

Chapter 4: Criminal Offenses

[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, and fishing.

Please see [Chapter 8: Transfer to Tribal Criminal Court or Other Jurisdiction](#).

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—Stand-alone 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: Nondelinquency Proceedings: Status Offenses/Family in Need of Services \(FINS\)](#).

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 (either youth or adult) 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 ICRA and [Oliphant](#) with current 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 (e.g., 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](#).

About the Tribal Law & Order Act and the Violence Against Women Act 2013

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About the Tribal Law & Order Act and the Violence Against Women Act 2013

The U.S. Supreme Court in [Oliphant v. Suquamish Indian Tribe](#), 15 U.S. 191, 208 held that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non-Indian for crimes committed in Indian country.

However, on July 29, 2010, Congress passed the [Tribal Law & Order Act](#) (“TLOA”) that enhanced the tribes’ authority to prosecute and punish criminals. However, tribes are required to provide certain due process requirements. For further information, please see:

- United States Department of Justice, [Tribal Law and Order Act](#).

- National Congress of American Indians, [Tribal Law & Order Resource Center](#).

Further, the VAWA 2013 reauthorization recognized tribes' inherent authority 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:

- Tribal Law and Policy Institute, [Violence Against Women Act – Title IX: Safety for Indian Women](#).
- United States Department of Justice, [Violence Against Women Act \(VAWA\) Reauthorization 2013](#).
- United States Department of Justice, [VAWA 2013 Pilot Project](#).
- [National Indigenous Women's Resource Center](#).

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](#)¹¹ (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 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 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.”¹² 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

¹¹ PL 248-109.

¹² Id.

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.