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REVIEW

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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The two original, irredeemable American sins—the twin stains forever defacing the Stars and Stripes—are the treatment of American Indians and native Africans, both of which were enslaved and subjected to rigorous and merciless programs of cultural genocide by the United States. The first three features of this issue explore and demonstrate different aspects of these sins—and in the course of doing so, demonstrate their abiding nature.

Schoolyards should never be graveyards. Only the pathologies and perversions of hate could bring them together. Yet, in 2017, the U.S. army recovered the bodies of nearly two hundred Indian children from the grounds of The Carlisle Indian Industrial School in Carlisle, Pennsylvania. The school, which closed in 1918, was part of a national effort to destroy the cultural identity of native peoples through the forced relocation and brainwashing of their children. When those children later died at the school, they were simply buried in the backyard. Once the bodies were discovered, representatives from the Northern Arapaho tribe in Wyoming visited Carlisle to claim them, so they could be returned to tribal lands for dignified funerals.

Given what happened at Carlisle, it should come as no great surprise that the bodies of young black children continue to be excavated from the grounds of The Arthur G. Dozier School for Boys, a reform school near Tallahassee, Florida that was run like a sadistic prison from 1900–2011. So far, the bones of nearly sixty boys have been recovered. In *The Nickle Boys*, Pulitzer-prize winning novelist Colson Whitehead uses the device of fiction to describe the horrors of the school. This issue begins with a review of Whitehead's powerful novel by *NLGR* Contributing Editor Paul Von Blum, who teaches in UCLA's Department of African American Studies. Von Blum plums the depths of Whitehead's rich, multi-layered exploration of what happened at the school and concludes that *The Nickle Boys* should be required reading for all incoming law students.

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**CRIMINALIZING THE YOUNG:
A RACIST HORROR STORY**

In general, literature and the humanities offer the legal community powerful insights not available in conventional legal discourse, including most cases, law review articles, and treatises. I have had the pleasure of teaching humanities materials for the past half-century, primarily to undergraduates at the University of California but occasionally in law school settings. Novels, short stories, films, and visual artworks addressing legal institutions critically, and often savagely, are capable of generating intense and durable reactions among student audiences; some of these reactions can positively impact their future legal career choices along anti-racist, anti-sexist, anti-homophobic, and similar social justice paths.

One of the literary genres in this broad tradition concerns incarceration, specifically juvenile imprisonment. Two iconic works from Ireland and England respectively that I have used effectively are Brendan Behan's *Borstal Boy* and Alan Sillitoe's *The Loneliness of the Long-Distance Runner*. Both of these magnificent literary works address the deep inequities of the "reform" school system in those countries, focusing especially on social class and the frequently brutal treatment of working-class youth.

A recent magnificent addition to this literary narrative of juvenile imprisonment from America is Colson Whitehead's *The Nickel Boys*. Whitehead, one of America's leading black writers, felt compelled to write this novel when he discovered the story of the infamous reform school that became the setting for the book. His chilling novel is based on the real history of a reform school in Florida that operated from 1900 to 2011 and that destroyed the lives of thousands of white and black children. This book is a terrifying narrative of racial injustice that occurred during the early years of the Civil Rights Movement.

The actual historical and legal context sets the tone for the literary work itself. *The Nickel Boys* is a fictional account of the Dozier School for Boys, renamed as the Nickel Academy for a former leader of the "school." The State of Florida ran this institution as a reform school. The Dozier School for Boys also promoted horrific beatings, torture, and even murder during its infamous existence. It was a place of rampant and unspeakable violence

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and abuse. The University of South Florida discovered fifty-five graves on its grounds and even more gravesites are being identified as late as 2019. There was no accountability and no serious state oversight. It was truly a monstrous place.

Two facts are also legally relevant here. As a state entity, the Nickel Academy was fully bound by all federal constitutional constraints, including the Fourteenth Amendment's requirement for equal protection under the law and the Eighth Amendment's prohibition of cruel and unusual punishment, among others. Moreover, the historic 1954 *Board v. Board of Education* ruling outlawing racial discrimination in schools bound the Nickel Academy, ostensibly a school, although its pupils were in fact inmates. The bogus education provided in that setting was nevertheless segregated by race throughout most of its history and the leaders of that reform school revealed an astonishing ignorance, or more likely contempt, of the federal legal requirements it faced.

SPOILER WARNING

Colson Whitehead's brilliant novel focuses on two young inmates of that infamous place. His main character is Elwood Curtis, an intelligent African American high school senior who lived with his grandmother in segregated Tallahassee. Abandoned by his parents at an early age, he is honest, hard-working, and above all keenly interested in education. In high school, he had a white teacher, a former freedom rider, who saw his high academic potential. He was also profoundly moved by the emerging civil rights struggle; he had a recording of Dr. Martin Luther King, which he played incessantly. He planned to attend a segregated college when he graduated and seemed to be on a path for a decent and productive life, insofar as that was possible in the era of the Jim Crow South.

That goal of a good life was abruptly upended when he was caught hitchhiking in a stolen car. With no presumption of innocence, young Ellwood was sent off to the Nickel Academy, for "physical, intellectual, and moral training." Arriving in handcuffs, he found a nice-looking campus, a decorative front for what actually lay before him and the other inmates. After intake, Nickel Academy assigned him to the colored housing, wearing more threadbare uniforms than the white boys incarcerated at the institution, merely one more manifestation of the separate but unequal system of segregation of the South in that era.

Soon after his arrival, Elwood met another African American inmate named Turner. More cynical and hardened, Turner understands all too well the power dynamics of the Nickel Academy. Like millions of African

Americans over the centuries, he realized the depth of white supremacy and the adaptive mechanisms required to navigate and survive in a racist society. He did his best to pass these lessons on to a naïve Elwood.

Early on during his incarceration, Elwood got a glimpse of the bogus education available to black students. The teacher in the colored schoolhouse was a genial alcoholic incompetent, and the textbooks were worse than he had had in his previous segregated school. Moreover, many of the other black inmates, mostly illiterate, paid no attention to the absurd lessons. In short, the education there was a fraud. In actuality, African American children on the outside received superior educations from their teachers in segregated schools because their teachers genuinely cared about them for the most part. The Nickel Academy pretense was a cover for the forced labor that the inmates were required to perform—a system not structurally different from slavery itself. Whitehead does a masterful job in his effective and understated way to encourage readers to make this chilling comparison.

As the narrative continues, Ellwood discovered the true horror of the institution. Good natured and fundamentally decent, he tried to break up a fight among some of the inmates. His big mistake: late at night, staffers came for him and removed him to the beating room, where he was mercilessly strapped perhaps 70 times. The result sent him to the reformatory hospital for over a week. The marginally competent doctor changed his dressings for his severe wounds from his beating and gave him aspirins. His friend Turner managed to get admitted by eating some soap powder to make himself sick with a stomachache. That action was reflective of the long historical cunning that African Americans have used in dealing with white racism in innumerable settings; it also allowed Turner to stay with his friend and avoid the forced work that was the true purpose of the Nickel Academy.

Following his release from the hospital, Ellwood rejoined various work crews. Some of these were in the surrounding town—the free world. In the process, he witnessed the pervasive graft, where Nickel officials skimmed profits and cash from the supplies and products of the institution. This was the kind of petty corruption that was (and is) all too common in state agencies throughout the country. But it had a devastating impact on the black inmates—no toothpaste, inferior school supplies, inferior food, and the like.

One of the highlights of the Nickel Academy year was the annual boxing match between the white and colored boys. The colored boys had held the title for fifteen years, a reality that did not sit well with the white rulers outside the institution itself. During the year that Elwood was incarcerated, the black boxer was a bullying and not too bright young man named Griff. In the championship match, he was to fight a white boy named Big Chet.

Money was riding on the championship. The Nickel Academy Superin-

tendent, Mr. Spencer, had a private meeting with Griff. Whitehead put the matter delicately: "Good sportsmanship means letting the other team win sometimes." But Griff was too thick to comprehend the Superintendent's meaning. Finally, he told him directly that he was to take a dive in the third round or else they would take him out back. Spencer ended with consoling language: "You know you can beat him. That'll have to be enough." Griff never understood the significance of the meeting.

The championship match went on and Griff never took a dive, to the great consternation of Spencer and the other white men who had bet on Big Chet. They came for Griff that night and he was never seen again. Fifty years later, the forensic examiners dug him up and noted fractures on his wrist as well as many other broken bones. The Nickel Academy was a site of murder.

As Whitehead chillingly reveals, additional torture, sometimes resulting in death, regularly occurred. Before Ellwood arrived, a regular form of punishment was the sweatbox, also used in other Southern prisons, where inmates suffered dehydration, sometimes to the point of death. Influenza, tuberculosis, and pneumonia also took their toll. Likewise, accidents and other examples of egregious institutional negligence claimed many lives. The dead boys were buried in Boot Hill or released to their families. The novel also notes that some boys who had been "leased out" to local families wound up dead.

There were four ways out of the Nickel Academy. The first was to actually serve one's time, which ranged from six months to two years. The Administration, at its discretion, could lighten the term for good behavior, which generally meant servility.

The second way out of this hellhole was to simply age out. That meant reaching the age of eighteen, when boys were shown the door and released into a hostile world. Most were so damaged that they were likely to wind up in even harsher penal institutions after "reoffending" following their lives in the free world. As Whitehead writes, "Nickel boys were so fucked before, during, and after their time at the school, if one were to characterize their general trajectory."

The third way was to die. The University of South Florida archaeologists made that abundantly clear in their investigations. "Natural causes," blunt trauma as occurred with boxer Griff and many others, or shotgun blasts for those caught trying to escape—all tragic endings for boys whose young lives were cut short after serving time in what was supposed to be an educational institution.

The fourth was the most dangerous, but in some ways, it was the most definitive way out of this place of horror. A few boys sought to make a run for it. Most runners were captured, beaten, placed in a dark cell for a couple

of weeks, and returned to their previous routine. In one case, a young man named Clayton Smith got picked up while attempting to flee by a white man who returned him to Nickel. Afterwards, the secret graveyard got a new “resident.”

Elwood could never forget the words and influence of Dr. Martin Luther King. Always reflective, he well understood the oppressive arrangements of the Nickel Academy. He had written a letter about the place and following a visit from state inspectors, he handed his letter to one of the inspectors. Another huge mistake: of course the letter was turned over to the Academy authorities, and the reprisal was swift and severe. It happened the same as before. They came at night to his colored dormitory with their flashlights and took him to the “White House” again. The Superintendent himself, plainly angered, gave him twenty licks, having said “I don’t know where they get those smart niggers.”¹

Then, they took him to a dark cell with only a bucket for a toilet. It was a jail within a jail. Elwood could think only of Dr. King’s words. His experiences in solitary confinement mirror those of prisoners in juvenile and adult institutions throughout the country. They are inhumane and unconscionable—and unconstitutional.

When he was finally freed from that hellish regime, his friend Turner told him that they would take him “out back” the next day. In short, Turner knew that certain death awaited his friend. There was only one alternative, and Turner put it bluntly: “We got to get, man.”

The escape attempt, not surprisingly, was harrowing. But as usual, power prevailed. Officials from the Nickel Academy were on the trail, armed with shotguns. The first blast missed. The second hit the mark and Elwood fell. Improbably, Turner kept running and made it to freedom.

Colson Whitehead added a powerful fictional element to his novel with Turner’s character. After settling in New York City and starting a successful business, Turner assumed his friend’s name, becoming Elwood Curtis. Perhaps it was to avoid detection as an escaped prisoner from a Florida reform school or to memorialize and honor his friend’s memory and life—or both. Many years later Turner cum Elwood returned to Tallahassee to attend a press conference about an update on the forensic investigation of the dead boys from the Nickel Academy. Some of the boys who had been beaten at the White House were also to speak. They were part of a website and were all white. Turner/Elwood thought that someone needed to speak for the black boys. It was a disconcerting trip, but for him a necessary one.

The author’s treatment of this character near the end of the novel is especially imaginative and makes this work an exemplary contemporary American novel. His ending is extremely unusual and differs from the

more conventional narrative throughout most of the book, but it works very effectively. Whitehead's book will and should be taught in literature and humanities classes in the United States and throughout the world.

It also has profound implications far beyond those and cognate fields. Law students have a compelling need to read it as well. Courses in the juvenile justice system and in criminal law generally can use this and similar works of fiction to grapple with the deeper realities of the systems they are studying. Law is much more than cases, statutes, and legal institutions; above all, it is what actually happens "on the street" or, in these cases, behind bars.

Few if any juvenile penal institutions or reform schools today bear any resemblance to the Nickel Academy. Yet many still have instances of cruelty and even brutality. Distressing percentages of inmates come from minority communities. Much of this is a result of the school to prison pipeline in the United States. Elwoods and Turners abound in our decrepit school systems. American juvenile justice institutions rarely engage in what could be called serious education and far too many of the young people currently incarcerated return to neighborhoods that are incubators of even greater criminality in the future, a consequence of grinding poverty and racism in capitalist America.

Colson Whitehead has written an outstanding, dark, and deeply troubling novel. I think that law school acceptance packets should include it along with official letters of congratulations.

NOTES

- 1 The word "nigger" is repulsive and has had horrific consequences on millions of human beings for centuries. But language is contextual. When that monstrous word is used pejoratively, it must be instantly and strongly condemned. But in literature and other artworks, it can have powerful descriptive functions, especially when used by African American writers and artists. That is the case in this text.



**WHEN YOUR COLONIZERS ARE HYPOCRITES:
FEDERAL POVERTY “SOLUTIONS” AND INDIGENOUS
SURVIVAL OF SEX TRAFFICKING IN INDIAN COUNTRY**

Introduction

In the last four years, there has been a veritable explosion of media attention on the problem of human trafficking in Indian country.¹ The rate of missing and murdered Indigenous women in the United States has always been high, but with more attention being paid to it not only by mainstream media outlets but by both the federal government and the public at large, the U.S. seems to have “discovered” a new, horrific display of domestic trafficking in its own backyard.² Human trafficking is by its nature covert, which makes statistics and crime rates almost impossible to track; depending on the organization, the study, and the year, numbers of people being trafficked varies between thousands and millions—vastly different numbers, covering vastly different definitions of human trafficking itself.³ For Indigenous people in the U.S., that number is even more difficult to pin down, especially considering that most of the agencies that investigate crimes in Indian country⁴ do not record the race of trafficking survivors, and, frequently, do not record instances of labor trafficking of Indigenous people at all.⁵ Despite the newfound national awareness of the rate of human trafficking in Indigenous communities, it is not, as Sarah Deer points out, an *epidemic* of trafficked Native women; that is, it is not a sudden, natural occurrence with a predictable end date.⁶ Instead, the extreme poverty in Indian country—enforced in many ways by the federal government over the centuries—has resulted in a perfect storm.⁷ Entire underground economies have developed in Indian country around human trafficking activity.⁸ Even more dangerously, the impact of the Alaska Native Claims Settlement Act (“ANCSA”)⁹ has effectively extinguished all Indigenous land claims in Alaska in favor of providing land to Alaska Native corporations, resulting in no “Indian country” in which government programs can be implemented.¹⁰ While in some ways this has led to Alaska Native communities gaining more control over their economic destinies, it has also resulted in extreme

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underfunding and enormous poverty levels.

Through the conjunction of faulty, flawed welfare and workfare programs implemented in tribal jurisdictions, and the impact of Adverse Childhood Events (“ACEs”)—traumatic events which can grievously impact the psychological and physical health of children in poverty—Indigenous peoples become highly susceptible to human trafficking.¹¹ (Examples of ACEs include physical, emotional, or sexual abuse; substance abuse in the household; neglect; domestic or intimate partner violence (“DV/IPV”), and other factors.¹²) The federal government has effectively created a human trafficking economy in poverty-stricken tribal reservations via these flawed welfare/workfare programs, in coordination with ACEs brought about by ongoing poverty and intergenerational trauma. This economy thrives through lack of funding, governmental inefficiency, and a toxic overlap of Supreme Court decisions and federal law which prevents any kind of prosecution of human traffickers—or the necessary policy work required to combat the causes of human trafficking itself. Part I of this paper provides an overview of jurisdictional confusion and poverty in Indian territory, focusing primarily on the reservations of South Dakota and North Dakota, and Native villages in Alaska, as well as examining the welfare programs that have been developed to combat the problem. Part II examines the impact of poverty on vulnerable populations, provides an overview of human trafficking of Indigenous peoples, and correlates the ACEs experienced by Native youth with the increased risk of human trafficking, focusing particularly on sex crimes in Anchorage and so-called “man camps” around fracking sites. Part III discusses the basis of human trafficking law in the United States, on international, federal, and state levels; the relative inefficiencies of each level in effectively combating the societal problem of human trafficking; and the jurisdictional complexities preventing any kind of prosecutorial solution for the issue. It also provides an overview of how this affects sex trafficking in Indigenous communities. Part IV discusses how the combination of extreme poverty and inefficient human trafficking laws has created human trafficking economies in Indigenous communities. Part V describes a series of policy recommendations, beginning with the immediate allowance for self-determination and self-rule for Native communities, to provide relief and an ending to this crisis of the human trafficking economy.

Poverty in Indian Country: Laws, Statistics, and Results

A. What It Means To Be In “Indian Country”

Vine Deloria, Jr., and Clifford Lyle argue that “[a]ny examination of Indians and the judicial process must confront, at the very beginning, certain legal concepts that have taken on a status of primacy in the field of federal

Indian law. ‘Indian Country’ is such a concept.”¹³ “Indian country” as a legal term-of-art has shifted in a variety of ways over the long and contentious relationship between the federal government and Indigenous communities around the United States.¹⁴ After the Indian Reorganization Act provided tribes the ability to return to or recreate their own tribal governments in 1935, the term “Indian country” was established to mean land in any Native reservation remaining under the jurisdiction of the federal government, including roads and rights-of-way in those territories; allotments with titles still in Indigenous hands; and “all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof.”¹⁵ Today, Indian country—whether supervised by a tribe or by state government—is still generally a federal dominion, thus creating complex intersecting jurisdictional problems, and lacunae, with respect to both tribal governance and the prosecution of crimes including most problematically sex trafficking and sexual abuse crimes.¹⁶

What Indigenous people do or do not have control of within their own territory is questionable.¹⁷ While the legal terrain is frequently murky, what *is* clear is that poverty in Indian country is rampant.¹⁸ One in four Indigenous people in the United States lives in poverty, and on reservations that number is yet higher, with almost 27.4% of people living on reservations living in poverty between 2006 and 2010.¹⁹ Studies demonstrate that 78% of Indigenous people live off the reservation, where studies show they are twice as likely to live in poverty as white people.²⁰

Poverty-stricken reservations are not solely a modern phenomenon; Indigenous people forced to live on reservations, frequently hundreds of miles away from their ancestral lands, have had high rates of poverty since their initial relocation.²¹ In many cases, their relocation was deliberately done in order to allow American theft of Indigenous wealth.²² The image of the poverty-stricken reservation, and of Indigenous peoples living in extreme, debilitating poverty, predates the concept of Reagan’s “welfare queen” by a few centuries and continues to persist today with well-meaning but frequently voyeuristic investigations, case studies, and anthropological treatises written by non-Indigenous peoples.²³

The “othering” of Native Americans has been evolving since pre-colonial times, transforming from a colonialist perspective on the “savages” of North America, completed by the infantilization, exotification, or outright destruction of other genders, to the placement of Indigenous peoples into that special, highly racialized category of *undeserving poor*; by the development of the welfare state.²⁴ Indigenous people were mainly known by popularized images of sexually avaricious women and lazy men.²⁵ Native peoples in the United States have been shunted from one piece of land to another

for centuries, being ripped from ancestral communities and crushed into pieces of territory that, at the time of the inception of reservations, often (and still, in some cases) did not appear to have any particular arability or wealth associated with them.²⁶ Indigenous peoples were heavily associated with savagery; “Indian livelihood in this discourse [of 18th and 19th century politics] represented a form of poverty that white Americans could and should avoid.”²⁷ (In the twenty-first century, the policies of extermination or relocation have continued; on November 7, 2018, the Department of the Interior (“DOI”) officially announced its intention to revoke the trust status of 321 acres of what had been the Mashpee Wampanoag reservation, as the Mashpee had not been included in the Indian Reorganization Act of 1934.²⁸) Treaties were purposefully violated and allotments deliberately distributed to cut out Indigenous peoples from their own economies and the wealth of their own land—which, in many Indigenous societies, was the least important aspect of their ancestral communities and the culture surrounding it.²⁹ Economically speaking, manipulation of both the image and the reality of Indigenous poverty has continued, as “free-market fundamentalist economists and politicians [have] identified the communally owned Indigenous reservation lands as an asset to be exploited and, under the guise of helping to end Indigenous poverty on those reservations, call for doing away with them—a new extermination and termination initiative.”³⁰ In 2002, a report by the Government Accountability Office (“GAO”) to Congress stated that “tribes have used various strategies to stimulate economic development; but despite these efforts, unemployment and poverty on reservations remain high.”³¹ When poverty is deliberately cultivated, it is incredibly difficult to weed out.

B. The Dakotas: Poverty On and Off The Reservation

In 2013, South Dakota was number one in the nation for Native Americans living below the poverty line.³² For the 65,000 Indigenous people living in the state in 2013, more than 48% of them were living below the poverty line, which at that time was \$11,170 per individual per year.³³ Most of the poverty in South Dakota is “concentrated on the state’s nine Indian reservations,” and even those fleeing the extreme poverty in Indian territory generally wind up in similar poverty in Rapid City or other major metropolitan areas in the state.³⁴ In 2017, more than 90% of Lakota residents on the Pine Ridge Lakota Reservation—the second largest Native reservation in South Dakota, run by the Oglala Sioux Tribal Council—were living below the federal poverty level.³⁵ Most homes are shacks or trailers; few are connected to electricity or running water; and the suicide rate is four times the national average for teenagers.³⁶

North Dakota has the second highest levels of impoverishment for In-

Indigenous Peoples. It has five Indian reservations (one of them, Standing Rock, stretches over the border between North and South Dakota); over 39,000 people, or over 5%, of the North Dakota population identifies as Indigenous, making North Dakota a state with one of the highest American Indian populations in the country.³⁷ More than 2 out of 5 of Native Peoples (41.6%) live in poverty.³⁸ Altogether, North and South Dakota have over 104,000 people who identify as Indigenous, with roughly 68,000 of them living on reservations.³⁹

C. The ANCSA and Alaska Native Poverty

Alaska has had a different relationship with the federal government for many years, and thus a different trajectory for the introduction of Indigenous poverty into the state.⁴⁰ Initially, management of Alaska Native peoples was placed in the hands of the Bureau of Indian Affairs (“BIA”) in 1931, after the 1867 Treaty of Cession stated that “[t]he uncivilized tribes [of Alaska] will be subject to such laws and regulations as the United States may, from time to time adopt in regard to aboriginals of that country.”⁴¹ Alaska became a state in 1959.⁴² Officially, Alaska’s statehood placed all Native territories at that time under the jurisdiction of the state government, due to the implementation of Public Law 280, which we discuss further below.⁴³ It also meant confusion for Native peoples, as throughout the 1950s and 1960s, decisions on the state level chipped away at Native land claims.⁴⁴ Eventually, Alaska Natives and Native corporations negotiated with the state to formally extinguish all aboriginal land claims in Alaska in exchange for forty-five million acres to the corporations and about \$1 billion.⁴⁵

The ANCSA officially ended the idea of “Indian country” in Alaska—and did not include a provision for any kind of federal services for the Natives still living in villages in the state.⁴⁶ Many Alaska Native villages remain—more than 200 separate villages have been recognized as “Native entities” by the BIA—but few have any land, and where they do, it is not “Indian country.”⁴⁷ Initially, ANCSA was meant to raise the economic mobility of Alaskan Natives; instead, it has fed into a de-valuation of Alaska Native governments and autonomy.⁴⁸ The Kuskilvak Census Area, which is not federally recognized by the BIA as an Indigenous community but is still primarily populated by Alaska Natives, is one of the poorest regions in the United States, with an unemployment rate of more than 21%, a per-capita income of just over \$11,000, and a 37.8% poverty level in 2017.⁴⁹

D. Welfare Programs in Indigenous Communities

The relationship between Native populations and the federal government has been fraught, complicated, and difficult to characterize. The BIA, established in 1824,⁵⁰ was supposedly meant to assist Indigenous peoples

in the United States; this far precedes any kind of welfare program put forward in the U.S., and its prescribed intention fulfills the basic elements of welfare: the establishment of a government agency or system intended to aid or provide succor to poor or poverty-stricken communities, including health care, education, and monetary assistance.⁵¹

However, characterizing the BIA as a welfare program would be both offensive and highly misleading. The BIA often operated with the clear, if unexpressed, purpose of wiping out Native populations either through assimilation or extermination, and for many years functioned exactly as it was intended.⁵² Not only that, but the BIA was formed not to liaise with poor communities or provide assistance, but rather to coordinate interactions between the federal government and Indian tribal governments, which it also destroyed with a systematic, racialized kind of paternalism that completely excluded Indigenous governments and Indigenous leaders.⁵³ As described by Wilkinson:

The Bureau of Indian Affairs exercised a nearly unfathomable degree of authority. The local superintendents, selected by the BIA without consulting the tribes, controlled the tribal budgets and manipulated tribal chairmen by disbursing or withholding dollars. Tribal ordinances were subject to BIA approval. . . . In addition to governor, the BIA was banker, educator, doctor, and land manager. It controlled most reservation jobs, ran the schools, the hospitals, administered tribal and individual bank accounts and leased, and sometimes sold, Indian land.⁵⁴

Native peoples in the mid-twentieth century U.S. experienced (and some continue to experience) the most racialized form of welfare directed at those who are supposedly the “undeserving” poor, leading to invasive and unwelcome interventionism, completely undercutting personal and tribal autonomy in both legal and moral senses.⁵⁵ Stereotypical imagery of Indigenous Peoples has been used to mischaracterize and villainize welfare programs in the U.S. for decades.⁵⁶ Notably:

The sharp distinction between social insurance and public assistance and harsh stigma attached to government aid, in what Michael Katz calls the “semi-welfare state” of the United States, evolved from behaviorist explanations of poverty closely related to attitudes towards American Indians. Emphasis on moral and intellectual weakness among the poor was frequently bolstered by images of American Indian life. Movements to reform the poor occasionally intersected with measures to assimilate Indians. Characterization of welfare programs as wasteful and counterproductive was also reinforced by widely publicized evidence of corruption and incompetence in the administration of Indian affairs.⁵⁷

Indigenous peoples in the United States, then, were either “depraved indigents [or] pampered wards,” overdrawing on government resources or turning their backs on “society” entirely; either way, they were to blame for their own poverty.⁵⁸ It was only with the 1975 American Indian Self-Determination and Education Assistance Act that Indigenous communities began to take greater control over their own welfare and education; prior to that point, many state governments had excluded Indigenous people from welfare programs entirely.⁵⁹ Like African-American/black communities during the New Deal era, Indigenous peoples have been suffering the consequences of welfare reform as a tool to force what Pickering and Harvey describe as “racialized rural minorities” far away from the economically dominant white majority.⁶⁰

In more recent times, the relationship of Native peoples with U.S. state and federal welfare or workfare programs—whether those people live on tribal reservations or not—has become highly diverse. Every three years, federally recognized tribes can submit an application under the Tribal Temporary Assistance for Needy Families (“TANF”) program to the U.S. Department of Health and Human Services (“HHS”); if these programs are approved, HHS will then ensure that the tribe receives part of the TANF fund set aside for the state in which the tribe is located.⁶¹ In 2015, there were 70 approved Tribal TANF programs, which collectively served 284 recognized tribes or villages; that year, there were 566 federally recognized tribes served by the BIA.⁶² Thus, in 2015, Tribal TANF only covered roughly half the recognized Indigenous communities in the United States.⁶³ The other half were covered in a patchwork of state or municipal welfare systems, which for reasons detailed below have their own difficulties in being properly implemented.

Workfare, a welfare program which forces unemployed adults to work for welfare benefits, also applies to Native Peoples through the Native Employment Works program. This provides funding to support education; job readiness, placement, and retention; and other work-related activities.⁶⁴ There are currently 78 tribal grantees in this program.⁶⁵

Today, seven Alaska Native villages have Tribal TANF programs (the Association of Village Council Presidents in Bethel; the Bristol Bay Native Association; the Cook Inlet Tribal Council; the Kodiak Area Native Association; the Maniilaq Association; the Tanana Chiefs Conference; and the Tlingit and Haida communities). Most North Dakota tribes (including the Spirit Lake Sioux Tribe, the Standing Rock Sioux, the Three Affiliated Tribes of Ft. Berthold, and the Turtle Mountain Band of Chippewa) are covered under Native Employment Works.⁶⁶ Tribes in South Dakota are covered both by Tribal TANF and Native Employment Works (“NEW”), with the Cheyenne River Sioux, Lower Brule Sioux, Oglala Sioux, Rosebud

Sioux, and Sisseton-Wahpeton Oyate tribes being enrolled in NEW and only the Sisseton-Wahpeton Oyate tribe operating its own TANF program.⁶⁷

However, even tribes with TANF and NEW programs continue to suffer from poverty, due to uneven implementation and conflicts between tribal and state governments. Pickering, in her five-year sociological study of the Oglala Sioux of Pine Ridge after the destruction of the Aid to Dependent Children program and the new implementation of TANF, notes:

[The state government] used the discretion granted [to it] under devolution to implement workfare programs that resulted in the transfer of federal resources from poor minority communities to areas where labor markets were more robust and service infrastructures more developed . . . [T]he accomplishment of these putatively non-racial goals were, in fact, predicated upon a racially regressive redistribution of resources.⁶⁸

She also noted that:

No one agency or organization can meet all these needs. Unfortunately, the experience in Pine Ridge over [1999-2004] has been just the opposite. Given the special relationship between the federal government and the Oglala [Sioux], and the sovereignty of the tribe over the lands within the reservation boundaries, the state has consistently tried to limit its economic obligations towards the residents of the reservation . . . commitments on the part of the state to help . . . are tied to waivers either of sovereign immunity or of tribal jurisdiction in favor of the state.⁶⁹

Essentially, at least in this case, states that do not already have jurisdiction over tribal matters blame tribal sovereignty and lack of trust between state and tribal governments for the continuing poverty of Indigenous nations.⁷⁰ This tactic is both hypocritical and callously indifferent to the needs of Native Peoples. It is a way for states to use welfare as a means of attempting to obtain jurisdiction over tribal nations and their lands while neglecting to assist in the process of TANF recipients shifting from welfare to working lives.⁷¹ It leaves Indigenous people in a double bind, in danger of losing sovereignty and independence, while receiving little understanding and even less aid.

Adverse Childhood Events and Human Trafficking: A System Set to Fail

A. Health, Wealth, and Psychology: How Minds Impact Poverty and How Poverty Impacts Minds

It is impossible to analyze poverty and its causes in a legal vacuum; legal issues are informed by economic and social policies, and vice-versa. Any fair discussion of the causes and results of poverty in any community in the

United States must examine all aspects of the issue. One of the most popular psychosocial understandings of poverty and its intergenerational endurance in spite of supposed solutions presented by the federal government are ACEs, incidents which impact the psychological and physical health of children raised in poverty.⁷² Well-known examples include abuse (physical, emotional, psychological, or sexual); some kind of household dysfunction, such as substance abuse, mental illness, intimate partner violence (“IPV”), or criminal behavior; and emotional or physical neglect, among others.⁷³ Children who experience between four and ten ACEs are more likely to develop physical health issues later in life, including cardiovascular disease, diabetes, STIs, and autoimmune diseases; they are also more likely to be handling mental health conditions (post-traumatic stress disorder, depression, or anxiety are particularly common) or displaying high risk behaviors (such as smoking, alcohol or drug abuse, or high risk sexual behavior).⁷⁴ Similarly, the risk for unemployment for people who experienced four or more ACEs was 3.6 times higher for men, and 1.6 times higher for women.⁷⁵

Indigenous peoples in the United States have experienced debilitating poverty for generations.⁷⁶ There have been a few notable exceptions; the Osage people in Oklahoma in the early 1900s experienced a wealth boom due to oil reserves on their land but were eventually murdered for it; in more recent decades, the Shakopee Mdewakanton Sioux Community of Minnesota are rumored to be making over \$1 million per tribe member via their popular casino.⁷⁷ In many ways, this intergenerational delivery of poverty in Indigenous communities has been a function of welfare and welfare reform, but the continuance of it is due in some large part to the generational trauma and associated ACEs which frequently impact Indigenous peoples in the United States.⁷⁸ Intergenerational trauma has been described as “a traumatic event that began years prior to the current generation and has impacted the ways in which individuals within a family understand, cope with, and heal from trauma.”⁷⁹ It has been noted in communities impacted by the Holocaust (Jewish and Romani peoples, particularly where intergenerational trauma was initially described as *concentration camp syndrome* or *survivor syndrome*⁸⁰). While psychological and sociological research into the phenomenon of generational trauma is still in its early stages, there is extensive evidence that the transmission of trauma intergenerationally results in detrimental impacts on the psychological and the socioeconomic status of cultures and communities.⁸¹ Indigenous peoples of North America are no different in this regard. As described by Walter R. Echo-Hawk,

Social science researchers describe the chronic aftereffects of severe trauma observed in human survivor populations . . . as *Posttraumatic Stress Disorder* (PTSD). In the American Indian population, PTSD is

classified by mental health and social science researchers into a distinct subcategory variously denominated as *Postcolonial Stress Disorder* (PCSD), *Historical Trauma*, or *Historical Unresolved Grief* . . . The impact of that traumatic history upon their social pathology is seen in the appalling life and mental health statistics that mark tribal communities today.⁸²

The tactics used by the conquering Europeans against Native Americans—extended relocation, infection with epidemic diseases, enslavement for both labor and sex, forced assimilation, culturally insensitive, debilitating, and often cruel “Indian schools,” together with the concerted efforts by the federal government to assimilate, or exterminate all Native cultures, societies, governments, and territories—have instilled PCSD/historical trauma in Native communities across the entirety of the United States.⁸³ It is impossible to find any Native tribe, out of the over 540 still present in America, whose members are not suffering from PTSD.⁸⁴ “Generational trauma has been identified as a major contributor to Native communities’ extremely high rates of poverty, violent victimization, depression, suicide, substance abuse, and child abuse.”⁸⁵ A free report by Mary Annette Pember, links the vicious alcoholism of her grandfather to her grandmother’s abandonment of her children—such as Pember’s mother. She writes that:

[Grandmother] Cele’s actions were the beginning of yet another cycle of abandonment. It seems more than coincidental that she was the first generation to attend Sister School and to hear their messages of Indian racial, cultural and spiritual inferiority. Did she come to believe that she and Native people were unfit to parent their own children?⁸⁶

In a horrific negative cycle, historical trauma feeds into the proliferation of ACEs in Indigenous communities, fueling the cycle of poverty, which is then compounded by the creation of *more* ACEs due to extreme federally-induced poverty levels in Indigenous communities across the nation (including Alaskan Native villages), which feeds into further trauma—and compounds the vulnerability of Native peoples to human trafficking.⁸⁷

B. “Whip Her Well . . . Then She Will Stay”: A Socio-Legal History of Native Peoples in Trafficking⁸⁸

The concept of Native and Indigenous women being pressured or captured into sex trafficking has a long, ugly history in the United States.⁸⁹ Beginning with Christopher Columbus capturing and selling young girls in the Caribbean for his sailors’ sexual gratification in the misnamed “New World,” Indigenous women have been particularly vulnerable to human

trafficking—particularly sex trafficking.⁹⁰ The exploitation and sale of Indigenous women is an industry which has its roots in colonization and the establishment of the United States. This has fed into extensive, overlapping traumas for Native communities for generations.⁹¹ Today, human trafficking of Indigenous peoples is primarily portrayed as an issue of sex trafficking. It is likely that Indigenous men are also being caught in situations of labor trafficking. However, due to the long-term fetishization and sexualization of Indigenous women,⁹² the sex trafficking of Indigenous women and girls is much more prevalent in the media. For decades, Indigenous women in the U.S. have been portrayed as either sexually aggressive “Poca-Hotties” or the erotic, available “rez girl” in fetish porn.⁹³ As Sarah Deer describes, “Colonial legal systems historically protected (and rewarded) the exploiters of Native women and girls and therefore encouraged the institutionalization of sexual subjugation.”⁹⁴

The U.S. has long preferred to ignore its own history of domestic human trafficking, but “[f]ocusing on foreign governments as the force of the [trafficking] problem erases the brutality Native women have experienced as a result of actions within the United States.”⁹⁵ Settler colonial rape and sexual assault on Indigenous peoples has often accompanied and was a means to accomplish the overthrow of Indigenous nations.⁹⁶ Today some goals have changed but the assaults and sexual violence continues. In the U.S. the rate of sexual violence against Indigenous women remains far higher than for any other ethnic group in the country.⁹⁷ The Centers for Disease Control and Prevention in the 2010 *National Intimate Partner and Sexual Violence Survey*, estimates that 49% of all Indigenous women in the United States experiencing some kind of sexual violence in their lifetime.⁹⁸ However, due to the low rates of reporting of sexual violence or assault, the number is probably much higher.⁹⁹

It is no coincidence that ACEs also play a big role in the determination of at-risk populations for human trafficking. The Alaska Sex Trafficking Task Force report lists common identifiers of survivors of trafficking or people who are vulnerable to being trafficked; these include poverty, previous sexual abuse, current or former drug or alcohol addiction, physical, mental, or emotional health difficulties, PTSD, and STD/STIs.¹⁰⁰ ACEs have been connected scientifically to higher vulnerabilities to human trafficking, especially for minors; those who have been sexually abused were anywhere from 2.52 to 8.21 times more likely to be trafficked than those minors who were not.¹⁰¹ “Generational trauma in combination with prior physical and/or sexual victimization can further intensify Native women’s and youths’ vulnerability to traffickers, especially traffickers that portray the sex trade as a quick path to empowerment and financial independence.”¹⁰² Statistics for labor trafficking are scanty; while it is generally believed labor trafficking

is occurring in and being inflicted on Indigenous American communities, it is not nearly so recognizable, nor as easily documented, as sex trafficking, regardless of the social context and geographical location in which it occurs.¹⁰³

When placed into conversation with the impact that intergenerational trauma has had on poverty levels in Indigenous communities, and the compounding of that trauma through ACEs induced by extreme poverty levels, the catastrophic levels of sex trafficking of Indigenous women in the United States seem less surprising.¹⁰⁴ Rather, it is inevitable.

Human Trafficking in the United States and Proposed Legal Solutions

A. International, Federal, and State Definitions of Human Trafficking

In 2000, the United Nations established the Protocol to Prevent, Suppress, and Punish Trafficking in Persons (“the Trafficking Protocol” or “the Protocol”), which defines human trafficking as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or other practices similar to slavery, servitude or the removal of organs.¹⁰⁵

The United States, a key negotiator in the proceedings, ratified the Protocol, and continues to be an enormous voice in anti-trafficking communities around the world.¹⁰⁶ The same year, a month before the TIP Protocol was signed and ratified, the U.S. passed its own form of the Protocol, the Trafficking Victims Protection Act (“TVPA”).¹⁰⁷ Historically speaking, the U.S. has always focused more closely on the phenomenon of sex trafficking than labor trafficking, and this is generally exemplified by the policies undertaken by various presidents since the enactment of the TVPA.¹⁰⁸ More specifically, the TVPA describes human trafficking as:

(1) sex trafficking involving the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for a commercial sex act through force, fraud, or coercion, or where the victim has not attained 18 years of age; or (2) labor trafficking involving the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁰⁹

Another pre-eminent federal statute handling trafficking (at least, sex trafficking) in the United States is the Violence Against Women Act (“VAWA”).¹¹⁰ Initially enacted in 1994, VAWA’s original intention was to address the concerns and demands of grassroots campaigns regarding domestic violence, especially against women, in the United States.¹¹¹ VAWA has since been re-authorized three separate times (in 2000, 2005, and 2013) but is currently sitting, after being re-authorized by the House of Representatives, without Senate re-authorization.¹¹² Sections of VAWA have been dedicated to the safety and empowerment of Native women since its inception, but the 2005 reauthorization included newfound purposes for what was entitled the (perhaps inelegantly named) “Safety for Indian Women Title.” The National Indigenous Women’s Resource Center characterizes this title as a recognition of the “unique legal relationship of the United States to Indian tribes and women;” it states that:

The purposes of this title are:

- (1) to decrease the incidence of violent crimes against Indian women;
- (2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and
- (3) to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.¹¹³

In spite of a semi-auspicious inauguration, VAWA has not fully enabled Indigenous women to be able to “exercise their sovereign authority” to respond to violent crimes, such as domestic abuse, rape, sexual assault, or sex trafficking.¹¹⁴ In 2013, VAWA was reauthorized again; the 2013 Reauthorization Act provided tribal authority to condemn or prosecute non-Indian peoples “committing certain acts of domestic violence or dating violence . . . in the Indian country of the tribe . . . and added sex trafficking for Indian tribes as a purpose area.”¹¹⁵

One of the fundamental flaws of VAWA has been widely acknowledged to be the definition of sexual assault through the overlap between “domestic violence” and “dating violence” under Title IX of the 2013 Reauthorization.¹¹⁶ Due to the Supreme Court decision of *Oliphant v. Suquamish Indian Tribe*, discussed further below, no non-Indigenous person who sexually assaults an Indigenous person can be prosecuted in tribal courts if the two were not already in a long-term relationship.¹¹⁷ The definition of “domestic violence” (“DV”) categorizes DV/IPV as:

Any felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is

cohabitating with or has cohabitated with the victim as a spouse or intimate partner¹¹⁸

In conjunction with *Oliphant*, VAWA at once both allows and disallows human traffickers who are strangers, and not intimate partners of the trafficking survivor, from being prosecuted in Indian country.¹¹⁹ Theoretically, state or federal courts could take the case on, but rates of prosecution of human trafficking on the federal level, while rising, remain low, and states have comparable rates depending on the year.¹²⁰

After the implementation of the TVPA in U.S. federal law, states individually constructed their own human trafficking laws, which may or may not fit into the framework developed by the TVPA and the Trafficking Protocol. State laws regarding anti-trafficking frameworks have been previously regarded to fall into one of two options: those meant as immigration regulations, and those focused on criminalization of sex work.¹²¹ The three states listed below primarily script their laws into the criminalization of sex work, and thus focus more primarily on combating sex trafficking. As of 2012, Alaska's human trafficking statutes classified sex trafficking in the first degree as an incident where an individual:

(1) induces or causes a person to engage in prostitution through the use of force; or (2) as other than a patron of a prostitute, induces or causes a person under 20 years of age to engage in prostitution; or (3) induces or causes a person in that person's legal custody to engage in prostitution.¹²²

Lesser counts of sex trafficking include the management, control, or ownership of a prostitution enterprise, the procurement or solicitation of a patron for prostitution, or the use of commercial sexual conduct as an enticement for travel through advertisements, promotions, facilitation, sale, or offers.¹²³

Alaska's sex trafficking statute, unlike either the international definition put forward in the Protocol or the federal definition included in the TVPA, does not include force, fraud, or coercion in its elements for determining whether an individual has been trafficked for sex; it boosts the minimum age for a survivor of non-forcible sex trafficking from 18 to 20, and includes a custodial element to the statute in order to cover victims and survivors of sex trafficking who are differently abled, neurodivergent, or have psychiatric disabilities.¹²⁴ Due to both the ANCSA and PL-280, Alaska's statutes about sex trafficking are uniformly applied to Native villages in the state, without the consent of the Indigenous communities themselves.¹²⁵

The South Dakota statute, which, like the Alaska statute, supplants any tribal laws which could be applied to circumstances of human trafficking, classifies the crime of human trafficking as:

22-49-1. Human trafficking prohibited. No person may recruit, harbor, transport, provide, receive, or obtain, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude. No person may benefit financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section. Any violation of this section constitutes the crime of human trafficking. If the victim is under eighteen years of age, the crime of human trafficking need not involve force, fraud, or coercion.¹²⁶

Different forms of human trafficking are defined in South Dakota legislation, but the primary form legislated against and the one that is most particularly focused on by the statutes themselves is sex trafficking.¹²⁷ While forced labor and involuntary servitude are both mentioned, it is sex trafficking which is most frequently the interest of state legislatures when developing legal language about human trafficking, due perhaps in part to the distinctly white Christian American phobia to consensual sex work.¹²⁸ (There has been constant ideological conflict regarding the definition of sex work and whether it can ever be consensual, or if it is all simply human trafficking; many people can, do, and have participated in sex work voluntarily, but this is rarely recognized by U.S. legislatures, with only Nevada legalizing some forms of consensual sex work.¹²⁹ Frequently this results in laws which scoop consensual sex workers and label them as victims of trafficking, or as traffickers themselves.¹³⁰)

First degree human trafficking in South Dakota solely deals with sex trafficking of minors, as stated in 22-49-2:

22-49-2. First degree human trafficking—Felony—Attempt against minor. If a person guilty of human trafficking under 22-49-1, and the act:

- 1) Involves committing or attempting to commit kidnapping;
- 2) Involves a victim under the age of eighteen years;
- 3) Involves prostitution or procurement for prostitution; or
- 4) Results in the death of a victim;

The person has committed human trafficking in the first degree.¹³¹

By contrast, a person is guilty of second degree human trafficking under 22-49-3 if that person:

- 1) Recruits, harbors, transports, provides, or obtains, by any means, another person knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution, forced labor, or involuntary servitude; or

2) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in this section.¹³²

22-49-4. Hiring person forced to engage in sexual activity—Felony. It is a Class 6 felony for a person to hire or attempt to hire another person for a fee to engage in sexual activity, as defined in 22-23-1.1, if the person knew or should have known the other person was being forced to engage in the activity through human trafficking.¹³³

Finally, North Dakota—a state in which PL-280 does not apply and so is only relevant to Indigenous people who are not physically on a reservation—has one of the most recently redrafted human trafficking laws in the country, with an updated version being voted into place in 2017.¹³⁴ Separate charges exist for human trafficking (split between forced labor and sexual servitude) as well as an entirely new set of statutes for patronizing a victim of sexual servitude (with a secondary statute for patronizing a minor for commercial sexual activity).¹³⁵ Broadly speaking, the definition of human trafficking in North Dakota is:

1. A person commits the offense of trafficking an individual if the person knowingly recruits, transports, transfers, harbors, receives, provides, obtains, isolates, maintains, or entices an individual in furtherance of:

a) Forced labor in violation of section 12.1-41-03; or

b) Sexual servitude in violation of section 12.1-41-04.

2. Trafficking an individual who is an adult is a class A felony.

3. Trafficking an individual who is a minor is a class AA felony.¹³⁶

In 2015, the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota passed an anti-human trafficking law on the tribal level to combat human trafficking on the reservation. Entitled Loren's Law, it allows tribal courts to prosecute those human trafficking cases which "don't rise to the level of being charged in U.S. District Court" and requires defendants to "pay for any expenses incurred by the victim."¹³⁷ In addition to force, fraud, and coercion as elements in the law, Loren's Law also provides that sex trafficking is:

The recruitment, transportation, transfer, harboring, enticement, providing, obtaining, or receipt of any sexual act (sexual intercourse or contact) from a person over the age of 18 by any means (including electronic/telephonic), for the purpose of prostitution or practices similar to prostitution. A person is guilty of sex trafficking if the individual commits or benefits from any one or more of the following:

- 1) Benefits financially or receives anything of value from knowing participation in the sex trafficking of a person over the age of 18, knowing or having reason to know it is derived from an act of sex trafficking.
- 2) Promotes, recruits, entices, harbors, transports, provides, or obtains by any means another person over the age of 18, knowing that person may be subjected to sex trafficking.
- 3) Attempts or conspires, or has the intent to promote, recruit, entice[,] harbor, transport, provide or obtain by any means another person over the age of 18, knowing that person will be subjected to sex trafficking.¹³⁸

Loren's Law also has an extensive definition of labor trafficking, as well as of debt bondage, forced labor, and sex trafficking of a minor.¹³⁹ Additionally, Loren's Law states that there is no statute of limitations on filing or prosecution of any offense listed which involves a victim under 18 at the time of the offense, and provides that criminal complaints may be filed against a John or Jane Doe when "there is physical evidence (forensic interview/examination, DNA, fingerprints, false name given, etc[.]) that a child is a victim of a human trafficking crime but where the perpetrator is unknown."¹⁴⁰

B. Sex Trafficking in Indigenous Communities: The Impact of the Three Ps

1. A Jurisdictional Hellscape: Public Law 280 and *Oliphant v. Suquamish Indian Tribe*

Prior to 1953, criminal jurisdiction in Indian country was, if not completely uniform, very nearly so; crimes committed in tribal jurisdictions were investigated and prosecuted by the federal government and the tribes themselves, as until Congress declared the states to have authority over tribal jurisdiction, they lacked the ability to interfere at all.¹⁴¹ The federal government handled most crimes, with tribes only having the jurisdiction OVER crimes by Native peoples that were victimless, or minor crimes committed by Indigenous people against Indigenous people; later, due to the passage of the Indian Civil Rights Act (which also empowered Native communities with what was essentially the Bill of Rights, almost 180 years after the initial Bill of Rights was signed for white America), tribal jurisdiction was restricted to only being able to hand out punishments limited to fines up to \$5000, one year in jail, or both.¹⁴² After the Obama administration passed the Tribal Law and Order Act in 2010, tribal nations could sentence offenders within their jurisdiction (i.e. Indigenous peoples committing crimes against Indigenous peoples) to up to three years' incarceration per offence.¹⁴³ The Tribal Law and Order Act, however, also stipulates that "[n]othing in this

Act confers on an Indian tribe criminal jurisdiction over non-Indians,” regardless of whether that crime took place in Indian country.¹⁴⁴

Congress’s passing of PL-280 passed jurisdiction of criminal matters from tribes to state jurisdiction.¹⁴⁵ Initially after enactment, only five states were immediately affected (Alaska, when it became a state in 1959, as well as California, Minnesota, Nebraska, Oregon, and Wisconsin). Tribal entities in these states were not asked for consent and the law was imposed over any objections that they may have had. However, PL-280 has since been expanded to other optional states, where the consent of Native peoples within those respective territories is required before the law can apply to them.¹⁴⁶ The primary practical effect of PL-280 was the cessation of all tribal jurisdiction over criminal matters within tribal territory in the five mandatory states, including Alaska; this change was implemented without the necessary funding being set aside to support the new system accompanying it.¹⁴⁷ In 1968, with the passing of the Indian Civil Rights Act, PL-280 was amended, not only to allow for Native consent before its implementation by state governments, but also—relevant to the discussion of human trafficking—granting states criminal jurisdiction “over any or all ... offenses.”¹⁴⁸ In the state of Alaska, especially in conjunction with ANCSA, all criminal offenses against Alaska Native peoples are effectively investigated by state law enforcement agencies.¹⁴⁹ Village and Tribal law enforcement officials, especially those in remote areas, often receive no training; state law enforcement frequently need to fly in to northern villages, and it can take days for crimes scenes to even be processed, let alone for crimes to be investigated.¹⁵⁰

Further confusing this jurisdictional quagmire is the Supreme Court’s 1978 decision in *Oliphant v. Suquamish Indian Tribe*. The 1970s were not particularly progressive years for Supreme Court decisions. In the post-*Brown* era, the pendulum of the Court’s conscience swung from liberal to decidedly conservative, and *Oliphant* resulted in one of the most restrictive decisions on tribal criminal jurisdiction ever.¹⁵¹

The history of tribal criminal jurisdiction over non-tribal members was, in the Supreme Court’s eyes, not much of an issue prior to 1978.¹⁵² The passing of the (admittedly not perfect) Indian Civil Rights Act of 1968 and, prior to that, the Indian Reorganization Act of 1934, had constructed Indian territory with tribal governments where prior the federal government had been managing tribal “allotments”—that is, land that had been set aside for Indians who had been removed from their native territories.¹⁵³ According to Rehnquist’s opinion in *Oliphant*, Indigenous tribes had been “divested of [criminal prosecution as a] sovereign power of self-government by their ‘incorporation’ into the United States by operation of the doctrine of discovery.”¹⁵⁴ Drawing on the inherently racist rhetoric of *Johnson v. M’Intosh*, Indigenous territorial rights had taken a step forward with the

IRA, and three back with *Oliphant*.¹⁵⁵ At this point in American history, no tribal government can prosecute a non-tribal member for committing crimes in Indian country, with very few exceptions. This means that when (not if) a case of human trafficking occurs in North Dakota, South Dakota, or Alaska, the process of filing a case against a trafficker—who oftentimes is not Indigenous and has no relationship with the reservation at all—is functionally impossible. Unfortunately for Indigenous peoples, federal or state prosecution, not tribal, is pretty much the only legal option they have if they wish to get justice for survivors, due to the prosecutorial restrictions placed upon them by the Tribal Law and Order Act.¹⁵⁶ State prosecution is only available to those states where PL 280 is applicable; if it is not, then Indigenous survivors of trafficking must rely on federal courts.¹⁵⁷

2. The Three Ps and the Inadequacies of Human Trafficking Law in the United States

At this point in the jurisprudence surrounding human trafficking, it is generally accepted that the legal framework in combating the issue is centered around the Three P approach: *prosecution* of traffickers, *protection* of trafficking survivors, and *prevention* of trafficking itself.¹⁵⁸ Out of the three, the U.S. has focused primarily on prosecution, and through the implementation of the *Trafficking in Persons Report* (in which the U.S. ranks countries around the world on different tier levels based on their ability to combat human trafficking within their countries, mainly through the number of successful prosecutions of human traffickers within the last 365-day period) ensures the rest of the world performs similarly.¹⁵⁹ The Three P method is in line with both the text of the Trafficking Protocol, as the Protocol was developed as a supplement to the United Nations Convention against Transnational Organized Crime (“Palermo Protocol”), and the TVPA, which mirrors the Protocol almost exactly.¹⁶⁰ However, the Three P framework means that human trafficking is examined and discussed as if it were a solitary criminal act to be handled on a case-by-case basis, rather than a criminal *phenomenon* inspired by country and community conditions, economic inequality, capitalism, racism, and misogyny.¹⁶¹ This means that the combating of human trafficking is a slow process of one-by-one case management—when cases are brought at all.¹⁶²

In the case of Indigenous peoples, occurrences of human trafficking are as much the result of larger societal and criminal phenomena as they are of individual criminal acts. Historically, American social morals have always been much more frightened by the concept of the luring of young, virginal white women into instances of sex slavery than they have been of the impoverishment, enslavement, criminalization, and abuse of black, Latinx, Indigenous, queer, and neurodivergent communities.¹⁶³ Even with newfound

focus on the impact trafficking has on minority groups, that phenomenon continues today, in part due to the history of American blindness to the abuse of minority communities, including (and particularly) Indigenous peoples.¹⁶⁴

3. Chasing Ghosts: Prosecuting Instances of Human Trafficking and IPV in Indian Country

To further complicate matters regarding the *prosecution* arm of the Three P format for combating human trafficking in the United States, investigations and prosecutions of perpetrators of human trafficking or IPV (often interlinked, as frequently intimate partners will become someone's trafficker) are varied depending on the reservation and the relevant jurisdictions. Several different organizations have investigatory and prosecutorial power in Indian country, but the two biggest are the BIA and the Federal Bureau of Investigation ("FBI"). The latter assigned "more than 100 agents and 40 victim assistance staff, located in 19 of its 56 field offices, to work Indian country cases full time" in 2017.¹⁶⁵ That is roughly 150 people, to investigate cases in 362 federally administered "Indian land areas" in the U.S. They are understaffed by anyone's standards.¹⁶⁶ Additionally, the BIA provides law enforcement services to 40 tribes directly, and to others indirectly, and still more tribes have their own, independent tribal law enforcement.¹⁶⁷

Setting aside employment numbers, rates of prosecution of either human trafficking or cases of IPV are in a historic downswing. From 2013 to 2015, there were more than 6,100 human trafficking investigations conducted federally; about 1,000 of those, or 1/6th, were prosecuted.¹⁶⁸ Out of that 1/6th, between 2013 and 2016, there were only fourteen investigations and two prosecutions of human trafficking in Indian country.¹⁶⁹ Tribal law enforcement agencies ("LEA") in roughly the same time period (2014 to 2016) reported "a total of 70 human trafficking cases . . . ranging from 0 to 8 investigations for each tribal LEA in a year."¹⁷⁰ While this survey by the GAO only received answers from 27 tribal LEAs in total, with 24 reporting on their human trafficking statistics, these numbers are incredibly low—especially when you consider that Indigenous women are so likely to be trafficked.

Bringing charges against human traffickers in Indian country depends on the satisfaction of jurisdictional requirements (such as Loren's Law). If those requirements are satisfied, and if both the trafficking survivor and the trafficker are Indigenous people, then tribal governments, wishing to retain jurisdiction over the case, must bring a minor enough charge under the definition of human trafficking that the consequences are less than three years' imprisonment or a fine between \$5,000 and \$15,000 (as required by the Tribal Law and Order Act),¹⁷¹ If it is investigated by the BIA or by the

FBI, it becomes a federal crime, charged under federal law by a federal prosecutor, and the sentencing guidelines, financial consequences, and community repercussions can be much more powerful—which isn't always a good thing. Most notably, federal prosecutors who handle crimes committed in Indian country, outside of PL 280 states, are often socially and cognitively divorced from the community in which the crime was committed and the socioeconomic status of those involved. As stated by Washburn:

Unlike a narcotics distribution offense, which is subject to federal jurisdiction wherever it occurs . . . the federal prosecutor has jurisdiction over Indian country offenses only if the offense occurred in Indian country. Yet the federal prosecutor is unaccountable to the relevant community and has no particular motivation to address community interests. The Indian country regime thus imposes an important responsibility on federal prosecutors without imposing any accountability.¹⁷²

Native reservations have good reason not to trust federal prosecutors to serve their interests, and frequently federal prosecutors have no concept of how to deal with or function in reservation cultures.¹⁷³

Trafficking in Indian Country: A Perpetuation of an Old Standard

Through uneven implementation of welfare, economic disenfranchisement, and deliberate impoverishment of Indigenous communities, the federal government of the United States has implemented policies that foster (as it has always implemented such policies) human trafficking economies in Indian country.¹⁷⁴ Human trafficking economies endure through continued victimization of Indigenous peoples by the federal government, which has been a long-standing tradition of the U.S. as a nation, as discussed above.

It is critical to note that I am not arguing that *Native people* are currently—or willingly—participating a human trafficking economy. In the cases cited below, primarily in Alaska and North Dakota, it is *non-Native people* who are trafficking Indigenous women. However, the federally enforced poverty in Indian country (in the colloquial sense of the term, to include Alaska Natives), in combination with the complete prohibition of Native Peoples to prosecute crimes committed by non-Natives against Native peoples, means that *other* populations have taken advantage of the economically desperate, and funneled them into criminal sex-slave trafficking organizations.¹⁷⁵

A. “Traffickers Know Who To Target”: Sex Trafficking of Indigenous Women in Alaska and the Dakotas

The statistics on human trafficking are shadowy and indistinct, due to the underground nature of the crime of human trafficking, and the difficulty in proving human trafficking occurs in criminal court.¹⁷⁶ The biggest study on human trafficking of Indigenous women was conducted in the state of

Minnesota, which by its locality impacts the available statistics for sex trafficking of Indigenous women in North and South Dakota.¹⁷⁷ However, some data is still available, which provides a picture that the legal realm can work with.

1. Alaska

In a study conducted at four separate sites in both the U.S. and Canada, it was established that “an average of 40% of women involved in sex trafficking identified as an AI/AN or First Nations.”¹⁷⁸ In one of those locations surveyed, Anchorage, Alaska, Native Peoples comprised 33% of the women arrested for prostitution. Because of the lack of understanding of the difference between voluntary sex work, sex trafficking, and sex for survival, prostitution is often conflated with sex trafficking).¹⁷⁹ The federal response to sex trafficking of Alaska Natives is made difficult not only by the incoherent jurisdictional mess created by Congress and PL-280, but lack of funding combined with the inaccessibility. Some of the poorest, most rural Native communities in Alaska require a plane to access, and response to a call for law enforcement can take hours or days to occur.¹⁸⁰ Eighty-two percent of law enforcement agencies in the state of Alaska who were interviewed by the Alaska Human Trafficking task force “do not believe that they have the resources to identify and investigate trafficking cases when there are higher priority cases”¹⁸¹

Anchorage is the largest place in Alaska. We call it the largest village because you have thousands of Native people who live there. And on top of that, we move all the time We’re always going from place to place because of family, or because of our tribal obligations, or our work. You go to town to shop, and too often that’s where things happen.¹⁸²

Native women and girls will have IDs or money stolen, to prevent them from returning to their rural communities, and to make it easier to shove them into sex work.¹⁸³ According to FBI agents posted in Anchorage:

[Traffickers have] told us that they will recruit Alaska Native girls because they feel that they are easier to turn out. They may have come from rural Alaska where there were drug and alcohol issues, and they’re easier to get addicted to chemicals. They may have had a history of sexual abuse and they view that as well as something that makes [the girls] much more vulnerable and easy to traffic. Traffickers specifically target Alaska Native girls because they can advertise them as Alaska Native, as Asian, as Polynesian . . . [w]ith the boom of the internet and social media, it is easier for these traffickers to communicate and start that recruitment process. So you might be somebody that . . . that lives in a small village, and yet a trafficker can still reach you now.¹⁸⁴

It is primarily underage girls who are being targeted, with the average age of survivors being between 15 and 17 years old at the time of their victimization.¹⁸⁵ Notably, traffickers target young Indigenous women who are “attending Alaska Federation of Natives conventions and other Native events in Anchorage.”¹⁸⁶ Often, traffickers will implement the “lover boy” method of grooming underage girls via dating or romantic/sexual intimacy, and then forcing their “partner” into involuntary sex work once the emotional bond has been created.¹⁸⁷ Frequently, drug addiction is also involved.¹⁸⁸ Many trafficking survivors in Alaska have experienced homelessness, sexual abuse, or both before being trafficked.¹⁸⁹ In 2012, 32 cases were referred for prosecution under AS 11.66.110; 27 were prosecuted, and 19 were convicted.¹⁹⁰ The U.S. as a whole prosecuted 282 federal human trafficking cases in 2017; the level of investigations collectively dropped.¹⁹¹

Alaska is the site of what was possibly the largest restitution awarded in any sex trafficking case in the United States prior to 2009.¹⁹² Don Arthur Webster, Jr. was ordered to pay \$3,615,750 to the eleven women and girls who Webster forced into commercial sex; Webster, who ran fake escort services, would addict the women and girls to crack cocaine and then force them to work at his businesses, frequently physically and sexually abusing them.¹⁹³ After a jury convicted Webster of trafficking on February 5, 2008, he was sentenced to 360 months in prison and placed on lifetime supervised release.¹⁹⁴

2. North and South Dakota

North Dakota and South Dakota are some of the premiere centers in the United States for the fracking industry.¹⁹⁵ In 2012, the state of North Dakota saw a 7.2% increase in overall crime, with a total of 23,647 arrests for sexual assault, prostitution, drug abuse, and other violent offenses.¹⁹⁶ In 2014, prior to the end of the oil boomlet in North Dakota—one of many, and frequently recurring depending on the inconsistency of the oil market—incidents of domestic violence had quadrupled in the area around Williston, North Dakota.¹⁹⁷ Housing camps for male workers who rushed to profit from fracking became known as “man camps,” and in North Dakota they were sometimes positioned on reservation land.¹⁹⁸ Rape and assault incidents skyrocketed, and the number of Native women and girls in North Dakota trafficked into the camps to sate the demand for sex expanded rapidly.¹⁹⁹ Not coincidentally, the reservations in North Dakota are some of the poorest in the nation, making Indigenous women and girls easily victimized by the influx of non-Native men into the area.²⁰⁰ In 2016, several women were “recruited” from the Turtle Mountain Reservation and forced into sex trafficking; the trafficker made the women ingest methamphetamine to keep them under control and frequently threatened them with Tasers and BB

guns.²⁰¹ Survivors were also frequently trafficked from surrounding states, including South Dakota and Minnesota.²⁰² After the sale of oil dropped sharply in 2017, and with the federal government intervening to approve the DAPL pipeline (since rescinded) the oil industry in North Dakota is looking to rise again; fracking companies have dumped more than \$30 billion into the work and drawing workers from all over the country once more.²⁰³

South Dakota is also known for its fracking fields and man camps.²⁰⁴ Additionally, rural South Dakota is particularly known for its pheasant hunting, which results in a wave of sportsmen attending events in the state every autumn.²⁰⁵ The Wiconi Wawokiya (“Helping Families”) shelter on the Crow Creek Reservation has seen a spike of Indigenous women and girls being trafficked and sold to the sportsmen and to men who work the oil fields.²⁰⁶ The “gentleman’s clubs” opened during hunting season are primary locations for the trafficking of Indigenous women in South Dakota.²⁰⁷ Outside of the hunting season, Indigenous people continue to be trafficked for sex:

We’re also seeing traffickers coming into the reservation and selling drugs . . . Sometimes they get these young women to sell for them, and then if they end up owing these guys money, then the guys trafficking them out for sex to get money back from them. If the girls resist, the perpetrator will beat them up, threaten them or their families, rape them, or in some cases, have them gang raped.²⁰⁸

In 2015, the U.S. Attorney’s Office in South Dakota prosecuted sex trafficking cases that frequently involved Indigenous women and girls, many of whom left the reservations to travel to Sioux Falls.²⁰⁹ Victimization of Indigenous women occurred not on the reservation, but more frequently in cities, particularly Sioux Falls, where Indigenous people frequently shift to when they attempt to escape the poverty of the reservations. The *Garden of Truth* study focused mainly in Indigenous women who were born and raised in Minnesota, with 44% of them coming from reservations. Of the women who grew up on reservations, 14% moved to Minnesota from reservations in South Dakota, particularly Pine Ridge, Rosebud, or Cheyenne River; some of these women were trafficked to Minnesota, and others simply moved to the state.²¹⁰ For those who were recruited, recruitment methods included “enticement at schools or bars, recruitment as dancers, hitchhiking, gang coercion, and enticement into [trafficking] via the Internet.”²¹¹ Forty-six percent of the women had been in foster care, four percent of those from South Dakota; some of those women lived on reservations prior to being fostered.²¹² Only one woman who had been fostered was fostered on a reservation.²¹³ More specialized statistics on human trafficking of Indigenous people in South Dakota are unknown.

B. What Do the Statistics Mean?: How Federally Enforced Impoverishment Facilitates Sex Trafficking of Indigenous People

How a person becomes trafficked is rarely clear, but the overall pattern for the ensnarement of Indigenous women into sex trafficking has recognizable tracks.²¹⁴ The first is unemployment. Indigenous women and girls who are not able to find employment opportunities on the reservation or in the surrounding area (primary examples being Standing Rock, Pine Ridge, or the Kusbak Census Area) look to opportunities offered by outsiders or Native people on the reservation.²¹⁵ The women are then either brutalized or forced into performing as a sex worker, usually by a trafficker who uses violence, drugs, or both in order to gain control.²¹⁶

The second is the “lover boy tactic.”²¹⁷ Indigenous women and girls will be lured into meeting with or trusting a man who then turns into their trafficker, again through either brutalization, emotional manipulation, violence, drugs, or a combination of all four to keep them controlled.²¹⁸ Frequently, women will not recognize that they have been trafficked. Also, frequently, they will be overrepresented in the population of those arrested for prostitution in the area in which they are trafficked.²¹⁹

The federally enforced impoverishment of Indigenous communities on reservations has created a mechanism which funnels Indigenous peoples into circumstances of human trafficking.²²⁰ The lack of economic empowerment and opportunity on reservations and the ineffective welfare/workfare programs available even through Tribal TANF mean that Indigenous people, especially women, seek employment opportunities elsewhere.²²¹ The impact of that enforced poverty on Indigenous women makes them vulnerable to being ensnared by traffickers.²²² The more economically independent a person is, and the fewer ACEs they experience, the less likely they are to be trafficked.²²³ Due to the federal neglect of reservations, the racialized impact of welfare on rural populations (especially of Indigenous peoples), the impact of generational trauma as inflicted by the federal government, and the deliberate disempowerment of Indigenous populations by the United States, the U.S. has created, and continues to facilitate, a human trafficking economy on Native land and in Indigenous communities.²²⁴

Further, the U.S. government has crafted a system in which Indigenous people are trafficked without any form of recourse. There is no efficient prosecutorial option for tribal jurisdictions to take on trafficking on their own terms. Due to PL-280, the Tribal Law and Order Act, and *Oliphant v. Suquamish*, trafficking cases—if and when they are prosecuted—are frequently referred to state prosecutors. The low prosecutorial rates of crimes committed in Indian country are bad enough; however, the sheer level of complexity and aggregate transgenerational trauma of Indigenous

peoples when it comes to the federal government leads to distrust and re-traumatization of survivors if they come forward.

Given the long history of federal-tribal relations, the federal prosecutor simply may not be anyone whom the community has any reason to trust. The result is that the child victim [of sexual assault] is victimized anew by a political dynamic that aligns the victim with the United States and against the community and the defendant. This dynamic may well cause further psychological injuries to the child victim of sexual assault [a common ACE] and lead to the victim's alienation and estrangement from family members. In that respect, a new harm is done to the child that might not have occurred in the absence of the federal prosecutor . . . [which] often has psychological ramifications that are even more serious than the harm done by the perpetrator of the sex offense.²²⁵

Effectively, prosecuting human trafficking cases within federal court frequently retraumatizes the trafficking survivor. In the case of children, this adds further ACEs to the pile, heightening their further vulnerability to being trafficked again in future.

This will not be news to Indigenous people. The victimization of Indigenous communities by the U.S. government has a long history which still goes unacknowledged in popular discourse.²²⁶ The concept of federally enforced poverty (whether deliberate or accidental) in facilitating and creating human trafficking economies has been studied in other countries, but not yet examined in the United States.²²⁷ There must be further examination of both the sociological and legal implications of federally facilitated criminal phenomena on Indigenous land, and immediate action must be taken to empower and enable Indigenous people to respond to these crimes.²²⁸

Indigenous Empowerment, Indigenous Solutions

The extensive sex trafficking of Native women and girls has not been occurring without notice. After further awareness was brought to the issue by the Obama administration throughout President Obama's second term, state and federal lawmakers have begun work on trying to combat the problem through persecutorial means.²²⁹ In 2017, Senator Heidi Heitkamp (D-ND) introduced Savanna's Act into Congress, intending to streamline and simplify information sharing about human trafficking cases by expanding tribal access to federal crime databases.²³⁰ Another bill, the End Trafficking of Native Americans Act, which was coauthored by Heitkamp, Senator Lisa Murkowski (R-AK), and Senator Catherine Cortez Masto (D-NV), would "expand efforts to combat human trafficking among Native Americans and Alaska Natives . . . [by establishing] an advisory committee to make recommendations to the Justice and Interior departments and a coordinator within

the [BIA] to organize prevention efforts across federal agencies.”²³¹ Both of these bills are currently in committee, with no indication as to if or when they will be passed.²³² A third bill, the SURVIVE Act (Securing Urgent Resources Vital to Indian Victim Empowerment) would funnel money into the problem by carving out 5% of a federal crime victims’ fund to be used solely for Indigenous survivors of violent crimes, including rape, domestic violence, human trafficking, and others.²³³ Rather than funneling money into the community, it would be tabbed for use in programs and services, including crisis centers and shelters.²³⁴ Currently, the SURVIVE Act is on the legislative calendar as Number 368.²³⁵

All three of these proposed laws tackle the same problem in the same way as it has always been tackled. Savanna’s Act points out the same problems which have always existed in Indian country when it comes to laws, law enforcement, and survival: a lack of necessary training, necessary equipment, interagency cooperation, and “appropriate laws” to confront the problem. It even acknowledges that:

(7) The complicated jurisdictional scheme that exists in Indian country—

(A) has a significant negative impact on the ability to provide public safety to Indian communities;

(B) has been increasingly exploited by criminals; and

(C) requires a high degree of commitment and cooperation among Tribal, Federal, and State law enforcement officials.²³⁶

National attention—especially federal attention—being paid to the issue of sex trafficking in Indian country may provide a salve, but not a solution. Not only that, but Savanna’s Act and the End Trafficking of Native Americans Act feed further into the federal government’s obsession with the prosecution of traffickers rather than the total prevention of trafficking.²³⁷ While updating the law is critical and ensures protection of vulnerable Indigenous populations in the short-term, the long-term problem of enduring Indigenous poverty and cultural othering can’t be solved through more prosecutorial action.²³⁸ Through an application of the U.N.’s Declaration of the Rights of Indigenous Peoples, and proper establishment of true tribal sovereignty, poverty-driven trafficking in Indigenous communities might actually decrease.²³⁹

A. Prosecuting Traffickers, Limiting Solutions

As has already been discussed, the federal and international focus on the prosecution arm of the three branches of anti-human trafficking law has led to a dangerous oversimplification of an international problem.²⁴⁰ The traf-

ficking of human beings is an international issue which, from a combination of NIMBY-ism (Not In My Backyard-ism, as many people cannot believe trafficking happens in their immediate community), monetary pressure, and cultural misunderstandings, has continuously evaded a simple solution.²⁴¹ However, one thing has become clear over the two decades that the Protocol was initially ratified: focusing solely on the prosecution of individual traffickers, and not on the untangling of poverty, racism, misogyny, and colonialism that feeds into the phenomenon of trafficking itself, is dooming vulnerable communities to continued victimization.²⁴²

Even when the U.S. government chooses to prosecute traffickers of Indigenous people, removing traffickers from society calls to mind the image of the boy with his finger in the dike. Without repairing the structural issues which promote and prompt human trafficking, human trafficking will continue.²⁴³

B. Tribal Sovereignty and the Ending of Infantilization

One of the largest obstacles in Indigenous communities effectively combating human trafficking on their own land is the overly-complicated, inherently infantilizing limitations of tribal jurisdiction on tribal lands.²⁴⁴ When law enforcement agencies cannot coordinate, the government does not provide enough funding for proper trafficking prevention programs, education and employment are low, and people leave the community in an attempt to escape rampant poverty, there cannot be impactful work done to eliminate trafficking entirely.²⁴⁵

It has already been projected by major thinkers in federal Indian law that self-determination and tribal jurisdiction will go a long way to undoing the impact of intergenerational trauma on Indigenous communities in the United States.²⁴⁶ The impacts of PL-280, VAWA, *Oliphant*, and *Johnson* have made their mark in blood in the history of Indigenous peoples of the United States; removing tribal lands from the impact of those laws and decisions would mean a chance for Indigenous communities to rebuild, and define life for themselves.²⁴⁷ A return to tribal jurisdiction, with Congressional support of tribal infrastructures and tribal communities *on the terms of the tribes*, will deliver a greater impact and a greater blow to traffickers taking advantage of Indigenous communities than proposed federal laws ever could.²⁴⁸

As impossible and unlikely as it seems that Congress will give up control and jurisdiction over Indian country, it would be a harkening back to the initial treaties made with Native peoples of North America—ones that the federal government broke, repeatedly.²⁴⁹ As terrifying as the word “reparations” is to white Americans, self-determination and tribal sovereignty would push for that end.²⁵⁰ At the very least, it would enable poverty-stricken

communities to be able to take the lead in their own economic development. As Wilkinson states:

The underpinning for the revivals would be a working tribal sovereignty, true self-rule, not a false-front version where the BIA or the state had the final say. Experience in Indian economic development, for example, has shown that strong and effective tribal governments, anchored in tribal culture, are critical for economic success. Professor Joseph Kalt . . . reported: “We cannot find a single case of sustained economic development where the tribe is not in the driver’s seat The only thing that is working is self-determination—that is, *de facto* sovereignty.”²⁵¹

C. The U.N. Declaration on the Rights of Indigenous Peoples

Perhaps the most distant—and yet the brightest—option for transforming poverty in Indigenous nations is the U.N. Declaration on the Rights of Indigenous Peoples. The United States does not like to follow international law or precepts.²⁵² However, as pointed out by Walter R. Echo-Hawk, implementing the precepts of the U.N. Declaration of the Rights of Indigenous Peoples might be the key, or at least a major part, of empowering Indigenous people in the United States to be able to function as fully socially and economically independent societies, separate from the control and confusing tangles of federal, state, and local jurisdictions.²⁵³ Even without a full implementation of tribal sovereignty, which many in Congress would object to, the empowerment of Indigenous peoples as prescribed by the Declaration would facilitate greater flexibility and capabilities in combating human trafficking at its root—not necessarily in individual crimes, but in fighting the abusive social conditions which create the vulnerability in the first place.²⁵⁴ The Declaration states that:

Article 1. Indigenous peoples have the right to the full enjoyment . . . of all human rights and fundamental freedoms as recognized in . . . international human rights law.

Article 4. Indigenous people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.

Article 5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.²⁵⁵

Most notably:

Article 22. 1. Particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children, and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.²⁵⁶

Conclusion

While the relationship between reservation poverty and federal action (or inaction) has long been established, and the connection between poverty and human trafficking has also been frequently discussed in sociological materials, the connection between U.S. paternalism, jurisdictional enforcement of poverty, and the proliferation of sex trafficking of Native women and girls must be as thoroughly documented. The ongoing racist implementation of workfare and welfare programs, in conjunction with the infantilization and disenfranchisement of Native populations by Congress, and the continuing generational trauma which impacts almost every aspect of Native life, has created a flawless (though perhaps unintentional) mechanism for the funneling of Indigenous peoples into economies of human trafficking. The federal government of the United States must acknowledge its own culpability in the further traumatization of Native Americans, and provide the recognition and respect promised and denied to independent, Indigenous nations which have existed in North America for thousands of years. As stated by Vine Deloria Jr.: "Sovereignty is not only political but a matter of survival, and the denial of sacred lands and sites is a form of genocide."²⁵⁷

NOTES

- 1 *See generally* Proclamation No. 9688, 83 Fed. Reg. 587 (Dec. 29, 2017); *see also* *Trafficking of American Indian and Alaska Natives*, INDIAN LAW RESOURCE CTR. (Oct. 6, 2017), <https://indianlaw.org/safewomen/trafficking-american-indian-and-alaska-natives>; *see also* Suzette Brewer, *Sold for Sex: Senate Committee Investigates Human Trafficking of Native Women and Children*, REWIRE NEWS (Sept. 28, 2017), <https://rewire.news/article/2017/09/28/sold-sex-senate-committee-investigates-human-trafficking-native-women-children/>; *see also* Victoria Sweet, *Disproportionate Impacts of Human Trafficking in Native Communities*, HUMAN TRAFFICKING CENTER (Feb. 14, 2017), <http://humantraffickingcenter.org/disproportionate-impacts-human-trafficking-native-communities/>.
- 2 *See Trafficking in Native Communities*, INDIAN COUNTRY TODAY (May 24, 2015), <https://newsmaven.io/indiancountrytoday/archive/trafficking-in-native-communities-JGKqWdmCQ0-6BCi-rN-X9w/>; *see also* Suzette Brewer, *Sold for Sex: Senate Committee Investigates Human Trafficking of Native Women and Children*, REWIRE NEWS (Sept. 28, 2017), <https://rewire.news/article/2017/09/28/sold-sex-senate-committee-investigates-human-trafficking-native-women-children/>.
- 3 The Global Slavery Index (questionable for its statistical analysis methods, but also one of the most frequently cited) estimates that there were roughly 403,000 people in “modern slavery” in the United States in 2016. *United States (Country Studies)*, GLOBAL SLAVERY INDEX, <https://www.globalslaveryindex.org/2018/findings/country-studies/united-states/>. The International Labour Office estimated that globally, there were over 40 million people in “modern slavery” conditions. International Labour Office & Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT’L LABOUR OFF. 5 (2017).
- 4 In legal parlance, “American Indian” is the most common term for a broad scope of over 540 separate tribes and communities in the lower United States; “Alaska Native” refers to Native peoples in the state of Alaska. The terms “American Indian,” “Native peoples,” and “indigenous” will be used interchangeably with the names of specific tribes as is necessary.
- 5 *See generally* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-325, HUMAN TRAFFICKING: ACTION NEEDED TO IDENTIFY THE NUMBER OF NATIVE AMERICAN VICTIMS RECEIVING FEDERALLY-FUNDED SERVICES (2017).
- 6 *See generally* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-325, HUMAN TRAFFICKING: ACTION NEEDED TO IDENTIFY THE NUMBER OF NATIVE AMERICAN VICTIMS RECEIVING FEDERALLY-FUNDED SERVICES (2017); *see also* SARAH DEER, THE BEGINNING AND THE END OF RAPE 13 (2005) (describing an “epidemic” as a natural phenomenon with a probable end; domestic violence and sexual assault of Native women, as described by Deer, is instead a protracted phenomenon deliberately implemented by the U.S. government throughout its history, continuing today).
- 7 *See generally* DEER at 13.
- 8 *See infra* Part II.
- 9 *See generally* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 33-40 (3d ed. 2012) (hereinafter CASE) (reviewing the impact of ANCSA on the relationship between Alaska Natives and the federal government).
- 10 *See id.*
- 11 *See* Laudan Aron et al., *How are Income and Wealth Linked to Health and Longevity*, URB. INST. & VCU CTR. ON SOC’Y AND HEALTH 7 (2015); *see also* Roy Wade, Jr., *The Impact of Poverty and Adverse Childhood Events on Child Health*, AAP

- NATIONAL CONFERENCE (Oct. 24, 2016) <https://www.aap.org/en-us/Documents/AAPCommunityPediatricsWade2016.pdf>
- 12 Roy Wade, Jr., *The Impact of Poverty and Adverse Childhood Events on Child Health*, AAP NATIONAL CONFERENCE (Oct. 24, 2016) <https://www.aap.org/en-us/Documents/AAPCommunityPediatricsWade2016.pdf>
- 13 VINE DELORIA, JR. & CLIFFORD M. LYLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 58 (1983).
- 14 *See generally id.*, 58-79.
- 15 *See* Indian Reorganization Act, 25 U.S.C.A. § 5123 (2018); *see also* 18 U.S.C.A. § 1151 (1948).
- 16 *See generally* LOUISE ERDRICH, *THE ROUND HOUSE* (2012) (describing how interjurisdictional conflicts on Indigenous reservations can result in crime victims languishing without justice from any legal system).
- 17 *See infra* Part III.
- 18 *See* Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, PEW RESEARCH CENTER (Jun. 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>; *see also* K. Whitney Mauer, *Indian Country Poverty: Place-Based Poverty on American Indian Territories, 2006-10*, 82 RURAL SOC. 3 473, 473 (Sept. 2017).
- 19 *See id.*
- 20 *North Dakota Legislative Proposal 08-23-2018*, NATIVE AMERICAN DEV. CTR. (2018), https://www.legis.nd.gov/files/committees/65-2017/19_5168_03000appendixi.pdf (hereinafter NATIVE AMERICAN DEV. CTR.); Joe Whittle, *Most Native Americans live in cities, not reservations. Here are their stories*, THE GUARDIAN (Sept. 4, 2017), <https://www.theguardian.com/us-news/2017/sep/04/native-americans-stories-california>.
- 21 *See* Mauer, *supra* note 15, at 474.
- 22 *See* Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.
- 23 *See* ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES* 211 (2014).
- 24 *See id.*; *see also* Duane Brayboy, *Two Spirits, One Heart, Five Genders*, INDIAN COUNTRY TODAY (Sept. 7, 2017), https://newsmaven.io/indiancountrytoday/archive/two-spirits-one-heart-five-genders-9UH_xnbFVEWQHwKjNn0rQQ/.
- 25 *See* DEER, *supra* note 6, at 42-43.
- 26 *See generally* DUNBAR-ORTIZ, *supra* note 20, at 133-161.
- 27 DANIEL H. USNER, *INDIAN WORK* 83 (2009).
- 28 Frank Hopper, *Give Us Back Our Reservation: Mashpee Wampanoag and Allies March on the Capitol*, INDIAN COUNTRY TODAY (Nov. 15, 2018), https://newsmaven.io/indiancountrytoday/news/give-back-our-reservation-mashpee-wampanoag-and-allies-march-on-the-capitol-O2aeJIbIHkyFyrSwyU_WEW/?fbclid=IwARIn_hfu1TNlFkQNjBm28Jloz6ELqvi_JcjTVVLTmOhmOHcxnVx62nXrG0.
- 29 *See* DUNBAR-ORTIZ, *supra* note 20, at 207-208. (The Lakota Sioux have been demanding the return of the Black Hills (where Mount Rushmore has been carved) since 1877; when the Supreme Court ruled that the Black Hills had been taken illegally, it offered remuneration to the Sioux, who rejected it. The money has been sitting in an interest-bearing account since 1980, which in 2011 was currently at more than \$757 million

dollars. At the same time, the Pine Ridge Reservation in South Dakota had unemployment rates of over 80%. The Black Hills themselves mean more.)

- 30 See DUNBAR-ORTIZ, *supra* note 20, at 91.
- 31 U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-695T, WELFARE REFORM: TRIBES ARE USING TANF FLEXIBILITY TO ESTABLISH THEIR OWN PROGRAMS 2 (2002).
- 32 Associated Press, *South Dakota leads nation in Native American poverty rate*, RAPID CITY JOURNAL (Feb. 20, 2013), https://rapidcityjournal.com/news/south-dakota-leads-nation-in-native-american-poverty-rate/article_524eda1b-f783-529d-8a54-61543128ecd8.html.
- 33 *Id.*
- 34 See *id.*
- 35 Jacqueline Gullede, *American Indians struggle to survive winter in South Dakota*, CNN (Feb. 13, 2017), <https://www.cnn.com/2017/02/13/health/iyw-american-indian-lakota-charity-one-spirit-firewood-program/index.html>; see also *Biggest Indian Reservations In The United States*, WORLDATLAS (last updated June 5, 2018), <https://www.worldatlas.com/articles/biggest-indian-reservations-in-the-united-states.html>.
- 36 Patrick Strickland, *Life on the Pine Ridge Native American reservation*, AL JAZEERA (Nov. 2, 2016) <https://www.aljazeera.com/indepth/features/2016/10/life-pine-ridge-native-american-reservation-l61031113119935.html>.
- 37 See NATIVE AMERICAN DEV. CTR., *supra* note 17.
- 38 See *id.*
- 39 See Associated Press, *South Dakota leads nation in Native American poverty rate*, RAPID CITY JOURNAL (Feb. 20, 2013), https://rapidcityjournal.com/news/south-dakota-leads-nation-in-native-american-poverty-rate/article_524eda1b-f783-529d-8a54-61543128ecd8.html; see also NATIVE AMERICAN DEV. CTR., *supra* note 17; compare Mary Garrigan, *State's Native American population grows 15 percent*, RAPID CITY JOURNAL (Feb. 17, 2011), https://newsmaven.io/indiancountrytoday/archive/two-spirits-one-heart-five-genders-9UH_xnbfVEWQHWkjNn0rQQ/ (“Pourier estimates the population of the Pine Ridge Reservation at 40,000 Todd County, which comprises a large part of the Rosebud Sioux Reservation, had 9,612 residents Cordier has an unofficial count of 9,626 tribal members alone”) with Tribal Affairs, N.D. INDIAN AFF. COMMISSION, <http://indianaffairs.nd.gov/tribal-nations/> (“In total, there are 31,329 American Indians living in North Dakota . . . [a]lmost sixty percent [31,329 x .60 = 18,797] live on reservations. . . .”)
- 40 *Alaska's History*, ALASKA PUB. LANDS INFO. CENTERS, <https://www.alaskacenters.gov/explore/culture/history>.
- 41 Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All The Russias to the United States of America, art. 3, U.S.S.R.-U.S., June 20, 1867, 15 U.S.T. 539.
- 42 *Alaska's History*, ALASKA PUB. LANDS INFO. CENTERS, <https://www.alaskacenters.gov/explore/culture/history>.
- 43 CASE, *supra* note 9, at 32.
- 44 *Id.* at 34.
- 45 *Id.* at 35.
- 46 *Id.*
- 47 See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4239-41 (Jan. 30, 2018).

- 48 Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 454 (1999/2000) (“By imposing Alaska state jurisdiction, transferring title to state corporations, and refusing to recognize tribal jurisdiction . . . the federal government essentially divested Alaska Native tribal governments . . . of most if not all of their autonomous attributes”).
- 49 See QuickFacts, Kusilvak Census Area, Alaska, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/kusilvakcensusareaalaska>; see also Lisa Demer, *It's one of the poorest places in the U.S. Can residents of the Lower Yukon make it better?*, ANCHORAGE DAILY NEWS (Sept. 29, 2017), <https://www.adn.com/alaska-news/rural-alaska/2017.09/29/its-one-of-the-poorest-places-in-the-u-s-can-residents-of-the-lower-yukon-make-it-better/>; see also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235, 4239-41 (Jan. 30, 2018).
- 50 Bureau of Indian Affairs, *Mission Statement*, <https://www.bia.gov/bia>.
- 51 See USNER *supra* note 23, at 75.
- 52 See, e.g., Kevin Gover, (former) Assistant Secretary—Indian Affairs, *Remarks at the Ceremony Acknowledging the 175t Anniversary of the Establishment of the Bureau of Indian Affairs* (Sept. 8, 2000) *reprinted in* 25 AM. INDIAN L. REV. 161, 161-62 (2000-2001).
- 53 See USNER, *supra* note 23, at 75-76; see also CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 21 (2005).
- 54 See WILKINSON, *supra* note 47, at 21.
- 55 See *id.*
- 56 See USNER, *supra* note 23, at 82.
- 57 See *id.*
- 58 *Id.* at 86.
- 59 See USNER, *supra* note 23, at 76
- 60 See Mark H. Harvey and Kathleen A. Pickering, *Color-blind Welfare Reform or New Cultural Racism? Evidence from Rural Mexican- and Native-American Communities*, in 15 RES. IN RURAL SOC. AND DEV. 61, 76 (Paul Milbourne, ed., 2010) (hereinafter Harvey).
- “[W]elfare reform plays a major and regressive role in the ongoing process of racial formation in the United States. It does so by exacerbating the material inequalities that obtain between racialized rural minorities and the white mainstream, thereby expanding the gap in material well-being that forms the breach in which ideologies of essentialized difference and hierarchy flourish.”
- 61 Tribal TANF, ADMIN. FOR CHILD. AND FAMILIES, DEP’T OF HEALTH AND HUM. SERVICES, <https://www.acf.hhs.gov/ofa/programs/tribal/tribal-tanf>.
- 62 See *id.*; see also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5020 (Jan. 29, 2016). <https://www.federalregister.gov/documents/2016/01/29/2016-01769/indian-entities-recognized-and-eligible-to-receive-services-from-the-united-states-bureau-of-indian>
- 63 See Tribal TANF, ADMIN. FOR CHILD. AND FAMILIES, DEP’T OF HEALTH AND HUM. SERVICES, <https://www.acf.hhs.gov/ofa/programs/tribal/tribal-tanf>.
- 64 Native Employment Works, OFF. OF FAM. ASSISTANCE, ADMIN. FOR CHILD. AND FAMILIES, <https://www.acf.hhs.gov/ofa/programs/tribal/new>.
- 65 *Id.*

- 66 *See Help for Families*, OFF. OF FAM. ASSISTANCE, ADMIN. FOR CHILD. AND FAMILIES, <https://www.acf.hhs.gov/ofa/help>; *see also Native Employment Works Grantees and Funding, July 1, 2017 to June 30, 2018*, OFF. OF FAM. ASSISTANCE, ADMIN. FOR CHILD. AND FAMILIES, <https://www.acf.hhs.gov/ofa/resource/native-employment-works-grantees-and-funding>.
 - 67 *See Help for Families*, OFF. OF FAM. ASSISTANCE, ADMIN. FOR CHILD. AND FAMILIES, <https://www.acf.hhs.gov/ofa/help>; *see also Native Employment Works Grantees and Funding, July 1, 2017 to June 30, 2018*, Office of Family Assistance, Administration for Children and Families, <https://www.acf.hhs.gov/ofa/resource/native-employment-works-grantees-and-funding>.
 - 68 *See Harvey*, *supra* note 54, at 67.
 - 69 KATHLEEN PICKERING ET AL., *WELFARE REFORM IN PERSISTENT RURAL POVERTY: DREAMS, DISENCHANTMENTS, AND DIVERSITY* 98-99 (2006).
 - 70 *See id.*
 - 71 *See id.*
 - 72 *See* Laudan Aron et al., *How are Income and Wealth Linked to Health and Longevity*, URB. INST. & VCU CTR. ON SOC'Y AND HEALTH 7 (2015); *see also* Roy Wade, Jr., *The Impact of Poverty and Adverse Childhood Events on Child Health*, AAP NATIONAL CONFERENCE (Oct. 24, 2016) <https://www.aap.org/en-us/Documents/AAPCommunityPediatricsWade2016.pdf>
 - 73 Roy Wade, Jr., *The Impact of Poverty and Adverse Childhood Events on Child Health*, AAP NATIONAL CONFERENCE (Oct. 24, 2016) <https://www.aap.org/en-us/Documents/AAPCommunityPediatricsWade2016.pdf>
 - 74 *Id.*
 - 75 *See* Aron, *supra* note 66, at 8.
- “Even after controlling for race and ethnicity, the risk of unemployment with four or more ACEs was 3.6 times higher for men and 1.6 times higher for women. . . Children who are raised in poverty and suffer poor health can find it difficult to climb the economic ladder or to leave disadvantaged neighborhoods, often repeating the cycle when they have their own children.”
- 76 *See infra* Part I.
 - 77 *See generally* DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (2017); *see also* Jean Carter, *5 Riches Native American Tribes Owning Casinos*, USA ONLINE CASINO BLOG (Oct. 24, 2017), <https://www.usaonlinecasino.com/blog/5-richest-native-american-tribes-owning-casinos/>.
 - 78 *Compare infra* Part I with Part II.
 - 79 Tamara Hill, *Should mental health professionals understand intergenerational trauma?*, ASS'N FOR CHILD AND ADOLESCENT MENTAL HEALTH (Dec. 18, 2017), <https://www.acamh.org/blog/intergenerational-trauma/>.
 - 80 *See* P. Fossion et al., *Family approach with grandchildren of Holocaust survivors*, 57 AM. J. OF PSYCHOTHERAPY 519, 519-527 (2003).
 - 81 Howard Pinderhughes et al., *Adverse Community Experiences and Resilience: A Framework for Addressing and Preventing Community Trauma*, PREVENTION INST. 12 (2015).
 - 82 WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 101 (2013).
 - 83 *See id.*

- 84 See Alexandra Pierce & Suzanne Koeplinger, *New language, old problem: Sex trafficking of American Indian women and children*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 2 (2011) (hereinafter Pierce).
- 85 See *id.*
- 86 Indian Country Today, *Intergenerational Trauma: Understanding Natives' Inherited Pain*, INDIAN COUNTRY TODAY (May 10, 2018), <https://newsmaven.io/indiancountrytoday/news/intergenerational-trauma-understanding-natives-inherited-pain-HuBOpnz-69kSHjN3RsfyRYg/>.
- 87 See *infra* Part II.A.
- 88 DAVID T. COURTWRIGHT, *VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM THE FRONTIER TO THE INNER CITY* 64 (1996) ("The girl, when sold to a white man, is generally skeary for a while and will take the first chance to run away....Should you take her again, and whip her well, and perhaps clip a little slice out of her ear, then she will stay").
- 89 See generally DEER, *supra* note 6, at 59-75.
- 90 See generally ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN SLAVERY IN AMERICA*, "Chapter 3: The Trafficker and His Network" (2016); see also DEER, *supra* note 6, at 62.
- 91 See *id.*; see generally RESÉNDEZ, *supra* note 83.
- 92 See DEER, *supra* note 6, at 62; see also Ruth Graham, *How Sex Trafficking Became a Christian Cause Célèbre*, SLATE (Mar. 5, 2015), <https://slate.com/human-interest/2015/03/christians-and-sex-trafficking-how-evangelicals-made-it-a-cause-celebre.html>.
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- 94 *Id.*
- 95 See DEER, *supra* note 6, at 61.
- 96 See *id.*
- 97 M.C. Black et al., *National Intimate Partner and Sexual Violence Survey 2010 Summary Report*, CTR. FOR DISEASE CONTROL AND PREVENTION 20 (2011).
- 98 *Id.*
- 99 See DEER, *supra* note 6, at 5. ("Through my work in Native communities, I heard more than once, *I don't know any woman in my community who has not been raped.*")
- 100 *Final Report and Recommendations*, ST. OF ALASKA TASK FORCE ON THE CRIMES OF HUM. TRAFFICKING, PROMOTING PROSTITUTION, AND SEX TRAFFICKING 6-7 (Feb. 15, 2013).
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- 105 G.A. Res. 55/25 (III) annex, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000).

- 106 *Signatories to the United Nations Conventions against Transnational Crime*, UNODC, <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.
- 107 Trafficking Victims Protection Act, 22 U.S.C. § 7102 (9) (2000).
- 108 *Compare* President George W. Bush, Remarks at the Tampa Marriott Waterside Hotel (July 26, 2004) (“Worldwide, at least 600,000 to 800,000 human beings are trafficked across international borders each year. Of those, it is believed that more than 80 percent are women and girls, and that 70 percent of them were forced into sexual servitude”) *with* President Barack Obama, Remarks to the Clinton Global Initiative (Sept. 25, 2012) (“When a little girl is sold by her impoverished family – girls my daughters’ age – runs away from home, or is lured by the false promises of a better life, and then imprisoned in a brothel and tortured if she resists – that’s slavery”).
- 109 *See* 22 U.S.C. § 7102 (4), (9)-(10).
- 110 Violence Against Women Act of 1994, Pub. L. No. 103-322.
- 111 *Id.*
- 112 *The Violence Against Women Act – Factsheet*, NAT’L INDIGENOUS WOMEN’S RESOURCE CTR. (Sept. 7, 2017), <http://www.niwrc.org/resources/vawa-fact-sheet>; *see also* Ashley Killough, *House passes reauthorization of Violence Against Women Act*, CNN (Apr. 4, 2019, 2:59PM) <https://www.cnn.com/2019/04/04/politics/house-passes-violence-against-women-act-reauthorization/index.html>.
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- 114 *Id.*
- 115 *Id.*
- 116 *See* 42 U.S.C. § 13925 (2006); *see generally* Rory Flay, *A Silent Epidemic: Revisiting the 2013 Reauthorization of the Violence Against Women Act to Better Protect American Indian Native Women*, 5 AM. INDIAN L. REV. 230 (2017).
- 117 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
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- 121 *See generally* Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96 (2017).
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- 123 Alaska Stat. 11.66.120 (2018)
- 124 Alaska Stat. 11.66.110.
- 125 *See* Pub. L. No. 83-280 (1953); *see also* Act of December 18, 1971, Pub. L. No. 92-203.
- 126 S.D. Codified Laws § 22-49-1 (2017).
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 - 134 N.D. Cent. Code § 12. 1-41-01 (2017).
 - 135 *Id.*
 - 136 N.D. Cent. Code § 12. 1-41-02 (2017).
 - 137 Amy Dalrymple & Katherine Lymn, *Native American populations 'hugely at risk' to sex trafficking*, BISMARCK TRIBUNE (Jan. 5, 2015), https://bismarcktribune.com/bakken/native-american-populations-hugely-at-risk-to-sex-trafficking/article_46511e48-92c5-11e4-b040-c7db843de94f.html.
 - 138 Governing Body of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, *Resolution No. 14-195-VJB* (Dec. 2014) <https://static1.squarespace.com/static/5a5fab0832601e33d9f68fde/t/5b06fb222b6a289bb32a3ecd/1527184167147/14-195-VJB.pdf>.
 - 139 *Id.*
 - 140 *Id.*
 - 141 See DUANE CHAMPAGNE & CAROLE GOLDBERG, *CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280* 5 (2012).
 - 142 See 25 U.S.C. § 1302(a)(7).
 - 143 Tribal Law and Order Act of 2010, § 234(b).
- A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—
- (1) has previously been convicted of the same or a comparable offense by any jurisdiction in the United States; or
 - (2) is being prosecuted for an offense comparable to any offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.
- 144 Tribal Law and Order Act of 2010, § 206.
 - 145 See 18 U.S.C. § 1162(a) (1953).
 - 146 Sarah Deer et al., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women*, OFF. ON VIOLENCE AGAINST WOMEN AND TRIBAL L. AND POL'Y INST. 1 (Kansas and New York had assumed jurisdiction over Indian country prior to 1953; currently, nine more states have implemented PL-280 to various extents: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington).
 - 147 See Teresa Cotsirilos, *AK: In rural communities, Village Police Officers face impossible job*, ALASKA PUBLIC MEDIA (Sept. 21, 2018), <https://www.alaskapublic.org/2018/09/21/ak-in-rural-communities-village-police-officers-face-impossible-job/>; see also Tanya H. Lee, *The Wild, Wild North: Law & Order Scarce in Rural Alaska*, INDIAN COUNTRY TODAY (Jan. 22, 2014), https://newsmaven.io/indiancountrytoday/archive/the-wild-wild-north-law-order-scarce-in-rural-alaska-33gGMHjWHUUmUixyr_UDwhA/.

- 148 25 U.S.C. § 1321(a).
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- 151 See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 191 (1978).
- 152 See *id.* at 212.
- “We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared.”
- 153 See Indian Civil Rights Act, 25 U.S.C. § 1302 (2010); see also Indian Reorganization Act, 25 U.S.C.A. § 5123 (2018).
- 154 ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 91 (2005).
- 155 See *Oliphant*, 435 U.S. at 196 (quoting *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823)).
- 156 Tribal Law and Order Act of 2010, § 234(b).
- 157 U.S. Dep’t of Just., *Tribal Crime Data Collection Activities, 2015*, <https://www.bjs.gov/content/pub/pdf/tcdca15.pdf> (stating in footnote 3 that “Federal jurisdiction in Indian country is contained under the Indian Country Crimes Act (18 U.S.C. § 1152), the Indian Country Major Crimes Act (18 U.S.C. § 1153), and the Assimilative Crimes Act (18 U.S.C. § 13)”).
- 158 U.S. Dep’t of St., *3Ps: Prosecution, Protection, and Prevention*, <https://www.state.gov/j/tip/3p/>.
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- 165 U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-762T, INVESTIGATIONS IN INDIAN COUNTRY OR INVOLVING NATIVE AMERICANS AND ACTIONS NEEDED TO BETTER REPORT ON VICTIMS SERVED 4 (2017).
- 166 *Id.* at 3.
- 167 See *id.* at 4.
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- 169 *Id.*
- 170 *Id.* at 9 (27 tribal LEAs were asked; 24 reported).

- 171 Tribal Law and Order Act of 2010, § 234(b).
- 172 Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 710, 734 (2006).
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- 174 *See infra* Part IV.
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- 176 *See generally* Alexis A. Aronowitz, *Overcoming the Challenges to Accurately Measuring the Phenomenon of Human Trafficking*, DANS REVUE INTERNATIONALE DE DROIT PENAL, 493, 493 (2010).
- 177 *See generally* Melissa Farley et al., *Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota*, MINN. INDIAN WOMEN'S SEXUAL ASSAULT COALITION (2011).
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- 192 U.S. Attorney's Off., Anchorage Division, *Webster Ordered to Pay \$3.6 Million to Victims in Sex Trafficking Case*, FED. BUREAU OF INVESTIGATION (Apr. 9, 2009), <https://archives.fbi.gov/archives/anchorage/press-releases/2009/webster-ordered-to-pay-3.6-million-to-victims-in-sex-trafficking-case>.
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**Dennis Cunningham and
Jeffrey Haas**

**BOOK REVIEW:
THE TORTURE MACHINE**

The Torture Machine, Racism and Police Violence in Chicago, by People's Law Office and longtime National Lawyers Guild attorney Flint Taylor, is a meticulously detailed and authentic, truly appalling story of shame and disgrace to the city of Chicago, its political and police administration establishments, and numerous judges of the Cook County criminal courts; an account of dozens of cases in which black men from the South Side were sent to state prison—and a number to Death Row—on the basis of confessions extracted from them by police torture. For more than a decade, during the 1970s and 1980s, a group of Chicago Police Department (“CPD”) detectives, under the command of Lieutenant Jon Burge, regularly arrested black men as suspects in various serious criminal cases and brought them to Area Two HQ for “questioning,” which consisted of aggravated physical abuse until they would agree to confess under duress. Just about every suspect confessed under these conditions.

Members of the Prosecutor's office, notably including Assistant State's Attorney Larry Hyman, State's Attorney Richard M. Daley, later elected Mayor of Chicago, and Chief Assistant State's Attorney Richard Devine, who later succeeded Daley, took statements put into the “suspects” mouths by the investigating detectives. The Prosecutor's office used the transcribed statements against the “suspects” turned torture victims to obtain convictions and severe sentences.

Cook County judges uniformly denied motions to suppress the confessions despite the clear evidence of coercion and disregarded the striking flow of such similar evidence from cases arising out of Area Two. The same detectives from the Burge group witnessed the alleged admissions of guilt every time. And yet, with one glaring exception, no challenge to their testimonies was ever sustained—regardless of the evidence.

The torture practice finally came to light in the course of a federal civil trial. The case was first filed by Andrew Wilson, *pro se*, under 42 U.S.C. § 1983 seeking damages for the torture he endured while he was interrogated for being a “cop killer.” Wilson was sentenced to death but the Illinois Supreme Court overturned the conviction and held that the confession upon

Haas and Cunningham are two of the founding partners of the People's Law Office, now celebrating its 50th year, are longtime NLG members, and are beloved comrades of the author.

which the conviction was based was brutally coerced. The court cited evidence including a photograph that showed black burn marks, in parallel lines up and down his stomach and chest, made by a hot radiator to which he had been chained by the Burge group during his interrogation.

Eventually, the case was brought to the People's Law Office in Chicago, a group of lawyers specializing in police misconduct cases and taken up by author Flint Taylor and his PLO comrades, Jeffrey Haas and John Stainthorp. The three soon found they had entered a nightmare, in the courtroom of then-U.S. District Court Judge Brian Duff.

Judge Duff, as Taylor describes in mind-bending detail, made no secret of his hostility to Wilson and his lawyers. Judge Duff extended that hostility to his rulings and showed a determination that Wilson's claims would not succeed. Among the most egregious and consistent ways that Judge Duff railroaded Wilson's claims to two successive juries was to allow Burge's lawyers to present every detail of the police killing, despite repeated objections by Wilson's lawyers, while denying cumulating evidence of prior similar acts of torture and physical abuse by Burge against other criminal suspects.

Perhaps the most significant event that occurred during the first jury trial was when Taylor received an anonymous letter, which appeared to come from a Chicago police officer. The letter warned Taylor that there were other cases of torture at Area Two. Successive communications named one of Burge's torture victims as Melvin Jones. Wilson's lawyers quickly discovered a transcript of Jones making similar charges of electric shock in his own motion to suppress and in the transcript Burge threatened Jones with the same treatment he had given "Satan" and "Cochise." These persons were located and confirmed they were Burge torture victims, which led to the discovery of other victims.

Wilson's lawyers argued to Judge Duff that Federal Rule 404(b) allowed evidence of bad acts in rebuttal during the first jury trial. However, Judge Duff denied the arguments on the grounds that the defendants had not been allowed to take the victims' depositions before the trial. As a result, the first jury was hung, having heard nothing about Wilson's torture allegations, which was supported by the doctors and nurse who first examined him. Instead the jury heard Burge's, several Area Two detective's, the State's Attorney's, and a court reporter's repeated denials that no one touched Wilson at Area Two. These participants in the coerced statement claimed there was a minor scuffle when Wilson was first arrested and he may have been slightly injured by the "wagonmen" transporting him from Area Two after he "confessed".

At first Taylor and his co-counsel thought the hung jury had a silver lining and giving them the opportunity to give the Defendants' notice of

the other torture victims and remove the objection to the torture victims' testimonies. However, at the scheduling conference, Judge Duff declared a second trial would begin the next week. This did not allow enough time to fully develop the testimony of the increasing number of torture victims. Taylor writes that he and his co-counsel went "ballistic."

In an attempt to make the record, if not postpone the trial, Taylor, Haas, and Stainthorp filed a motion to continue the second trial citing all of the new direct evidence from other Burge torture victims that should be admitted into evidence at the second trial. Arguing this motion for continuance and to allow into evidence Burge's prior acts of torture, set the tone and the outcome for the second trial. Duff refused both the continuance and to allow the other torture victims to testify. Taylor, Haas, and Stainthorp did not hide their frustration as the second trial loomed under the shadow of the rank injustice of the first. Contempt citations followed. Duff even threatened he would declare a mistrial (attributable to their conduct) if they continued to pursue their arguments.

Nevertheless they persisted with their objections and offers of proof designed to preserve the record, which were met with denials, reprimands, and further contempt citations by Judge Duff as the trial quickly degenerated into a judicial dogfight. Not surprisingly the second civil trial provided the PLO Lawyers with the first steps to a successful appeal, including a not-guilty verdict for Defendant Burge and the city and a record replete with judicial mistakes and partisanship.

Taylor describes the appeal in dramatic fashion from the morning when PLO lawyers learned they had a very conservative panel of judges assigned to hear the case, to the pinnacle of the argument when Judge Posner confronted Bill Kunkle, Burge's lawyer with Kunkle's rhetorical question to the jury: "What kind of due process was it when Andrew Wilson sentenced those officers to death?" Kunkle chuckled inside with the brilliance of his prejudicial remarks, until Posner leaned over and asked, "You wanted the jury to hate him?" Taylor describes the long pause in which the appeal likely held in the balance. Kunkle finally admitted "I probably did want the jury to hate him." The reversal of the verdict below in Burge's favor followed, and the door was finally reopened to judicial scrutiny of Burge and company's serialized acts of torture.

The result of the Wilson trials and appeals, the publicity, and social activism work that accompanied them, always supported and often initiated by the PLO lawyers, was to make Burge's torture a public issue. This effort included a film for PBS entitled "End of the Nightstick" which chronicled organizing efforts by activists and contained interviews with Burge torture victims, PLO attorneys, and community activists.

Smelling blood, or more accurately torture, Taylor led the invigorated investigation to uncover more victims and expose the complicity of Cook County's top prosecutors, (most notably Richard M. Daley) and ruling city officials (again most notably Mayor Richard M. Daley) in encouraging, condoning, and covering up Burge's actions. This project and quest led the PLO, and Taylor in particular, through numerous cases where wrongful imprisonment resulting from torture by Chicago police was established, new trials were granted, and freedom, denied for decades, was finally won. Through this prolonged struggle, a total of more than 125 alleged Burge torture victims have been identified, and efforts to free those still incarcerated continue. Taylor, fifty years from the establishment of the PLO when he was a student at the Northwestern University Law School, vows he has no plans to stop what he's been doing.

Taylor opens his book with the event that set the fate of the PLO as police misconduct lawyers: The police raid on December 4, 1969. That day, Fred Hampton, chairman of the Illinois chapter of the Black Panther Party, several members of who were already clients of the PLO, was murdered while asleep in his bed. As CPD officers approached the residence, party members were unable to awaken Fred Hampton because, as it was later shown, he had been nefariously drugged at dinner the night before, most likely by a trusted member who secretly worked for the FBI.

The FBI instigated the raid as part of the infamous "COINTELPRO" campaign by which the Bureau sought to "neutralize" the BPP and other dissident groups. They supplied the police raiders with a floor plan of the apartment where Fred and other Panthers stayed, which was obtained from their informant William O'Neal. The floorplan specifically marked the location of Fred's bed.

In the wee hours of December 4, 1969, fourteen Chicago police officers raided the Hampton apartment. After fatally shooting Panther Mark Clark at the front door, the police sent a fusillade of carbine and machine gun fire through a wall directed towards the location where the floor plan showed that Fred's bed was located. Two CPD officers entered the bedroom. One inquired "Is he dead yet?" After two pistol rounds were fired into Fred's head from about two feet away, one of the raid's survivors heard a police voice in the bedroom say, "He's good and dead now."

In addition to the murder of Hampton and Clark, four other Panthers received serious gunshot wounds, including from a police Tommy gun used by an officer, who said he was providing "covering fire." The four wounded Panthers, along with three others who were not shot, were all charged with attempted murder. After these charges were dropped because the prosecution acknowledged the physical evidence did not support the police testimony,

the PLO started a civil case against the raiders and their supervisors. This legal battle took thirteen years including an 18-month trial in 1976 through 1977, two trips to the Court of Appeals, and one to the U.S. Supreme Court. In all of these cases Taylor—learning on the job—played a leading role. Ultimately, in 1983, the families of Hampton, Clark, and the survivors obtained a large settlement, one third of which was paid by the FBI. The story is told in rich detail in an earlier PLO book, *The Assassination of Fred Hampton*, by the undersigned Jeff Haas, who was co-counsel with Taylor in what was then the longest civil trial in U.S. history. Like the present volume, Haas's book provides an intricately detailed account of CPD's radical perversion of power, indulged and defended by the City's political leaders.

After fully establishing himself as a civil rights practitioner during the Hampton epic, Taylor moved ahead through a number of cases, including an action against police, the Ku Klux Klan, and Nazi members for the wrongful death of five members of the Communist Workers' Party who were ambushed as they and others prepared for a civil rights march in Greensboro, North Carolina in 1979. Taylor also worked on several important Chicago cases involving deadly police violence and systemic cover-up of evidence. It was in the midst of this flow of work that Taylor, Haas, and Stainthorp, as detailed above, got drawn into Wilson's case.

After the Court of Appeals ordered a new trial for Wilson in his civil rights case, Taylor found himself involved in a series of post-conviction cases on behalf of a series of prisoners who were torture victims who sought his help in trying to get their convictions opened up. In his conscientious way, he kept careful files, replete with transcripts, memos, and even newspaper clippings, from all the cases they did, and this enabled the grim, intricate history he presents here of the Burge torture regime at Area Two.

In case after case, the reader is led through the complex and often arcane process of the post-conviction and civil rights cases, by extended quotations from the original court proceedings, the pleadings, affidavits from the prisoner-victims, transcripts of colloquy in the courtrooms, rulings by judges—including several extraordinary statements by judges who came to realize the gruesome reality behind the petitions before them—and news reports of various actions and outcomes. Every so often there appears a verbatim, detailed statement by a victim—nearly unbearable to read—of just what was done to him, how it felt, and the creative steps by which the officers led him to affirm their fabricated statements of how the crime was supposedly committed. This painfully detailed torture included electric shock to the genitals (with the Torture Machine and cattle prods), mock executions with pistols and shotguns, near suffocation with bags and typewriter covers, beatings with rubber hoses and telephone books, and accompanied by racial epithets in the pursuit of confessions and lawless punishment.

In all, Taylor and his PLO colleagues—most particularly Attorneys Haas, Stainthorp, Joey Mogul, Tim Lohraff, Ben Elson, Erica Thompson, Sarah Gelsomino, and Brad Thomson—represented scores of prisoners with torture claims, obtaining exonerations, pardons, substantial damages, and reparations from the City of Chicago in satisfaction of torture claims. In 2006, a four-year investigation by Cook County Special Prosecutors, appointed after sustained public pressure around the torture issue, yielded only a whitewashed report that exonerated Daley and other high ranking officials. In 2008, Jon Burge, who had been dismissed from the police force in 1993, was indicted by the local U.S. Attorney's office, after a sustained campaign by the lawyers, together with several community groups who had been drawn into the campaign of exposure initiated by the PLO. Although the statute of limitations for acts of torture had long since ran, Burge was charged with perjury, for his arrogant sworn denials in one of the civil cases that he knew anything about torture. Convicted by a jury in 2010, Burge served three and a half years in federal prison, before his release in 2014. He died, broken but unrepentant, in September 2018. None of his confederates were ever prosecuted. They, like Burge until his death, have continued to collect their police pensions.

No case better represents the combination of indefatigable lawyering, the limitations of the court system, and the ability of political lawyers and an engaged community to find creative and political solutions than the case of Darrell Cannon. Denied relief by the district court for his claims of torture and wrongful conviction resulting in a twenty-four year sentence because he had accepted a three thousand dollar settlement, when Burge's torture crimes were still being hidden, Cannon seemed to have found a decidedly sympathetic response from Federal Appellate Judge Ilana Rovner who was on the panel hearing his appeal.

Before he began his oral argument, Judge Rovner asked the City Attorney, "On what planet does he [Cannon] have a meaningful redress in the courts under those circumstances.... You would have us enforce a settlement procured by defendants who so rigged the deck that no plaintiff could have proven a legitimate claim and that to me seems to be the bottom line here." She continued with similar loaded questions indicating complete disdain for the City's position. Expecting a favorable decision Cannon and PLO lawyers turned down a million dollar offer to settle from the city, only to find it evaporated when, fifteen months after the argument, Rovner and her two 7th Circuit cohorts upheld the District Court's dismissal. Cannon, like many of Burge torture victims was left without a legal remedy for compensation even though he and they had established their convictions were based on confessions coerced by Burge and his henchmen.

By this time, community groups, who were influenced by the revela-

tion of Burge's torture and the compelling accounts of the victims, had created the Chicago Torture Justice Memorial (CTJM), and Taylor's PLO co-counsel Joey Mogul, with input from the CTJM drafted a reparations ordinance, which included compensation for all those like Cannon who were locked out of the legal system. Taylor cites CTJM leader Mariame Kaba to explain why the term reparations was used: "The racial component of this is an essential part of the torture itself... The victims were subjected to repeated racial epithets." Taylor relies further on Kaba to write "the term reparations was used [to] reflect the fact that this was compensation meant to make amends for abuse at the hands of the state, and underscores that race and bias were central."

With relentless pressure the community, Cannon as one of the CTJM's main spokespersons, the reparations ordinance was finally able to gain passage by the city council in 2015. It provided reparations payment to numerous torture victims, a full public mayoral apology, a center for the treatment of torture survivors, the establishment of a physical memorial, and a rule that all eighth and tenth grade students in Chicago's public schools would be given full instruction about the history of Chicago police torture. Indeed this unprecedented ordinance follows the historical demands, not yet realized nationally, of many African-American leaders and community members. It is an illustration of collaboration, communication, and respect between peoples' lawyers and the movements and clients for whom they advocate.

This book is hard to read. It isn't because of the intricately detailed accounts Taylor compellingly presents of the various cases he worked on—some of which he is still working on. Rather, it is the overwhelming truth of remorseless crookedness, cruelty, and, above all, racism of these sworn peace officers, their colleagues, and their superiors in the station and otherwise, who studiously ignored what they were doing. Perhaps worse is the systematic blind eye that everyone else in the system turned, including politicians, judges, prosecutors, other police, defense lawyers, and prison officials, for so many years. How so many public servants, working every day, were able to ignore the stream of cases, from the same group of Area Two detectives, involving alleged confessions, by defendants who denied guilt and insisted that their purported confessions had been extracted by torture, all as recounted here, seems to be simply unfathomable. Even in a day and age when police kill unarmed black men regularly, all around the country, it is hard to imagine that such an overwhelming number of similar accounts were ignored. An answer may be found in the second meaning suggested by the book's title—Chicago's political machine, the Daley machine as it were, is, at bottom, why the scandal of all police scandals was officially sanctioned.

The Torture Machine describes the action and the drama. It takes us inside the lawyer's mind in many momentous civil rights cases. It shows the dedication, ingenuity, strategic thoughtfulness, and persistence shown by its author and his colleagues in the People's Law Office, in the face of concerted state resistance, for so many years, with such outstanding results. Truly, he has vindicated—as have others—the audacity shown fifty years ago, when with some trepidation, he and his youthful cohorts, including the reviewers here, determined to call themselves The People's Law Office, and set about trying to live up to that name. Flint Taylor has done it, beyond measure, and the proof is here.

95 THESES ON JANUS: THOUGHTS ON THE END OF COMPANY UNIONISM

Often, the worst way to become prisoner of a system is to have a dream that things may turn better, that there is always the possibility of change. Because it is precisely this secret dream that keeps you enslaved to the system.

- Slavoj Žižek

1. *Janus*¹ was intended to be a death-blow to organized labor. Whether we survive depends on how maneuverable we are in the coming years.
2. *Janus* is the latest iteration of an old union-busting tactic: destroy labor's internal cohesion under the slogan "voluntary unionism."
3. *Janus* elevates anti-union objection to a full First Amendment right. This is ironic, because the original power of organized labor came from the First Amendment. Joining a union was an act of dissent and free association, a mutual-aid pact against the capitalist order.
4. Labor can turn *Janus*' First Amendment pretensions around, if we re-imagine our organizing models. If we go back to defending ourselves against hostile outsiders, instead of trying to claim state-sanctioned control over them, the First Amendment flips back in our favor.
5. *Janus* is one step in an ongoing attack on exclusive representation. We are used to thinking of exclusive representation in employer-based units as the only way labor can present itself to capital. But what if we had to choose between our Section 7 right of mutual aid and our Section 9 status as the employer's exclusive bargaining partner? Post-*Janus* law will force that choice soon enough.
6. This problem is illustrated by an apparent loophole in *Janus*. While the Court forbids public-sector unions from requiring objectors to pay for contract negotiation, Justice Alito surprisingly allowed that we *may* charge non-members to act on their behalf in grievance arbitration. Nevertheless, the AFL-CIO and public-sector unions like AFSCME have discouraged efforts to charge non-members after *Janus*. The rationale is that these charges would complicate the uniform duty of fair representation and so erode the union's exclusive status with the employer.
7. I argue that this is short-sighted. Exclusive representation is a valuable option, but holding onto it at any price abandons the original idea of worker self-organization. It elevates the union's relationship to the *employer* over its members' mutual-aid promise to each other.

Michael Anderson is a union lawyer at Murphy Anderson PLLC in Boston. He thinks organizing depends on free speech. He doesn't like to be called a "labor" lawyer, because that assumes workers sell themselves to capital rather than the other way around. He prefers to practice "surplus value recapture" law. In his real life, Michael delivers funny political monologues in venues from New England to London. His influences include George Orwell, Abbie Hoffman, and the first three Clash albums.

8. In any case, after *Janus* the Roberts Court may take away exclusive representation whether we like it or not. The Court would have to defy logic and precedent to do that, but logic and precedent did not prevent *Janus*.
9. If that happens, state legislatures will be free to amend public-sector law to give enforceable bargaining rights for members-only unions.
10. *Janus* does not prevent this. *Janus* attacks the specific model of the agency shop governed by union security. It loses its force if membership precedes the employment relationship.
11. Membership-based models have existed since the old guild and craft unions. Unions have avoided members-only organizing because current law will not give them enforceable bargaining rights. But this can change. If members-only unions have bargaining rights, they can use the same tools unions have always used against erosion of work standards by non-members, like union-standards clauses and work preservation rules.
12. This changes the First Amendment dynamic of *Janus*. Non-union objectors may refrain from joining, but they cannot complain that union members win better deals than at-will employees. Unions can then assert the very Constitutional rights of free association that hostile outsiders now assert against us.

How Did We Get Here?

13. *Janus* attacks industrial unionism. This was originally a private-sector model that became the template in the public sector.
14. *Janus* punishes unions for relying on host employers to supply their members.
15. We live inside this model, because it is the legacy of the last era of Labor victory.
16. The CIO campaigns of the 1930s and 40s organized through employers, rather than by pooling separate reservoirs of labor. Like viruses, CIO unions wanted to take over capitalist firms from the inside, to gain a new member with every new hire. The watchwords of industrial unionism were “exclusive representation” and “union security.”
17. The CIO replaced the older model of labor unions as independent cartels of skilled labor, organized by trade, that contracted at arms-length with employers. In the older craft model, workers didn’t necessarily become permanent employees of signatory employers. The center of their work lives was the hiring hall. The modern exponents of this craft model are the Building Trades.
18. The early craft unions had a lot of limitations. They were typically skill-based brotherhoods that excluded anyone who wasn’t white, male or native-born. They usually didn’t have any interest in organizing the unorganized except within the narrow bandwidth of their trade.
19. But at least craft unions were independent of employers. When you joined the Bricklayers, you just joined, prior to getting hired by a capitalist, without asking the Government’s or an employer’s permission. There was no legalese on your membership card about how the Bricklayers would be “authorized as your

exclusive bargaining agent to represent you for purposes of collective bargaining with your employer.” You weren’t “authorizing a representative”; you were joining a mutual-defense pact, all for one, one for all.

20. Industrial unionism came from the more radical elements. Instead of protecting craft jurisdiction, the CIO adopted the IWW’s earlier insistence on organizing the unorganized across entire industries.
21. Industrial organizing is essentially a viral model. The Union does not administer a hiring hall or lease out its members. It takes over the Employer from within, using the Employer’s own hiring to grow the Union as an embedded part of its business.
22. New Deal unions organized entire industries because they had weapons that were taken away in 1947. New Deal unions could lawfully run secondary picketing, boycotts and strikes. Hot-cargo clauses were still lawful. The closed shop was lawful, so that workers had to join the union first just to get hired.
23. “Members only” organizing and exclusive representation were not contradictory before 1947. In a closed shop, they were synonymous.
24. Union membership in the 1930s was driven by the benefits members got from mutual aid that non-members did not. This included the power of organizational cohesion. Anyone joining a union before 1947 knew that the group could discipline or exclude members who crossed picket lines. *Which side are you on?* was a slogan that separated members from nonmembers. Join us or don’t join us, but if you don’t, don’t come to us for the mutual aid you rejected.

***Janus* didn’t cripple industrial unionism. Taft-Hartley did.**

25. The Taft-Hartley Act neutered industrial unionism. Overnight in 1947, industrial unions lost the secondary boycott and the closed shop. Members who crossed picket lines could simply resign with no consequences for their job. States could enforce right-to-work laws, invented in Southern states to prevent white workers from being “forced” to associate with black workers.
26. Taft-Hartley used the structure of exclusive representation to turn industrial unionism into employer-dependent unionism. Once they lost the power to turn an industry into an oligopoly of union-dominated companies, unions became company-based “representatives” that exist only as adjuncts of the employer oligopsony. The union became a conduit for purchasing labor efficiently rather than a vehicle for labor to appropriate capital.
27. The most damaging part of Taft-Hartley was § 9(c)(5):² “In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling.” The employer’s operational needs control the contours of organizing. To a European union this provision would be intolerable. It declares that that *workers are not allowed to decide who they organize with*.
28. By accepting that organizing is a function of the employer’s operation, we lost the right to complain when the employer shows up as an uninvited guest in the NLRA representation case. Under current law, workers who want to organize

have to accept the intervention of a hostile outside power as a full party. Far from prohibiting employer meddling, the law guarantees employers the right to require participation in its propaganda sessions, preside over the workers' vote, and litigate who is even eligible to be represented. Unions rightly see this as outrageous, but this is the necessary consequence of employer-based exclusive representation.

29. Union outrage often masks deeper unexamined problems that come from employer domination. For example, *Freund Baking Co. v. NLRB*³ held that it is an objectionable "grant of benefits" for a union to file a wage-and-hour suit on behalf of unit workers during the election period. (It's only by the grace of a footnote that "organizing services" are not deemed such a bribe.) *Freund Baking* is appalling, in the first instance, because it refused to recognize wage litigation as protected activity. But this misses the more sinister element of the decision: *it assumes workers do not become members entitled to a union's mutual aid until the Government and the Employer say so.*
30. So when does a supporter become a member? When a worker signs a card during an organizing drive, is she joining the union with full LMRDA rights, or is she only an "applicant" whose membership isn't consummated unless her employer consents? This confusion is reinforced because unions typically don't charge dues until the employer agrees to a contract with dues checkoff. Unions who lose decertification elections usually don't treat their former members as having any ongoing status with the union. In both cases, the assumption is that membership doesn't exist without dues payment, and dues payment doesn't exist without the employer's administration.
31. After Taft-Hartley, if a worker isn't really our member until the Employer and the Government say so, what is left of our claim to independence? What's the difference between us and company unions?
32. This commits us to a tortured version of what a union is. A worker no longer joins a mutual-defense pact with all other members -- he or she "authorizes" an agent "to represent me in collective bargaining" in a government-fixed unit, only so long as the union's relationship with the employer remains intact.
33. This is a deeply alienated picture of union membership. A Yugoslavian joke under Tito: "Before the revolution, capitalists rode around in big black cars. But now, the workers do—through their representatives."

Where is the Court going after *Janus*?

34. *Janus* punishes this alienated model. It abolishes union security (for now, in the public sector). Its logic puts exclusive representation under threat in both public and private sectors.
35. The *Janus* Court is shocked, *shocked*, that employees are "forced" to pay for their representation. This is selective libertarianism. The Roberts Court would never give public employees a Constitutional right to a job. Nor would it recognize "conscientious objection" as an excuse to avoid paying for economic benefits in any other context. This is not a coherent doctrine. *Janus* is a political act.

36. *Janus* widens the breach in the social contract. In 1935, labor agreed to confine its organizing to government-certified units – the exclusive representation system of Section 9. In exchange, the law recognized the right of mutual aid and protection in Section 7. *Janus* severs the two sides of this bargain. A union that wants to be the exclusive representative in an employer-based unit can no longer expect mutual aid from those it represents.
37. But this is nothing new. *Janus* only affected the 22 states where union security was still lawful. *Janus* had no effect in 28 states, including Michigan, Indiana and Wisconsin, which were already fully “right-to-work” in both public and private sectors.
38. The Court may go in one of three directions after *Janus*. It can declare victory and stop. It can wipe out all labor law, public and private. Or it can bring down the Apocalypse, but only on the public sector.

Scenario 1: A short-term political hit

39. *Janus* may just be a short-term move to defund Democratic politicians. In this scenario, the Court was simply motivated to deny unions the political spending power that *Citizens United*⁴ gave corporations.
40. That was the tenor of Justice Kennedy’s remarks at the *Janus* argument.⁵ After writing *Citizens United* as an even-handed protection of corporations and unions alike, Justice Kennedy dropped the pretense of even-handedness. He expressed outrage that unions’ political agenda created a feedback loop, where Democratic politicians reward union donors by entrenching them further in state and local employment. He mocked the State’s argument that unions were the government’s “partner”: “It can be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes? That’s the interest the state has?” Justice Kennedy implied that crippling unions was a sufficient reason for *Janus* to win: “If you do not prevail in this case, the unions will have less political influence; yes or no? Isn’t that the end of this case?”
41. Of course, Justice Kennedy was unwittingly repeating the argument against *Citizens United*. It would have been interesting if the State respondents in *Janus* had frankly defended union-security as the First Amendment exercise of the electorate: “yes, the voters of Illinois like unions, and they have the right to elect governments that exercise that patronage in the same way that Republican politicians reward their corporate contributors. If that feedback loop didn’t bother the Court in *Citizens United*, why should it bother you here?”
42. If *Janus* is only an effort to hurt public-union political spending, the Court may not be as interested in the next wave of Right to Work arguments against exclusive representation. Alito wrote ambiguously: “It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itsself a significant impingement on associational freedoms that would not be tolerated in other contexts.” If “not disputed” means “beyond dispute,” the

Court will adhere to *Minnesota State Board for Community Colleges v. Knight*,⁶ which rejected that First Amendment challenge.

Scenario 2: The *Lochner* Apocalypse

43. On the other hand, *Janus* may be the next step in a full revival of *Lochner v. New York*⁷ in the guise of the First Amendment.
44. Justice Alito expressed longing for this golden past: “into the 20th century, every individual employee had the ‘liberty of contract’ to ‘sell his labor upon such terms as he deemed proper.’”⁸ So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders.” He hastened to add “we are not in any way questioning the foundations of modern labor law.” But it is hard to see how the foundations of modern labor law remain intact if “liberty of contract” is now a First Amendment right.
45. If that is coming, the Court will not need to focus on exclusive representation alone. If the First Amendment forbids any legislation that regulates employers’ and employees’ right to associate with each other, the Court will strike down the National Labor Relations Act, the Norris-LaGuardia Act, minimum wage laws, and any other New Deal constraint on “First Amendment rights of free economic association,” in both public and private sectors.
46. After a revival of *Lochner*, employers and anti-union employees would have a First Amendment right not to associate with union members. This would make Norris-LaGuardia’s ban on yellow-dog contracts, and § 8(a)(3) of the NLRA, unconstitutional. The First Amendment doctrine of *Janus* would simply replace the substantive-due-process doctrine of 1905.
47. Ironically, a revival of *Lochner* would also wipe out anti-labor legislation, including right-to-work laws themselves. The closed shop could not be prohibited. If an employer decided that it only wanted to associate with union members, right-to-work laws could not constitutionally prevent it.
48. The *Janus* Court’s discovery of the First Amendment also undermines older doctrines restricting pro-union speech and assembly. For example, laws forbidding peaceful secondary picketing, like § 8(b)(4) of the NLRA, had been justified on the theory that the First Amendment is irrelevant to labor disputes. That distinction can no longer be defended after *Janus*. Picketing and boycotts that would be protected if conducted by the Westboro Baptist Church or Operation Rescue can no longer be denied to unions because they express a disfavored viewpoint.
49. In *Janus*, the State and AFSCME relied heavily on anti-First Amendment cases like *Pickering* and *Garcetti* to argue that speech about the workplace isn’t really speech on a matter of public concern.⁹ This may have been a necessary position, but there are reasons to be glad that argument failed. The modern labor movement would have been crushed in its infancy if union speech about the workplace had not enjoyed full First Amendment protection.¹⁰ The more recent inroads against secondary boycott law, in *DeBartolo* and the banner cases, would have been wiped out if the Court had agreed that labor speech is outside the First Amendment.

50. *Janus* also unwittingly undermines state laws prohibiting public employee strikes. If Mark Janus cannot be forced to work against his conscience, then neither can the teachers of West Virginia. The fact that they speak, assemble and cease work in voluntary association may or may not be *protected* by state law, but it cannot be *criminalized* if the First Amendment defines their grievances as a matter of public concern.

Scenario 3: Ban exclusive representation in public sector only

51. The Court may also take *Janus* to an extreme, but only in the public-sector. It may take Justice Alito's description of exclusive representation ("a significant impingement on associational freedoms that would not be tolerated in other contexts") to mean that, once it is disputed, the Court will *not* tolerate it, at least among government employees.
52. The Right to Work Committee is currently arguing that exclusive representation is "coerced speech," because anti-union workers have a right not to have a union speak for them at all, even in contract negotiation.¹¹ If the Court accepts this argument, it will effectively hold that all federal and state public-sector labor law, including the FLRA, is unconstitutional.
53. In the alternative, the Right to Work Committee is arguing that exclusive representation is unconstitutional so long as nonmembers are excluded from voting on contract ratification, officer elections or any other internal union decision-making.¹² In other words, anti-union objectors will try to squeeze exclusive representation into oblivion by demanding that unions surrender their internal democracy as its price.
54. If the Court accepts this argument, public-sector unions will have to choose whether they will abandon any pretense of being a democratic membership organization, in order to cling to exclusive representation.
55. The attack on exclusive representation is nothing new. For decades, the Right to Work Committee has been squeezing this pressure point: exclusive representation means the union has "members" who didn't choose to be but for their employer's compulsion.
56. This has already forced decades of debilitating litigation over free-riders' rights to *Beck* and *Hudson* rebates, resignation and dues checkoff revocation.¹³ Courts tell us that organizing the unorganized isn't legitimately a "chargeable activity" for servicing a unit.
57. In a sense, the defeat in *Janus* was inflicted long ago. The mere fact that unions must now present themselves as service providers attached to an employer, rather than independent mutual-aid societies, means that we are no longer the same organizations that built the movement.
58. If organized labor is now a universal service provider, it's no different than Public Broadcasting. It's funded by voluntary contributions, but its duty is not to its members. It must permit anyone to enjoy its benefits and allow anyone to weigh in. This changes "membership" from citizenship to altruism. If this is the

future, it's hard to see why labor organizations would not simply dissolve into 501(c)(3) advocacy groups, which could then be funded by liberal billionaires without bothering with dues, officers or elections.

***Janus* doesn't overrule *Boston Harbor*.**

59. *Janus* loses its force if labor recruits capital differently.
60. Like many constitutional cases, *Janus* assumes a background of state law that must exist before the First Amendment kicks in. You have a First Amendment right to handbill in a public park, but no First Amendment right to have a park in the first place. If the City converts a park to a private shopping mall, you have no further First Amendment right to leaflet there.
61. *Janus* assumes that the public employer hires workers first, and only then compels them to pay a union. But in other models, like the craft and guild systems, the employer recruits labor from private contractors or a hiring hall at arms-length. In § 8(f) arrangements, copied by temp agencies in the gig economy, workers come from a labor pool independent of the employer. They do not even become permanent employees.
62. Of course, privatization and temp labor are anathema to public-sector unions, for good reason. Full-time employment has always been a basic right that public-sector unions must defend. But the battle against outsourcing and casual labor is successful only where unions have political sway with public employers, absent a right to strike. If that leverage is present, those governments will protect worker interests. If it is absent, union opposition will be powerless to stop privatization and casual labor anyway.
63. *Boston Harbor* holds it is perfectly permissible for a State to prefer unionized private contractors with no-strike guarantees when it is acting in a proprietary role.¹⁴ Remarkably, *Boston Harbor* is not mentioned anywhere in *Janus*, either by the majority or the dissent.
64. So say the State of Illinois decided to privatize its prison system, by contracting with Prison Industries, Inc. to run facilities formerly staffed by AFSCME members who had been employed directly by the State. Would those AFSCME members have a *Janus* right to stop the privatization, because that might interfere with their right to support their chosen union? Would they have a First Amendment right to be retained by Prison Industries, Inc., to preserve AFSCME's successorship rights? Of course not! You may have a First Amendment right to support a union once you have a State job, but you have no Constitutional right to a State job to begin with.
65. So suppose Prison Industries, Inc. is then organized through a private-sector NLRB election by the Teamsters. It reaches a state-wide contract with union security (legal in Illinois). As a result, in order to work in Illinois prisons, a guard has to be employed by Prison Industries, Inc., which means the guard has to pay dues to the Teamsters. Does this violate the guard's *Janus* rights? Is the State of Illinois constitutionally compelled to terminate any privatization contract with

an employer once its employees organize? Of course not! The State is contracting, not employing. If AFSCME members aren't entitled to a guaranteed job, then neither are anti-union workers.¹⁵

66. Suppose the State of Illinois is entertaining bids for state-wide prison operation. The State wants to protect itself by requiring bidders to have a no-strike contract binding on its employees. The only way a private contractor can do this is through a collective-bargaining agreement. Suppose further that the State imposes union-scale labor standards on any contractor under prevailing wage laws. Could non-union contractors invoke their employees' *Janus* rights, to say these conditions violate the First Amendment? Of course not! The State has the same right as any private proprietor to choose its contractors according to its business needs. If AFSCME members can't complain that prisons are now operated by a Teamster signatory, non-union objectors can't complain either.
67. Suppose the State of Illinois chooses to staff some public functions through a gig-economy model, using a temp agency like Labor Ready. The temp workers do not become permanent public employees. Does this violate Mark Janus's or AFSCME members' First Amendment rights? Of course not! So suppose the State of Illinois uses a labor cooperative owned by the very workers it leases out, and this cooperative is affiliated with AFSCME. This is just a modern revival of craft union hiring halls. Can the courts intervene to prohibit this contracting? Of course not! Unless the Court were to exert Constitutional supervision of all public contracting, *Janus* cannot reach this model.
68. This is not to say that craft organizing is preferable in the public sector. But it illustrates that *Janus* becomes irrelevant if we can maneuver between different organizing models.

Justice Alito leaves a loophole.

69. One of the most aggravating things about *Janus* is the degree to which the right wing of the Court was willing to repudiate its core beliefs (*e.g.*, the Constitution does not guarantee anyone a job, there is no such thing as a free lunch.) In effect, the Court approved the very free-riding it condemns in Takings cases.¹⁶
70. Justice Alito was unable to suppress his normal conservative instincts completely. In a momentary departure from the Right to Work Committee's agenda, Justice Alito made an important concession in footnote 6. To answer the dissent's complaints about free-riding, he drew an arbitrary distinction between paying for contract negotiation and paying for one's own grievance arbitration: "Individual nonmembers could be required to pay for that service or could be denied union representation altogether. [Some States have laws providing that, if an employee with a religious objection to paying an agency fee 'requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure.' This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.]"¹⁷

71. This passage is intuitively satisfying. A religious objector like Kim Davis is free to declare that God has forbidden her to have anything to do with the union. But if she gets fired, and then decides that God has changed His Mind, the Union has every right to make her pay for her newfound demand for union protection.
72. To be sure, charging non-members would raise a lot of issues. Does the Union charge market rate for lawyers? Once it accepts the objector's money, does the Union lose its discretionary control over the grievance? Is the Union's paid representation subject to a deferential *Vaca v. Sipes*¹⁸ standard, or a more demanding malpractice standard?
73. These are all serious problems. But they will have to be solved unless the labor movement decides that it will *never* treat non-members differently. If unions yield on that, there is no limit to how far the Right to Work Committee will go: it will demand voting rights, contract ratification rights, even the right of objectors to assume office in the union they want to destroy.
74. These are problems that come up even outside of *Janus*. Exclusive representation faces another DFR-related threat, potentially more dire than *Janus*. After *14 Penn Plaza*, employers are using exclusive representation to demand that individual statutory rights be arbitrated.¹⁹ Hostile courts will then tell employees who don't get the relief they want to sue the *union* for failing to prevent the employer's discrimination. A growing number of courts now refuse to let unions rely on *Vaca v. Sipes* discretion, on the theory that their direct Title VII liability is not insulated by a DFR standard.
75. In response, unions may have to decide whether to open up their grievance procedures in EEO cases, to allow discrimination claimants to proceed on their own, if the Union chooses not to proceed. This inflicts the damage of loosening union control over the grievance procedure. But eventually it may be the only alternative to defending Title VII actions over every grievance where the union has not won full relief.

Labor is already moving on from the industrial model.

76. The romantic memory of the 1930s obscures the reality that the labor movement has already been moving away from the industrial model for decades.
77. The watchword in the 1930s was "wall-to-wall" organizing; anything less was backward craft unionism that would allow the employer to divide and conquer. But now it is a truth universally acknowledged that employers want big units and unions want smaller ones.
78. Under *Specialty Healthcare*,²⁰ unions moved to make representation conform to the specific classifications the Union had organized, rather than a larger unit that would dilute the organizing drive with non-members. Under *Specialty Healthcare*, the union is still the exclusive representative of the micro-unit. But defining the unit to be more congruent with union support means that we are already distinguishing between members and nonmembers in the same workplace.
79. All of the objections to members-only organizing could be raised against the micro-units of *Specialty Healthcare*. If the shoe department in a department

store organizes alone, the employer may raise wages in the unrepresented remainder around the micro-unit, to undermine the union. Other unions are also free to raid adjacent parts of the workplace. If labor now wants to organize in less than all of the workplace, it is already abandoning exclusive representation as industrial unions understood it in the 1930s.

80. Post-*Janus* litigation is already forcing public-sector unions to argue that members must be treated differently from nonmembers based on the member's voluntary choice. Unions like AFSCME are correctly arguing that a full member is not entitled to retroactive refund of dues after *Janus*. Unlike an involuntary agency-fee payer, a full member voluntarily *chose* the right to join a democratic organization, to vote on contracts and officers. As long as the full member had notice of the option to be a fee-paying non-member, he can't demand a refund for dues he voluntarily paid in return for the benefits of membership.
81. Post-*Janus* litigation is also forcing unions to recognize that the payment of dues is an act of individual choice, not collectively-bargained compulsion. Public-sector unions must now fight off demands to cancel all dues authorizations, on the presumption that no rational worker would ever voluntarily pay dues if she didn't have to. The important change in post-*Janus* litigation is that unions are finally defending their members' support as First Amendment-protected exercise. Once the union-security compulsion is lifted, a worker who nevertheless sticks with the union is entitled to the same First Amendment protection as Mark Janus.
82. The end of union security also forces creative strategies to organizing. For example, a union in a right-to-work state is free to tell workers that it will disclaim interest, and void the contract, unless the unit achieves X % membership. This is lawful in the private sector.²¹ The union is also allowed to publicize members and nonmembers by name.²² This organizing strategy tells workers that the union does not exist apart from their voluntary choice -- it will not carry on as a bureaucratic relic if they refuse.

Members-only organizing: the brave new world.

83. Since 1947, unions outside the Building Trades have been skeptical of "members only" models, for good reason. The NLRB and most public-sector agencies currently refuse to enforce any bargaining duty against employers unless the union claims exclusive representation. This makes a "members only" union dependent on the employer's good will to exist.
84. As the offensive against exclusive representation continues, however, the distinction between "members only" and "exclusive representation" is a distinction without a difference. The main objection to members-only organizing is that it cannot be enforced against an unwilling employer. But this is already a problem in the public sector. Absent a right to strike, political goodwill is the only protection public-sector unions have.
85. In any event, this objection is circular. The lack of enforceable bargaining rights for members-only unions is a defect that be cured if the law recognizes them.
86. That is not a fanciful possibility. In 2007 and 2008, fourteen major unions signed off on rulemaking petitions asking the NLRB to hold the § 8(a)(5) duty

to bargain does not require the union to be a § 9(a) exclusive representative.²³ Professor Charles Morris wrote the lead petition, based on his book *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*.²⁴ Morris marshalled extensive historical proof that the NLRA was originally intended to give unions an option between members-only and unit-wide exclusive representation. The petition was brought by the Steelworkers, IBEW, CWA, UAW, IAM, CNA and UE, and supported by a second petition by Change to Win, on behalf of the Teamsters, the Laborers, SEIU, the Carpenters, the UFW, the UFCW, and UNITE HERE.

87. As Morris argued, the danger of a fragmented unit can be addressed by keeping some aspects of majority rule. A members-only union might still be required to show majority support in a given unit. Once recognized, however, the union could elect whether it will bargain for all workers in the unit or only for its voluntary members. A members-only union resembles an FLSA collective action. As long as membership remains open to all, the contract would only cover those workers who opt in by joining.
88. Non-union objectors would have no obligation to join, but no ground to complain if the members-only union won better wages and benefits. Under the NLRA, it is well settled that an employer may offer different wages and benefits to its represented and unrepresented employees, without violating §8(a)(3).²⁵ This applies to non-union employees not covered by a members-only agreement, as in *NLRB v. Reliable Newspaper Delivery*.²⁶ “Unquestionably there was a difference between the treatment of the members of the [members only] union and the non-union employees with respect to the pay increase. Nevertheless the non-union men were not deprived of anything that was rightfully theirs. . . If they had been members of the union they would have been within the contract and would have received the extra money.”
89. Members-only organizing is also immune to DFR-based attacks that presume exclusive representation. The Union has no duty of fair representation as to workers it does not represent, even if the employer chooses to mirror union-negotiated terms in its dealings with non-unit employees.²⁷
90. The members-only model is also criticized because employers might erode its strength by manipulating wages and work assignments to nonmembers. In a post-*Janus* future where exclusive representation is abolished, that horse has already left the barn. It is also a problem now whenever the employer can assign work to subcontractors or outside facilities. Unions already have the tools to demand most-favored-nations clauses (any benefits given nonmembers must be given to members), union-standards clauses (any work that can be done by members must be done at union scale) or work preservation (defining what work can be done outside the unit.) We don’t represent these outside employees, but that doesn’t prevent us from contractually defining how our members’ rights dovetail with theirs.
91. It is also urged that members-only might permit rival unions to raid the workplace. The problem can be met if the members-only union is required to show majority support as a condition for recognition. Company unions can still be

attacked with proof of employer domination under § 8(a)(2) and its state analogues. In a legal landscape where unions face outright decertification from non-union objectors, the threat from competing unions is the least of our worries.

92. Five years after the Morris petition was filed, the Obama Board summarily dismissed it, saying it had better things to think about: “we have decided to deny the above petitions, without passing on the merits of the arguments set out therein. . . . The petitions call for a significant reinterpretation of the National Labor Relations Act, and would require the dedication of substantial Board resources to study the issues raised by the petitions and the significant legal and policy considerations presented thereby. We have determined that the resources that would be required to address the petitions are better allocated to the adjudication of cases and to the rulemaking proceedings currently in progress at the Board.” NLRB Unpublished Order, August 26, 2011.
93. This was a missed opportunity. As the progressive reforms of the Obama Board and its public-sector equivalents are being systematically dismantled, the labor movement can no longer avoid thinking about the “significant reinterpretation” the petitions demanded.
94. To bewail *Janus* as the Apocalypse is to concede that we are already helpless. But we are not helpless. If the law takes exclusive representation away, let’s demand the right to bargain for those who *want* to be our members. If we are worried that public-sector wages and benefits will go down as a result of *Janus*, then let’s start organizing strikes. It worked in West Virginia. If someone says such strikes are illegal, let’s throw *Janus* back at them: union support is now a First Amendment right.
95. The challenge after *Janus* is not whether the New Deal system of exclusive representation remains desirable. The challenge is to be ready if it is taken away.

NOTES

- 1 *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018).
- 2 29 U.S.C. § 159(c)(5).
- 3 165 F.3d 928 (D.C. Cir. 1999).
- 4 *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 318 (2010) repeatedly describes the regulations it struck down as an impingement on “corporations and unions,” suggesting that both labor and capital would benefit from the ruling.
- 5 See pages 46 and 47 of oral argument transcript in *Janus*, *supra* note 1, available online at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_bocf.pdf.
- 6 465 U.S. 271 (1984).
- 7 *Lochner v. New York*, 198 U.S. 45 (1905).
- 8 *Adair v. United States*, 208 U.S. 161, 174–175 (1908).
- 9 See *supra* note 4, at 40–44, 62, citing *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968) and *Garcetti v. Ceballos*, 547 U.S. 410, 421–422 (2006). The cases limiting secondary boycott prohibitions to avoid First Amendment conflict include *DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568 (1988); *Sheet Metal Workers’ Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007), and *Carpenters Local 1506 (Eliaison & Knuth of Arizona)*, 355 NLRB 797 (2010).
- 10 See *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State*, 308 U.S. 147 (1939).
- 11 See, e.g., *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) (rejecting Right to Work attack on exclusive representation, following *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), though the plaintiffs argued that *Knight* is no longer good law after *Janus*).
- 12 See Appellants’ Post-*Janus* Replacement Brief in *Branch v. Department of Labor Relations*, Case 2017-P-0784 (Mass. App. Ct., filed August 27, 2018).
- 13 *Teachers v. Hudson*, 475 U.S. 292 (1986); *Communications Workers v. Beck*, 487 U.S. 735 (1988) were the pre-*Janus* vehicles for requiring unions to pay rebates to agency fee payers for union expenditure that were not “germane,” but to the unit. *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 453 (1984); *Scheffer v. Civil Service Employees Ass’n, Local 828*, 610 F.3d 782 (2d Cir. 2010) and *Pirlott v. NLRB*, 522 F.3d 423 (D.C. Cir. 2008) held that union organizing outside the objector’s unit was not “germane,” but cf. *United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).
- 14 *Building & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc. (Boston Harbor)*, 507 U.S. 218, 229 (1993).
- 15 See *Higgins Electric, Inc. v. O’Fallon Fire Protection Dist.*, 813 F.3d 1124, 1130 (8th Cir. 2016) (“[A] governmental preference for union labor in the construction industry ... does not ‘directly or substantially interfere’ with the rights of laborers to refrain from joining a union.”) (quoting *Lyng v. UAW*, 485 U.S. 360, 366 (1988)).
- 16 See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) and other First Amendment cases, such as *Hurley v. Irish-American Gay and Lesbian Group*, 515 U.S. 557, 573–575 (1995).
- 17 *Janus*, *supra* note 1, at 2468–69 n.6.
- 18 *Vaca v. Sipes*, 386 U.S. 171 (1967).
- 19 *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) holds that individual statutory discrimination claims may be subject to collective-bargaining arbitration if the parties

agreed to make the union grievance procedure exclusive. Employers after *14 Penn Plaza* have a strong incentive to bargain for that exclusivity. A union's failure to win adequate relief may no longer be judged under the deferential *Vaca v. Sipes*, *supra* note 11, standard if the plaintiff alleges that the union's failure to remedy the employer's discrimination itself violated Title VII. *Green v. AFT/Illinois Federation of Teachers Local 604*, 740 F.3d 1104 (7th Cir. 2014).

- 20 *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) liberalized unit definitions to permit unions to exclude classifications unless the employees in the excluded classifications have an "overwhelming community of interest" with the employees in the petitioned-for unit. The Trump Board overruled *Specialty Healthcare* in *PCC Structural*s, 365 NLRB No. 160 (2017).
- 21 *See Production and Maintenance Union, Local 101 (Bake-Line Products, Inc.)*, 329 NLRB 247 (1999).
- 22 *See Letter Carriers v. Austin*, 418 U.S. 264 (1974).
- 23 In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining, Petition of Steelworkers Union and other labor organizations, seeking Rulemaking before the National Labor Relations Board (Aug. 14, 2007), *available online* at <http://www.nlr.gov/nlr/about/foia/documents/PetitionRequestingRulemaking.pdf>.
- 24 Charles Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Cornell University Press, 2005).
- 25 *Dallas Morning News*, 285 NLRB 807, 808 (1987).
- 26 187 F.2d 547, 549-550 (3d Cir. 1951).
- 27 *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20 (1971); *Bensel v. Allied Pilots Association*, 387 F.3d 298, 312 (3d Cir. 2004); *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 774-775 (6th Cir. 2003); *Dycus v. NLRB*, 615 F.2d 820, 827 (9th Cir. 1980).

In *When Your Colonizers Are Hypocrites*, Alix Bruce focuses on human trafficking within indigenous communities in Alaska and the Dakotas. Bruce reviews the multifarious factors—U.S. domination of tribal governments, failed national programs, forced poverty, and others—that have led to the proliferation of this crisis (with U.S. indifference), while recognizing several practical reforms that may relieve the problem. But Bruce also pointedly notes that true tribal sovereignty and reparations are essential to any meaningful, longstanding fix.

Flint Taylor's *The Torture Machine: Racism and Police Violence in Chicago* chronicles, in scholarly detail, the appalling torture regime that flourished for years within the notoriously barbarous and bigoted Chicago Police Department—an agency whose ongoing legacy of cruelty almost beggars belief. Attorneys Dennis Cunningham and Jeffrey Haas, who worked with Taylor at the legendary People's Law Office of Chicago for years, review *The Torture Machine* with particular interest and familiarity. For all the inhumanity described in its pages, they review a story of heroism, courage, and the justice that a band of dedicated civil rights lawyers can accomplish in the face of mighty opposition.

Our issue closes with labor lawyer Michael T. Anderson's thoughts on the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018), the most recent blow to labor unions by the reactionary Roberts Court, which is increasingly determined to facilitate the exploitation workers, the First Amendment be damned. Anderson reminds us that the tried-and-true answer to the Court's attempt to dismantle labor rights is to organize—and then strike. The Guild is no stranger to taking first to the streets and then to courtroom in defense of labor and our activist-brethren. Indeed, it's what we do best. Anderson's *95 Theses on Janus* is a wonderful call to arms.

National Lawyers Guild Review

Submission Guidelines

National Lawyers Guild Review is published quarterly by the NLG. Our readership includes lawyers, scholars, legal workers, jailhouse lawyers and activists. With that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

Though we are open to manuscripts of any length, articles typically run about 7,000 words. Pages in issues of *NLGR* generally contain about 425 words.

Submit your manuscript in Microsoft Word format electronically as an attachment to an email. For reference, we use the *Chicago Manual of Style*. Citations should appear as **endnotes** and follow Bluebook style. Citations should identify sources completely and accurately. Lengthy textual commentary and string cites are discouraged.

Include a short sentence or two describing your professional affiliation, background and area(s) of legal specialization. This description will appear with the article if it is accepted for publication. Please also include a phone number and ground mail address.

Manuscripts should be sent to the Articles Editor at nlgreview.articles@nlg.org, whereupon they will be forwarded to the Editor-in-Chief for review by members of the NLGR's editorial board. If accepted, manuscripts will be edited, and the edited manuscripts will be returned to the author for review; however, because of production schedules, late changes are prohibited and authors generally do not see typeset proofs. We make every effort to clear any changes with the author.