

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 determine 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. For example, what should be the guiding philosophy and values of your juvenile justice system? Is the primary goal to help youth grow and heal (a.k.a. habilitation and rehabilitation)? Is the primary goal to require youth to repair harm done to others (a.k.a. restorative justice)? Should you also hold youth accountable (a.k.a. accountability)? Is it important to punish youth (a.k.a. punishment and retribution)? When should promoting public safety be a higher priority? Will the new law be informed by the science on adolescent brain development? What cultural principles and values are to be promoted? See [Chapter 30: Integrating Culture, Customs, Traditions, and Generally Accepted Practices](#).

The team may also choose to hold community meetings to educate the community and to get feedback on some critical organizational issues. For example, do we wish to reform our laws for children and adolescents/young adults (including child maltreatment, status offenses, truancy, 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 Family in Need of Services (FINS) model? Which population is best served with the out-of-court resources available?

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 obligations⁴ owed to youth by the tribe and the family/extended family?
- Should all juvenile records be destroyed at a certain point or just certain juvenile records?

[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”⁵ and “rehabilitative” juvenile justice system—where the goal is to help youth become capable and/or to bring youth back to a

⁴ A number of more traditional tribes are exploring the responsibilities and rights of extended family members and what rights, privileges, and duties they might have with respect to youth. Some of these rights, privileges, and/or duties have been put into tribal statutes. See Chapter 30, “Integrating Culture, Customs, Traditions, and Generally Accepted Practices.”

⁵ The medical definition of “habilitation” is “assisting . . . a child with achieving developmental skills when impairments have caused delaying or blocking of initial acquisition of the skills. Habilitation can include cognitive, social, fine motor, gross motor, or other skills that contribute to mobility, communication, and performance of activities of daily living and enhance quality of life.” This is as opposed to the medical definition of “rehabilitation” as “. . . a treatment or treatments designed to facilitate the process of recovery from injury, illness, or disease to as normal a condition as possible.” Available at <http://medical-dictionary.thefreedictionary.com>, visited 16 January 2015.

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, and educational systems. This process should include an exploration of various therapeutic justice models that are often incorporated in precourt, postcourt, 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 historically exist in tribal communities, for example, methamphetamine abuse. With new behaviors and problems, the culture must adapt. For instance, all horse-involved tribes at one point were prehorses; 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, for example, 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 regarding self-respect, honoring self, positive beliefs, etc.?
- What are the values regarding 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 regarding 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 are 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 in which the perpetrator has a high potential for violence against others (including the intake officer, mediator, or peacemaker, etc.), cases in which there is a likelihood of traumatizing, victimizing, or retraumatizing/victimizing

the victim (in child abuse or domestic violence situations), and/or cases in which 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 [Restorative Justice Online](#), [Edutopia](#), and [Fact Sheet on Evidence Based Prevention and Intervention Programs](#).

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 justice 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.⁶

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

⁶ William Adams, Julie Samuels, Janeen Buck Willison, Hannah Dodd, Meredith Dank, Barbara Parthasarathy, Kamala Mallik-Kane, Jessica Kelly, Sybil Mendonca, & KiDeuk Kim, *Tribal Youth in the Federal Justice System*, ix (2011) available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/234549.pdf>, visited 16 January, 2015.

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

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 using 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.

About the Indian Child Welfare Act

The [Indian Child Welfare Act](#) (ICWA) was passed by Congress to address the problem of Native children being removed from Native homes (off and on reservations). Often states did not adequately involve tribes in cases regarding Native children. Tribes were concerned about the high number of Native children being raised outside of their tribal communities by non-Natives. Not only were these children away from their family, but they often lost their tribal culture. In response to these problems, ICWA sought (1) to affirm existing tribal authority to handle child protection cases (including child abuse, child neglect, and adoption) involving Indian children and to establish a preference for exclusive tribal jurisdiction over these cases; and (2) to regulate and set minimum standards for the handling of those cases remaining in state court and in state child social service agencies.⁷

For further information on ICWA, please see:

- Tribal Law & Policy Institute, [Indian Child Welfare Act](#)
- Native American Rights Fund, Online edition of “[A Practical Guide to the Indian Child Welfare Act](#)”
- National Indian Child Welfare Association, [Indian Child Welfare Act of 1978](#)

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

⁷ Tribal Law & Policy Institute, Indian Child Welfare Act available at <http://www.tribal-institute.org/lists/icwa.htm>, visited 29 December, 2014.

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, incorrigibility, curfew violations, running away, 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 percent 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, and 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 fifteen years old when the offense was committed and served on average sixteen months before serving approximately 81 percent of their sentence. The average time served doubled from twelve months in 1999 to twenty-five months by 2008.

Most were committed to the custody of the Federal 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 percent) or were supervision violators (31 percent).

According to the [Federal Bureau of Prisons Federal Juvenile Population](#) web page, 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.”

About Public Law 280 States

In a [Public Law 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). PL 280 also permitted the other states to acquire jurisdiction at their option.

PL 280 has generally brought about:

1. An increased role for state criminal justice systems in “Indian country” (a term that 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).

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.

About the Indian Civil Rights Act

The [Indian Civil Rights Act](#) (ICRA) was enacted by Congress in 1968, and then amended in 1986, 1991, 2010, and 2013. Tribal inherent sovereignty predates the United States and the U.S. Constitution. Tribes did not participate in the Constitutional Convention and did not ratify the U.S. Constitution. As a result, the Bill of Rights and other individual liberty protections found in the Constitution do not apply to tribal governments. After years of Senate testimony regarding abuse of Native individuals by state and federal officials, as well as tribal governments, Congress passed ICRA. This extended certain constitutional provisions to tribal governments. The 1986 amendment increased tribal sentence limitations, for a single offense, from six months imprisonment and/or \$500 fine to one year imprisonment and/or \$5,000 fine. The 1991 amendment reaffirmed tribal court criminal jurisdiction over all Indians (tribal members and nonmembers). In 2010 the [Tribal Law and Order Act](#) (TLOA) amended ICRA to increase tribal sentence limitations to a maximum of three years imprisonment and/or \$15,000 fine. However, to exercise these enhanced sentences tribes must provide certain additional civil protections, including the provision of effective defense counsel and a licensed and law-trained judge, make the tribal laws publicly available, and maintain a record of the criminal proceeding.

The 2013 amendment recognized tribes' inherent authority to exercise "special domestic violence criminal jurisdiction" over non-Indian offenders who commit domestic violence, dating violence, or violate a protection order. However, in order to exercise this special domestic violence criminal jurisdiction, tribal courts will have to provide certain enumerated due process protections. These include all of the TLOA due process protections (even if tribes do not impose the enhanced sentencing options), as well as several additional due process protections including the right to an impartial jury.

For further information on ICRA, please see [Tribal Law and Policy Institute](#), [Indian Civil Rights Act](#).

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 Family In Need Of Services (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: Nondelinquency Proceedings: Status Offenses/Family in Need of Services; Chapter 22: Nondelinquency Proceedings—Family in Need of Services (FINS) Interim Care; Chapter 24: Nondelinquency Proceedings—Family in Need of Services (FINS) Referral to Juvenile Counselor; Chapter 25: Nondelinquency Proceedings—Family in Need of Services (FINS) Breakdown in Parent-Child Relationship; Chapter 26: Nondelinquency Proceedings—Family in Need of Services (FINS) Consent Decrees; and Chapter 27: Nondelinquency Proceedings—Family in Need of Services (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 eighteen 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 co-parenting skills/emphasis are essential, etc. 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 goal is for child support to emphasize co-parent 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 in the preceding text. 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 courts; 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 offenders 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 noncourt-based activities for individual, family, and community support.

Please see [Chapter 31: Tribal Healing to 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 and treatment goals 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 close to 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 participate in marriage.

See [Chapter 6: Subject Matter Jurisdiction](#).

C. Should Court Rooms 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 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 justice 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 1980s and 1990s 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.⁸

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

We note that the University of Washington’s Center of Indigenous Research and Justice 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.

⁸ See for, e.g., Chapter 4, “Why Crime Is Different,” in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, Massachusetts: Harvard University Press, (2008).