

# national lawyers guild

Volume 73  
Number 4  
Winter 2016

# REVIEW

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

—Preamble, NLG  
Constitution



**Border Town Bullies: The  
Bad Auto Deal and Subprime  
Lending Problem Among  
Navajo Nation Car Buyers** 193

Megan Horning

**Successes and Failures:  
Assessing the ICTY After  
*Prosecutor v. Radovan Karadžić*** 232

Alan W. Clarke & David Gesspass

**Putting Scalia in Perspective** 245

David Gesspass, Nathan Goetting  
& Meredith Osborne

After the deregulation of the financial industry during the 1980s and 1990s, banks and other lenders initiated predatory lending practices that, in fairly short order, helped precipitate the near-collapse of the U.S. economy during the “Great Recession” of 2008. Lenders did what they always do when they aren’t compelled to do otherwise—they targeted members of vulnerable populations—the poor, the financially illiterate, the elderly—with promises of homes, vehicles, and other items that they should have known the borrowers could not afford, while they would profit even on defaulted loans. These contracts polarized wealth, increasing the already out-of-whack income disparity between rich and poor. They devastated borrowers financially and exacerbated social problems, including crime rates, concomitant with poverty. These harms were too obvious not to have been foreseen by lenders, who nonetheless proceeded like a juggernaut until the last possible moment before the bubble burst. The financial catastrophes of 1929 and 2008 were different in a thousand ways but, ultimately, they were the result of the same fundamental cause—the indomitable spirit of capitalism itself—the greed of the haves levied against the weaknesses of the have-nots.

Unlike the Roosevelt administration’s aggressive response to the Great Depression, recent reforms have been mere gestures designed to stabilize and entrench (and in many cases to outright bail out) rather than punish those responsible for the 2008 collapse. The same morally corrupt system, based on perverse incentives whereby lenders profit in seemingly direct proportion to the financial pain they cause borrowers, remains largely in place.

“Border Town Bullies: The Bad Auto Deal and Subprime Lending Problem among Navajo Nation Car Buyers” by Megan Horning examines a particularly reprehensible example of the kind of predatory lending. It explores

*Continued inside the back cover*

---

**NATIONAL LAWYERS GUILD REVIEW, formerly GUILD PRACTITIONER**, is published quarterly by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are \$75/yr for libraries and institutions; \$25/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. NATIONAL LAWYERS GUILD REVIEW is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, and the Alternative Press Index.

*Editorial Board:* Nathan Goetting, Editor in Chief; Meredith Osborne, Executive Editor; Crystal Abbey, Managing Editor; Kathleen Johnson, Book Editor; Katherine Taylor, Notes Editor; Deborah Willis, Layout Editor. Contributing Editors: Alan Clarke, Marjorie Cohn, Ryan Dreveskracht, Riva Enteen, Michael Faithful, David Gespass, Ann Fagan Ginger, Laura Horton, Nathan H. Madson, Henry Willis. The opinions expressed in the articles are those of the various authors, and each article is Copyright, 2016, by the author and by NATIONAL LAWYERS GUILD REVIEW.

*Advisory Panel:* Elvia Arriola, John Brittain, Margaret Burnham, Erwin Chemerinsky, David Cole, Barbara Dudley, Richard Falk, Lennox Hinds, Sylvia A. Law, Staughton Lynd, Harold McDougall, Ruben Remigio Ferro, Jitendra Sharma, Kenji Urata, Frank Valdes, Patricia Williams.

**Megan Horning**

**BORDER TOWN BULLIES: THE  
BAD AUTO DEAL AND SUBPRIME  
LENDING PROBLEM AMONG  
NAVAJO NATION CAR BUYERS**

**Introduction**

Lucille Platero, an elderly Navajo woman, traveled to a border town to purchase a car. She was looking for a small car that fit her budget. Instead, the salespeople had her test drive a large truck. The salespeople forced Ms. Platero to leave her license and social security card at the dealership during the test drive. Their high-pressure sales tactics lasted all day. In the evening, when she was tired, she agreed to purchase the truck. On her way home, the truck broke down. The dealer refused to fix the truck and repossessed the car after some time. Despite Ms. Platero's dispossession, she still received calls for the repossessed vehicle.<sup>1</sup>

Because of the Navajo Nation's geographic remoteness, rough roads, lack of water and electricity, and vehicle-dependent livelihood, Navajo Nation<sup>2</sup> residents *need* vehicles for daily survival, ideally large four-wheel-drive vehicles. Navajo Nation border towns are the closest and most convenient locations for many Navajo individuals to purchase such vehicles. As a result, these border towns have an unusually high number of car dealerships who are eager to meet this demand.<sup>3</sup> Navajo car buyers' geographic and cultural circumstances create a "strong demand to buy cars and incentive to sell cars," but also "create a market place ripe for excessive greed" to an even greater extent than is typically present in U.S. auto sales.<sup>4</sup> Border town auto dealerships frequently exploit Navajo car buyers, especially tribal elders,<sup>5</sup> through deceptive and aggressive sales tactics. The auto dealerships' zeal for profit also translates into high interest "excessive lending" through subprime lending companies.<sup>6</sup> Because a car is often the "single largest investment" a

---

Megan Horning received her J.D. and Indian Law Certificate in 2017. She thanks Professor Nathalie Martin for the encouragement, consumer law information, and helpful writing tips she provided throughout the semester. Thanks to classmates in Professor Martin's Spring 2016 Consumer Law course for their helpful contributions and critiques of my work. Thanks to Matthew VanWormer for connecting me with auto contracts and for working directly with those affected by bad auto deals and subprime lending on the Navajo Nation. Thank you to Allison Parks and Lucas Henry for my introduction to Navajo Nation law. Thank you to Jonah Begay, Patrick Horning, and Adam Oakey for their advice on car sales. Thank you to Phoebe Tollefson and Christy Chapman for thoughtful proofreading.

Navajo family makes,<sup>7</sup> the unfair auto deals and subprime lending rampant in Navajo Nation border towns are devastating for Navajo individuals, families, communities, and the entire Navajo Nation.

This article argues that due to the circumstances of Navajo Nation residents, Navajo car buyers have a greater need for cars and are therefore disproportionately harmed by unfair border town auto deals and subprime auto loans. Additionally, this article suggests several ways to address these issues while acknowledging the conundrum created if Navajo Nation residents are prevented from buying cars.

Part I of this article describes the current U.S. auto sales and lending process, including the stages of car buying, credit score calculation, and how national auto sales, lending, and investment markets profit from unfair car sales and subprime lending. Part II details the geographic remoteness, unique cultural differences, and living circumstances of the Navajo Nation and the relationship between those circumstances and the desperate need for a vehicle and the resulting vulnerability many Navajo people experience. Part III uses data from the Navajo Nation Human Rights Commission<sup>8</sup> and sample Navajo purchaser auto contracts to illustrate the extreme tactics Navajo Nation border town auto dealerships and subprime lending companies used to bully Navajo car buyers into bad auto deals and unsustainable subprime loans. Part IV provides solutions to alleviate and eliminate bad auto deals and subprime loans for Navajo car buyers.

## **I. How salesmen, dealers, lenders, and investors profit from U.S. auto sales**

The American auto sales industry works to promote dealers', lenders', and investors' profits. Section A outlines the stages of the auto sales and lending processes as experienced by car buyers. Section B describes the American credit scoring system and how it limits low-credit car buyers' choices. Section C reveals auto salespeople's, dealers', and lenders' incentives to pressure low credit score car buyers into loans they are not likely to be able to repay and details their methods for doing so.

### **A. The stages of a car purchase and loan**

An overview of the basic stages of the car purchase-sale process is a helpful starting point for understanding auto lending in the U.S., which is discussed in the next section.<sup>9</sup> First, a person interested in buying a car selects a car model and car dealer or vice versa. Next, the prospective buyer negotiates with car salespeople, employees of the dealership, to determine a car's principal price, and the inclusion or exclusion and price of additional features. Unlike other major purchases, taxes, title fees, cost of repairs and

warranties, and the costs of paying off a loan on an existing car are added to the car's list price.<sup>10</sup>

This negotiation process, and the added fees, can be confusing and stressful to buyers. One particularly stressful aspect of the negotiation and purchase process is the loan agreement. The auto dealer, lender, and buyer must all agree upon the interest rate and terms of the loan. Usually, after sending out loan applications to several lending companies, the dealer and buyer will select a loan based on the interest rate and terms offered by the lender.<sup>11</sup> This process is often known as "getting financing approved." In determining whether a buyer should be approved for a loan, there should be an independent and objective review of a buyer's credit, which includes examining the buyer's debt-income ratio.<sup>12</sup> Immediately after the contract is signed, the dealer sells the contract to the lending company, which then takes possession of the car title. Consequently, the lender—not the dealership—accepts the buyer's payments until the loan is fully repaid.<sup>13</sup>

## **B. Subprime auto loans among car buyers with low credit scores**

For the vast majority of Americans, cars are a primary means of sustenance and survival, a symbol of pride, freedom, and the ability to "control [] one's own destiny."<sup>14</sup> Research has found that car ownership is closely tied to the economic success of American families.<sup>15</sup> Cars are frequently one of the largest assets American families own, and can often be the most valuable asset of families who do not own their own homes.<sup>16</sup> As very few Americans are able to pay in cash upfront when purchasing a car, financing and paying installments on a loan is common.<sup>17</sup>

The auto lending industry categorizes borrowers based on their credit score.<sup>18</sup> Credit scores below 620 are considered to be subprime and have much higher interest rates than credit scores above 620, which are considered less risky by lenders.<sup>19</sup> Factors that can lower a borrower's credit score include multiple delinquent payments on other loans, charge-offs,<sup>20</sup> repossessions, bankruptcies, low household incomes,<sup>21</sup> dilatory credit card repayments, and dilatory or partial home mortgage repayments.<sup>22</sup> Occasionally, periods of "acute financial stress" such as a failed marriage, failed business, or high-cost serious illness can also lower an individual's credit score.<sup>23</sup> Many with low credit scores have low incomes or are young and have not made many purchases on credit.<sup>24</sup> These low scores yield higher interest rates during financing. Dividing borrowers into two distinct categories—low-credit risk prime lending and medium to high credit risk subprime lending—results in a disparate impact on lower credit scoring auto loan borrowers.<sup>25</sup>

Most auto loans are given to borrowers with "prime" credit scores,<sup>26</sup> borrowers whose credit report factors include "having a credit history of at least

three years, non-delinquent historic performance on installment debt, and at least two years of employment.”<sup>27</sup> Borrowers with prime credit scores can often obtain low interest auto loans directly from their own finance company, bank, or credit union.<sup>28</sup> In these loans, the borrower signs a contract with his or her finance company, bank, or credit union to pay the “amount financed” which is the total price determined with the dealership plus a finance charge, which is an interest rate set by the finance company, bank, or credit union.<sup>29</sup> The finance company, bank, or credit union will then loan the borrower cash to purchase the vehicle in exchange for a security interest in the car.<sup>30</sup> Since the subprime mortgage crisis, banks have tightened lending standards and it is even more difficult for borrowers with medium to low credit scores to obtain low interest loans.<sup>31</sup>

Subprime borrowers can often only obtain auto loans from subprime lending agencies because of the tightened restrictions traditional lending agencies place on subprime borrowers.<sup>32</sup> Most subprime auto loans are executed through three forms of dealership financing:<sup>33</sup> (1) the dealer solicits outside lending companies to evaluate the borrower’s credit and offer the borrower a loan;<sup>34</sup> (2) the dealer’s own financing arm purchases the loan;<sup>35</sup> or (3) a traditional banking or financing institution carries the loan.<sup>36</sup> All three forms of subprime auto lenders charge much higher interest rates than the rates charged for prime auto loans.

For example, interest rates above six percent are considered very high for an auto loan.<sup>37</sup> Interest rates in subprime auto loans, however, can rise to the double digits, resulting in a loan with eventual costs that are equal to or more than the car’s actual value.<sup>38</sup> Nevertheless, many car buyers have no choice but to enter into subprime auto loans despite higher interest rates, because their need for a car outweighs the costs of obtaining one.<sup>39</sup>

If a buyer enters into a subprime loan with an unreasonable repayment plan, particularly in light of the buyer’s income, it is likely that the car will be repossessed when the buyer inevitably defaults. Upon repossession, the holder of the contract can sell the car at auction to recover some of the costs of the car. However, because the car has likely depreciated in value, the holder is unlikely to recover the contract price. Consequently, the lender may choose to obtain a deficiency judgment against the buyer, where the buyer becomes responsible for the difference between what the lender received at auction and the price of the vehicle under the purchase contract.<sup>40</sup>

### **C. High profits drive auto salespeople, dealers, lenders, and investors to lend to and invest in low credit car buyers**

While high interest rates associated with subprime lending clearly disadvantage borrowers, there are strong incentives for auto dealers and auto

lenders to offer subprime loans. Although it may seem counter-intuitive for dealers and lenders to provide financing to borrowers less likely to repay their loans, dealers and lenders actually benefit from making subprime loans and carrying large quantities of subprime loan debt. These benefits outweigh the corresponding risks of default, which has in turn led to a dramatic growth in subprime auto-lending industries and investment in such industries.

### **1. Dealer incentives for subprime loans and unscrupulous tactics**

Auto-dealers are motivated by numerous incentives and kickbacks that accompany auto sales and auto lending.<sup>41</sup> On the most basic level, because auto salespeople are paid on commission they are motivated to sell as many cars and make the largest loans as possible.<sup>42</sup> With the general aim of making profits, auto salespeople and dealerships engage in insidious practices to push auto loans on people with low credit scores. While the loans themselves are legal, the sales tactics used appear less so.

In some cases, the aggressive sales tactics used on vulnerable subprime buyers include fraud and deception. First, auto dealers receive dealer reserve kickbacks, which are “a slice of the interest on the loan” given to dealers by lending agencies every time they make a new loan.<sup>43</sup> Accordingly, auto salespeople push borrowers towards higher interest rate loans because the kickback percentages are higher for higher interest rate loans. This is true even when a borrower’s credit score could qualify for lower interest rates.<sup>44</sup> Second, these kickbacks incentivize simple overselling. Salespeople are encouraged to persuade purchasers to choose bigger, more expensive cars. A bigger car requires a bigger loan, which results in a greater kickback to salespeople.<sup>45</sup>

Auto salespeople can also increase the overall size of a loan by “loan packing,” which adds “overpriced and unused or frankly unnecessary” products to the loan, such as guaranteed auto protection (“GAP”) insurance,<sup>46</sup> rust-proofing,<sup>47</sup> extended service contracts, or warranties that are already covered by the manufacturer. GAP insurance is optional insurance coverage added to a collision insurance policy and may pay the difference between a car’s loan balance and what the insurance company will pay if the car is considered a covered total loss.<sup>48</sup> Similarly, by adding hidden fees called “add-ons” to purchase contracts, auto salespeople can increase the size of a loan without borrowers noticing until they leave the lot and the loan is final.<sup>49</sup>

Bait and switch tactics are also used to increase the size of a loan, which involves substituting more expensive cars, with added features, after a buyer has already committed to a basic model.<sup>50</sup> Finally, as noted above, auto loans are frequently made to cover both the purchase price of a new car and the negative equity on a borrower’s trade-in.<sup>51</sup>



In addition to the kickbacks, auto salespeople and dealers employ practices that can increase profits even after a loan is finalized. For instance, when borrowers fail to pay their auto loans, dealers often repossess their cars and sell them for a higher value in a practice called “churning.”<sup>52</sup> In some instances of churning, “hundreds of cars have been sold multiple times by used car dealers.”<sup>53</sup> This practice has also evolved into the often-illegal practices of spot delivery and yo-yo car sales, both described in detail below.

For some dealers and auto salespeople, the profit-motive is so strong that they resort to “illegal business practices, such as forging signatures on sales contracts, falsifying information on credit applications, and wrongfully repossessing vehicles.”<sup>54</sup> Ultimately, once the contract and title of the car have been sold to the lending agency and the auto dealer receives the purchase price of the car, and receives its cut of the interest, the auto dealer is no longer accountable for the car’s costs. Accordingly, the risk of default has passed to the lending agency.

## **2. Lender incentives to make subprime auto loans**

Despite the assumption that lending companies are only successful if borrowers repay their loans, auto lenders also have significant motivations to make subprime auto loans. A common assumption in the lending business is that “the risk of not being paid back on the loan [should] act[] as a constraint on lending behavior and encourage[] lenders to monitor credit worthiness of the borrower out of self-interest.”<sup>55</sup> If the lender collects enough in interest and fees over time, however, the lender may still make a profit even with a loss of some of the principle.<sup>56</sup> Thus, there are several ways auto lenders profit from the fees and interest charges on subprime auto loans. In general, lending companies profit from the interest rates they charge borrowers, and occasionally, this interest can generate a profit greater than the value of the car itself.<sup>57</sup>

One way lending companies profit from subprime auto loans is when the dealer and lender agree to permit the dealer to mark up the borrower’s interest rate from the rate originally set by the lending company. This increase is added to the dealer’s profits. This strengthens the relationship between the lender and dealer, ensuring the lending company’s continued business with the dealer.<sup>58</sup> Lenders can also profit from subprime auto loans by allowing dealers to screen borrowers for them. This saves the lender from paying screening fees.<sup>59</sup>

Moreover, because auto loans cannot be discharged by bankruptcy,<sup>60</sup> lenders are promised repayment or repossession.<sup>61</sup> This assurance provides an “enormous incentive” for auto lenders to lend to borrowers with low credit who are unlikely to repay and has led to “excessive” subprime auto lending.<sup>62</sup>



The risk of not profiting when a borrower fails to pay his or her auto loan is mitigated through churning, as discussed above.<sup>63</sup> In fact, repossession has become increasingly easy for lenders as automatic systems that locate and shut a car off remotely have replaced the traditional method of sending repo men to find, boot, and tow away cars upon default.<sup>64</sup> Subprime auto lending is a profitable practice for auto lenders because the risk of losing profit on defaulted subprime loans is mitigated by high interest rates that survive bankruptcy and the ease of selling a repossessed car.

Additionally, loan securitization, bundling, and reselling create a culture that disregards borrower default. Lenders' lack of concern as to whether loans will be repaid stems from the lender cashing out on the loan early and selling any associated risks early on in the loan's life.<sup>65</sup> In turn, securitizing, bundling, and reselling encourage lenders to find higher numbers of low credit borrowers to increase profits.<sup>66</sup>

### **3. Investor incentives to invest in subprime auto loans**

As noted above, subprime loans are often "bundled" together, and after a series of repurchasing and repackaging, these bundles are sold to an investor in a hedge fund or high yield mutual fund.<sup>67</sup> Specifically, after a lending company takes the title of a subprime auto loan, it typically bundles it with thousands of similar auto loans into a "collateralized bond instrument."<sup>68</sup> These collateralized bond instruments can then be "sold off in pieces to the highest bidders"<sup>69</sup> as if they are "investment grade securities."<sup>70</sup> These bidders are investors seeking returns on the high double-digit interest rate charges levied on subprime auto loans. Inflated interest rates yield great returns for investments, particularly "in a market where interest rates on whole hover stubbornly close to zero."<sup>71</sup> Additionally, collateralized subprime loans are appealing to investors because they have high returns compared to other auto loan investments and carry substantially lower risks than subprime mortgages.<sup>72</sup> For example, Wall Street stockbrokers have been successful in selling subprime auto loan bundles to even "the most stalwart institutional investors, including insurance companies and public pension funds."<sup>73</sup> These collateralized subprime loans are perceived as a reliable investment because the "sheer necessity of car ownership...precludes the possibility of a huge decline in overall sale."<sup>74</sup> Through securitization, auto dealers and lenders offering subprime loans pass the risk of default onto investors, which in turn places the risk of loss upon public pensions.<sup>75</sup>

Investors are essentially gambling when they invest in bundled subprime loans. Investors wager that a sufficient number of borrowers within the bundled security will be able to pay enough of their loans to generate a profit, notwithstanding that many will default along the way. And, because

subprime loans have extremely high interest rates, lenders enjoy good odds that they will profit before the borrower goes under and defaults. However, in spite of good odds, such investments always carry an inherent risk that a larger number of buyers will default, resulting in overall losses to the investor.<sup>76</sup> While it would seem poor judgment to invest in loans that are unlikely to be repaid, the strong motivation for profit encourages auto dealers and lenders to offer subprime auto loans. Likewise, profit is the driving force in investors' "buying fren[zy]" in subprime loan instruments.<sup>77</sup>

#### **4. The subprime auto industry is sparsely regulated**

Taking into account Americans' persistent need for cars and the rapid growth of the subprime auto-lending industry, the subprime auto industry is surprisingly unregulated. While the economic downturn after the mortgage crisis spurred new regulations that cracked down on subprime lending for home mortgages and credit cards,<sup>78</sup> auto sales lobbyists successfully spared the auto-lending industry from similar regulations, including the Dodd-Frank Wall Street Reform Act<sup>79</sup> and the Consumer Financial Protection Bureau.<sup>80</sup> Consequently, high interest rate loans, like subprime auto loans, are generally legal under state and federal law and there are few legal regulations for policing the subprime auto loan industry.<sup>81</sup> This lack of enforcement power, paired with the multi-level motivation for profit, perpetuates a "vicious cycle of aggressive [subprime auto] lending."<sup>82</sup>

#### **5. Many subprime loans are predatory**

There exists a "marketplace ripe for excessive greed[.]" because of the continued and widespread demand for cars and the strong incentive for profits at all levels of the auto sales industry.<sup>83</sup> Advocates for auto buyers and borrowers struggle to balance the need for regulation with low credit buyers' need for financing.<sup>84</sup> As subprime lenders serve people with no alternative access to credit, "subprime loans target some of the nation's most desperate and least financially savvy consumers, many of whom have experienced extended periods of dire financial straits" or come from communities that have been systematically denied credit.<sup>85</sup> While not all subprime car loans are the result of predatory tactics,<sup>86</sup> many are predatory in nature because auto dealers regularly and unfairly engage in deceptive and fraudulent practices. Thus, most subprime loans in the last decade have been the product of predatory lending practices.<sup>87</sup>

#### **6. Harmful effects of subprime auto loans on borrowers, families, and communities**

The growth of the subprime lending industry and related lack of industry regulation has resulted in harmful effects for borrowers, their families, and

the communities in which they live. Subprime auto loans can put individual borrowers into cycles of debt that impact the family and individual's emotional and financial health for generations. These cycles of intergenerational debt, in the aggregate, can hinder an entire community's economy, and even threaten the stability of the national economy as happened in 2008.

Subprime auto loans' harmful effects wreak long-lasting and detrimental financial havoc on borrowers. Typically, subprime borrowers borrow much more than what their car is actually worth and take much longer to pay off loans compared to borrowers with prime auto loans.<sup>88</sup> For example, in order to keep a low credit borrower's monthly payments low, subprime lenders stretch the borrower's installment payments out for a longer term.<sup>89</sup> While the average prime auto loan lasts four to five years, it takes close to six years to pay off the average subprime auto loan.<sup>90</sup> Longer loan periods give subprime borrowers' cars' trade-in value more time to depreciate, ultimately causing many subprime borrowers to transfer the remaining balance left on a worn-out car to a new car purchase.<sup>91</sup> Alternatively, someone who purchases a car with a subprime auto loan may pay for the car for months or years after the car is no longer running and worthless. The harmful effects of subprime loans bring individuals—whose finances are already unstable—into a cycle of “incur[ring] excessive debt.”<sup>92</sup>

The cycle of debt incurred from subprime auto loans also impacts the families and communities of borrowers. A borrower's debt and associated low credit score affect the upward economic mobility of borrowers' children.<sup>93</sup> This occurs in two ways. First, financial stress experienced by parents can inhibit children's learning in school, well-being at home, and later pose a barrier to higher education.<sup>94</sup> Second, like other forms of intergenerational poverty, parents pass on to their children their low credit scores and correlated high interest rates and debt. For example, parents with a low credit score may not be able to cosign on a child's auto loan, borrow through a bank or credit union, or assist in paying off a vehicle quickly.<sup>95</sup>

On a larger scale, excessive indebtedness also harms communities. For example, borrowers with high interest rates are less able to make purchases or investments that contribute to their local economy, and may even avoid entrepreneurship.<sup>96</sup> Such collateral consequences contribute to a cycle of poverty where the poorest are forced to incur the highest rates of debt in order to purchase a car.<sup>97</sup> This adds to the growing national wealth gap<sup>98</sup> and maintains an economic underclass in our society.<sup>99</sup> On a national scale, economists warn that the same factors that led to the mortgage crisis and dramatic economic downturn in 2008<sup>100</sup> are also present in the subprime auto lending industry and pose serious risks for our nation's economic future.<sup>101</sup>

## **II. Navajo Nation residents are especially vulnerable to bad auto deals and subprime auto loans**

The Navajo Nation and the surrounding border towns are one area of Indian Country where unfair car sales and lending practices disproportionately impact low income Native American car buyers. These circumstances result in the Navajo Nation's residents' unique vulnerability to predatory lending schemes in the car industry.

The following section describes some of the realities of Navajo life today with respect to Navajo Nation residents' heightened need to buy cars and their vulnerability in auto deals. Section A shows how Navajo Nation residents' rough roads, spread out homes, and sources of income require car ownership for survival. Issues involving poverty, literacy, and language are the three most influential factors that make some Navajo car buyers especially vulnerable to unfair auto sales and lending. Section A also describes the limited options Navajo Nation residents have to purchase goods, services, and cars in border towns where exploitive sales practices are prevalent. Section B outlines the Navajo Nation's legal response to these unfair auto sales and lending practices. It focuses on how this civil regulatory jurisdiction is limited by the Navajo Nation's borders.

### **A. Realities of Navajo Nation life**

The Navajo Nation, home of the largest Native American tribe in the United States, spans Arizona, Utah, and New Mexico and covers over 27,000 square miles.<sup>102</sup> In 2014, the Navajo Nation population totaled over 300,000 members,<sup>103</sup> more than half of whom resided on the Navajo Nation reservation.<sup>104</sup> The Navajo Nation is admired by outsiders for its maintenance of Navajo language and culture, traditional lifestyles<sup>105</sup> and high desert landscapes, from red sandstone spires and canyons to mountains and plateaus.

The Navajo Nation extends about 160 miles north to south and just over 300 miles from east to west.<sup>106</sup> There are about 15,000 miles of public roads on the Navajo Nation.<sup>107</sup> However, this estimate does not include the hundreds of miles of personal roads individuals have built from main public roads to reach their rural homes. Within the Navajo Nation, only 23 percent of public roads are paved, while the remaining majority are dirt roads.<sup>108</sup> Public transportation is rare in most parts of the Navajo Nation<sup>109</sup>

Due to the geographical breadth of the Navajo Nation and the limited infrastructure, Navajo Nation residents live differently from other Americans. Vehicle ownership is very important to this lifestyle. Most Navajo Nation residents live spread apart in small single-family homes with extended family.<sup>110</sup> Many of these homes do not have running water, electricity, and telephone and

internet services.<sup>111</sup> To address these needs, many Navajo families use their vehicles to haul water in large plastic tanks from nearby towns and wells and haul coal or wood to heat their homes.<sup>112</sup>

Vehicle ownership is also essential to Navajo Nation families' income. Working away from family home sites or away from the Navajo Nation is a primary source of income for many Navajo Nation residents. Most of these jobs require long daily commutes to worksites in border towns, schools, hospitals, power plants, or mines. Additionally, numerous Navajo workers generate income by traveling across the United States to do welding, construction, or mining work at temporary job sites. These workers not only use their vehicles to travel to job sites but also live out of their vehicles while on the job. Other Navajo workers derive income through Jeep and truck tours of tourist destinations such as Monument Valley, Canyon de Chelly, and Antelope Canyon. Many Navajo Nation families make or supplement their income and continue traditional ways of life by raising livestock, such as cattle, sheep, goats, and horses.<sup>113</sup> Consequently, having large trucks to haul water, feed, and trailer livestock is critical to this source of income.

In combination with the high need for vehicle ownership explained above, high poverty and illiteracy on the Navajo Nation make many Navajo Nation car buyers vulnerable to unfair auto sales and lending practices.<sup>114</sup> In 2010, 38 percent of Navajo Nation residents were classified as severely poor and living below the poverty line.<sup>115</sup> That same year, the median household income of Navajo Nation residents was \$27,389.<sup>116</sup> About half of the Navajo population speaks the Navajo language at home, while many elders speak only the Navajo language.<sup>117</sup> Many middle-aged and elderly Navajos were either subjected to deliberate and abusive assimilation practices in boarding schools, or did not attend school at all. This resulted in many not learning to speak, read, or write English well.<sup>118</sup> This problem has carried over to twenty-first century Navajo students because of a lack of school funding and inadequate culturally responsive education.<sup>119</sup> They are often not as academically successful as their non-Navajo peers.<sup>120</sup> These poverty, literacy, and language factors contribute to Navajo car buyers' vulnerability during exploitive sales and lending practices.

Border towns, which are situated just across the Navajo Nation borders, serve as hubs of goods and services for Navajo Nation residents and as homes for many Navajo tribal members who work off the reservation. The largest of these border towns are Page, Arizona; Holbrook, Arizona; Winslow, Arizona; Flagstaff, Arizona; Gallup, New Mexico; Grants, New Mexico; Farmington, New Mexico; Albuquerque, New Mexico; and Cortez, Colorado.<sup>121</sup> These border towns often contain the nearest grocery stores, clothing and supply

stores, banks, hospitals, schools, laundromats, and restaurants for many Navajo Nation residents.<sup>122</sup> For some Navajo Nation residents, the drive to the nearest border town is often over 100 miles.<sup>123</sup> Depending on the season, reaching these border towns require Navajo residents to traverse deep sand, mud, snow, and ice.<sup>124</sup>

The Navajo Nation Humans Rights Commission describes Navajo Nation residents' travel to these border towns as a "daily exodus." Each day, approximately 12,470 vehicles travel into Gallup and 7,015 vehicles travel into Farmington.<sup>125</sup> These counts show just how crucial vehicle ownership is for Navajo families who travel to border towns for goods and services. Furthermore, the Navajo Nation Human Rights Commission, recognized the emotional importance of vehicle ownership to Navajo families, when it stated that "[a]cquiring a new vehicle brings pride to a household and instills a sense of accomplishment and wealth."<sup>126</sup>

As a result of border towns being isolated hubs of commerce, there is a long-standing pattern of commercially exploiting the Navajo residents' heavy reliance on the border towns' goods and services. Border town main streets are often lined with trading posts, pawn shops, payday lenders, auto title lenders, tax anticipation lenders, rent-to-own furniture stores, liquor stores, and bars. And many border towns are infamous for poverty, violence, alcoholism, and alcohol-related deaths.<sup>127</sup> Yet, as discussed below, one common and often unmentioned venue of border town exploitation is car dealerships. All of the above factors illustrate the unique and heightened "need for transportation" among Navajo Nation residents,<sup>128</sup> and the ways in which Navajo customers are vulnerable to car dealers' greedy auto sales tactics and high interest rate loans.

## **B. The Navajo Nation's legal response to residents' need for vehicles**

In light of the residents' vulnerability to exploitive commercial practices, the Navajo Nation Council enacted a highly protective consumer protection law in 1999.<sup>129</sup> The Navajo Nation Consumer Practices Act ("Act") protects consumers from unfair, deceptive, and unconscionable sales practices by sellers of goods and services within the Navajo Nation.<sup>130</sup> The Act directly addresses car sales, including provisions on motor vehicle warranties, and provides the right to ask for a Navajo language translator and caps on interest rates.<sup>131</sup> Further, the Act precludes repossessing cars from the Navajo Nation without the owner's voluntary written consent or an order from a Navajo Nation court.<sup>132</sup> While the Act aspires to protect Navajo car buyers, the place of sale determines its application. As a result, many of its provisions are inapplicable to Navajo car buyers who purchase vehicles in border

towns just outside of the Navajo Nation.<sup>133</sup> Instead, state law and state courts govern such sales.

### **III. Unfair border town auto deals and subprime lending to Navajo car buyers**

The discriminatory practices of Navajo border town auto dealers and lenders are particularly acute when compared to the national auto sales and lending climate. Furthermore, the magnitude of high interest subprime auto loans sold to Navajo car buyers harms the purchasers, their families, and communities. Part IV below details the drastic discriminatory circumstances Navajo car buyers experience when purchasing and paying off vehicles based upon data from a recent Navajo Nation Human Rights Commission Report (“Report”)<sup>134</sup> and analysis of sample the auto contracts and finance applications from recent Navajo car buyers.

#### **A. Navajo car buyers are isolated from information and competition**

This section draws upon the experiences of Navajo car buyers to illustrate the ways that border town bullies (lenders and dealers) target this population with unfair auto deals and unsustainable auto loans throughout the car buying process. This section presents these abuses in the order of the car buying process: (1) car dealer and car model selection, (2) auto contract negotiation, (3) auto financing, and (4) repossession.

The remote geography, unique Navajo way of life, and prevalent poverty on the Navajo Nation each create barriers to information and a lack of options for Navajo car buyers—a problem uncommon elsewhere the U.S. Larger cities with numerous car dealerships, such as Phoenix, Arizona; Salt Lake City, Utah; and Albuquerque, New Mexico, are difficult for most Navajo car buyers to access because they are hundreds of miles from most Navajo Nation residents’ homes. Thus, most Navajo car buyers are limited to purchasing cars from the dealerships available in the large Navajo Nation border towns: Gallup and Farmington, New Mexico and Holbrook and Flagstaff, Arizona.<sup>135</sup> Because these border towns are still hours away from many Navajo car buyer’s homes, the distance between home and dealership exacerbates the pressure of making a purchase and diminishes a car buyers opportunity to make informed choices.

Additionally, many Navajo car buyers “lack[] basic information about purchasing a vehicle[],” which limits their ability to compare dealers and car prices. Missing information includes “[i]nformation on credit profiles, warranties, and blue book values.”<sup>136</sup> This problem is, in part, because many Navajo homes are without internet access.<sup>137</sup> Additionally, language and literacy barriers prevent many Navajo individuals, especially elders, from



understanding available consumer information.<sup>138</sup> Survey results from the Report show that only about 40 percent of Navajo car buyers research the car they intended to buy before entering a dealership.<sup>139</sup>

## **B. Border town bullies use unscrupulous tactics during contract negotiation ensure high profits**

Navajo Nation border town auto salespeople and dealers use various legal and illegal tactics to sell high quantities of vehicles and to increase profits in car sales with Navajo consumers.<sup>140</sup> Navajo car buyers' experiences illustrate how Navajo border town dealers and salespeople take these tactics to the extreme by capitalizing on Navajo car buyers' unique characteristics and vulnerabilities.

For example, many dealers use advertisements to target Navajo car buyers, a common tactic because local advertisements are a leading factor when a Navajo car buyer chooses a dealership.<sup>141</sup> Advertisements target Navajo car buyers by using Navajo language, livestock and hay giveaways, and "free" barbecues.<sup>142</sup> Dealership employees use many aggressive marketing tactics, including official-looking mailings that read "You've Won a Car!," providing fake car keys, and false checks claiming to be cashable at local dealerships.<sup>143</sup> In some instances, the Navajo Nation government shows support for these dealers by allowing the dealers to sponsor Navajo Nation fairs and contribute prizes to Navajo Nation Gaming Association incentives.<sup>144</sup>

### **1. Raising the price and additional features**

Navajo border town dealers use high-pressure tactics to sell expensive vehicles with high interest rates to earn big commissions and dealer kickbacks. These profit-boosting tactics are frequently deceptive and forceful. Add-ons are a common profit-boosting tactic among border town dealers. Navajo car buyers' contracts are often "laced with add-ons" that the car buyer does not notice, and that "make no sense, cost too much, and keep the family in debt."<sup>145</sup>

For instance, one Navajo elder found that he had a maintenance service agreement in his contract that required him to travel a hundred miles to Gallup every time he needed his vehicle serviced.<sup>146</sup> GAP insurance is a similarly expensive add-on, commonly added onto Navajo car buyers' contracts. Yet, border town bullies rarely honor GAP insurance when Navajo car buyers seek to collect on their GAP insurance policies.<sup>147</sup> One Navajo elder even described how she had to take out a loan to cover repairs when the GAP insurance was not honored.<sup>148</sup>

Moreover, border town auto dealers do not limit themselves to the typical auto sales add-ons. They frequently create add-ons specific to the car. These provisions are slipped stealthily into contracts. One Navajo mother

who intended to pay \$20,000 for a car for her college student son was told that her son could sign the contract by himself in the morning. Later, when she reviewed the signed contract, the mother saw that an additional \$10,000 in add-ons, including a \$4,000 service charge and a \$499 tire fee, had been added to the contract overnight, without their knowledge.<sup>149</sup>

## **2. Pressure to buy expensive alternate vehicles**

Border town auto dealers also persuade Navajo car buyers to purchase entirely different cars than what the buyer originally intended.<sup>150</sup> In one instance, a dealership sold a Navajo buyer a two-wheel drive truck, worth less than his trade-in, under the impression it was a higher valued four-wheel drive truck.<sup>151</sup> Similarly, when salespeople realize that low income or a poor credit score may prevent a buyer from getting a loan for a larger make or model, the salespeople force a sale by pressuring the buyer into a smaller, less expensive model that may not fit the buyer's needs. One Navajo elder was pressured into buying a small truck when he really needed a larger vehicle, and later he had to pawn his valuables to make the \$600 monthly payments on the small truck.<sup>152</sup> Forcing buyers into purchasing cars the buyer did not want, is another predatory tactic used in these border towns.

## **3. Two cars at once**

Among the most egregious trade-in schemes border town dealers use is selling Navajo car buyers two cars at once. Generally, with this scheme, the dealership first sells a buyer a car that quickly turns out to be faulty. When the buyer takes the car back to the dealership, the dealer feigns agreement to take control of the car and then sells the buyer another model. Instead of trading in the old car, as the buyer would expect, the dealer simply sells the buyer another contract, meanwhile, the dealer keeps possession of the old car while the buyer still maintains ownership according to the title. And then, in a month's time, the buyer receives billing statements for both cars, even though the buyer does not possess either the first car or the title. In this way, the dealer profits from the first car by repossessing it and reselling it to another buyer.<sup>153</sup>

## **4. Closing the deal and issues at signing**

Dealers ensure profit by using a variety of nefarious, deceptive, and high-pressure tactics to ensure Navajo car buyers sign auto contracts. "[S]ome automobile dealers literally preyed on Navajo families, purposely misled them and pressured them into signing contracts when the consumer's financial means [were] not there at the beginning of negotiating the contract."<sup>154</sup> Further, the circumstances surrounding these auto contracts "deprived [many Navajos] of the right to freely negotiate a contract under the conditions acceptable

and understood by the consumer.”<sup>155</sup> Many Navajo car buyers complained of lengthy auto contracts “filled with legal jargon” that they could not easily understand.<sup>156</sup> A majority of Navajo car buyers admitted to relying on verbal agreements with dealers and salespeople. For that reason, they did not read their auto contracts closely.<sup>157</sup> Nor were they aware of the contract’s contents, including whether down payments, trade-ins, and add-ons were included.<sup>158</sup>

One way border town auto dealers frequently pressure Navajo car buyers into assuming high costs and unfair contracts is by refusing interpreters for Navajo car buyers who do not speak English.<sup>159</sup> This denial occurs in two ways. Some dealers simply do not provide in-house interpreters. Others barred relatives who accompany car buyers specifically to interpret during contract negotiations.<sup>160</sup>

As a part of their strategy to compel Navajo car buyers into signing auto contracts, border town auto dealers aim to wear down Navajo car buyers. Many participants reported being delayed for the entire day at dealerships and then rushed into signing a contract before closing.<sup>161</sup> This delaying tactic deserves greater attention, since many Navajo car buyers have to make special plans, save money, and travel over a hundred miles to reach a dealership, followed by another hundred miles to drive home the same evening. While prolonging the sale and wearing down the buyer, dealers and salespeople also frequently and illegally detain potential buyers by holding their car keys, driver’s licenses, and/or social security cards until a contract is signed.<sup>162</sup> One Navajo elder who decided not to purchase a car that day had to call the police before the dealer would return his keys and license.<sup>163</sup>

In some cases, border town auto dealers have even threatened purchasers. In one striking instance, a dealer called a middle-aged man at 1:30 in the morning. The purpose of the call was to force the man to sign an incomplete auto contract. The dealer threatened the man that if he did not sign the contract, he would report the car as stolen to the police. All the while, the dealer actually had physical possession of the vehicle.<sup>164</sup>

Another way border town auto dealers lure Navajo car buyers into contracts is by manipulating income and demographic information on buyer finance applications. The dealer may do this to improve the chances that the buyer will obtain financing or to increase the interest rate on the loan. Many Navajo car buyers have been pressured into “soft” credit checks at a grocery store, fair, or flea market, in which salespeople collect their demographic information and later use it to solicit auto loans, often without the potential buyer’s knowledge.<sup>165</sup> Some individuals even reported they were made to believe they were entering their demographic information for a contest or raffle and not for a car loan.<sup>166</sup>

Salespeople use names and addresses gained in these credit checks to locate people at home where they could pressure them into signing contracts.<sup>167</sup> This is especially common among the elderly who feel vulnerable and pressured at home when they are alone with a stranger.<sup>168</sup> Based on these credit checks, many potential Navajo buyers are told they are eligible for a loan when an accurate analysis of their income would indicate otherwise.<sup>169</sup> Navajo car buyers also complain of being confused about who is financing the loan.<sup>170</sup>

Lastly, a common way dealers and salespeople ensure a contract is finalized is by instructing Navajo car buyers to lie about their income and/or down payment amounts.<sup>171</sup> In the worst instances, the salespeople forge these amounts themselves.<sup>172</sup>

### **5. Yo-yo sales and spot deliveries**

A yo-yo car sale is one in which a person purchases a car with dealer arranged financing, pays a non-refundable deposit to the dealer, and drives the car off the lot. Within a few days the dealer calls the purchaser saying that the financing has been denied and that he or she must return the car. At that point, the dealer keeps the non-refundable deposit and is able to resell the car at full price.<sup>173</sup> Yo-yo sales are highly profitable because once the buyer returns the car, the buyer either has to come up with more money for a larger down payment, agree to a higher interest rate, or agree to extend the loan period to keep the car, return the car and forfeit the down payment, or accept a lesser valued vehicle.

Similarly, spot delivery, a variation of the yo-yo car sale, occurs when salespeople actually deliver the car to the purchaser before financing has been approved and then later require the purchaser to return the car. Again, the purchaser either loses their deposit or is forced to pay a higher interest rate.<sup>174</sup>

A radio advertisement enticed one middle-aged Navajo male car buyer to a dealership about 100 miles from his home.<sup>175</sup> He signed a contract to purchase a vehicle and drove the vehicle home. Days later, the dealership called and demanded he return the car because his financing was not approved. The dealer threatened that the vehicle would be reported stolen to the police if not returned. However, the buyer was unable to return the car until his employer approved the time off. When the buyer returned the vehicle the dealership asked him to make a higher down payment to keep the vehicle. Because the buyer declined to put more money down, salespeople took him into a separate room and swore at him. In retaliation and to compensate for the buyer's refusal to make a higher down payment, the dealership forced him to pay a mileage fee exactly equal to the higher down payment before he could leave. After this incident, the buyer continued to receive threats from

the dealer.<sup>176</sup> Border town auto dealers will go to great lengths to secure any type of profit, even where no sale can be made.

## 6. Faulty vehicles

Border town auto dealers also profit by selling faulty vehicles to Navajo car buyers for full price. Many Navajo car buyers complained that their vehicles broke down on the way home from the dealership or shortly thereafter.<sup>177</sup> After complaining about being sold a faulty vehicle, one buyer reported being lectured by the dealer about leaving the lights on, which was not the cause of the mechanical defect at all.<sup>178</sup> Another buyer reported being forced to leave the dealership on foot when she could not pay for repairs for a mechanical issue she discovered on the way home from the dealership.<sup>179</sup> In an extreme case, one middle-aged buyer was sold a vehicle that had to be repossessed because it had no VIN number, which made the car impossible to register and insure. A representative of the dealer rudely told the faultless man and his wife “they were screwed” in reference to the dealership’s own actions.<sup>180</sup> Navajo buyers who were sold faulty vehicles also often complained of expensive repairs. The repairs on one woman’s newly purchased vehicle were so expensive the woman could not make payments and the vehicle was repossessed.<sup>181</sup> Additionally, some buyers complained of conditions in auto contracts that repairs could only be done at the dealership, which was hundreds of miles from the buyers’ homes.<sup>182</sup>

## 7. Repossessions

Like interest rates, repossessions are yet another way subprime auto lenders profit from Navajo car buyers. While the Navajo Nation Code limits vehicle repossession on the Navajo Nation,<sup>183</sup> illegal repossessions are still common occurrences. Because of the Navajo Code restricting vehicle repossession, many repo men wait until a family leaves the Navajo Nation boundaries so that they can repossess the vehicle in a border town. An elder woman recounted a repo man who “literally pulled an old lady and man out of their truck” at a laundromat in Gallup.<sup>184</sup> In another instance, Santander Consumer USA, Inc. hired a Tohono O’edham tribal member to repossess vehicles on the Navajo Nation. This repo woman came to a Navajo elder’s home even after the elder had entered into an agreement with Santander to make up her \$200 debt. The repo woman took the vehicle after agreeing to return it in two days, but instead permanently repossessed it.<sup>185</sup>

When their cars are repossessed, Navajo car buyers suffer great financial loss and hardship. One elderly couple pulled from their vehicle was only one month behind on their payments and had made payments on the car for years.<sup>186</sup> The car taken by the repo woman had five years of payments, with only a few months remaining to pay it off.<sup>187</sup> In circumstances like these,

lenders profit tremendously because they can resell the car for full value and keep all of the payments the original car buyer made. The Navajo car-buying population represents just a small fraction of the profits lenders and investors make from subprime auto loans. But the deceptive and aggressive sales tactics used on Navajo car buyers in border towns bring concentrated profits to border town auto dealers and their subprime lending partners.

### **C. Contracts of Navajo car buyers**

Below are two sample car sales contracts from recent Navajo car buyers. They are not representative of all Navajo car buyers' contracts, but are not atypical.<sup>188</sup> These contracts illustrate how border town auto dealers use various combinations of the aggressive and illegal sales tactics mentioned above to sell high interest contracts and loans and to maximize profits.

#### **1. Mary's Ford Fiesta**

Mary,<sup>189</sup> a 70-year-old Navajo woman, purchased a new 2014 Ford Fiesta at a border town's only dealership. A 2014 Ford Fiesta's sales price with the same amenities should have been around \$14,880.<sup>190</sup> However, on Mary's contract, the car price was \$21,972.28. This was a 48 percent dealer markup.

The dealership also added several deceptive and/or illegal add-ons to the price of the car. First, the dealership charged her \$3,000 for a manufacturer warranty that could have been negotiated down to a much lower price.<sup>191</sup> Second, the dealership charged Mary with a \$389.99 "Dealer Documentary Fee." Third, the dealer charged Mary \$282.56 for "Payments...to Public Officials for Official Fees." Fourth, the dealer charged Mary \$900 for unneeded GAP protection. With tax,<sup>192</sup> this totals \$4571.56 in unnecessary add-ons that contributed to a higher interest profit for both the dealer and the lender.

On top of the add-ons, the lender charged Mary an 18.1 percent APR interest rate. In fact, the \$16,595 total in interest charged on her new car exceeded the Fiesta's value. Although Mary's actual income was \$900 a month,<sup>193</sup> the lender forged her finance application and reported Mary's monthly income at \$5,711. Mary did not have a chance to review the finance application and the lender did not request her to provide any of her own financial information. However, this forgery did not seem to reduce her interest rate,<sup>194</sup> and she still ended up with an 18.10 percent APR interest rate and a loan term of 6 years (72 months) with monthly payments of \$580.55. Payments at this rate were unsustainable and left Mary with only about \$320 dollars to cover all of her other monthly expenses.

#### **2. Susie's Dodge Challenger**

Susie, a 54-year old Navajo woman, purchased a used 2013 Dodge Challenger. The sticker price was \$24,577.50, which was reasonable.<sup>195</sup> However,

Susie was charged \$2,300 for a vehicle service contract, \$389 for a “Dealer Documentary Fee,” \$22.50 for payments made to “Public Officials for Official Fees,” and \$900 for GAP insurance. This totaled \$3,611.50 in unnecessary but negotiable add-ons. Altogether, the sticker price with the add-ons, minus \$200 trade-in value and a \$400 down payment, totaled \$27,589. While most of the contract value seems accurate, despite the overpriced service contract and unnecessary GAP insurance, Susie was charged a 22.42 percent interest rate. The result was a \$706.55 monthly payment, and a total in interest of \$23,282.60, an amount almost equal to the worth of her car.<sup>196</sup> This interest plus the principal price made Susie’s final obligation \$51,471.60. The price is unreasonable considering Susie’s income was \$360 a month in General Assistance benefits. Despite that, the dealership forged Susie’s finance application and stated her monthly income was \$5,408. Her finance application also stated falsely that she had been retired for twenty-five years.

#### **D. Impact on Navajo individuals, families, communities, and the Navajo Nation**

The “predatory lending practices [in] Corporate America” have a greater effect on communities of color,<sup>197</sup> working class, and under-educated populations.<sup>198</sup> Minority groups—especially African-Americans and Latinos—suffered higher losses in the subprime mortgage crisis, even where their credit scores were comparable to their white counterparts.<sup>199</sup> Similar disparities appear in credit card lending,<sup>200</sup> payday, title, tax refund anticipation, and rent-to-own consumer loans<sup>201</sup>—and these institutions are typically “concentrated in minority neighborhoods.”<sup>202</sup>

As in other areas of consumer law, auto dealers and subprime auto lenders specifically target people of color, women, and the poor. These communities bear the negative effects of subprime auto loans unduly.<sup>203</sup> A study by Ian Ayers and Peter Seigelman found that women and African-American test buyers were quoted higher car prices by dealers than male and white test buyers, even when the test buyers stated they had their own financing.<sup>204</sup> Ayers and Seigelman postulated that this differentiated race and gender treatment was based on “statistical discrimination.” The researchers found that prejudicial inferences were not based on “psychological distaste for associating with blacks and women” but on the additional costs dealers assumed minority and women buyers would have interest in or ability to pay.<sup>205</sup> Auto dealers’ racial and gender discriminatory practices appear to carry over into auto lenders’ practices. In 2014, Santander Holding Consumer USA Inc., a large nationwide subprime auto lender, was found by the Consumer Protection Bureau to have “systematically discriminated against 235,000 Black, Hispanic, and Asian-Pacific Islander borrowers” in the prior three years.<sup>206</sup>



Like other minority communities across the U.S., unfair consumer laws affect Indian Country communities disproportionately. Payday lenders and other consumer loan companies are concentrated within tribal lands and surrounding border towns.<sup>207</sup> The Seattle Times recently uncovered an elaborate, predatory scheme by national mobile home manufacturer Clayton Homes.<sup>208</sup> In its predatory lending scheme, Clayton Homes falsely represented itself as the only mobile home lender for Navajo Nation residents to steer Navajo Nation residents into its costly subprime mobile home loans and away from low interest federal and tribal lending programs.<sup>209</sup> Predatory lending practices have unusually harsh consequences on Native American individuals, families, and communities because of intergenerational poverty, barriers to building credit, and racism towards Native Americans. Subprime loans amount to “exploitation of the poor, the desperate, and /or unsophisticated”—communities most in need of protection.<sup>210</sup>

The deceitful, and sometimes illegal, sales tactics of border town auto dealers have injurious financial and emotional effects on Navajo car buyers. Subprime loans provide Navajo car buyers “with the opportunity to purchase” a needed car “but they also burden the consumer with excessive charges and fees when a consumer defaults on the payment.”<sup>211</sup> Many Navajo car buyers complain that they could not afford monthly car payments.<sup>212</sup> Further, Navajo car buyers complain of long loan terms.<sup>213</sup> As one elder woman put it, “by the time the loan is paid off, the vehicle no longer works.”<sup>214</sup> Border town dealers “will always look for ways to finance a vehicle even if it means the lender will eventually be stuck with the risks of making a loan to a consumer who does not have the capital or collateral to even buy a vehicle in the first place.”<sup>215</sup> And “a persistent pattern of predatory sales practices,” including “financing arrangements that harm and hurt the consumer,” are widespread among Navajo Nation car buyers.<sup>216</sup>

The heightened need for cars and economic circumstances among Navajo car buyers combined with the extreme sales tactics employed by border town auto dealers make subprime lending more frequent and more profitable—a bigger problem on the Navajo Nation compared to the rest of the United States.<sup>217</sup> As Navajo Nation residents’ incomes are generally low, Navajo Nation home value does not equate to homes on fee land.<sup>218</sup> Many families are already in cycles of debt and it is difficult for Navajo Nation car buyers to build credit.<sup>219</sup> Thus, Navajo car buyers frequently must resort to purchasing subprime auto loans.<sup>220</sup> Accordingly, border town auto dealers commonly use subprime lending companies to secure high interest, long-term loans for Navajo car buyers.<sup>221</sup> This means that Navajo car buyers are more strongly targeted for and impacted by subprime loans and their salespeople, dealers, lenders, and investors are profiting from Navajo car buyers at much higher

rates than they would be selling to car buyers in other demographic groups.

The bad car deals and subprime auto lending described herein is harmful to Navajo individuals and families.<sup>222</sup> Many car buyers feel remorse, embarrassment, and shame that they were “scammed or cheated” into a car purchase.<sup>223</sup> Some also experience sickness from the stress of unfair auto deals and subprime loans.<sup>224</sup> The debt accrued from these high principal, high interest loans is financially devastating to Navajo families.<sup>225</sup> Many buyers describe auto bills exceeding or nearly exceeding their monthly income, which makes it harder to meet daily survival needs.<sup>226</sup> APRs, loan terms, monthly bills, and total car buying costs near or above the families’ incomes<sup>227</sup> demonstrate why low income Navajo families disproportionately suffer from the effects of unfair car deals and subprime auto loans.

Within the impacted Navajo families, elders and families with young college students are especially vulnerable. Many Navajo elders are targeted by auto salespeople because they are English illiterate and unable to understand the words written into the contracts and, sometimes, even the spoken words in contract negotiations. Navajo elders are more likely to be victims of predatory sales because they live on fixed incomes, have “nebulous understandings of money management” and do not speak or understand English.<sup>228</sup> Border town auto dealers also target elders because of their cultural belief that a person’s verbal promise is of the highest importance.

The English and financial illiteracy among many Navajo elders and the high value many elders place on verbal promises benefit auto dealers in two ways: (1) many elders believe the salesperson’s oral promises and (2) auto dealers can change the terms of their promises on paper without elders noticing.<sup>229</sup> In some instances some less than scrupulous immediate family members of Navajo elder car buyers use the vulnerabilities of their relative by getting him or her to purchase cars for the younger relative or cosign on the younger relative’s car loans.<sup>230</sup>

Dealers also play into the familial closeness and sense of shared responsibility of many traditional Navajo families by pressuring car buyers’ relatives to trade in vehicles or take over old car loans so a contract can be made for a relative that day.<sup>231</sup> Unfair border town auto deals and subprime loans to college students and their families also illustrate barriers to building intergenerational wealth and higher education among Navajo car buyers.<sup>232</sup>

The cumulative effects of the individual and familial hardships created by unfair auto deals and subprime auto loans disproportionately threaten the welfare of larger Navajo communities and the Navajo Nation as a whole. Over half of Navajo car buyers surveyed reported unfair auto deals and high interest long term subprime car loans,<sup>233</sup> including repossessions, yo-yo

sales, threats, and the loss of employment related to their car purchase.<sup>234</sup> Meanwhile, Navajo Nation car buyers' "serious purchasing power"<sup>235</sup> feeds the border town auto dealers and state treasuries—but not the Navajo people or the Navajo Nation's economy. The exacerbated circumstances of Navajo subprime auto loans threaten the Navajo Nation economy, and ultimately contribute to the deficits in national auto lending.

### **III. Solutions to the unfair auto deal and subprime lending problem among Navajo car buyers**

While unfair auto deals and subprime lending have been a longstanding practice in Navajo Nation border towns, this problem is not without remedies. Because it is so pervasive, activists seeking a solution need to take a multi-faceted approach. However, any solution that creates barriers to car sales and reduces the population that is eligible to purchase a car has the unintended side-effect of ensuring that many Navajo car buyers cannot purchase a car. As car ownership is essential for survival for Navajo people, not owning a working vehicle could be far more problematic than debt. Solutions to the unfair auto deal and subprime lending problem among Navajo car buyers need to account for this problem.

#### **A. Play "the game": A (non)solution**

To survive the unfair car deals described above, some Navajo car buyers, have developed a resourceful (non)solution to the unfair auto deal and subprime lending. I characterize it as the "game" and is a synthesis of the Navajo car buyer data presented above. Instead of resisting these often unfair and high interest loans some Navajo car buyers have learned to play lenders at their own game.<sup>236</sup>

First, a Navajo car buyer purchases a car from a dealer at a high interest rate, perhaps knowing that it will be an unfair deal. Even so, the buyer considers it the only available option because of a low income and credit score. The buyer leaves the dealership with the car and a very high monthly payment, knowing he or she will not be able to pay them. Meanwhile, the dealer and salespeople benefit immediately by cashing in on the car's full sale price and any kickbacks as soon as they sell the buyer's contract to the lender. Then the buyer and lender begin a game of chicken, to see who gives in first.

If the lender can force the buyer into making enough payments to cover the cost of the vehicle plus profit the lender wins. This happens relatively fast because the payments include the high interest. However, if the buyer stops paying, uses the car, and gets the car repossessed before the lender profits on the sale, the buyer wins. The buyer can then go out and get another car at a similarly high interest rate and repeat the process.

This approach requires the buyer to disregard the impact this game will have on his or her credit. I theorize some Navajo car buyers have accepted being in debt and will pay while they can to keep the car. They may go into car negotiations knowing that their interest rate will be astronomical but will have no other way to acquire a necessary vehicle. They may expect and face repossession, but the immediate life sustaining benefits of having a car outweigh the losses. In this circumstance, the buyer gains the use of a vehicle while the dealer loses out on the buyer's payments for as long as possible. This allows those with low credit scores, perpetuated by poverty and debt, to use a car. This game is especially probable given that many border town dealers are willing to forge financial applications. Further, the Navajo Nation's protective repossession provisions enable buyers who can no longer make payments to use the car for a longer period before repossession than a buyer living outside the Navajo Nation would typically have.<sup>237</sup>

However, the risks and losses for a buyer who is successful at this "game" are devastating in the long term. The buyer's losses in this situation are all of the stresses involved with unreasonably high monthly payments, including further credit destruction, vehicle repossession, bill collection calls, and continued barriers to acquiring a vehicle. The biggest problem with this approach is that it continues to trap car buyers in a debt cycle.

The savvy reader will ask "but what about the deficiency cost left for the buyer to pay after the repossession of the vehicle?" The answer to this question brings unfair border town auto dealers and subprime lending full circle by "churning" the car. If a car worth \$15,000 is repossessed after the buyer made \$10,000 in payments, the lending agency auctions the car to a dealer for \$12,000. This would leave the original buyer with a \$3,000 deficiency still owed. However, if the purchasing dealer can resell the car to another Navajo car buyer for \$21,000, it would cover both the \$3,000 deficiency and the \$12,000 price paid for the car, plus make the dealer \$6,000 in profit. With such high profits, the dealer can afford to pay the original buyer's deficiency, leaving the original buyer open to a new unfair car deal. Thus, churning perpetuates unreasonable markups and cycles of debt for other Navajo car buyers.

Although dealers', lenders', and buyers' maneuvers in this game are less than noble, the Navajo car buyer's role is a creative use of personal agency.<sup>238</sup> The experience of living with racism and poverty in almost every aspect of daily life,<sup>239</sup> which includes exploitation in regular transactions, has led to resilience and ingenuity among Navajo car buyers that allow them to work the auto sales system to their short-term advantage. Playing the game does not result in turning the tables because whether Navajo car buyers "lose" or "win" the game, they remain in growing cycles of debt and stress. Thus the game is not financially, emotionally, or economically sustainable.

## B. Prospective solutions

Education about the unfair sales tactics and buyer's rights in car sales and lending could be presented through multiple methods. The public needs access to information about predatory lending schemes and aggressive sales tactics. This information needs to be provided in Navajo and English. Outreach efforts should include the radio, local newspapers, and word of mouth. In this outreach, potential car buyers need to be educated specifically with information that border town salesmen, dealers, and lenders are looking to make the highest profit and have no incentive to ensure the car buyer can afford the vehicle.<sup>240</sup>

Further, Navajo people must be educated on the components of an auto contract and a buyer's rights in contract negotiations.<sup>241</sup> Again, any education materials need to be provided in Navajo and English. While brochures on this topic exist, they are often useless because many Navajo elders do not fully comprehend written English, especially if it contains difficult auto and financial jargon. Informational sessions conducted in the Navajo language could address these education issues. Such sessions could be presented at Navajo Nation fairs, schools, chapter houses, and senior centers. Another way to get this information out would be a series of video public service announcements with clear explanations in both English and Navajo shown via YouTube, local radio stations, and television.

Finally, formal financial literacy education in schools within the Navajo Nation and in border towns should be mandatory. This would be especially helpful to high school and community college students so that they will not be duped into an unfair auto deal or a subprime loan that would destroy their credit the first time they purchase a car. Ideally, those students would pass information on to their family members. Targeting the younger generation, who have yet to establish their credit history with financial literacy would allow the Navajo Nation to, hopefully, break the cycle of unfair auto deals and low credit.

Second, the Navajo Nation government should deny support to border town auto dealers that use unfair sales tactics and prey on Navajo buyers. The Navajo government should take steps to prevent future predatory practices. One way to deny Navajo Nation support is to prohibit bad border town auto dealers from advertising on Navajo Nation land, local television and radio, fairs, sporting events, and at tribal casinos.

To address predatory practices the Navajo Nation could also develop a code of ethics, applicable to border town auto dealers. The foundation for this ethical code could be the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").<sup>242</sup> The ethical code could require border

town salespeople and dealers to undergo mandatory training sessions with curriculum on unfair auto sales practices. The ethical code could also establish a public rating system, showing prospective Navajo car buyers which dealers engage in ethical transactions. A rating system would also incentivize dealers to compete for high ratings.

However, these two solutions would limit Navajo buyers' access to dealers. To address the limited dealership options, and to empower the Navajo Nation to harness members' purchasing power, the Navajo Nation could create car dealerships within its borders.<sup>243</sup> Creating car dealerships would stimulate the Navajo Nation economy, be convenient for Navajo Nation residents, and create a way for the Navajo Nation legislature and courts to regulate auto sales to Navajo buyers. Further, the hundreds of millions of dollars in Navajo car buyers' spending power could benefit Navajo people by increasing Navajo Nation infrastructure, educational quality, employment, and living conditions.

Third, to address the unfair deals and practices, the Navajo car buyers could pursue litigation. For example, the ACLU or other non-profits could sue for unfair practices.<sup>244</sup> However, up to this point, very few state, federal and tribal judges have heard Navajo car buyers' claims because auto dealers settle claims before their unscrupulous practices are made public.<sup>245</sup>

Fourth, to address unfair car deals and subprime loans, increased state, tribal, or federal regulations on car dealers' activities should be imposed. For example, interest rate caps in Arizona, New Mexico, and Utah would reduce the exorbitantly high APR rates and finance charges that Navajo car buyers are currently being charged. This alone would not result in any sweeping change and alone would also limit many Navajo car buyers' abilities to finance a car; and is therefore an impractical solution.

Fifth, reducing interest rates would combat Navajo car buyers' financial losses and debt cycles. One radical way to eliminate the high interest payments dealers and lenders charge is through the traditional lending circle.<sup>246</sup> In lending circles, groups of people needing loans contribute to a common pool and periodically pay one person a loan. For low-income individuals who cannot make large purchases or investments in cash, lending circles are much easier than a savings account because they can contribute a small amount on a regular basis and then receive a large amount when needed. In the border town auto deal situation, a participant in a lending circle could pay the full cash price of a car without having to worry about interest. However, there could be a lot of distrust of informal lending circles and it could be difficult to implement among low-income borrowers.<sup>247</sup>

Finally, Navajo buyers could join a credit union in an effort to decrease APRs.<sup>248</sup> The first "credit unions were built around people who had 'a com-

monality of needs,' because '[p]eople working, or associating, or living together in compact communities knew each other and were usually aware of a colleague's ability or disposition to repay a loan.'"<sup>249</sup> Credit unions are different than banks because they do not loan their own revenue, instead they collect "savings funds from members' accounts" and distribute "them in the form of interest-earning loans and other investments."<sup>250</sup> Thus, buyers with low credit benefit from the lower interest rates offered by credit unions. Navajo car buyers who want to take advantage of these low interest rates could establish membership with a credit union sometime before their purchase.<sup>251</sup> In the ideal situation, the Navajo Nation could establish its own credit union tailored to Navajo Nation citizens' needs.

## Conclusion

Navajo people are suffering the consequences of high debt and pass these problems down to the next generation because cars are essential to Navajo survival. Meanwhile, through racist, deceptive, and exploitive practices, border town auto dealers and subprime lenders target and exploit a vulnerable minority group. These practices run counter to racial and social justice. Navajo car buyers, advocates, teachers, the Navajo Nation, border town car dealers and sales people, and border town communities must take steps to end the unfair auto deals and subprime lending occurring on and near the Navajo Nation.

Millions of dollars have been stripped from the Navajo economy. These unfair circumstances cause immense stress. While the (non)solution game allows some Navajo car buyers to use a vehicle, it is not sustainable. Replacing unfair border town auto deals, subprime auto loans, and the "game" with a comprehensive and thoughtful combination of the solutions could halt the exploitation occurring with border town auto sales and, instead, empower and Navajo car buyers, families, and communities by making them financially stable.

---

## NOTES

1. NAVAJO NATION HUMAN RIGHTS COMM'N, ASSESSING ABUSE OF NAVAJO CUSTOMERS WHEN PURCHASING VEHICLES IN BORDER TOWNS 77 (2014), *available at* [http://www.nnhrc.navajo-nsn.gov/docs/NewsRptResolution/PublicHearingReports/NNHRC\\_AutoReport.pdf](http://www.nnhrc.navajo-nsn.gov/docs/NewsRptResolution/PublicHearingReports/NNHRC_AutoReport.pdf) [hereinafter ASSESSING ABUSE].
2. The term "Navajo Nation" is used throughout this article to refer to the land base of the Navajo tribe held in trust by the U.S. Government. In 1868, after the U.S. Government's forced removal of the Navajo tribe from their homelands, the Treaty Between the United States of America and the Navajo Tribe of Indians permitted the Navajo tribe to return to their homelands as well as established a large portion of that area as the Navajo reservation. *See* Treaty with the Navaho, U.S. -Navajo Nation, art. II, *ratified* July 25, 1868, 15 Stats. 667, *available at* <http://digital.library.okstate.edu/kappler/vol2/treaties/nav1015.htm>. Although this area is sometimes referred to as the Navajo Reservation, to emphasize



the sovereign status of the Navajo tribe, I employ the term “Navajo Nation” to refer to the land within the external boundaries of the Navajo Reservation.

3. ASSESSING ABUSE, *supra* note 1, at 41 (stating there are 115 auto dealers in Gallup and Farmington, New Mexico alone).
4. Chunlin Leonhard, *Negative Externalities and Subprime Auto Financing: Time to Let the Hanging Paragraph Go*, 45 U. TOL. L. REV. 267, 280 (2014).
5. The Navajo Nation Elder Protection Act, 29 N.N.C § 1802 (2009) (this Act acknowledges the special respect given to Navajo elders in Navajo culture stating, “It is the policy of the Navajo Nation to continue the traditional respect which members of the Navajo Nation have for Diné elders. Elders are valuable resources to the Nation because they are repositories and custodians of Navajo history, culture, language, and tradition; vested in Diné elders is the hope of the Navajo Nation to retain its tribal history, culture, language and tradition. Navajo elders provide stability by being role models for their children and grandchildren to whom they demonstrate long-standing commitment to family, marriage, employment, profession and other social institutions. Based upon these premises, it is in the Nation’s best interest and welfare to protect its elders from abuse, neglect, mistreatment, exploitation, and other mistreatment.”).
6. Leonhard, *supra* note 4, at 280. *See also* ASSESSING ABUSE, *supra* note 1, at 14 (stating that subprime loans are “ripe for the significant number of Navajo consumers who have poor credit scores”).
7. ASSESSING ABUSE, *supra* note 1, at 19. Because Many Navajo Nation residents live on homesite leases rather than own the property in fee, homeownership takes different forms and value than it does on private property elsewhere in the U.S. *Cf.* Navajo Nation Land Dept., HOMESITE, NAVAJO LAND DEPT., <http://www.dinehbikeyah.org/homesite/index> (last visited on Apr. 11, 2017) (explaining five Navajo Nation offices “assist clients in obtaining a one-acre residential lease for 75 years. The Leasee has an option of renewal of lease or assign the lease to another individuals or even terminate the lease. The lease provides an opportunity for the Navajo families to build a home or even mortgage a home with lease hold interest.”).
8. ASSESSING ABUSE, *supra* note 1.
9. This is assuming the new or used car is being bought from a dealer, not an individual car owner.
10. Leonhard, *supra* note 4, at 273.
11. Interview with Adam Oakey, UNM Law Student, Former Auto Salesmen, in Albuquerque, N.M. (Apr. 11, 2016).
12. ASSESSING ABUSE, *supra* note 1, at 42 (stating the debt to income rule: a potential buyer should be granted an auto loan if around 40 percent of the buyer’s income is spent on monthly bills including the car payment, and 60 percent of the buyer’s income is spent on groceries, gas, entertainment, and household needs).
13. Notably, these loans do not usually stay in the hands of the original lender. Instead, they are almost always bundled and resold to other lenders as a single instrument that investors can buy in a hedge fund or high yield mutual fund. The last link in this chain is that individual investors can purchase stock in the bundled funds and trade this stock with other investors for profit.
14. Leonhard, *supra* note 4, at 272.
15. *Id.* *See also* Jeff Kirk, *Subprime Auto Loans the Rising Menace of Wall Street’s Latest Darling*, 18 J. CONSUMER & COM. L. 72, 73 (2014) (stating in 2013, 91 percent of Americans used their personal vehicles to reach their workplaces, while only 27 percent of American workplaces were accessible via public transportation).
16. Leonhard, *supra* note 4, at 273.

17. R. Carter Pate et al., *Subprime Auto Finance: The Year of Bankruptcies*, AM. BANKR. INST. J. 30, 31 (1998).
18. *Credit Scores*, FED. TRADE COMM., <https://www.consumer.ftc.gov/articles/0152-credit-scores> (last visited Apr. 12, 2017) (stating a credit score is a number used by lending companies to decide the terms and interest rate a borrower will pay on a loan). There are several steps involved in the calculation of a borrower's credit score. First, credit reporting agencies continually collect and store information on every American's borrowing habits, including each individual's bill-paying history, account type, number, and age, records of late and on-time bill payments, collection actions, and outstanding debt. Second, these credit reporting agencies use this information to draft a credit report. Third, when a borrower prepares to make a large purchase such as a car, lending companies buy a credit report for the individual borrower from a credit reporting agency. Next, lending companies use statistical programs to compare the information in the individual borrower's credit report to the information of other consumers with similar profiles. Under the Equal Credit Opportunity Act (ECOA), a lending company's statistical scoring system may not use race, sex, marital status, national origin, or religion as factors to predict whether a borrower will repay a loan. Age may be used as a factor, but elderly applicants must be treated equally in the statistical program. The program awards individual borrowers points for each factor that shows he or she is likely to repay a debt. Finally, the statistical program totals the points to create the borrower's credit score. *See also* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 9 (2014) (stating that credit scores generally range between 300 and 850).
19. Evan Hendricks, *Credit Reports, Credit Checks, Credit Scores*, 28 GPSOLO 32, 34 (2011), available at [http://www.americanbar.org/content/dam/aba/publications/gp\\_solo\\_magazine/full\\_issue\\_2011\\_july\\_august\\_28\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/full_issue_2011_july_august_28_5.authcheckdam.pdf). *See also* Matt Jones, *7 Simple Steps to a Subprime Auto Loan*, EDMUNDS.COM (Mar. 2, 2015), <http://www.edmunds.com/car-buying/7-simple-steps-to-a-subprime-auto-loan.html>.
20. *Charge-Off*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/chargeoff.asp#ixzz46h51tu1j> (last visited Apr. 12, 2017) (defining charge-off as a "debt that is deemed uncollectible by the reporting firm and is subsequently written off").
21. Pate et al., *supra* note 17, at 30 (defining low-household incomes as incomes "of 20,000 to 40,000 annually").
22. Kirk, *supra* note 15, at 72–73.
23. *Id.* at 72.
24. Pate et al., *supra* note 17, at 30.
25. *Id.*
26. *Id.*
27. *Id.*
28. Leonhard, *supra* note 4, at 273–74.
29. *Id.* (stating in addition to the purchase price of a car taxes, titles and other fees are often included in the "amount financed").
30. *Security Interest*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/security-interest.asp> (last visited Apr. 12, 2017) (defining security interest as a "legal claim on collateral that has been pledged, usually to obtain a loan"). In the auto loan context, a security interest means the lender holds the title to the car until the borrower has repaid the full price of the financed amount and the accrued interest to the lender).
31. Leonhard, *supra* note 4, at 273–74.
32. Kirk, *supra* note 15, at 72 (noting that interest rates for subprime auto loans could be as high as 30 percent); *see also* Pate et al., *supra* note 17, at 30 (noting that the typical subprime auto loans in 1998 ranged between \$5,000 and \$14,000 with APR rates usually exceeding 15 percent at an averaged 22 percent).

33. Leonhard, *supra* note 4, at 274.
34. Kirk, *supra* note 15, at 73 (reporting that Santander Consumer USA, Inc., one such lender that specializes in subprime loans, financed almost one quarter of all the subprime auto loans made across the United States in the first half of 2014).
35. *Id.* (listing General Motors Acceptance Corp., Ford Motor Credit, and Toyota Motor Credit as common dealer financing arms). *See also* Leonhard, *supra* note 4, at 274 (stating auto manufacturers operate lending companies that offer “attractive financing terms and relaxed credit standards” in order to sell more cars).
36. Kirk, *supra* note 15, at 73 (stating Wells Fargo “manages a total of \$50 billion in auto loans, and in 2013, 17 percent of its loans were given to consumers with credit scores of 600 or less”).
37. Roger Thorne, *What is Considered High Interest on a Car Loan?*, THE NEST, <http://budgeting.thenest.com/considered-high-interest-car-loan-24414.html> (last visited Apr. 12, 2017).
38. Jessica Silver-Greenberg & Michael Corkey, *In a Subprime Bubble for Used Cars, Borrowers Pay Sky-High Rates*, N.Y. TIMES (July 19, 2014, 12:36 PM), <http://dealbook.nytimes.com/2014/07/19/in-a-subprime-bubble-for-used-cars-unfit-borrowers-pay-sky-high-rates/>.
39. Leonhard, *supra* note 4, at 280.
40. Ellen Barrie Corenswet, *I Can Get It for You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081, 1081–82 (1975).
41. Leonhard, *supra* note 4, at 275.
42. *Id.* at 272. *See also* Interview with Adam Oakey, *supra* note 11 (stating car salesmen only earn between 25 percent and 35 percent of the profit of a car sale, and this percentage increases by the quantity of cars sold. In some cases, this equates to only about \$100 for 4 or 5 hours of sales work.).
43. Interview with Adam Oakey, *supra* note 11 (explaining that the car lot where he worked made more “points” as salespeople negotiated higher loan interest rates and car salesmen received bonuses based on these points.). *See also* Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL’Y 165, 183 (2010).
44. Adam Levitin, *Toward a Universal Ability to Repay Requirement*, CREDIT SLIPS, <http://www.creditslips.org/creditslips/2014/08/toward-a-universal-ability-to-repay-requirement.html> (last visited Apr. 12, 2017).
45. *Id.*
46. *What is Guaranteed Auto Protection (GAP) Insurance?* CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/askcfpb/797/my-dealer-offered-me-guaranteed-auto-protection-gap-insurance-what-it.html> (last visited Apr. 12, 2017) (defining GAP insurance as covering “the difference between what your insurance pays if your vehicle is totaled and the damage to your vehicle exceeds the actual cash value (ACV), and the amount you still owe the lender at that point”).
47. Levitin, *supra* note 44.
48. ASSESSING ABUSE, *supra* note 1, at 72.
49. *Id.*
50. *Id.*
51. Leonhard, *supra* note 4, at 274–75.
52. *Id.* at 281–82.
53. *Id.* at 282.
54. Pate et al., *supra* note 17, at 30.
55. Leonhard, *supra* note 4, at 272.

56. Levitin, *supra* note 44.
57. Leonhard, *supra* note 4, at 281.
58. CharCretia V. Di Bartolo & John J. Tomaine, *Indirect Lending: It's Not Personal, It's Just Business*, 19 FIDELITY L.J. 53, 61–62 (2013).
59. *Id.* at 61.
60. See Leonhard, *supra* note 4, at 267–68 (stating “The Hanging Paragraph [of 11 U.S.C. § 1325(a)(9)] makes car loans non-dischargeable in a Chapter 13 individual bankruptcy under certain conditions if the loans qualify as purchase-money security interest (‘PMSI’) loans, i.e., when borrowers obtained the loans to buy new cars.”).
61. Leonhard, *supra* note 4, at 280.
62. *Id.*
63. Conrenswet, *supra* note 40, at 1081–82.
64. Kirk, *supra* note 15, at 73 (stating “modern technology has given lenders the ability to disable vehicles via any computer or smartphone with Internet access. So-called ‘driver-interrupt devices’ allow both lenders and ‘repo men’ to disable a car at the click of a mouse button until any outstanding loan balance has been paid, and they are increasingly being installed in vehicles purchased with subprime loans”); see also Interview with Adam Oakey, *supra* note 11 (stating that he is acquainted with a border town car dealer who does in-house financing at the highest interest rate permitted in New Mexico, installs electronic repossession devices, monitors buyer’s locations through GPS, and is enthusiastic about bringing cars back to his lot).
65. Levitin, *supra* note 44.
66. *Id.*
67. Kirk, *supra* note 15, at 73.
68. *Id.* at 72.
69. *Id.*
70. Leonhard, *supra* note 4, at 283.
71. Kirk, *supra* note 15, at 72.
72. Leonhard, *supra* note 4, at 280 (stating this lower risk has to do with the fact that, unlike home mortgagors, auto borrowers remain responsible for deficient payments after bankruptcy).
73. Kirk, *supra* note 15, at 72.
74. *Id.* at 73.
75. Leonhard, *supra* note 4, at 283.
76. Kirk, *supra* note 15, at 73.
77. *Id.* See also Leonhard, *supra* note 4, at 282.
78. Leonhard, *supra* note 4, at 271.
79. ASSESSING ABUSE, *supra* note 1, at 13.
80. Leonhard, *supra* note 4, at 284.
81. Kirk, *supra* note 15, at 73.
82. Leonhard, *supra* note 4, at 283.
83. *Id.* at 280.
84. Kirk, *supra* note 15, at 72.
85. *Id.*
86. *Predatory Lending*, THE FREE DICTIONARY, <http://financial-dictionary.thefreedictionary.com/Predatory+lending> (last visited Apr. 13, 2017) (defining predatory lending as the”

practice in which a loan is made to a borrower in the hope or expectation that the borrower will default”).

87. Johnson, *supra* note 43, at 176–77.
88. Leonhard, *supra* note 4, at 281.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 284.
93. *Id.* at 287.
94. Leonhard, *supra* note 4.
95. Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. \_\_ (forthcoming 2017) (on file with Professor Nathalie Martin, University of New Mexico School of Law) (reporting “black individuals and households are particularly susceptible to falling into debt because black families face a historical financial disadvantage that began in slavery and therefore, lack the financial safety net of accumulated wealth enjoyed by many whites. This is commonly referred to as a ‘wealth gap.’”).
96. See Leonhard, *supra* note 4, at 287.
97. *Id.* at 288.
98. *Id.*
99. *Id.*
100. *Id.* at 285 (recalling that the cause of the mortgage crisis was lenders with strong incentives for immediate profit pushing subprime loans in a quantity over quality manner that eventually caused a “bubble” in which subprime borrowers were no longer able to pay their home mortgages at rates that could keep investors’ collateralized loans afloat).
101. Leonhard, *supra* note 4, at 285.
102. Dan Frosch, *U.S. to Pay Navajo Nation \$554 Million: Payment Settles Long-Standing Claims U.S. Mismanaged Funds, Resources*, WALL ST. J. (Sept. 24, 2014, 2:46 PM), <http://www.wsj.com/articles/u-s-to-pay-navajo-nation-554-million-1411584416>.
103. *Id.*
104. ARIZONA RURAL POLICY INSTITUTE, DEMOGRAPHIC ANALYSIS OF THE NAVAJO NATION USING 2010 CENSUS AND 2010 AMERICAN COMMUNITY SURVEY ESTIMATES 6 (2016), available at <http://www.azcia.gov/Documents/Links/DemoProfiles/Navajo%20Nation.pdf> (reporting 180,462 tribal members lived within the Navajo Nation borders in 2010).
105. RAYMOND FRIDAY LOCKE, BOOK OF THE NAVAJO 26–27 (1992).
106. GOOGLE MAPS, <https://www.google.com/maps/@35.0473125,-106.6405675,12z> (last visited Apr. 22, 2016) (obtaining mileage from Google maps walk setting measuring Page, AZ to Flagstaff AZ (130 miles), Bluff, Utah to St. Johns, Arizona (198 miles), Farmington, New Mexico to Ramah, New Mexico (141 miles), and Cameron, Arizona to Tohajilee, New Mexico (307 miles) and providing rough estimates of median north to south and east to west mileage).
107. LARRY UTE JOE, NAVAJO NATION SCHOOL BUS ROUTES 16, available at <http://www.nmlegis.gov/lcs/handouts/IAC%20093015%20Item%207%20Navajo%20Nation%20School%20Bus%20Routes.pdf> (last visited Apr. 22, 2016) (stating that there are 6,217 miles of Bureau of Indian Affairs roads, 5,010 miles of Navajo Nation roads, 1,642 miles of state roads, and 1,864 miles of county roads within the Navajo Nation).
108. *Id.* (stating that of the public roads within the Navajo Nation, 3,381 miles (23 percent) are paved, 11,352 miles (76 percent) are dirt, and 234 miles are graveled (1 percent)).
109. *Cf.* NAVAJO TRANSIT SYSTEM, <http://www.navajotransit.com> (last visited Apr. 23, 2016) (showing limited Navajo Nation bus routes).

110. Davis v. Means, 7 Navajo Rptr. 100, 102 (Navajo 1994).
111. ASSESSING ABUSE, *supra* note 1, at 19.
112. Interview with Jonah Begay, Navajo Nation Resident in Albuquerque, N.M. (Mar. 26, 2014) (His mother has a 350 gallon and 250 gallon water tank, and she lives 17 miles from a water source. She makes one trip per day in the winter and two trips per day in the summer for water for her household and livestock. The family's home is heated by coal in the winter, which is brought by pick-up truck from 90 miles away.).
113. Estate of Navajo Joe, 4 Navajo Rptr. 99, 99 (Nav. Ct. App. 1983) (stating "[i]n Navajo common law a grazing permit is one of the most important items of property which a Navajo may own. A permit means that an individual may have the means of sustenance of a traditional Navajo sheep, provide income, food, and clothing.").
114. ASSESSING ABUSE, *supra* note 1, at 20 (stating that Navajo students currently perform below national academic standards).
115. ARIZONA POLICY INSTITUTE, *supra* note 104, at 36 (stating that this classification is based on U.S. census bureau poverty thresholds which define "severely poor" as living in a family with income below one half of their poverty threshold as determined by the U.S. census bureau).
116. *Id.* at 29; *see also* ASSESSING ABUSE, *supra* note 1, at 20 (reporting that in 2007 the per capita income of Navajo Nation residents was \$7,122).
117. Felicia Fonseca, *Navajo Top List of Native Language Speakers in the US*, BOSTON.COM (Dec. 14, 2011), [http://archive.boston.com/news/nation/articles/2011/12/14-navajo\\_tops\\_list\\_of\\_native\\_language\\_speakers\\_in\\_us/](http://archive.boston.com/news/nation/articles/2011/12/14-navajo_tops_list_of_native_language_speakers_in_us/) (stating there were about 169,000 Navajo language speakers in 2011 but that the language was dwindling among younger generations).
118. Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 3 ARIZ. L. REV. 819, 864–65 (2001).
119. *Id.* at 866–74.
120. *Id.*
121. GOOGLE MAPS, *supra* note 106 (searching "Navajo Nation").
122. ASSESSING ABUSE, *supra* note 1, at 20.
123. GOOGLE MAPS, *supra* note 106 (using driving mode measuring from Chinle, Arizona, commonly thought of and the center of the Navajo Nation, to Gallup, New Mexico, (91 miles, 1 hour, 38 minutes), to Farmington, New Mexico (111 miles 2 hours, 6 minutes), and to Flagstaff, Arizona (170 miles, 2 hours, 51 minutes). *See also* ASSESSING ABUSE, *supra* note 1, at 21 (stating that most Navajo Nation residents have to travel 60 miles or more for basic goods and services); Fort Defiance Housing Corp. v. Lowe, No. SC-CV-32-03, slip op. at 6–7 (Navajo Apr. 5, 2004) (stating "[w]e take judicial notice of the fact that distances within the Navajo Nation are great, and transportation is sometimes difficult").
124. LARRY UTE JOE, *supra* note 07, at 2–3.
125. ASSESSING ABUSE, *supra* note 1, at 20–21.
126. *Id.* at 40.
127. NAVAJO NATION HUMAN RIGHTS COMM'N, ASSESSING RACE RELATIONS BETWEEN NAVAJOS AND NON-NAVAJOS 2008–2009; A VIEW OF BORDER TOWN RACE RELATIONS, (2010).
128. ASSESSING ABUSE, *supra* note 1, at 2.
129. *Id.* *See also* Navajo Nation Consumer Practices Act, 5 N.N.C. §§ 1101–1161 (2009).
130. 5 N.N.C. §§ 1101–1161; *see also* ASSESSING ABUSE, *supra* note 1, at 56.
131. ASSESSING ABUSE, *supra* note 1, at 56.

132. *See* 7 N.N.C. § 621 (2009).
133. ASSESSING ABUSE, *supra* note 1, at 17 (stating the point of sale affects court jurisdiction).
134. ASSESSING ABUSE, *supra* note 1 (explaining how border town auto dealers and lenders prey on Navajo Nation tribal members who purchase vehicles from dealers located in the vicinity of the Navajo Nation). The Report illustrates the range of exploitative practices that many Navajo Nation border town auto salespeople, dealers, and lenders use to profit from Navajo Nation members' heightened need for cars and trucks. The Report contains information collected from a survey of Navajo car buyers, testimony of Navajo car buyers recorded at public hearings, and summaries of car buyer complaints submitted to the Commission.
135. *Id.* at 46.
136. *Id.* at 9.
137. *Id.*
138. *Id.* at 61, 64-65 (recalling how various Navajo elders signed auto contracts they did not understand).
139. *Id.* at 48.
140. *Id.* at 48.
141. ASSESSING ABUSE, *supra* note 1, at 48, 72, 74.
142. Telephone Interview with Stewart Begay, Junior Account Executive, KTNN (Feb. 17, 2017) (confirming that auto dealers sent KTNN, the Navajo Nation radio station, their advertisements, where KTNN translates the advertisements into Navajo while reading them on the air. Mr. Begay also confirmed that the content of these advertisements is often tailored to Navajo car buyers.).
143. ASSESSING ABUSE, *supra* note 1, at 42-43. *See also* Mailer from Brad Francis Chrysler Jeep Dodge Ram (Dec. 13, 2016) (on file with author) (containing a "100 percent credit approval guarantee," a fake car key, a "Scratch, Match, and Win" game, a fake check for \$2,497.00 addressed to "Valued Customer" and more).
144. ASSESSING ABUSE, *supra* note 1, at 42. This government support deceives Navajo Nation consumers into thinking auto dealers are reputable.
145. *Id.* at Letter of Transmittal.
146. *Id.* at 61 (describing how a vehicle maintenance charge was added when it was supposed to be included in an elderly man's auto contract).
147. *Id.* at 72-73.
148. ASSESSING ABUSE, *supra* note 1.
149. *Id.* at 68-69.
150. *Id.* at 77.
151. *Id.* at 60-61.
152. *Id.* at 75.
153. *Id.* at 70 (reporting Sallie Bitsuie was sold a faulty vehicle. After she returned it to the lot and purchased a different vehicle, she found out the first car trade-in was not counted and the returned vehicle had been sold at auction. She was left paying the deficiency on the first car and the monthly payments on the second car.). *See also id.* at 62 (reporting an elderly Navajo man was sold two vehicles from the same dealer in the same week). *Accord*, In my personal experience, in a case where two cars were sold at once showed that the Navajo elder car buyer believed that she could return and exchange a faulty car to a dealer just as other faulty products can be returned to the stores where they are bought.
154. ASSESSING ABUSE, *supra* note 1, at 19.
155. *Id.* at 10.



156. *Id.* at 40.
157. *Id.*
158. *Id.*
159. *Id.* at 31.
160. ASSESSING ABUSE, *supra* note 1. *See also id.* at 10; *id.* at 63 (reporting Bahe Begay who had never been to school and never became literate in English, was not allowed to use his relative as an interpreter and, as a result, did not know what was in his auto contract).
161. *Id.* at 41. *See also id.* at 59–61 (reporting Eugene Price and Leo Gishie were kept waiting all day and felt tired when they were rushed into signing their contracts).
162. *Id.* at 31.
163. *Id.* at 61 (describing how a border town auto dealer held Lee Gishie keys and driver's license hostage for hours, and Mr. Gishie had to call the police before the dealer would return them). *See also id.* at 77.
164. *Id.* at 76.
165. *Id.* at 13–14. *See also id.* at 41 (stating “[t]oo often, automobile dealership personnel encroach on Navajo Nation lands and entice elders and non-English speaking Navajo citizens to buy vehicles or commit to turn over personal info that [inevitably] opens door to future pestering”).
166. Based on my personal experiences working with Navajo consumer law clients.
167. ASSESSING ABUSE, *supra* note 1, at 62.
168. *Id.* at 67 (describing how a 92-year old woman was pressured into a credit check at the grocery store. She was then told she was eligible for a new car despite her protests that she had a vehicle repossessed on which she still owed, that she didn't drive, and that she didn't have a license. The salesman told her that her name would be on the contract for ten days, then her granddaughter's name would be added. Later, the salesman came to her home where he further pressured her to the point that she felt physically, emotionally, and mentally sick. Adding insult to injury, when she complained about the employee to the dealership, she was made an offer to buy a different vehicle.). *See also id.* at 62 (describing how a salesman brought a truck and contract to elderly couple's home when they were alone, and they “felt compelled to sign”).
169. *Id.* at 14.
170. *Id.* at 41.
171. *Id.* at 31. *See also* Interview with Adam Oakey, *supra* note 11 (stating some auto sales people encouraged buyers to lie about their incomes on finance applications).
172. Katherine J. Wise, *A Matter of Trust: The Elimination of Federally Funded Legal Services on the Navajo Nation*, 21 AM. INDIAN L. REV. 157, 166 n.52 (1997).
173. Levitin, *supra* note 44.
174. Gregory R. Ingalsbe & Raymond G. Ingalsbe, *Spot Delivery: Why It Is Illegal and Why Car Dealers Have Been Getting Away with Theft for So Long*, 38 N. KY. L. REV. 221, 222 (2011) (stating that spot-delivery creates a “Hobson's choice” because the dealer takes “the consumer out of the car-buying market, let[s] him or her fall in love with the car, and call[s] him or her back to the dealership (as if on a yo-yo string) knowing full-well that the consumer will, and often must, agree to the new, more expensive terms-classic bait and switch”).
175. ASSESSING ABUSE, *supra* note 1, at 74–75.
176. *Id.* at 74–75.
177. *Id.* at 60 (reporting that Eugene Price had a truck for one day, and it would not start. He was lectured by the dealership personnel about leaving the lights on when there was actually trouble with an ignition switch the dealer had put on); *id.* at 65 (Kee Smiley was sold

a faulty vehicle in Gallup which had broken down three times, and “[t]he dealer refused to meet with him or repair the truck.”). *See also id.* at 70, 77 (reporting Lucille Platero purchased a vehicle whose pump failed and the spark plugs fell out. Her contract was removed from the glove compartment when she took it to the dealer for repairs.).

178. *Id.* at 60.
179. *Id.* at 63–64.
180. *Id.* at 76–77.
181. ASSESSING ABUSE, *supra* note 1, at 71.
182. *Id.* at 61.
183. 7 N.N.C. § 621.
184. ASSESSING ABUSE, *supra* note 1, at 67. *See also id.* at 72.
185. *Id.* at 66.
186. *Id.* at 67.
187. *Id.* at 66.
188. These contracts were obtained from DNA People’s Legal Services, the primary legal aid provider on the Navajo Nation (on file with author).
189. Signees’ names and descriptive information on these contracts have been changed to protect DNA People’s Legal Services clients’ identities.
190. 2015–2016 Ford Fiesta Prices: MSRP vs Dealer Invoice vs True Dealer Cost w/ Holdback, CARBUYINGSTRATEGIES, <http://www.car-buying-strategies.com/dealer-invoice/ford-fieta-prices.html> (last visited Apr. 13, 2017) (listing a 2016 Ford Fiesta four door hatchback with an MSRP of \$14,880).
191. Interview with Adam Oakey, *supra* note 11 (stating that Mary’s Warranty price was too high and such warranties were negotiable down to \$700 or \$800 dollars).
192. State sales tax is charged when the buyer receives the car outside the Navajo Nation but not when the car is delivered within Navajo Nation.
193. Email from Matthew VanWormer, Mary’s attorney, DNA Peoples Legal Services (March 9, 2016 4:27 PM) (on file with author) (explaining her income source was limited only to what she received from Social Security).
194. Interview with Adam Oakey, *supra* note 11 (stating that some sales people forge income to get the loan approved, but that this forgery does not affect APR calculations involving the buyer’s credit score).
195. 2016 Dodge Challenger, CARS.COM, <http://www.cars.com/dodge/challenger/2016/snapshot/> (last visited Apr. 13, 2017) (listing a 2016 Dodge Challenger two door coupe with an MSRP of \$26,995).
196. *Cf.* A buyer with nearly a perfect credit score who bought a similar car in the same state received financing with an APR of 2.99 percent and will end up paying only \$3,036.79 in interest.
197. Johnson, *supra* note 43, at 166.
198. Leonhard, *supra* note 4, at 289.
199. Johnson, *supra* note 43, at 177–81; *see also* Leonhard, *supra* note 4, at 289.
200. Freeman, *supra* note 95, at 1–5 (stating in 2016, black families were targeted for high interest credit cards using data mining affinities that served as a proxy for race).
201. Johnson, *supra* note 43, at 166–67 (reporting payday lenders, car title loan shops, tax refund anticipation lenders, rent-to-own stores, and similar business are abundant throughout urban communities of color and use targeted marketing with minority celebrities to target minority consumers. Further, these exploitative businesses obtained minority employees for the purpose of establishing trust with potential minority borrowers.).

202. Johnson, *supra* note 43, at 187.
203. *Id.*
204. Ian Ayers & Peter Siegleman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 305 (1995).
205. *Id.* at 315–17.
206. Jeff Sistrunk, *Santander Gets DOJ Subpoena Over Subprime Loan Practices*, LAW360 (Aug. 7, 2014, 9:11 PM), <http://www.law360.com/articles/565420/santander-gets-doj-subpoena-over-subprime-loan-practices>.
207. *Id.*; see also Arvind Ganesan, *Predatory Lending in Indian Country*, THE HILL (Sept. 24, 2013, 6:00 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/324007-predatory-lending-and-indian-country> (stating “[s]torefront and online lenders exploit the harsh reality that people on reservations and throughout the country are hurting, have basic expenses they can’t meet, and don’t necessarily have access to credit”).
208. Mike Baker & Daniel Wagner, *Minorities Exploited by Warren Buffet’s Mobile Home Empire*, THE SEATTLE TIMES (Dec. 26, 2015, 8:00 AM), <http://www.seattletimes.com/seattle-news/times-watchdog/minorities-exploited-by-warren-buffetts-mobile-home-empire-clayton-homes/>.
209. *Id.*
210. Leonhard, *supra* note 4, at 290.
211. ASSESSING ABUSE, *supra* note 1, at 14.
212. *Id.* at 75–76.
213. *Id.* at 79.
214. *Id.* at 71.
215. *Id.* at 16.
216. *Id.* at 39.
217. Allstate Indemnity Co. v. Black Goat, No. SC-CV-15-01, slip op. at 5–7 (Navajo Jan. 12, 2005) (the Navajo Nation’s highest court acknowledging that “Navajos increasingly use bank accounts, take out loans on vehicles and homes, and deal with interest on money in a variety of other circumstances”).
218. See *supra* note 7 and accompanying text.
219. ASSESSING ABUSE, *supra* note 1, at 14.
220. *Id.*
221. *Id.* at 46.
222. *Id.* at 10.
223. *Id.* at 19. See also *id.* at 77 (reporting a middle-aged man, who had previously purchased several vehicles in his lifetime, bought a vehicle that had no VIN number and that could not be registered or insured. As a result, he “was deeply appalled, disgusted and shameful of himself because he was taken advantage of and knew this was not the way to buy a vehicle.”).
224. *Id.* at 19, 47, 67.
225. ASSESSING ABUSE, *supra* note 1, at 40 (emphasizing how “[a]cquiring a new vehicle brings pride to a household and instills a sense of accomplishment and wealth.” However, “the loss of income” from paying unreasonably high auto bills created “buyer’s remorse” and financial suffering). See also *id.* at 47 (reporting that most Navajo families have debt of over \$5,000, and 33 percent have debt above \$25,000. Understanding that far fewer Navajos pay home mortgages due to the land ownership housing laws on the Navajo Nation, it is reasonable to assume much of this debt is auto debt.).

226. *Id.* at 47–49 (reporting some families even mentioned taking out additional high interest pay day loans to compensate for a high car bills).
227. *Id.* at 48 (reporting that, in the most extreme instances reported to the Commission, one car buyer paid an interest rate of 28.99 percent per month for a vehicle, another buyer had contracted to make 6 years and 10 months of payments, yet another buyer had the highest monthly auto bill of \$884.59 per month, and the highest total investment on a vehicle was \$72,890.40).
228. *Id.* at 40.
229. *Id.* at 23.
230. *Id.* at 40.
231. ASSESSING ABUSE, *supra* note 1, at 67, 76.
232. *Id.* at 68–69 (reporting that a Navajo mother agreed to a \$20,000 contract to purchase a car for her college student. However, the dealer suggested her son sign the contract the next morning. Later, the mother discovered \$10,000 in additional charges, including a \$4,000 service charge and a \$499 tire fee, in the contract that had not been there before her son signed. The salesmen then declined to speak to her because her name was not on the contract.).
233. *Id.* at 46 (showing that 56 percent of surveyed Navajo car buyers reported problems with dealers when purchasing a vehicle and just under half of surveyed Navajo car buyers had purchased high interest long term subprime car loans).
234. *Id.* at 47 (reporting that 26 percent of survey respondents had had vehicles repossessed; 18 percent were required to return vehicle to the dealer; 17 percent were threatened by dealers with criminal charges; and 5 percent had lost their employment due to the loss of their car).
235. *Id.* at 20–21 (finding that 12,470 vehicles travel to Gallup, New Mexico and 7,015 travel to Farmington daily from the Navajo Nation as well as extrapolating that if every vehicle traveling was purchased/financed for about \$30,000, the border town auto sales market was likely worth billions of dollars, with state taxes in the millions).
236. *See also* Interview with Adam Oakey, *supra* note 11 (recollecting that car salespeople sometimes work with low income or low credit score car buyers to forge financing applications and describing a dealership that looked forward to buyers’ repossession after selling cars at 26 percent interest rates).
237. *See* 7 N.N.C. § 621.
238. SCOTT APPELROUTH & LAURA DESFOR EDLES, CLASSICAL AND CONTEMPORARY SOCIOLOGICAL THEORY 755 (2008) (providing the sociological definition of agency as “a person’s capability or power to act, to “make a difference,” or to intentionally intervene in her world. Further stating “agency concerns events of which an individual is the perpetrator, in the sense that the individual could, at any phase in a given sequence of conduct acted differently.” (citing ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY 9 (1984))).
239. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001) (defining racism as the combination of prejudice towards a racial others and social power and asserting that racism takes on three different forms: (1) individual racism, (2) institutional racism, and (3) cultural racism. Individual racism is defined as assaults directed at a person due to their racial identity. Institutional racism encompasses the ways in which our societal infrastructure (education, division of labor, justice system etc.) has been constructed and maintained to benefit white people, and thus excludes and disadvantages racial minorities. Cultural racism manifests through the symbols Western culture sets as societal norms, such as the English language, individualistic values, and

Christianity. Individual, institutional, and cultural racism combine in settler societies to form barriers that make access to the privilege and cultural self-determination a complex, painful, and, often, insurmountable project for minority peoples.).

240. ASSESSING ABUSE, *supra* note 1, at 16.
241. *Id.* at 41.
242. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/61/L.67 and Add.1 (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).
243. ASSESSING ABUSE, *supra* note 1, at 20 (suggesting the Navajo Nation should establish its own car dealership); *cf. Id.* at 22 (stating that a Navajo nation auto dealership may be cumbersome and may not be worth the risk).
244. *ACLU Challenges Abusive Debt Collection Practices that Target the Poor*, AMERICAN CIVIL LIBERTIES UNION (Jan. 29, 2015), <https://www.aclu.org/news/aclu-challenges-abusive-debt-collection-practices-target-poor> (demonstrating that the ACLU and such advocacy organizations are using legal challenges to dismantle systems that “punish the poorest among us, disproportionately people of color”).
245. *Id.* at 17.
246. Patricia Cohen, *In Lending Circles, a Roundabout Way to a Higher Credit Score*, N.Y. TIMES (Oct. 10, 2014), <http://www.nytimes.com/2014/10/11/your-money/raising-a-credit-score-from-zero-to-789-in-26-months.html> (stating “these centuries-old networks are being seen as a promising tool to help low-income Americans build credit records”).
247. Nathalie Martin, *Giving Credit Where Credit Is Due: What We Can Learn From the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989, 1033–34 (2016).
248. Jeremy D. Franklin, *Credit Unions: Who Should Be Able to Serve the Underserved?*, 11 N.C. BANKING INST. 237, 238 (2007) (defining credit unions as “member-owned, democratically operated, not-for-profit institutions” with “the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means”).
249. *Id.* at 239.
250. Donald Novajovsky, *From National Credit Union Administration v. First National Bank & Trust to the Revised Federal Credit Union Act: The Debate Over Membership Requirements in the Credit Union Industry*, 44 N.Y.L. SCH. L. REV. 221, 224–25 (2000) (stating that, unlike savings and loans, savings banks, and commercial banks, a credit union cannot raise capital by issuing debt or equity securities. The article goes on to discuss that traditionally, credit unions “offered various types of savings accounts, and made simple mortgage, consumer, and personal loans,” and that “today, credit unions are fully competitive with many savings and commercial banking institutions.”).
251. *First American Credit Union*, ACCESS ARIZONA, <http://www.accessarizona.org/business-item/first-american-credit-union/> (last visited Apr. 13, 2017) (providing an example of one of several credit unions already serving Navajo Nation residents).



**Alan W. Clarke &  
David Gespass**

**SUCCESSSES AND FAILURES:  
ASSESSING THE ICTY AFTER  
*PROSECUTOR V. RADOVAN KARADŽIĆ*<sup>1</sup>**

**Introduction**

A quarter century after mass atrocity crimes raged throughout Bosnia and Herzegovina (BiH),<sup>2</sup> a sputtering International Criminal Tribunal for the Former Yugoslavia (ICTY) has belatedly convicted Radovan Karadžić—“the Butcher of Bosnia”<sup>3</sup> and former President of the breakaway Republika Srpska. Sentenced to 40 years imprisonment,<sup>5</sup> his crimes<sup>6</sup> include some of the most vicious and blameworthy known to international criminal law:

1. Crimes against humanity, including extermination, persecution, and murder;
2. War crimes, including grave violations of international humanitarian law and;
3. Genocide, “the crime of crimes.”<sup>7</sup>

The Balkan wars of those years roiled Europe and spawned the term “ethnic cleansing,” though the practice had had a long and sordid history.<sup>8</sup> There were almost daily allegations of war crimes by and against the various national groups. Among the most serious were those against three principal Serb leaders, Slobodan Milošević, who was president of Serbia, Ratko Mladić, a Serb general, and Karadžić. Milošević died in custody before his trial was completed and Mladić’s case is pending. Karadžić was convicted of genocide for the slaughter of thousands of Bosniak Muslim men from adolescence to old age at Srebrenica. He was not convicted of genocide for events in several smaller municipalities which were of the same character, but on a smaller scale. We will focus here on the genocide acquittals and the danger of the precedent they set.

Deciding what is, and what is not, genocide raises prickly questions. On the one hand, if the definition is too narrow it can provide a degree of impunity for perpetrators of this most inhuman of atrocity crimes.<sup>9</sup> On the

---

Alan W. Clarke is a professor of Integrated Studies at Utah Valley University in Orem, Utah and a contributing editor to National Lawyers Guild Review. His most recent book is *Rendition to Torture*, published by Rutgers University Press in 2012. David Gespass is an attorney in private practice in Birmingham, Alabama and a long-time member of our editorial board. He is a past president of the National Lawyers Guild and is chair of the board of CAIR Alabama.

other, too broad a definition would threaten to trivialize the offense. The popular understanding of genocide provides the rough parameters of a definition but, in today's world at least, the ultimate decision will be left, for better or worse, to judges. If international criminal courts are to have any credibility, the defense lawyers representing those accused of war crimes and crimes against humanity must be talented and thorough. Anything less than an aggressive defense that insures the rights of a defendant accused of particularly heinous crimes inevitably breeds distrust in the outcome.<sup>10</sup> Lawyers worth their salt will look for every possible way to show their clients' actions, even if murderous or otherwise criminal, did not amount to genocide. Because of this rigorous testing within the crucible of a vigorously contested trial, the definition of "genocide" must be sufficiently precise to yield convictions where the conduct in question is both reasonably provable and sufficiently heinous.

While the lay public may think Justice Potter Stewart's definition of pornography ("... perhaps I could never succeed in intelligibly [defining hard-core pornography]. But I know it when I see it ..."),<sup>11</sup> would suffice, that is not adequate for defining any crime, let alone one so serious as genocide. It is, therefore, important to review decisions that do so—to applaud their insights and to criticize their shortcomings—in an ongoing effort to find the correct balance between impunity and over-inclusion.

An appropriate source to start this inquiry is Raphael Lemkin, who coined the term in 1943. The next year, he published *Axis Rule in Occupied Europe*.<sup>12</sup> In that book, reference was made to "genocide" for the first time in print. He expounded on the need for the term and its implications in a magazine article two years later.<sup>13</sup> It is worth considering Lemkin's argument as to why the term was needed and what it meant, for guidance as to what it means—and should mean.

Lemkin finds that "mass murder" is inadequate because "it does not connote the motivation of the crime, especially when the motivation is based upon racial, national or religious considerations."<sup>14</sup> On the other hand, he argues that using terms suggesting national dominance by a stronger nation over a weaker one (e.g. "Germanization" back then, "ethnic cleansing" in the Balkans) is "inadequate, since it does not connote biological destruction."<sup>15</sup> This has been codified in the Convention Against Genocide.<sup>16</sup> The key provision in Article II is that there be specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>17</sup> Such intent must be manifested by killing or causing serious bodily or mental harm to members of the group, imposing conditions of life calculated to result in destruction of the group, in whole or in part, imposing measures to prevent births within the group or transferring children to another group.<sup>18</sup>



Notably, Lemkin believed that genocide should include cultural, as well as physical, destruction. A nation or ethnicity can be destroyed if any evidence of its peculiar cultural identity—religion, cuisine, music, art, etc.—is wiped out. Despite his best efforts, however, cultural genocide has not been included in the definition, even though an individual's entitlement and, by extension, a society's, to their particular culture are recognized as human rights.<sup>19</sup> Nevertheless, this concept was not included in the Convention on the Prevention and Punishment of the Crime of Genocide, which defined it as committing

any of the following acts . . . with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”<sup>20</sup>

In particular, “in whole or in part” is unsettled in its application and is inherently ambiguous. In general, the language has been interpreted to mean in whole or in substantial part. Even with that modification, vagaries potentially remain. Must the intent be to eliminate the group universally, or can it be limited to a particular location? If so, could that location be as small as a neighborhood or must it be something larger? If larger, does it have to be the size of a country or can it be something smaller?<sup>21</sup> One can say that answers to these questions should be based on what is reasonable, but some precision is necessary. At the same time, too much precision has its own problems.

Consider this analogy. The Supreme Court has long held that government officials who are sued are entitled to “qualified immunity” from suit unless they have violated a plaintiff's clearly established constitutional right.<sup>22</sup> A right is clearly established if prior court rulings have determined it to be so. The Eleventh Circuit held that to mean that a prior case with almost identical facts must have so held. In *Hope v. Pelzer*, Alabama prison officials were sued for handcuffing inmates who refused to work while chained to hitching posts for extended periods. Because there was no such conduct previously litigated, the Eleventh Circuit found the officials immune.<sup>23</sup> The Supreme Court reversed, holding that all that was required was that prior case law give an official “fair warning” that the alleged conduct is unconstitutional.<sup>24</sup> Defining genocide presents a similar quandary. Too much precision can protect egregious behavior. Too little leaves the matter to an individual trier of fact to decide.

There must be some degree of subjectivity involved in the decision, but such subjectivity must be within prescribed boundaries. Otherwise, one could reasonably argue that, for example, Dylann Roof's infamous murder of nine African-American churchgoers in Charleston, South Carolina<sup>25</sup> was genocide because it was done with the intent of starting a race war, even though there was no reasonable likelihood it would accomplish that end. Numbers also matter. For example, the deaths of a few members of a small ethnic group could constitute genocide when the same number of deaths of a large national group would not. These are difficult questions that must be discussed, litigated, and resolved over time.

With respect to the *Karadžić* decision, we are concerned with the subtle interplay between the elements of *actus reus* and the *mens rea*. While they remain analytically distinct, by creating an overly stringent mens rea requirement the *Karadžić* Court not only created a specific intent burden of proof that is too high, but also—at least arguably—on that had the effect of too tightly circumscribing the notion that genocide can focus on a substantial part of a protected group. Given that the municipalities in question had far fewer victims than was the case at Srebrenica, there is a danger that the finding of no genocide there could be interpreted to also limit the “in substantial part” requirement of the *actus reus* to larger groups such as that found at Srebrenica. Members of Republika Srpska army killed at least 7,000 Muslim men there in 1994.<sup>26</sup>

While the Convention's definition of genocide is not exactly that advocated by Lemkin, his initial definition provides a useful context for analyzing any particular court ruling. It can also help courts develop an effective approach for genocide prosecutions. Furthermore, the *Karadžić* case provides a good example of why this analysis is necessary. Even though he was acquitted of genocide in some particular instances, given his age, the 40-year sentence effectively meant life. There is no strong incentive, under the circumstances, for the prosecution aggressively contest the acquittals. Even if it chose to do so, it would necessarily work harder at defending the outcome and upholding the convictions *Karadžić* is appealing.

Courts confront the tension between addressing the specific case before them and its more generalized and universal precedential value. It is, therefore, incumbent upon others, able to consider the more general implications of a decision that may not be subjected to great scrutiny in the appellate process, to comment upon the more general effects of the particular decision.

We are in an early phase of development of international criminal law, which as yet has a relatively small body of precedent. Its evolution began with the Nuremberg and Tokyo tribunals, and little was added until the ICTY was

established in 1993. The International Criminal Tribunal for Rwanda was established in 1995 and was the first such tribunal to deliver verdicts against those accused of genocide. The International Criminal Court began its work in 2002 and has been stunted by the refusal of the United States to subject itself to its jurisdiction. Similarly, the extraordinary chambers of the courts of Cambodia, and the various hybrid international courts, are of recent vintage.

Because of the dearth of precedent, the significance of any one decision by an international criminal court today is amplified, as errors made now can, if not corrected, become the law for generations. Similarly, if courts now get things right and correct mistakes quickly, the cause of international justice—an absolute prerequisite to, though by no means a guarantor of, international peace—will be served to a far greater degree than errors in individual cases fifty years hence. Now is the time that precedent, for good or ill, will be established. Getting it right now will enhance immeasurably humanity's prospects for the future.

With the end of the cold war, the ICTY became the first international criminal tribunal since World War II.<sup>27</sup> The Karadžić conviction constitutes one of the last, and because of his power, rank and influence, most important, decisions handed down by the court. Karadžić played a role in nearly every aspect of the war and was involved in hundreds of atrocities.<sup>28</sup> This then provides a fitting opportunity to review<sup>29</sup> some of the ICTY's successes and failures.

International criminal law has progressed since the Nuremberg trials; mass atrocities are, at least occasionally and sporadically, punished. The scope for impunity is narrowing. However, these achievements have not evolved as far as human rights advocates might have wished. The failures of international cosmopolitanism are not limited to the obvious failures with respect to more powerful nations such as the impunity with which the Bush administration prosecuted an illegal war while creating a torture culture.<sup>30</sup> However, those have been well-addressed elsewhere<sup>31</sup> and need not detain us here. One hopes that the perspective, "that human rights shall be regarded as more sacred than property interests"<sup>32</sup> will come to apply equally to all international legal regimes. That evolution remains a distant hope.

### **Karadžić and the genocide concept**

There have been many criticisms of the Genocide Convention for leaving massive gaps in coverage.<sup>33</sup> These lacunae have only partially been filled in by the expansion of international customary law. The most important of these gaps—mass killings in peacetime of groups not protected by the Convention—has been partially addressed. The crime against humanity of extermination, under international customary law, now covers mass

killings of all kinds committed in peacetime as well as in war.<sup>34</sup> Before that evolution in the law, no matter how many were killed during peacetime (or internal conflict not meeting the definition of an “international conflict”)<sup>35</sup> the atrocity was not criminal under international law unless it fit the narrow definition of genocide. Other major gaps in the law of genocide include the exclusion from coverage of political groups which is only partially addressed by the expansion of crimes against humanity under customary law<sup>36</sup> and the elimination of cultural genocide.<sup>37</sup>

No court, much less one as new and untested as the ICTY, can cure all legislative drafting defects. However, courts can and do shape the direction of the law, for good or ill, through construction and interpretation. In that regard, the ICTY had an avenue for advancing the law in one important way by determining how widespread the killing and destruction must be before condemning it as “genocide.” Unfortunately, the court stopped halfway in the progressive advancement of genocide jurisprudence.<sup>38</sup>

The words “as such” in the definition of genocide<sup>39</sup> were intended to focus on the destruction of a protected group rather than that of the individual. The Convention focuses on the group’s destruction “as such,” that is, as a defined group and not simply as a collection of individuals. The massacre of individuals, (or other acts such as torture, infliction of conditions of life, prevention of births, etc.), no matter how heinous, does not become genocide unless those acts are also accompanied by the specific intent to destroy in whole or in part one of the protected groups viz. “national, ethnical, racial or religious.” The requirement that genocidal intent include the intentional destruction of a protected group “in whole or part” leaves to future interpretation just what constitutes a “part.” Courts have thus added the modifier “substantial” which helps only slightly. What then is the destruction of a protected group in “substantial part” and where is the threshold? The search for answers has generated considerable scholarly debate.

The ICTY had previously held that there was no minimum threshold for the number of victims killed.<sup>40</sup> Indeed, one killing if done with the requisite intent and with at least some plausible means of destroying a protected group in whole or in part should, at least in theory, suffice. That ruling does not help because the death of only one person can qualify as genocide if, and only if, at least one genocidaire intended (with plausible capability) to destroy a substantial part of a protected group. The ICTY advanced our notion of “substantial part” with the *Krstic* case, which held that 7–8 thousand males killed at Srebrenica from a population of 40,000 when combined with “ethnic cleansings” and other indicia of genocidal intent, was correctly understood to qualify as genocide.<sup>41</sup> In so holding, the court clarified that,

The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group.” . . .” If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.<sup>42</sup>

And,

The historical examples of genocide also suggest that the area of the perpetrators’ activity and control, as well as the possible extent of their reach, should be considered. . . . The intent to destroy formed by a perpetrator will always be limited by the opportunity presented to him.<sup>43</sup>

Thus, we learn that the genocide need not involve all of a protected group, that the reach of the genocidaire is crucial, that even smaller numbers may qualify if the protected group is yet smaller than that of those killed and raped in Srebrenica. The Court thus implicitly rejected those scholars who would have required that the courts employ a quantitative or numeric criterion limiting genocide to the intent to destroy on an industrial scale.<sup>44</sup> There is an important difference between the numeric test and the percentage test. Both can be seen as valid ways of determining whether a protected group has been destroyed in substantial part. But, as David Nersessian points out, “the intent to kill three members of a tiny aboriginal tribe of a dozen people (25 percent) probably is sufficient under the percentage test.”<sup>45</sup>

If this is the correct reading of the *Krstic* case, the implied use of a percentage test was a salutary, if modest, advance in our understanding. For example, it could well mean that the destruction of a small but distinct indigenous nation within, say, the Amazon rain forest would constitute genocide. ISIL’s destruction of the Yazidi has been called a potential genocide and that characterization was almost surely influenced by the ICTY’s understanding of Srebrenica.<sup>46</sup>

The International Court of Justice has also held the Srebrenica massacre to constitute genocide.<sup>47</sup> Tying Karadžić to Srebrenica then, while not easy, was merely a matter of proof, presenting few new doctrinal problems. The more problematic issue in indicting Karadžić revolved around his complicity in the atrocities in the other smaller municipalities. Could they constitute genocide or were they limited to crimes against humanity and crimes under international humanitarian law? While the crime against humanity of extermination may be in law an equally serious offence, at least in lay eyes it seems less so.<sup>48</sup> We conclude that the ICTY, despite whatever were its other virtues, muffed the opportunity to expand the scope of genocide to make the law more congruent with the common lay understanding.

The Trial Chamber in 2012 confirmed ten or eleven counts including the Srebrenica genocide but dropped the genocide count for the seven other

municipalities. The ICTY, however, had upheld similar genocide charges arising out of the seven municipalities in the *Milošević* case before he died, but of course this was not a final judgment. Reversing on appeal, the Appeals Chamber found two errors in the Trial Chamber's reasoning:

1. It failed to take evidence of the *actus reus* "at its highest;" and
2. With respect to specific intent to destroy a protected group in whole or in part, it also failed to recognize the evidence must be taken "at its highest" on a "98bis" motion (essentially, in common law terms, a motion to dismiss).<sup>49</sup>

This last failing seems particularly egregious in light of the evidence that, in meetings with Karadžić, "it had been decided that one third of Muslims would be killed, one third would be converted to the Orthodox religion and a third will leave on their own" and thus all Muslims would disappear from Bosnia."<sup>50</sup> To most people, that feels like an expression of genocidal intent. The issue's importance relates to the scope of how the genocide convention should be construed which, "pits restrictivists, who seek to tightly tether any application of the crime to the text of the Genocide Convention, against expansionists, who advocate for a broader understanding of the crime of genocide."<sup>51</sup>

The Trial Chamber tried Karadžić for genocide arising out of both the Srebrenica massacre and the seven additional municipalities. It found him guilty of the crime against humanity of extermination, which has as an element the intent to persecute or discriminate. And, it found he committed the *actus reus*<sup>52</sup> for genocide in "killing members of the group" and in "causing serious bodily or mental harm to members of the group."<sup>53</sup> But, it balked at finding genocidal intent beyond a reasonable doubt as to either of these genocidal acts. Moreover, it failed to find that Karadžić and his co-perpetrators subjected his Muslim victims to conditions of life calculated to bring about the physical destruction of the Bosnian Muslims or Bosnian Croats in these municipalities.<sup>54</sup> Thus, although he and his co-perpetrators, committed acts of genocide, and discriminatorily exterminated otherwise protected classes (Muslims and Croats), he was found not guilty of genocide.

Throughout this nearly 3000-page opinion, the court continually emphasized statements by the accused and his co-perpetrators indicating their motive was to remove Muslims from the areas desired by the Serbs. There are two problems with this. First, it seems to conflate motive (the reason for doing something) with intent (the conscious decision to do something).<sup>55</sup> Given Srebrenica and the above statement, it appears that the *intent* was to destroy the Muslims in substantial part and that the *motive* for doing so was to ethni-

cally cleanse the area for Serb habitation and domination. Moreover, while the intent to persecute as part of the crime of extermination is different from the intent to destroy a protected group in whole or in part—that difference seems to evaporate here where the persecutory impulse to exterminate was identical to the intent to destroy the group in substantial (one-third) part. Put another way, his intent was to discriminate against Muslims by exterminating them. To distinguish that from the intent to destroy the Muslims or Croats in whole or in part as a protected group seems to be a distinction so fine that it borders on the metaphysical.

Why does this matter? The court after all did find that the *actus reus* of genocide occurred in the municipalities thus setting the precedent for applying the concept to smaller scale genocides where the genocidal intent is clear.<sup>56</sup> However, in the court's eyes this was not genocide. For most people, these distinctions will not matter. The lay public will see the bottom line as "not genocide." At most, the better informed of the public will perhaps wonder at the Alice-in-Wonderland "legal" reasoning that makes such massacres "not genocide." But by confusing motive with intent, the decision may well make proof of genocidal intent much harder than it need be. Specific intent, whether in a run-of-the-mine murder case or in genocide litigation, is difficult enough to prove—as well it should be—without adding such confusion.

More importantly, the court here has set a bar to finding genocidal intent so high that it may be impossible to meet. Finally, the lay understanding of genocide is important—at least at the level of prevention. As David Luban plainly demonstrated, when the concept of genocide is unduly restricted it gives political actors, including the United States, the political cover to fail to do anything constructive in stopping genocides and proto genocides<sup>57</sup> or, we might add, it gives such actors license to engage in their own genocidal acts without consequence. The court had the opportunity to bring genocide law a little closer to the lay concept—and the concept that the words of the convention clearly signify—and it failed. That failure has consequences far beyond the particulars of this case. If punishment of genocide is to rise to the hopes given it by the world after the disasters of World War II, it needs to be broadly enough construed to push modern nation states into the position of feeling lay, as well as juridical and diplomatic, pressure to conform their actions to the common understanding. While the ICTY could not rewrite the Genocide Convention it could have interpreted the Convention to cover the smaller and less visible groups in the seven municipalities in BiH. That, in turn, would have made it harder to deny genocide in the early stages or in some of the smaller but no less nasty cases. It would have made it harder to ignore and would have put pressure on all of us to do something more than wring our hands at the next would be genocidaire.



We conclude where we began. International criminal law is far more developed, mostly for the better, by the jurisprudence of the ICTY. However, in conflating motive with the specific intent to destroy a protected group in whole or in part, the *Karadžić* case sets a precedent that makes it harder than necessary to prove the mens rea element of genocide. The Trial Chamber's confusion in this regard is regrettable not only with respect to appropriately punishing genocidaires, but it will also make it easier for nations to evade their responsibility to intervene to stop genocide.

The efforts of the court and the detailed opinion are to be applauded precisely because they provide critics the tools with which to analyze and develop the law of genocide at this crucial time. It would be remarkable if every finding and every conclusion in the court's voluminous (or, perhaps more precisely, multi-voluminous) opinion were beyond reproach. It is an indication of the seriousness with which the court approached its task that it made such detailed findings. Our criticism here reflects our belief that we must take the opinion as seriously as did the court by finding things with which to disagree. The law of genocide, as we noted initially, is in the early stages of its development. Even small mistakes, if not corrected, can have implications for decades. Better to get it right now. We trust our contribution will be one of many to come, before the law is set in stone.

#### NOTES

1. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).
2. The crimes included within this case occurred from October 1991 to November 1995.
3. So called by the western media. See, e.g., Agency Staff, *Butcher of Bosnia, Radovan Karadzic, Sentenced to 40 Years Prison in Genocide Case*, MANCHESTER EVENING NEWS (Mar. 25, 2016, 6:00), <http://www.manchestereveningnews.co.uk/news/uk-news/butcher-bosnia-radovan-karadzic-sentenced-11095204>.
4. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016).
5. *Karadžić*, Case No. IT-95-5/18-T at ¶6072.
6. *Id.* at ¶6071.
7. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> ("Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.").
8. See, e.g., *Ethnic Cleansing*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/129100.html> (last visited Apr. 21, 2017); see also Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFFAIRS, Summer 1993.

9. Genocide is a species of international criminal law that includes crimes against humanity and grave breaches of the Genocide Conventions. It is similar to the crime against humanity of extermination. However, as will be explained more fully below, it adds the notion of protected categories of victims and uses a difficult to prove *mens rea* element of specific intent, whereas the crime of extermination only requires knowledge and is not limited to a protected class of victims.
10. Such distrust is already a concern just because of who defendants are. The International Criminal Court has, thus far, prosecuted only Africans. The International Criminal Tribunal for the Former Yugoslavia (ICTY), whose opinion we are analyzing and critiquing here, has not prosecuted any Americans despite, for example, the bombing of the Chinese embassy in Belgrade.
11. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)
12. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (Lawbook Exchange, Ltd. 2014) (1944).
13. Raphael Lemkin, *Genocide*, 15 AM. SCHOLAR 227 (1946).
14. *Id.*
15. *Id.*
16. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III) (Jan. 12, 1951), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx> [hereinafter Convention on Genocide].
17. *Id.* at art. II.
18. *Id.*
19. *See* Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Art. 15, (Jan. 3, 1976), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; *id.* at art. 18; *id.* at art. 27.
20. Convention on Genocide, *supra* note 15, at art. II.
21. The ICTY partially answered these questions when it held that the Srebrenica massacres constituted genocide. The ICTY's holding in this regard was upheld by the International Court of Justice in *Bosn. & v. Serb.*, 2007 ICJ, No. 921, at ¶296 (Feb. 26). *See infra* notes 30-36 and accompanying text.
22. *Harlow v. Fitzgerald*, 457 U.S. 800 (1987).
23. *Hope v. Pelzer*, 240 F. 3d 975 (11th Cir. 2001).
24. *Hope v. Pelzer*, 536 U.S. 730 (2002).
25. *See, e.g.*, Alan Blinder & Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre*, N.Y. TIMES (Dec. 15, 2016) [https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html?\\_r=0](https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html?_r=0).
26. While important and closely related, this issue is beyond the scope of our present argument, which we limit to the question of whether the court utilized an overly stringent *mens rea* element.
27. UN Security Council Resolution 827 May 25, 1993 at, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>.
28. The Trial Chamber's complex opinion of 2,590 pages stands as a testament to the extensiveness of his activities in BiH and his engagement in nearly every major criminal atrocity produced by that war.
29. We do not intend this as a comprehensive assessment of the case or the court; rather it is the authors' idiosyncratic perspective that informs this short essay.
30. *See, e.g.*, ALAN W. CLARKE, *RENDITION TO TORTURE* (2012).
31. *See, e.g.*, NAT'L L. GUILD REV, Vol. 66, No. 1 (Spring 2009)

32. Preamble to the National Lawyers Guild Constitution, *available at* <https://www.nlg.org/wp-content/uploads/2016/03/NLG-Constitution-December-2012.pdf>.
33. *See, e.g.*, DAVID R. NERSESSIAN, GENOCIDE AND POLITICAL GROUPS (2010); David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur and the UN Report*, 7 CHI. J. INT'L. L. 303 (2006).
34. Prosecutor v. Tadić Case No. IT-94-I-A, (Judgment) ¶¶ 140 & 141.
35. *Id.* at ¶¶ 88-97.
36. NERSESSIAN, *supra* note 32.
37. Criticisms of the elimination of cultural genocide from the Convention go back to the very beginning. Raphael Lemkin sought to include it, saying, "I defended it successfully through two drafts. It meant the destruction of the cultural pattern of a group, such as the language, the traditions, the monuments, archives, libraries, churches. In brief: the shrines of the soul of a nation. But there was not enough support for this idea in the Committee. . . . So with a heavy heart I decided not to press for it." Paper by John Docker on *Raphael Lemkin's History of Genocide and Colonialism* for the United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies 3 (Feb. 26 2004), *available at* <https://www.ushmm.org/m/pdfs/20040316-docker-lemkin.pdf>.
38. Convention on Genocide, *supra* note 15, at art. II.
39. *See supra* note 9.
40. Prosecutor v. Karadžić, Case No. IT-95-5/18-AR98bis.1, Appeals Chamber Judgment, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 11, 2013), [http://www.icty.org/x/cases/karadzic/acjug/en/130711\\_judgement\\_rule98bis.pdf](http://www.icty.org/x/cases/karadzic/acjug/en/130711_judgement_rule98bis.pdf).
41. *Prosecutor v. Krstić*, ICTY A. Ch. 19.4.2004.
42. *Id.* at ¶12.
43. *Id.* ¶13.
44. *See, e.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeals Chamber Judgment, (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) (Wald, J., dissenting) (stating some learned commentators on genocide stress that the currency of this "crime of all crimes" should not be diminished by use in other than large scale state-sponsored campaigns to destroy minority groups, even if the detailed definition of genocide in our Statute would allow broader coverage" while arguing for a remand of the case on the genocide acquittal) *Id.* at para. 2.
45. NERSESSIAN, *supra* note 32, at 42.
46. HUMAN RIGHTS COUNCIL, REPORT OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE HUMAN RIGHTS SITUATION IN IRAQ IN LIGHT OF ABUSES COMMITTED BY THE SO-CALLED ISLAMIC STATE IN IRAQ AND THE LEVANT AND ASSOCIATED GROUPS (Mar. 13, 2015), *available at* [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A\\_HRC\\_28\\_18\\_AUV.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_18_AUV.doc).
47. *Bosn. & v. Serb.*, 2007 ICJ, No. 921, (Feb. 26); *Radislav Krstić*, Case No. IT-98-33-A at ¶ 12.
48. *See, e.g.*, Luban, *supra* note 32.
49. As the Appeals Chamber put it in paragraph 100, "pursuant to Rule 98 *bis* of the Rules, the Prosecution's evidence is assumed to be credible and is taken at its highest and that a judgment of acquittal shall be entered only if there is 'no evidence capable of supporting a conviction.' In the context of this appeal, the Appeals Chamber considers that the evidence on the record, taken at its highest, could indicate that Karadzic possessed genocidal intent. Other evidence on the record indicates that other alleged members of the ICE also possessed such intent. The Appeals Chamber considers that this evidence, assessed in conjunction with evidence regarding the scale and nature of the alleged genocidal and other culpable acts, is sufficiently compelling in its totality that no reasonable trial chamber could have

concluded, in the context of Rule 98 *his* of the Rules, that there was no evidence capable of demonstrating that Karadzic and other alleged *ICE* members possessed genocidal intent” (citations omitted).

50. *Karadžić*, Case No. IT-95-5/18-AR98bis.1 at ¶ 97.
51. Tatiana E. Sainati, *Toward a Comparative Approach to the Crime of Genocide*, 62 DUKE L.J. 161, 166 (2012).
52. *Karadžić* case summary at 19.
53. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra*, note XXXat (4)(a) and 4(b).
54. Case summary at 19.
55. *See Jelisić*, Case No. IT-95-10-A at ¶ 49. While motive and intent are certainly interrelated, they remain distinct. For example, New York’s standard jury instructions say: “Intent means conscious objective or purpose. Thus, a person commits a criminal act with intent when that person’s conscious objective or purpose is to engage in the act which the law forbids or to bring about an unlawful result. Motive, on the other hand, is the reason why a person chooses to engage in criminal conduct.”
56. *See NESSERSIAN*, *supra* note 32.
57. Luban, *supra* note 32.



**Keep  
track  
of  
the  
Guild**



**on Twitter, Facebook, & at [www.nlg.org](http://www.nlg.org)**

**national lawyers guild**

**David Gespass,  
Nathan Goetting,  
& Meredith Osborne**

## **PUTTING SCALIA IN PERSPECTIVE**

Donald J. Trump, having somehow become president of the United States, nominated Judge Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit to replace Associate Justice Antonin Gregory Scalia on the Supreme Court. The Senate recently confirmed him and he now sits on the highest court in the land. Gorsuch's primary qualification, based on news reports and Trump's public comments, seems to have been the likelihood that he will promote and continue Scalia's legacy on the Court.<sup>1</sup> He has written and spoken admiringly of, nearly deifying, virtually all things Scalia—his scholarship, his methodology, his “roar that could echo for miles.”<sup>2</sup> Shortly after Scalia's sudden death in early 2016, Gorsuch delivered what amounted to a eulogy of Scalia and his approach to deciding cases at the Case Western Reserve University School of Law. There, Gorsuch confessed that he was breathless and teary-eyed<sup>3</sup> at the news of Scalia's passing and made it clear he believed the late justice had been a judicial model to be followed. Word of this emotional episode was quickly circulated among right-wing legal activists as assurance that Gorsuch shared their admiration for the reactionary justice and could therefore be relied on to continue his legacy on the bench.<sup>4</sup>

This legacy needs a closer examination.

### **Scalia's originalism: Equal parts conceit and deceit**

Almost immediately after the announcement of his death, both the “left” and the right were quick to offer paeans to Scalia. He was, we were told, “a conservative icon”<sup>5</sup> with an “outsized legacy”<sup>6</sup>—a man who “changed the Court more than the Court changed him.”<sup>7</sup> Scalia was almost universally described as a legal colossus who forever altered the course of American jurisprudence. George Mason University's Law School now bears his name.

---

David Gespass is an attorney in private practice in Birmingham, Alabama and a long-time member of our editorial board. He is a past president of the National Lawyers Guild and is chair of the board of CAIR Alabama. Nathan Goetting is Editor-in-Chief of NLGR and an Associate Professor of Criminal Justice & Jurisprudence at Adrian College. Meredith Osborne is the Executive Editor of the NLGR. She is currently clerking on the Colorado Court of Appeals and will join the Colorado State Public Defender's Appellate Division in August 2017.

So does a new lectureship series at the Harvard Law School, where its inaugural speaker, moderate-liberal Associate Justice Elena Kagan, lauded his virtues.<sup>8</sup>

Popular and scholarly assessments of Scalia's thirty-year tenure on the Court—where he pioneered the interpretive methodologies known as originalism and textualism to discern the “original meaning” (hereinafter “originalism”) of the Constitution, now so tightly held to the bosom of the right-wing—have almost universally insisted that his work will have a lasting impact. We trust otherwise. Originalism is hopelessly flawed and amounts to a counterfeit methodology—with insidious and malicious consequences. It should be exposed and resisted.

The animating principle of originalism is that the scope of the Constitution is limited to the meaning of its text at the time of its ratification. In Scalia's hands, it does not even seek to divine the intent of the Framers as a way of understanding the text<sup>9</sup> but narrowly focuses on the ordinary understanding of the meaning of the words themselves at the time of enactment. Originalists tout this textual enterprise as its primary virtue because, they say, its application requires judicial restraint and a healthy respect for the constitutional doctrine of the separation of powers. They claim that this method ensures that a judge's personal policy preferences play no part in the outcome of the cases he or she presides over. An originalist judge is prevented by his or her own methodology from retrofitting the Constitution's text to suit contemporary political trends and social mores. To Scalia, the Constitution is “dead, dead, dead.”<sup>10</sup> It is not a document amenable to adaptation in light of cultural shifts, technological advancement, or pressing human needs.<sup>11</sup> It is not meant to be a vehicle through which a court can solve social problems. Instead, every act of interpretation is a journey into the increasingly distant past when many of the issues before the court—freedom of expression on social media, warrantless electronic surveillance, etc.—could never have been imagined.

Originalism is an intellectual edifice based on conceit and deceit. Its conceit is that the original meaning of an ancient legal text can actually be ascertained. Establishing the original meaning of a constitutional provision—like arriving at the objectively correct understanding of the Sermon on the Mount—poses an ultimately impossible epistemological task. The mere fact that the Constitution is a written document belies an immutable meaning. The essence of constitutionalism—like scripture and Shakespeare—necessitates evolution and reinterpretation through the lens of the interpreter. Seeking to apply the Fourth Amendment, as it was understood upon ratification in 1791 (assuming for the sake of argument that there was just one way of understanding it), to cases involving government drone

surveillance of political protesters or police hacking into a Facebook account, is a fool's errand. An attempt to find a rough understanding of the original meaning of the Constitution may be a fair starting point, but it should never serve as a finish line. The race would never end.

Its great deceit, which perhaps also involves some degree of self-deceit, is that judges are able to both recognize and set aside their personal political commitments and experiences while attempting to answer novel constitutional questions, especially when those questions lack any judicial precedent. Because originalism is unworkable, its practitioners account for its shortcomings by doing exactly what they have always—usually very publicly—flattered themselves that they never do: they infuse political preferences into their judicial opinions. Scalia was a master at this.

The inherent dishonesty of originalism has long been lamented and resisted among progressive legal activists and scholars. Erwin Chemerinsky, for instance, exposed the faults and the cognitive dissonance of Scalia's jurisprudence with devastating clarity and thoroughness years ago.<sup>12</sup> Likewise, constitutional scholars Sanford Levinson, Jack M. Balkin, and David A. Strauss have criticized the methodology with force.<sup>13</sup> Even so, the impact of these criticisms has been largely muted by the right-wing legal and political establishment's successful mobilization in response to the liberal reforms of the Warren Court and, in particular, *Roe v. Wade* in 1973.<sup>14</sup>

Any pretense of apolitical purity in Scalia's approach was exploded when he joined the majority opinions in *Texas v. Johnson*<sup>15</sup> and *Bush v. Gore*.<sup>16</sup> In *Johnson*, the Court held that burning a United States flag in protest is a form of speech protected by the First Amendment. Seventh Circuit Judge Richard Posner—like Scalia, a conservative Reagan appointee—points out that the majority opinion in *Johnson* was a strange argument for an originalist, as it is hard to conclude that the meaning of “speech” in 1789 included the kind of “symbolic speech” the Supreme Court endorsed therein.<sup>17</sup> And, in *Gore*, the majority *per curiam* opinion found that an order to recount ballots in certain counties, but not the entire state, deprived voters whose ballots were not recounted of their right to equal protection of the law. The holding was so far-fetched, not to mention unmoored from originalism, that the Court specifically said it could not be used as precedent for any future case.<sup>18</sup> Scalia's response to critics of his vote in this 5–4 case that decided a presidential election was “get over it.”<sup>19</sup>

Our expectation is that once the hopeless flaws and political ideology behind originalism are more universally understood, it will lose the cachet it currently enjoys.



## A reactionary through and through

Scalia was a right-wing ideologue. His judicial opinions, unsurprisingly, connected perfectly with his reactionary worldview. His originalist pretenses hardly covered up the true animating force behind his rulings. But even liberals were wont to pay lip service to his “restraint,” particularly when he broke from the Court’s conservative bloc. In particular, he was praised for his perceived civil libertarian bent on criminal procedure issues.<sup>20</sup> This praise is undeserved. It is rooted in a misunderstanding of Scalia’s underlying political commitments and long-term jurisprudential goals. Even when Scalia argued in favor of the rights of the criminally accused, a close reading of his opinions shows he has done so in ways which so constrain constitutional rights as to apply to a small and diminishing class of cases, but which would place far more in jeopardy. Because this aspect of Scalia’s jurisprudence is not well understood, we will discuss it at more length than the few examples would otherwise merit.

Scalia was a proponent of nearly unbridled executive and police power, especially when that power was used to control and discipline the poor, racial minorities, LGBTQ persons, and immigrants. Perhaps most stark was his assertion in *Herrera v. Collins*<sup>21</sup> that “[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.”<sup>22</sup> To hammer home his contention, he suggests: if, as the dissent argued, it shocks the conscience to find that the Constitution would allow such a result if a person were innocent, as the dissent argued, then it is the conscience of the dissenters that should be recalibrated.<sup>23</sup>

Although there were a few instances where Scalia could make one scratch one’s head, as with his Confrontation Clause opinions,<sup>24</sup> he was usually merciless in his willingness to allow the state to minimize the rights of the accused and heap cruelty upon the convicted. Scalia’s criminal law and procedure jurisprudence, as with his career on the Court generally, was largely an effort to roll back the milestone progressive victories of the Warren Court. There was hardly a brick in the edifice of the Warren Court Criminal Procedure Revolution that he did not seek to grind into dust.

Beyond the context of the Confrontation Clause, Scalia’s reputation as a rebel conservative defender of the accused is based primarily on his opinions in Fourth Amendment cases involving law enforcement searches. However, a closer reading of these cases shows that Scalia’s objective for the Fourth Amendment, while benefitting certain criminal defendants in the short term, is consistent with his general effort to eviscerate the liberties conferred by

the Warren Court. Here, the particular Warren Court case under attack is *Katz v. U.S.*, decided in 1967.<sup>25</sup>

In *Katz*, the Court held that warrantless bugging of a public telephone booth, where the defendant had no protected property interests, violated the Fourth Amendment because it intruded on the defendant's "reasonable expectation of privacy."<sup>26</sup> In announcing this rule, the Court radically broadened the scope of what constituted a "search" under the Fourth Amendment.<sup>27</sup> It rendered obsolete the "physical trespass doctrine" established by *Olmstead v. United States*<sup>28</sup>—a notorious case that, even when it was decided in 1928, was so out-of-touch and offensive to privacy rights that it inspired Justice Brandeis to write perhaps the most famous and eloquent dissent in the history of this area of the law.<sup>29</sup> *Katz* stands for the proposition that governmental intrusion on an individual's reasonable expectation of privacy constitutes a "search" for which a warrant is required and that only that which an individual "knowingly exposes to the public" is excluded from constitutional protection.<sup>30</sup> Although this test contains serious problems of its own that may eventually require reconsideration,<sup>31</sup> *Katz* was a necessary innovation that allowed the Court to resist increasingly ubiquitous government surveillance.<sup>32</sup>

Scalia always had contempt for *Katz*.<sup>33</sup> He viewed the Court's reimagining of a more expansive right to privacy in *Katz* as a mistake and, while he subsequently voted to uphold *Katz* under the principle of *stare decisis*,<sup>34</sup> he sought to diminish its use and impact by resurrecting *Olmstead*'s physical trespass doctrine. His major opinions interpreting what constitutes a search under the Fourth Amendment were, in varying degrees, parts of this effort.

In his 2001 opinion for the Court in *Kyllo v. United States*, Scalia concluded that the Fourth Amendment protected homes from warrantless surveillance by government agents using supersensory equipment not available to the general public.<sup>35</sup> In *Kyllo*, government agents stationed themselves in a van outside the home of a suspected drug dealer and used a thermal imaging sensor to determine if the temperature inside the home was hot enough to suggest he was using grow lamps to cultivate marijuana. While criticizing *Katz*, Scalia, perhaps in order to maintain a majority, nonetheless recognized its precedential authority and used it as the basis for the Court's ultimate holding.<sup>36</sup> However, it is plain that in this case Scalia sided with the defendant because the intrusion—albeit technological, not physical—was into his home, a place in which the defendant had a property interest that is explicitly protected in the Fourth Amendment.<sup>37</sup>

Scalia later wrote for the Court in *U.S. v. Jones*, a case in which the government surreptitiously and exceeding the scope of its warrant, maintained a GPS monitoring system on the defendant's car to track the vehicle's

whereabouts.<sup>38</sup> Holding that such conduct violated the Fourth Amendment, Scalia based the Court's reasoning in the physical trespass doctrine.<sup>39</sup> More recently, in *Florida v. Jardines*,<sup>40</sup> Scalia built on the *Olmstead* underpinnings of *Jones*.<sup>41</sup> Writing for the majority, Scalia addressed yet another governmental supersensory investigation of a defendant's home, this time through the use of a police dog that sniffed the exterior of the house. In *Jardines*, a more emboldened Scalia expressly championed the property interests of the suspect.

In both *Jones* and *Jardines*, Scalia saw no reason to apply *Katz*'s "reasonable-expectation-of-privacy test." In *Jones*, he wrote, "*Katz* did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates, [where] the *Katz* reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test."<sup>42</sup> In *Jardines* he even more heavily emphasized the physical trespass test, quoting an 1886 ruling<sup>43</sup> for support: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of [the defendant's] home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.<sup>44</sup>

This interpretation of *Katz* as a complement to, rather than a replacement of, the physical trespass test, would have come as a shock to the *Katz* Court itself, which made a point of expressly abrogating the outdated concept, writing: "the underpinnings of *Olmstead*...have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."<sup>45</sup>

Scalia's repeated de-emphasizing of *Katz* and reprioritizing of the long-discredited ideas of *Olmstead* have moved the Court in a dangerous direction that is contemptuous of basic notions of personal privacy. Scalia's physical trespass test turns the motto of the National Lawyers Guild—"[T]hat human rights shall be more sacred than property interests"—directly on its head.

In other areas of criminal procedure, Scalia made his commitment to governmental power at the expense of individual liberty and the tenets of democracy far more clear. He sought to dismantle the Exclusionary Rule, which ever since *Mapp v. Ohio*<sup>46</sup> in 1961 has helped to deter police misconduct and preserve the integrity of the trial process by ensuring that evidence illegally obtained by police cannot be used against the accused.<sup>47</sup> He voted to overturn *Miranda v. Arizona*,<sup>48</sup> one of the great rulings in the history of civil liberties, which protects criminal suspects from coercion and abuse during police interrogations. Scalia wrote that *Miranda* represented

a “milestone in judicial overreaching.”<sup>49</sup> He repeatedly dissented in cases prohibiting the death penalty for juvenile offenders.<sup>50</sup> And, despite the incredible work of groups such as the Innocence Project, who have used DNA testing to exonerate countless wrongfully convicted inmates nationwide, he repeatedly opposed making such testing more accessible to those seeking post-conviction relief,<sup>51</sup> including in the case of one death-row inmate who was ultimately exonerated.<sup>52</sup>

In the midst of a mass incarceration crisis, in which thousands of financially destitute criminal defendants around the country were being locked up for non-violent and low-level crimes, Scalia set his sights on Warren Court landmark *Gideon v. Wainwright*,<sup>53</sup> which established the constitutional right to court-appointed, state-funded counsel for indigent felony defendants. His dissent in *Alabama v. Shelton*,<sup>54</sup> in which his colleagues extended the right conferred by *Gideon* to the countless misdemeanor defendants subject to imprisonment, again showed solidarity with law enforcement and indifference to the indigent accused. Providing lawyers to poor criminal defendants was simply too costly, Scalia claimed. “Today, the Court gives this consideration [the cost of furnishing counsel in these cases] the back of its hand,” lamented the associate justice who spent thirty years backhanding the poor and desperate who sought justice at the Court.

### A blowhard in a black robe

Scalia was voluble and antagonistic during oral arguments.<sup>55</sup> He was notorious for directing barbs at his colleagues. He seemed to relish debasing the other justices in his written opinions, as well.

In his dissent in *Obergefell v. Hodges*, a decision that recognized same-sex marriage as a fundamental right, he sharply criticized Justice Anthony Kennedy’s majority opinion, snarling:

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.<sup>56</sup>

In *King v. Burwell*,<sup>57</sup> a case revisiting the constitutionality of the Affordable Care Act, Scalia, in a series of bizarre flourishes, called Chief Justice John Roberts’s majority opinion “pure applesauce” and “interpretive jiggery-pokery.”<sup>58</sup> In his concurrence in *Glossip v. Gross*, a death penalty case, Scalia mocked Justices Stephen Breyer and Ruth Bader Ginsburg for “waving over their heads a ream of the most recent abolitionist studies (a superabun-

dant genre) as though they have discovered the lost folios of Shakespeare, insist[ing] that *now*, at long last, the death penalty must be abolished for good.”<sup>59</sup> Even Justice Thomas, his closest ideological companion on the Court, was not immune. Scalia once accused him of promoting “a presidency more reminiscent of George III than George Washington.”<sup>60</sup> Such attacks have had their price. It has been reported that Scalia’s rebuke of Sandra Day O’Connor in *Webster v. Reproductive Health Services*<sup>61</sup>—where he labeled the perspective of the first woman Supreme Court justice “irrational”—so alienated her that she may have moved leftward politically as a result.<sup>62</sup> This is not to say that her politics shifted politically just to spite him, but his sneering and off-putting arrogance seemed to make O’Connor, a fellow Reagan-appointee, less inclined to embrace his views.

Scalia’s scoffing and derisiveness is unsurprising in light of his other values, all of which combine to form a stereotypically bigoted personality. In his dissent from *Romer v. Evans*,<sup>63</sup> a major gay rights case, he callously compared consensual gay sex to murder, polygamy, and animal cruelty:

The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of “animus” or “animosity” toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct . . .<sup>64</sup>

During oral argument in *Fisher v. Texas*, which preserved certain limited forms of affirmative action in higher education, he approvingly cited briefs that argued blacks belonged at less prestigious colleges and universities:

There are those who contend that it does not benefit African-Americans to get them into the University of Texas, where they do not do well, as opposed to having them go to a less-advanced school, a slower-track school where they do well.... One of the briefs pointed out that most of the black scientists in this country don’t come from schools like the University of Texas. They come from lesser schools where they do not feel that they’re being pushed ahead in classes that are too fast for them.<sup>65</sup>

While there has been no shortage of louts, boors, and obnoxious blowhards who have served as Supreme Court justices, most have shown enough self-discipline to keep their petty insults out of their judicial opinions. In a marked departure from traditional decorum (and basic standards of collegiality), Scalia’s dissenting opinions often bristle with contempt, sarcasm, and the puerile anger of a sore loser. Never in history has a justice so eagerly displayed his disrespect for the Court and his colleagues.

Scalia's ideological *bete noir*, Earl Warren, was able to steer the Court toward progressive ends during his tenure because he knew how to forge consensus. Scalia had no aptitude for this.<sup>66</sup> Scalia could write with great literary aplomb but, in major cases, it was usually in concurrence or dissent—and often only for himself. He energized his fellow right-wing jurists, especially younger acolytes like Gorsuch, but disrespected and alienated colleagues who failed to recognize his superior intellect and methods. His belief in his own greatness turned him into a diva on the bench who was as reluctant to compromise with others as others were to compromise with him.

We suspect that Scalia's greatest legacy will be his partisanship and the boorish and obnoxious manner with which he behaved as a justice. His vitriolic language, open contempt for the work of colleagues with which he disagreed, and lack of impulse-control on the bench has coarsened the Court's discourse. He often wrote and behaved like a pettish child with no sense of basic manners or common courtesy. We should remember the virulence of his character, not the color of the robe it was cloaked in."

#### NOTES

1. Richard Wolf, 'Scalia Index' Shines Light On Possible Trump Supreme Court Pick, USA TODAY (Jan. 30, 2017, 3:36 PM), <http://www.usatoday.com/story/news/politics/2017/01/30/supreme-court-trump-scalia-pryor-gorsuch/97057474/>.
2. Neil M. Gorsuch, *2016 Summer Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. 905 (2016).
3. *Id.*
4. Ed Whelan, *A Supreme Successor to Justice Scalia*, NATIONAL REVIEW (Jan. 31, 2017, 8:06 PM), <http://www.nationalreview.com/article/444439/neil-gorsuch-justice-scalias-supreme-successor>.
5. *All Things Considered: Reflections Of Conservative Icon Supreme Court Justice Antonin Scalia*, NATIONAL PUBLIC RADIO (Dec. 29, 2016, 4:08 PM), <http://www.npr.org/2016/12/29/507436655/reflections-of-conservative-icon-supreme-court-justice-antonin-scalia>.
6. Garrett Epps, *Justice Scalia's Outsized Legacy*, THE ATLANTIC (Feb. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/02/justice-scalias-outsized-legacy/462756/>.
7. Jonathan Turley, *Scalia's Greatest Strength, His Steadfastness, Was Also His Greatest Weakness*, WASH. POST (Feb. 14, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/02/14/scalias-greatest-strength-his-steadfastness-was-also-his-greatest-weakness/?utm\\_term=.a2fb8dedddfl](https://www.washingtonpost.com/posteverything/wp/2016/02/14/scalias-greatest-strength-his-steadfastness-was-also-his-greatest-weakness/?utm_term=.a2fb8dedddfl).
8. *See, In Scalia Lecture, Kagan Discusses Statutory Interpretation*, HARVARD LAW TODAY (Nov. 25, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/>.
9. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) ("It is curious that most of those who insist that the drafter's intent gives meaning to a statute reject the drafter's intent as the criterion for interpretation of the Constitution. I reject it for both.").

10. Nicole Flatow, *Justice Scalia: The Constitution Is 'Dead, Dead, Dead'*, THINK PROGRESS (Jan 29, 2013), <https://thinkprogress.org/justice-scalia-the-constitution-is-dead-dead-dead-baf9d39b44aa#4x9qwcuyr>.
11. Nolan D. McCaskill, *The 11 Most Memorable Scalia Quotes*, POLITICO (Feb. 14, 2016, 12:59 AM), <http://www.politico.com/story/2016/02/best-antonin-scalia-quotes-219274>.
12. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 HAWAII L. REV. 385 (2000).
13. Sanford Levinson, CONSTITUTIONAL FAITH (2001); Jack M. Balkin, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).
14. The Federalist Society, of which Scalia was an active part, was the primary engine of that change. In THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS our colleague, Michael Avery, has examined the impact of the Federalist Society as well as its legal strategy and tactics. See DANIELLE McLAUGHLIN & MICHAEL AVERY, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2013).
15. 491 U.S. 397 (1989).
16. 531 U.S. 98 (2000).
17. Mark Joseph Stern, *Listen to Federal Judges Shred Arguments That Civil Rights Law Doesn't Protect Gay Employees*, SLATE (Dec. 1, 2016, 1:20 PM), [http://www.slate.com/blogs/outward/2016/12/01/7th\\_circuit\\_judges\\_shred\\_arguments\\_that\\_civil\\_rights\\_law\\_doesn\\_t\\_protect.html](http://www.slate.com/blogs/outward/2016/12/01/7th_circuit_judges_shred_arguments_that_civil_rights_law_doesn_t_protect.html).
18. *Gore*, 531 U.S. at 109.
19. *Scalia On Bush v. Gore: "Get Over It,"* REALCLEAR POLITICS (July 18, 2012), [http://www.realclearpolitics.com/video/2012/07/18/scalia\\_on\\_bush\\_v\\_gore\\_get\\_over\\_it.html](http://www.realclearpolitics.com/video/2012/07/18/scalia_on_bush_v_gore_get_over_it.html).
20. See Caleb Mason, *Antonin Scalia, Civil Libertarian?*, SALON (April 2, 2013, 8:18 PM), [http://www.salon.com/2013/04/02/what\\_do\\_drug\\_sniffing\\_dogs\\_have\\_to\\_do\\_with\\_the\\_18th\\_century\\_justice\\_system\\_partner/](http://www.salon.com/2013/04/02/what_do_drug_sniffing_dogs_have_to_do_with_the_18th_century_justice_system_partner/); Viveca Novak, *Antonin Scalia, Civil Libertarian*, TIME (June 14, 2001), <http://content.time.com/time/nation/article/0,8599,130509,00.html>; Robert J Smith, *Antonin Scalia's Other Legacy*, SLATE (Feb. 15, 2016 7:28 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/antonin\\_scalia\\_was\\_often\\_a\\_friend\\_of\\_criminal\\_defendants.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html).
21. 506 U.S. 390 (1993).
22. *Id.* at 427.
23. *Id.* at 428.
24. See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990); *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). However, it should not go unnoticed that Scalia's broad, pro-defendant interpretation of the Confrontation Clause has the effect, either intentionally or incidentally, of thwarting the aims of feminists and others by especially benefitting defendants accused of violence against women. Scalia was a notorious *bete noire* on the Supreme Court to many on the feminist left. See Ruthann Robson, *The Legacy of Antonin Scalia: Don't Mourn, Organize*, WELLESLEY CENTERS FOR WOMEN, <http://www.wcwnonline.org/Women--Books-Blog/scalia> (last visited Apr. 5, 2017). In *Giles v. California*, for instance, Scalia, writing for the Court, granted a new trial to a man convicted of murdering his girlfriend because he was unable to cross-examine his dead girlfriend about a 9-1-1 tape played for the jury in which she reported his domestic violence. 554 U.S. 353 (2008). Scalia's broad interpretation of the Confrontation Clause is also strong ammunition against efforts minimize the traumatic effects of the trial process for rape (and child molestation) accusers. See Hannah R.



Norman, *Adult Rape Victims Need Protection Too: The Application of Closed Circuit Television and the Exception from Maryland v. Craig to Adult Rape Victim Testimony*, 55 WASHBURN L.J. 701, 720-22 (2016).

25. Katz v. U.S., 389 U.S. 347 (1967).
26. *Id.* at 361 (Harlan, concurring).
27. The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV (emphasis added).
28. 277 U.S. 438 (1928).
29. Katz, 389 U.S. at 353.
30. *Id.* at 352.
31. Amitai Etzioni, *Eight Nails Into Katz’s Coffin*, 65 CASE W. RES. 413 (2014).
32. Indeed, the physical trespass doctrine has no place in any society that respects privacy and is further made obsolete by failing to account for technological advances—satellites, drones, online tracking software, etc.—that allow police to investigate deeply into the private life of individuals from remote distances without physical intrusion.
33. Minnesota v. Carter, 525 U.S. 83, 91 (1998) (Scalia, J., concurring).
34. See *Kyllo v. United States*, 533 U.S. 27 (2001).
35. *Kyllo*, 533 U.S. at 40.
36. *Id.* at 32.
37. *Id.*
38. U.S. v. Jones, 565 U.S. 400 (2012).
39. *Id.* at 406.
40. Florida v. Jardines, 133 S. Ct. 1409 (U.S. 2013).
41. *Id.* at 1415
42. *Jones*, 565 U.S. at 406.
43. Boyd v. United States, 116 U.S. 616, 626 (1886).
44. *Jardines*, 133 S. Ct. at 1415 (Quoting Boyd).
45. Katz, 389 U.S. at 353.
46. 367 U.S. 643 (1961).
47. See, e.g., Hudson v. Michigan, 547 U.S. 586 (2006); Herring v. U.S., 555 U.S. 135 (2009); Utah v. Strieff, 136 S. Ct. 2056 (U.S. 2016).
48. 384 U.S. 436 (1966).
49. Dickerson v. U.S., 530 U.S. 428, 434 (2000).
50. See, e.g., Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989); Roper v. Simmons, 543 U.S. 551 (2005).
51. See, e.g., House v. Bell, 547 U.S. 518 (2006), District Attorney’s Office v. Osborne, 557 U.S. 52 (2009).
52. See House v. Bell, 547 U.S. 518 (2006).
53. 372 U.S. 335 (1963).
54. 535 U.S. 654 (2002).
55. In our view, it is more accurate to say that the Federalist Society, of which Scalia was an active part, was the primary engine of that change.

56. Obergefell v. Hodges, 135 S. Ct. 2584, 2630 n.22 (2015).
57. 135 S. Ct. 2480, 2501 (U.S. 2015); *see also* Transcript of Oral Argument, Fisher v. Texas, 579 U.S. \_\_\_\_ (No. 14-981), *available at* [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-981\\_4h25.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_4h25.pdf).
58. *Id.*
59. Glossip v. Gross, 135 S. Ct. 2726, 2747, 192 L. Ed. 2d 761, *reh'g denied*, 136 S. Ct. 20, 192 L. Ed. 2d 990 (2015).
60. [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-strikes-down-born-in-jerusalem-passport-law/2015/06/08/19562bb2-d71d-11e4-ba28-f2a685dc7f89\\_story.html?utm\\_term=.3b03bdd0b509](https://www.washingtonpost.com/politics/courts_law/supreme-court-strikes-down-born-in-jerusalem-passport-law/2015/06/08/19562bb2-d71d-11e4-ba28-f2a685dc7f89_story.html?utm_term=.3b03bdd0b509)
61. Webster v. Reprod. Health Servs., 492 U.S. 490, 537 (1989).
62. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 369 (2007).
63. Romer v. Evans, 517 U.S. 620 (1996).
64. *Romer*, 517 U.S. at 644.
65. Transcript of Oral Argument, Fisher v. Texas, 579 U.S. \_\_\_\_ (No. 14-981), *available at* [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-981\\_4h25.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_4h25.pdf).
66. The Warren Court's major decisions were rarely, if ever, by 5-4 votes. Brown v. Board of Education was unanimous. Baker v. Carr, the one person, one vote case that Warren said was the most important of his tenure, eventually had a 6-2 majority even though it had to be reargued because no clear majority emerged when it was first considered. Thus, we suggest that John Roberts promises (or threatens) to be a far more influential justice than Scalia ever was. Roberts is all, at once, a politician, a strategist, and a tactician. He will willingly sacrifice a short-term victory for long-term advantage. He will likely be on the Court for decades and will likely use that tenure to advance a reactionary agenda.



## Does your library have *National Lawyers Guild Review*?

Over two hundred law school and county law libraries do. If yours does not, take this copy with you and request that your library subscribe to ***National Lawyers Guild Review***, now in its 76th year. Issued quarterly. Library subscription rate \$75.00 per year, ISSN 0017-5390. You may order through the library's subscription agent or directly from: **NATIONAL LAWYERS GUILD REVIEW**, 132 Nassau Street, # 922, New York NY 10038.

the crushing effects predatory car loans continue to have on Navajo people. Horning explains the numerous social, cultural, economic, and geographical factors that combine to make the Navajo community uniquely susceptible to the profit-maximizing machinations of car dealerships. It comprehensively maps out the fraud, trickery, and coercion used against borrowers for whom a car is a necessity due to the remote and sparsely populated region in which they live. After diagnosing the problem, Horning goes on to suggest a list of remedies that might help protect the Navajo from continued exploitation.

In 1995, during the Bosnian War, the Bosnian Serb army separated 8,000 Muslim Bosniak males from the remainder of the population in the town of Srebrenica and deliberately murdered them. This act of violence, and the accompanying displacement and relocation of the town's remaining inhabitants, was the most egregious example of genocide and ethnic cleansing on European soil since World War II. International criminal courts have condemned many of those responsible, including Radovan Karadzic, president of the Republica Srpska, known today as the "Butcher of Bosnia." That former president Karadzic was captured, behind a leonine beard and a pseudonym in Serbia, and brought to justice was a relief to those who value human rights the world over. However, as Alan W. Clarke and David Gespass demonstrate in "Successes and Failures: Assessing the ICTY after *Prosecutor v. Radovan Karadzic*," the International Criminal Tribunal for the Former Yugoslavia's ruling in this case is hardly immune from criticism. This article analyzes the Court's opinion, especially focusing on how, by narrowly defining elements of the crime and increasing prosecutorial burdens, it might make future genocide prosecutions more difficult.

After about 30 years as an associate justice, last year one of the most reactionary and obnoxious justices in the history of the Supreme Court, Antonin Scalia, died. Since then many eulogies have been written. Right-wing legal activists have mourned a fallen idol. Despite disagreeing with many of his opinions, ideological opponents have, for the most part, been respectful if not downright obsequious in their praise for Scalia's intellect, commitment to his ideals, and capacity for eloquence. Nearly all have united in predicting his lasting impact on the Court and society.

David Gespass, Meredith Osborne, and I aren't so impressed. In "Putting Scalia in Perspective" we argue that the recently deceased justice adhered to a dangerous and deceptive method of legal interpretation that, conveniently and entirely unsurprisingly, was perfectly suited his longstanding political ambition of scaling back the progressive gains of the Warren Court era. We maintain that is his flawed approach to deciding cases, along with his boorish behavior toward his colleagues on the bench, that should be his legacy.

—Nathan Goetting, *editor-in-chief*

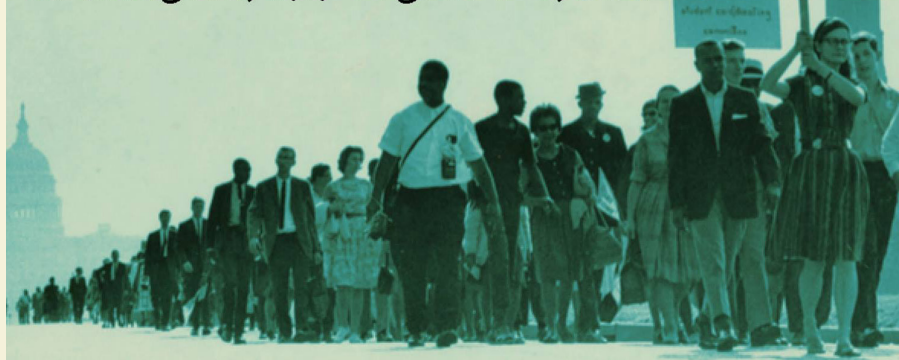


# #Law4thePeople

80<sup>th</sup> Anniversary Convention

UDC David A. Clarke School of Law

Washington, D.C. August 2-6, 2017



**J**oin hundreds of legal professionals, scholars and activists for five days of interactive CLEs, workshops, and panels by members of the oldest and most progressive public-interest bar association in the country.

To register & for more information, visit

[www.nlg.org/convention/](http://www.nlg.org/convention/)

---

NATIONAL LAWYERS GUILD REVIEW  
132 NASSAU STREET, SUITE 922  
NEW YORK, NY 10038

Periodicals  
Postage Paid