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Violence Against Native Women: Annotated Bibliography of Legal Resources

Marie Carcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 Wm. & Mary J. Women & L. 415 (2009).
Carcoran argues that the combination of tribes' lack of substantive jurisdiction over rape and their dependence on the federal government's inadequate response to crimes against women on tribal lands creates a system in which tribes cannot exercise self-determination in the face of the rape crisis on tribal lands. *Id.* at 423. Furthermore, Carcoran argues that the impact of P.L. 280, which allocated jurisdiction of some tribes to the state rather than federal government, has been largely negative, and has perhaps worsened the jurisdictional and legal issues related to rape in Indian Country by creating a system in which tribes are still reliant on an often unresponsive external authority. *Id.* at 425-26. Carcoran examines the role of traditional justice systems in relation to rape but notes some problems with implementing more traditional tribal court systems. *Id.* at 438-441.

Wendy A. Church, Resurrection of the Tulalip Tribes' Law and Justice System and its Socio-Economic Impacts (May 21, 2006) (M.A. capstone research project, Evergreen State College) (on file with author).
On July 7, 1958, the State of Washington accepted jurisdiction over the Tulalip Reservation at the Tribes' request under Public Law 280. *Id.* at 6. Church argues that the Tulalip Tribes' decision to retrocede state jurisdiction to the tribal government has benefitted the tribe socially, culturally, legally and economically. *Id.* at 3. In the late 1990s, the Tribes began the process of requesting retrocession; Church provides an overview of the Tulalip Tribes efforts in lobbying for and eventually achieving retrocession. Church examines how the legal system has changed and developed in recent years including the development of the Tribe's law and justice system. *Id.* at 15.

Sarah Deer, *Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State*, 31.4 SOC. JUST. 17 (2004).
Deer discusses the impact of Federal Indian law on Native American victims of crime, arguing for restoring full authority over crimes of violence against women and children to the tribal justice systems. Deer examines Federal Indian Law in relation to crime victims, the Major Crimes Act of 1885, Public Law 280, the Indian Civil Rights Act, and the impact of the Supreme Court decision in *Oliphant v. Suquamish* (1978).

Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455 (2004-2005).
This article is based on a speech Deer delivered as part of the symposium, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice* (April 16, 2004). *Id.* at 455. Deer argues that sexual assault jurisprudence is closely related to tribal

sovereignty, as sexual violence is "deeply embedded in colonizing and genocidal policies." *Id.* Deer discusses the epidemic of rape on native lands and the legal barriers restricting tribal governments from taking real action to combat sexual violence. She also examines traditional means of dealing with sexual assault. *Id.* at 463.

Sarah Deer, *Toward an Indigenous Jurisprudence of Rape,* 14 KAN. J.L. & PUB. POL'Y 121 (2004-2005).
Citing the high rates of sexual assault against Native women, Deer argues for the development of an indigenous jurisprudence of rape: "The justification for developing an indigenous jurisprudence of rape emerges in three distinct areas: (1) the high rate of sexual violence against Native women; (2) the inability of current legal systems to adequately address sexual assault of Native women; and (3) the strong anti-rape sentiment in the traditions and belief systems of Native people. The justification is also predicated on the unique nature of sexual assault as a criminal act that has a profound impact upon human dignity and wellbeing. Current legal scholarship (both feminist and indigenous) does not adequately address the issue of sexual violence against Native women." *Id.* at 121.

Deer discusses the jurisdictional problems related to prosecution of crimes committed in Indian Country. *Id.* at 127, and explores the relationship between colonization and sexual violence. *Id.* at 129-33. Deer discusses the development of Tribal Customary Law to confront sexual assault: "Contemporary tribal rape law will be most effective if rooted in tradition and grounded by a uniquely indigenous philosophy that understands the experience of rape on both a micro (individual) and macro (community) level." *Id.* at 137.

Matthew Handler, Note, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It,* 75 BROOK. L. REV. 261 (2009).
Handler looks at crime in Indian Country broadly, arguing that tribal government needs greater authority in both law enforcement activities and adjudication. He also asserts that federal law enforcement agencies must provide more effective responses to tribal communities.

Elise Helgesen, Note, *Allotment of Justice: How U.S. Policy in Indian Country Perpetuates the Victimization of American Indians*, 22 U. FLA. J.L. & PUB. POL'Y 441 (2011).
Helgesen discusses jurisdictional challenges, and the lack of resources on tribal lands. She then examines sexual assault against Native women. *Id.* at 460. She discusses the low rates of prosecution, and chronicles the legislative attempts to address violence in Indian Country. *Id.* at 463-68. Ultimately, Helgesen argues, tribal self-determination is the most long-term solution for effective law enforcement in Indian country *Id.* at 470.

TODD D. MINTON, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, JAILS IN INDIAN COUNTRY (2010).
The Bureau of Justice Statistician analyzes the current state of jails in Indian Country, notably: the number of inmates confined in Indian jails nationwide; the percentage of rated capacity occupied; those jails operating in highly overcrowded conditions; and basic biographical data on inmates.

Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & Soc. Challenges 1 (2009).
Pacheco examines traditional Native American Law, including the role of spiritual incentives and social deterrents to undesirable behaviors. *Id.* at 4-7. She examines the view of women under traditional law. *Id.* at 8. Pacheco then examines traditional criminal law, (*Id.* at 10), discussing punishment for severe crimes (*Id.* at 13), and different tribal approaches to sexual violence (*Id*. at 14-15). "Under traditional Native American law, when incidents of violence, either sexual or domestic, occurred, the consequences for the abuser were swift and harsh, usually including the possibility of banishment, death, or something similar." *Id.* at 15. Pacheco then examines contemporary tribal courts and the problems that arise with the limited tribal jurisdictional. *Id.* at 18, 23.

Suzianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M. L. Rev. 239 (2011).
Painter-Thorne begins this article with a description of the brutal gang rape of 23-year-old Leslie Ironroad on the Standing Rock Sioux Reservation in South Dakota in 2003. *Id.* at 239. The rape was never investigated; although Leslie described the assault and named her assailants before she fell into a coma and died, the Bureau of Indian Affairs police chief claimed that the rape was "unsubstantiated." *Id.* "Tragically, what happened to Leslie Ironroad is not unusual in Indian Country, where the criminal justice system is severely broken and crime has created a public safety crisis." *Id.* at 243. Painter-Thorne proceeds to examine the "epidemic of crime in Indian Country," including rampant sexual assaults. *Id.* She discusses jurisdictional hindrances to effective law enforcement, and the profound flaws in the Tribal Law and Order Act. *Id.* at 277.

Laura E. Pisarello, Comment, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 58 Emory L.J. 155 (2010).
Pisarello discusses jurisdictional issues; P.L. 280; and the detrimental impact of current federal law on law enforcement in Indian Country.

Maria Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant Fix*, 93 Minn. L. Rev. 1902 (2009).
Quasius explores jurisdictional problems with effective law enforcement on Indian Country. She explores The Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*, a decision holding that tribal courts have no jurisdiction to try or punish

non-Indians, effectively precluding tribal prosecution of non-Native people who sexually assault Native American women. Quasius argues that *Oliphant* was decided erroneously: "On the basis of dictum in one district court case, two Attorneys General opinions from the mid-nineteenth century, a 1960 statement by a Senate committee, and a 1970 Interior Solicitor's opinion that was subsequently revoked, the Supreme Court nearly eliminated the power of tribal governments to obtain justice for Native American rape victims." *Id.* at 1915. She then argues that tribes should have full jurisdiction over crimes in tribal country, and suggests an "opt-in" program to allow tribes to assume criminal jurisdiction gradually. *Id.* at 1924-25.

TRIBAL LAW AND POLICY INSTITUTE, FINAL REPORT: FOCUS GROUP ON PUBLIC LAW 280 AND THE SEXUAL ASSAULT OF NATIVE WOMEN (DEC. 31, 2007).
This document gives an overview of the focus group held by the Office on Violence Against Women in August 2007, to address Public Law 280 and sexual assault in Indian Country. Thirty-four invitees, including thirteen participants from PL 280 tribes, and seven from tribal coalitions in PL 280 states, attended the focus group session. Several themes of concern were identified, including: "funding problems; data collection issues; lack of reporting of sexual assault; not enough use of Sexual Assault Response Teams (SART) and sexual assault protocols." *Id.* at 5. The group recommended several steps, including improvements to data collection, additional training for law enforcement officers, development of new protocol for health care and forensic exams, among others suggestions for improving systemic response to victims of sexual assault in PL 280 states.

TRIBAL LAW AND POLICY INSTITUTE, PROSECUTOR SEXUAL ASSAULT PROTOCOL: RESOURCE GUIDE FOR DRAFTING OR REVISING TRIAL PROSECUTOR PROTOCOLS ON RESPONDING TO SEXUAL ASSAULT (SEPT. 2008).
This protocol gives background information on Native women and sexual assault and covers foundational educational material on non-consensual touching, spousal rape, stalking, survivors with disabilities, the role of victim advocates, and many more topics relevant to prosecuting sexual assault crimes in Indian Country. The booklet includes a model protocol. The last third of the booklet is a workbook to assist in developing a tribe-specific protocol.

TRIBAL LAW AND POLICY INSTITUTE, TRIBAL LAW ENFORCEMENT PROTOCOL RESOURCE: SEXUAL ASSAULT (JULY 2008).
This guide is subtitled, "Guide for Drafting or Revising Tribal Law Enforcement Agency's Protocols Responding to Sexual Assault." The first part of the booklet covers the same general material covered by the Prosecutor Sexual Assault Protocol guide, *supra.* The second section covers law enforcement-specific tools.

Rebecca Tsosie, *Indigenous Women an International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination*, 15 UCLA J. Int'l L. & Foreign Aff. 187 (2010).

This article examines whether there are conflicts between the feminist foundations of international human rights law and the cultural norms of some indigenous peoples. Tsosie examines international human rights norms regarding women, including CEDAW. She then examines the rights of indigenous peoples, and discusses the conflicts that can arise related to gender. "There is a strong sense in the Declaration [on the Rights of Indigenous Peoples] that indigenous peoples ought to have the right to practice and revitalize their cultural traditions and customs. But what if these customs and traditions are not gender neutral? What if they are perceived as discriminatory toward Native women?" *Id.* at 217. Tsosie argues: "Native peoples must develop an appropriate basis for contemporary human rights in the exercise of their cultural sovereignty, a process that often implicates the norms that have fostered cultural survival for many generations." *Id.* at 187.

TULALIP TRIBES, LAW AND JUSTICE BROCHURE (Mar. 2011).
This brochure provides an overview of the Tulalip Tribal Court, Elder Panel, Wellness Court, Juvenile Diversion Panel, Prosecutor's Office, Police Department, Probation Office, and other offices central to the Tulalip criminal justice system.

U.S. Senate Comm. on Indian Affairs, *Oversight Hearing Before the Comm. on Tribal Courts and the Admin. of Just. in Indian Country* (Jul. 24, 2008) (testimony of Hon. Theresa M. Pouley, Tulalip Tribal Court Judge and President, Northwest Tribal Court Judges Association).
Judge Pouley encouraged the Committee to support and fund tribal law enforcement and courts. *Id.* at 2. She noted that the Tulalip Tribes have been successful in channeling revenue earned through gaming and business development into improving the criminal justice system, and those improvements have yielded positive results including economic gains and improved quality of life on the Reservation. *Id.* Judge Pouley gave a background of the Tulalip Tribes, their legal system, and the negative impacts of PL 280. She outlined the Tribes' work on developing an effective criminal justice system, including increasing the number of police officers and expanding the Tribal Court. "The Tulalip Tribes has taken on this responsibility to build its own criminal justice system on the Reservation largely because the federal government has failed to fulfill its responsibility, and the state criminal authority proved ineffective." *Id.* at 4. Judge Pouley pointed to statistics showing a decrease in crime on the Tulalip lands in the years since retrocession. *Id.* at 5, 7. She concluded her testimony by urging the committee to "enhance the Tribal Law and Order Act by not only authorizing an increase in sentencing authority, but by authorizing an increase in tribal justice system funding." *Id.* at 16.

Timothy Williams, *Brutal Crimes Grip an Indian Reservation,* N.Y. TIMES, Feb. 2, 2012.
The Wind River Indian Reservation in Wyoming is afflicted with "a crime rate five to seven times the national average and a long history of ghastly homicides." Unemployment is estimated at 80%; at 40% the high school drop out rate is twice the average in Wyoming. This article touches on several of the brutal murders that have occurred in recent years on the reservation, population 14,000.