated agreements with neighboring local, state and federal governments, and the actual availability of tribal community resources. Depending on the overriding philosophy of the code it is important to build into the consequences not just “punishment” but also redemption possibilities, so that youth can be restored not just to their family but to their community. This includes an understanding of the citizenship requirements of their Indian nation. An aspect of punishment/consequences not generally available to non-Indian communities (other than proscribed stay-away orders) is the possibility of banishment for tribal member youth or expulsion for nontribal youth who commit certain offenses or become a danger to the community. Either of these can be for specific periods of time. Banishment should be considered ONLY as a consequence of last resort as it is for all intents and purposes the most severe sanction available to tribal nations.

### **[4.3] OFFENSES PARTICULAR TO A CERTAIN TRIBAL COMMUNITY**

These offenses can include certain archaeological site disturbances, including cemetery disturbances, which may or may not be defined as criminal behavior in nontribal settings. Even if they are defined in the nontribal setting, it is important to put a distinctive tribal perspective to any such crime. That could be in the enhancing of a crime; for instance, stealing from a dance camp would have an additional penalty not just related to the amount of loss, requiring a culturally appropriate settlement. There should be certain offenses that require a distinctive resolution that are not just general criminal redress. Each community needs to determine those offenses. Nonmembers should not define them.

The same can be true of the destruction of community resources (this can include natural resources and such things as school sites that benefit tribal children) including cultural resources. In all likelihood they have a certain monetary value but the shared value of community resource also needs to be addressed. For instance vandalizing a cultural site, including a currently used site should be considered a “criminal” offense and a cultural offense. The code would ideally list the consequences in a dual fashion so that the offender would be required to address both aspects of the offense. This is a method of bringing a philosophy into the tribal criminal court in an attempt to develop a real understanding that community must be addressed. This is victim representation not just at the individual level but also at the community level. It is meant to specifically foster responsible tribal citizenship.

It is important to hold on to the concept that if tribal communities want different results than those achieved by nontribal communities they must conduct their business in a different and tribally unique fashion. They should not mirror the system about which they have serious ongoing concerns. This is a critical component that, if addressed, could bring a tribe’s juvenile justice system into alignment with their tribal values.

### **[4.4] SEX OFFENDER REGISTRATION AND NOTIFICATION ACT IN INDIAN COUNTRY**

The Sex Offender Registration and Notification Act<sup>8</sup> (SORNA) also applies to tribal juvenile justice systems. The tribe needs to have a comprehensive approach that is a tribally, “global/all encompassing” approach to youth sex offenders. How and where the provisions of this act are referenced or addressed in tribal law is a local issue, but any juvenile code should recognize the outstanding issues as related to youth. SORNA provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. SORNA aims to close potential gaps and loopholes that existed under prior law and to generally strengthen the nationwide network of sex offender registration and notification programs.

SORNA also recognizes tribal court convictions. Section 127 of SORNA attempts to track the existing jurisdictional framework on Indian lands, but does so in a way that grossly

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<sup>8</sup>PL 248-109.

oversimplifies the complex distribution of authorities. SORNA recognizes two classes of tribes: (1) those subject to PL 280 jurisdiction in the six mandatory PL 280 states (Minnesota, Wisconsin, California, Nebraska, Oregon, and Alaska) and (2) all other tribes. For tribes in the first category, authority and responsibility to implement the SORNA on Indian lands was automatically delegated to the state in which the tribal lands are located. Tribes in the second category include those tribes subject to PL 280 jurisdiction but that are located within the voluntary PL 280 states, and where they were given one year to pass a resolution “elect[ing] to carry out [SORNA] as a jurisdiction subject to its provisions.” Those tribes that failed to enact a resolution before the deadline joined the mandatory PL 280 tribes in the first category, and all responsibility to implement the SORNA requirements on tribal lands was delegated to the state.

Of the 562 federally recognized Indian tribes in the United States in 2006, 211 were eligible to make an election under Section 127 of SORNA. The Department of Justice reported that, as of 2006 198 of the eligible tribes passed a resolution expressing their intention to comply with the SORNA mandates. An additional five tribes passed resolutions delegating their responsibilities under the act to the states in which the tribes’ lands are located. A number of Indian tribes in mandatory PL 280 jurisdictions, while expressly excluded from making an election under Section 127, passed resolutions stating their intention to comply with the law and expressing their opposition to the delegation of their authority to the state. Although Section 127 included a stringent deadline for tribes to elect to comply with the SORNA mandates, the law also acknowledged that any tribe that has made a Section 127 election may change its mind at any time and the responsibility for implementing SORNA on tribal lands will immediately fall to the state.

This is a developing area of law in Indian country. Unfortunately, Indian country has been the repeated hunting grounds for perpetrators with histories of victimizing, both in modern times and in prior eras. It is important that Indian communities implement policies that address these issues. It is of equal importance that in so doing particular attention be paid to the need to label individuals as sex offenders only when justified by their actions and the communities’ right to protection.

#### **[4.5] CONCLUSION**

The offenses/consequences established by a team will create the environment in which their community addresses youth who are not being successfully managed by themselves or their families. It is important that this management happen in a fashion that is value consistent with the community and that the practices of this system truly represent the values of each community. Similarly, it is important to keep in mind youth brain development and how it factors into offense definitions and appropriate consequences. The long-term impact of failing to intervene or intervening inappropriately is harm to our youth, their individual success, and the future welfare of the tribe and tribal community.