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# TIME TO BURY THE TOMAHAWK CHOP: AN ATTEMPT TO RECONCILE THE DIFFERING VIEWPOINTS OF NATIVE AMERICANS AND SPORTS FANS

Justin P. Grose\*

## I. Introduction

A young Caucasian undergraduate dons a buckskin outfit and “traditional” headdress of the fake American Indian Chief Illinewek.<sup>1</sup> He is the mascot for the University of Illinois at Urbana-Champaign.<sup>2</sup> Chief Illinewek readies for his barefoot rush onto the field at Memorial Stadium in Champaign, Illinois to pump up the crowd for yet another home National Collegiate Athletic Association (NCAA) football game. The stands are filled with thousands of football spectators interested in a competitive match-up against an opposing team – not in the history of the Lakota (Sioux) Indians. Among the spectators are a few Native Americans and their children. Chief Illinewek storms onto the field, covered in war paint, and dances around before the opening kickoff. Dressed in his “traditional” dress and performing a “native” dance, the young man dressed as Chief Illinewek thinks that he is honoring Native Americans. The spectators look on while laughing and taking pictures – no intentions or thoughts directed at the long plight of the Native American or his history or culture. One spectator, a Native American child, gazes in horror while numerous “white men” laugh at a depiction of someone who looks similar to an elder on his reservation. Now imagine that Chief Illinewek is a young Caucasian dressed in black face and white gloves or a sombrero and poncho. Would the laughing crowd still be “honoring” that individual?

The acceptance and widespread use of racial slurs has been progressively phased out over the course of the twentieth century, as society becomes less tolerant of racial stereotypes.<sup>3</sup> There is no denying that they still exist, but the common use of African American stereotypes, for example, dissipated during

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1. Louis B. Garippo, *The Chief Illiniwek Dialogue: IV. History of Chief Illiniwek*, U. ILL., [http://www.uillinois.edu/trustees/dialogue/report\\_files/IV.html](http://www.uillinois.edu/trustees/dialogue/report_files/IV.html) (last visited Apr. 25, 2011) (“None of the student Chiefs have been Native Americans.”).

2. *Id.*

3. Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, ANNALS AM. ACAD., Jan. 2009, at 243, 245.

the Civil Rights Movement of the 1960s.<sup>4</sup> All movements with legitimate goals must begin somewhere, even if the topic is not popular. An important step to gain momentum in the quest for equal treatment of Native Americans is to retire the Native American team names and mascots of sports teams.

Many will argue that sports team names like the Indians, Chippewas, Illini, Warriors, Braves, Blackhawks, and Redskins harm no one, or, in the alternative, that the harm is minimal. There is mounting evidence, however, to suggest that these types of names have detrimental effects on the well-being and self-esteem of Native American children.<sup>5</sup> In the alternative, free speech, economic freedoms, and the teams' supporters must all be taken into consideration. It is imperative to find a common ground between opposing sides. Unfortunately, the Supreme Court turned down an opportunity for progress and change in 2009 when it denied certiorari in *Harjo v. Pro-Football, Inc.*<sup>6</sup> In so doing, the Supreme Court dealt an added blow to the hope of resolving whether a sports team name or mascot can be offensive to a particular group of people.

The battle for the acceptability of Native American sports team names has origins preceding the initial filing of *Pro-Football, Inc. v. Harjo*.<sup>7</sup> Native Americans began to protest the use of derogatory names as early as the 1960s, when the National Congress of American Indians (NCAI) expressed its distaste with the continued use of Native American team names and mascots in professional and collegiate athletics.<sup>8</sup> Native Americans have long objected to the use of Native American stereotypes, even outside the sports context.<sup>9</sup>

To understand the offensiveness of the various names and the impact on Native Americans as a group, it is necessary to consider the plight of Native Americans and their history in the United States since the time of European colonization. "Colonialism is not just about holding distant lands and peoples

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4. See Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J. LEGAL COMMENT. 299, 302 (2009) ("After the success of the Civil Rights Movement in the 1960s, overt racism slowly diminished.").

5. See *infra* Part III.

6. 130 S. Ct. 631 (2009).

7. 565 F.3d 880 (D.C. Cir. 2009).

8. *American Indians and Sports Team Mascots: A Timeline of Change*, NCAI <http://www.ncai.org/ncai/resource/documents/governance/mastimeline.htm> (last visited Apr. 25, 2011) [hereinafter NCAI Timeline].

9. See, e.g., Dolph L. Hatfield, *The Stereotyping of Native Americans*, DOLPHHATFIELD.COM, [http://dolphhatfield.com/docs/Document\\_6.pdf](http://dolphhatfield.com/docs/Document_6.pdf) (originally published in the September 2000 issue of the *Humanist*).

in subjugation; it is about establishing and perpetuating systems of power.”<sup>10</sup> The settlers displaced the Native Americans, and continued to do so with the westward removal of the Indians.<sup>11</sup> Removal, as well as several subsequent policy-based movements, were all disguised as “protectionist,”<sup>12</sup> pursuant to the federal government’s trust obligation as guardian of the Indians.<sup>13</sup> In reality, these government actions paternalistically patronized the Indians, and continue to do so today.

Modernly, Native Americans consistently finish near or at the bottom of polls regarding their well-being and socioeconomic standing.<sup>14</sup> To counter such statistics and promote the overall prosperity of the Indian people, it is imperative to reach an end to this supposed “harmless” stereotyping of Native Americans. How can the opinions of the National Football League, its respective teams (that have contained very few Native American players throughout history),<sup>15</sup> and other sports teams nationwide outweigh the respective opinions and feelings of hundreds of tribes of Native Americans?

Part II of this comment explores the various team names that still exist in professional and collegiate sports, as well as the evolution and extinction of many names and practices, especially in the past forty years. It also provides a history of the litigation from the *Harjo* case. Part III discusses the emerging research on the psychological impact that racial stereotypes and Indian mascots have on Native Americans, especially children. Part IV explores possible claims and defenses that parties on both sides of the debate could assert. Part V discusses reasonable solutions to the problem that consider the respective interests of all involved parties. This comment concludes in Part VI.

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10. ALBERT L. HURTADO, REFLECTIONS ON AMERICAN INDIAN HISTORY 5 (2008).

11. Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 442 (1998).

12. Mark D. Poindexter, Comment, *Of Dinosaurs and Indefinite Land Trusts: A Review of Individual American Indian Property Rights Amidst the Legacy of Allotment*, 14 B.C. THIRD WORLD L.J. 53, 81 (1994).

13. Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 651 (2000).

14. *The Socioeconomic Status of Native Americans: A Special Policy Problem*, INST. FOR RES. ON POVERTY, <http://www.irlp.wisc.edu/publications/focus/pdfs/foc91f.pdf> (last visited Apr. 25, 2011).

15. Associated Press, *Sam Bradford ‘A Role Model’ Among Native Americans*, ESPN (Jan. 7, 2009), <http://sports.espn.go.com/espn/wire?section=ncf&id=3815383>.

## II. History of the Use of Native American Sports Team Names

### A. General Overview

The National Congress of American Indians (NCAI) first identified and denounced stereotypes derogatory toward Native Americans in 1968.<sup>16</sup> Its current policy “strongly condemns the use of sports team mascots that claim to portray Native Americans and Native cultures in a positive light[,] [recognizing that] it is only with Native Americans that this practice continues. It is a national insult and does nothing to honor the Native peoples of this country.”<sup>17</sup> These are powerful words from one of the largest Native American organizations in the United States.

The NCAI is a group of Native Americans from many different tribes, headquartered in Washington, D.C.<sup>18</sup> The purported goals of the organization include “monitor[ing] federal policy,” securing “rights and benefits to which [Indians] are entitled,” and “enlighten[ing] the public toward the better understanding of the Indian people.”<sup>19</sup> It is through agencies such as the NCAI that individual Native Americans have a voice. Moreover, the NCAI provides a general consensus for how the Native Americans view certain issues, discouraging line-drawing among the tribes to further protection through unity.<sup>20</sup>

To date, some Division-I schools in the NCAA still maintain a logo or mascot depicting Native Americans in a potentially defamatory manner.<sup>21</sup> Currently, the NCAA’s policy on the use of these types of mascots states that it

does not require member institutions to change their names or mascots. The policy precludes member schools with Native American nicknames, mascots, or imagery from *hosting* NCAA

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16. NCAI Timeline, *supra* note 8.

17. *Anti-Defamation and Mascots*, NCAI, <http://www.ncai.org/ncai/resource/documents/governance/NCAIposis.htm> (last visited Apr. 25, 2011) (statement of W. Ron Allen, president of NCAI).

18. *See Our History*, NCAI, <http://www.ncai.org/About.8.0.html> (last visited Apr. 25, 2011).

19. *Id.*

20. *See id.* (“NCAI stressed the need for unity and cooperation among tribal governments for the protection of their treaty and sovereign rights.”).

21. *NCAA American Indian Mascot Ban Will Begin Feb. 1*, ESPN (Aug. 12, 2005, 10:53 AM), <http://sports.espn.go.com/ncaa/news/story?id=2125735>.

championships. These schools are still eligible to participate in championships, but the policy restricts them from wearing uniforms or other paraphernalia that depict nicknames or images while competing in NCAA championship events.<sup>22</sup>

Even so, the teams are still allowed to use the nicknames for any *non-championship* games or events.<sup>23</sup> The team names and mascots thus are still used throughout the regular season, televised nationwide, and marketed and worn on millions of items of apparel. Some institutions, however, have developed policies against scheduling sporting events with opponents that retain Native American mascots or logos.<sup>24</sup>

Despite acknowledging the potential for prejudice that accompanies the nicknames and mascots, the NCAA has, as an additional safeguard to the policy debate, an allowance for such team names and logos when a specific tribe has endorsed the mascot or logo.<sup>25</sup> For example, Florida State University's use of the "Seminoles" mascot is allowed by the NCAA because of express endorsement by the Florida Seminole tribe.<sup>26</sup>

Some of the members of the tribes were allegedly divided on the issue of whether to support the NCAA's ban on Native American mascots.<sup>27</sup> There are differing views even between members of the same tribe – the Oklahoma Seminoles oppose Florida State University's use of Chief Osceola, while the Florida Seminoles support it.<sup>28</sup> It is interesting to note that Chief Osceola

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22. 2010-11 Division III General Championship Information (General Handbook - Universal). This handbook contains the NCAA's policy on mascots as applicable to all divisions and teams.

23. *See id.*

24. *See* Press Release, Univ. Of Missouri, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005).

25. Kenneth B. Franklin, *A Brave Attempt: Can the National Collegiate Athletic Association Sanction Colleges and Universities with Native American Mascots?*, 13 J. INTELL. PROP. L. 435, 446 & n.70 (2006); Univ. of Wisconsin, Athletic Board Recommendation to Amend the Faculty's Policy on Native American Logos and Names, (Oct. 1, 2007), *available at* <http://www.lssaa.wisc.edu/aisas/policy07.html> [hereinafter UW Recommendation]; Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Executive Committee Approves Native American Mascot Appeals Process (Aug. 19, 2005).

26. Press Release, Nat'l Collegiate Athletic Ass'n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review (Aug. 23, 2005).

27. Darryl Fears, *Indian Mascots: Matter of Pride or Prejudice? Even Tribes Are Divided as NCAA Issues Edict*, WASH. POST (Aug. 14, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/08/13/AR2005081300448.html?nav=rss\\_nation](http://www.washingtonpost.com/wp-dyn/content/article/2005/08/13/AR2005081300448.html?nav=rss_nation).

28. *Id.*

actually hated the American expansion into Florida, and upon his death, his American captors cut off his head for a trophy.<sup>29</sup> That particular tribal band logically would disapprove of the use Chief Osceola's image for the marketing and profit of collegiate football teams. Chief Osceola's story presents further evidence that the history of the Native American peoples throughout the country often is either distorted or ignored.

As of February 16, 2007, eleven teams were no longer subject to the NCAA policy because of name changes, five teams were exempt from the policy despite continued use of Native American nicknames, and three teams remained subject to it.<sup>30</sup> The three teams still subject to the policy were the Alcorn State University "Braves," the Arkansas State University "Indians," and the University of North Dakota "Fighting Sioux."<sup>31</sup> On September 9, 2010, however, "[t]he North Dakota Board of Higher Education adopted a resolution directing UND officials to retire the Sioux nickname and logo."<sup>32</sup>

#### *B. The Protracted History of Pro Football, Inc. v. Harjo*

To understand the history of the *Harjo* litigation, it is necessary to examine the federal statute under which the cause of action was initially commenced in 1992. Plaintiffs in the original *Harjo* case sought cancellation of the Washington Redskins trademark through the United States Patent and Trademark Office's Trademark Trial and Appeal Board (TTAB).<sup>33</sup> Section 2(a) of the Trademark Act of 1946, also known as the Lanham Act,<sup>34</sup> provided the primary grounds for the cause of action.<sup>35</sup> Section 2(a) provides that a trademark shall not be refused unless it "[c]onsists of or comprises immoral [] [or] scandalous matter; or matter which *may disparage or falsely suggest a*

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29. CAROL SPINDEL, DANCING AT HALFTIME: SPORTS AND THE CONTROVERSY OVER AMERICAN INDIAN MASCOTS 257-58 (2002).

30. See UW Recommendation, *supra* note 25; Press Release, Nat'l Collegiate Athletic Ass'n, Native American Mascot Policy – Status List (Feb. 16, 2007), available at <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/Native%2bAmerican%2bMascot%2bPolicy%2b-%2bStatus%2bList.html> [hereinafter Status List] (last visited Apr. 25, 2011).

31. Status List, *supra* note 30.

32. See Press Release, Nat'l Collegiate Athletic Ass'n, NCAA Statement on University of North Dakota Mascot Status (Sept. 9, 2010), available at [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/media+and+events/press+room/news+release+archive/2010/official+statements/20100910+univ+of+nd+mascot+statement](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/media+and+events/press+room/news+release+archive/2010/official+statements/20100910+univ+of+nd+mascot+statement).

33. See *Harjo v. Pro Football Inc.*, 30 U.S.P.Q.2d (BNA) 1828, 1994 WL 262249, at \*1 (T.T.A.B. 1994). The TTAB is an administrative board that hears adversary proceedings, usually on oppositions or attempted cancellations.

34. 15 U.S.C. § 1052(a) (2006).

35. *Harjo*, 30 U.S.P.Q.2d (BNA) 1828, 1994 WL 262249, at \*1.

*connection with persons, living or dead, . . . or bring them into contempt, or disrepute.*”<sup>36</sup> By its own language, the Lanham Act provides a basis for the cancellation of a trademark that is considered distasteful or harmful to individuals or groups.

The harm described in the Lanham Act is precisely what happens to Native Americans with the continued use of the stereotypical sports team names and mascots, whether at the professional, collegiate, or lower levels. The cancellation of the trademark would not necessarily immediately ban the use of the Washington Redskins (or any other team) logo, but it would cancel its registration with the United States Patent and Trademark Office in Washington, D.C.<sup>37</sup> With the cancellation of the trademark in effect, the team and its related entities would be unable to enforce or take legal action against parties that subsequently copy the trademark.<sup>38</sup> Because the name and logo would no longer be registered and thus would be unprotected, others would be free to profit from copies.<sup>39</sup>

In the *Harjo* case and others that are similar, the argument is always the same: the Native Americans argue that the depictions are disparaging, while the owners and representatives of the sports teams argue that they honor the Native Americans.<sup>40</sup> The Native Americans do not seek to profit from the trademark’s cancellation; rather, they simply wish to attend sporting events and read the sports section in the newspaper without feeling uncomfortable or upset because of the mocking logos.<sup>41</sup> The team owners and fans assert that there is a tradition behind the team names and mascots. They believe that the movement to change the team names is simply the product of a progressive and “politically correct” modern society.<sup>42</sup> But in light of recent studies documenting the harmful psychological effects of the continued use of such team names, it is difficult to make the argument that Native Americans are unharmed.<sup>43</sup>

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36. 15 U.S.C. § 1052(a) (emphasis added).

37. Brooke A. Masters, *Redskins Are Denied Trademarks*, WASH. POST (Apr. 3, 1999), <http://www.washingtonpost.com/wp-srv/sports/redskins/daily/april99/03/patents3.htm>.

38. *Id.*

39. *Id.*

40. Mike Wise, *Last Word on Redskins Is Not Ours*, WASH. POST (Sept. 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/17/AR2009091704483.html>.

41. *Harjo v. Pro Football Inc.*, 30 U.S.P.Q.2d (BNA) 1828, 1994 WL 262249, at \*1 (T.T.A.B. 1994).

42. *FAQs About the Institutionalized Use of “Indian” Sports Team Tokens*, AMERICAN INDIAN SPORTS TEAM MASCOTS, <http://www.aistm.org/fr.faqs.htm> (last visited Apr. 25, 2011).

43. *See infra* Part III.



### 1. Procedural History

The petitioners in *Harjo* filed the case with the TTAB in 1992.<sup>44</sup> In 1994, the TTAB first published its decision, ruling in favor of the petitioners' motion to strike the team's defenses to the original petition.<sup>45</sup> The TTAB granted the motion to strike with regard to all defenses except the potential secondary-meaning defense, which consisted of the team proffering alternative meanings of the word "redskin(s)."<sup>46</sup>

No significant developments occurred in the case until 1999, when the TTAB finally ruled in favor of the petitioners, calling for the cancellation of the Washington Redskins' trademark registration.<sup>47</sup> The tribunal heard a volume of evidence, including various linguistic and historical experts debating the nature and meaning of the word "redskin(s)."<sup>48</sup> One focal point for the tribunal was the meaning and determination of the word "disparagement" contained within Section 2(a) of the Lanham Act.<sup>49</sup> The tribunal considered the Act's legislative history and the notes surrounding its passage,<sup>50</sup> and ultimately determined that the Washington Redskins' logo and

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44. *Harjo*, 30 U.S.P.Q.2d (BNA) 1828, 1994 WL 262249, at \*1.

45. *Id.*

Respondent asserts, as affirmative defenses: that the petition fails to state a claim upon which relief may be granted (paragraph 40); that petitioners lack standing (paragraph 5); that the petition is barred by the doctrine of equitable estoppel (paragraph 6); that the petition is barred by laches (paragraph 7); that through long, substantial and widespread use, advertising and promotion in support thereof and media coverage, said marks have acquired a strong secondary meaning identifying the entertainment services . . . (paragraph 8); that upon information and belief, petitioners have not been and are not and will not be damaged by the continued registration of respondent's registered marks (paragraph 9); . . . petitioners have failed to state specifically and cannot state any special damages by virtue of the acts complained of in the cancellation petition herein (paragraph 10); that petitioners' claims under Section 14 of the Lanham Act, 15 U.S.C. § 1052(a), which abridges the respondent's right to freedom of speech provided by the First Amendment to the United States Constitution.

*Id.*

46. *Id.* at \*5, \*7.

47. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1999 WL 375907, at \*48 (T.T.A.B. 1999).

48. *Id.* at \*14-\*15.

49. *Id.* at \*35.

50. *Id.*

MR. ROBERTSON: Mr. Chairman, I have not any hesitation at all in saying that I do not think that section as presently drawn does cover the matter [meaning

mascot registrations should be canceled because “the subject marks may disparage Native Americans and may bring them into contempt or disrepute.”<sup>51</sup>

The team subsequently sought judicial review in the United States District Court for the District of Columbia.<sup>52</sup> The district court determined the following: “The TTAB’s finding of disparagement is not supported by substantial evidence and must be reversed. The decision should also be reversed because of the doctrine of laches precludes consideration of the case.”<sup>53</sup> The petitioners appealed this decision to the United States Court of Appeals for the District of Columbia (D.C.) Circuit.<sup>54</sup> The D.C. Circuit remanded the case on procedural grounds concerning the age of one of the appellants.<sup>55</sup>

Back in the district court, the same judge that ruled in favor of the team on a motion for summary judgment again ruled in favor of the team, finding that undue delay would result in economic prejudice to the franchise.<sup>56</sup> On second appeal to the D.C. Circuit, the circuit judge determined that the district court did not abuse its discretion.<sup>57</sup> The final death knell in the *Harjo* litigation came when the Supreme Court denied certiorari.<sup>58</sup> But a similar group would soon get a second chance.<sup>59</sup>

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of “disparagement”] at all. The word “disparaging” is too comprehensive in meaning. . . .

MR. FRAZER: I would like to make this suggestion with respect to the word “disparage.” I am afraid that the use of that word in this connection is going to cause a great deal of difficulty in the Patent Office, because, as someone else has suggested, that is a very comprehensive word, and it is always going to be just a matter of the personal opinion of the individual parties as to whether they think it is disparaging. I would like very much to see some other word substituted for that word “disparage.”

MR. LANHAM: That seems to me, in the light of administration, to be a very pertinent suggestion, and if you gentlemen can clarify that with verbiage you suggest it would be helpful.

*Id.*

51. *Id.* at \*48.

52. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

53. *Id.* at 145.

54. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

55. *Id.* at 50.

56. *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 62 (D.D.C. 2008).

57. *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 886 (D.C. Cir. 2009).

58. *Harjo v. Pro-Football, Inc.*, 130 S. Ct. 631 (2009).

59. Krista Gesamen, *Washington Redskins Litigation Will Continue*, NEWSWEEK (Nov. 17, 2009), <http://www.newsweek.com/blogs/the-gaggle/2009/11/17/washington-redskins-litigation-will-continue.html>.

## 2. Evidence Used by the Trademark Trial and Appeal Board

In addition to the personal testimony of all of the petitioners, the TTAB relied heavily upon experts to determine whether the team name was in fact disparaging to Native Americans.<sup>60</sup> The court used a wealth of evidence covering multiple disciplines. It considered the dictionary definitions for the term “redskin(s)” from the 1930s to present day.<sup>61</sup> The TTAB determined that the term always has a denotative function, and that since the 1960s, its use has dissipated in print or other media.<sup>62</sup> The court also noted that, while the name “Washington Redskins” obviously refers to the football team, it nonetheless references Native Americans as well.<sup>63</sup> Interestingly, the court did not find that the Redskins’ Native American man and spear logo had any possible disparaging effects.<sup>64</sup>

The TTAB used testimony from the petitioners themselves in which they “described instances when the word ‘redskin(s)’ was directed at them, or at other Native Americans in their presence, by non-Native Americans in what they described as derogatory manners.”<sup>65</sup> The responses and emotions these petitioners experienced are what one would expect – namely, anger and humiliation.<sup>66</sup> Additional testimony from one of the petitioners identified a resolution supporting a 1993 NCAI petition calling for the end of the use of the Washington Redskins’ logo. The resolution specifically stated that

the term REDSKINS is not and has never been one of honor or respect, but instead, *it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native Americans. . . .* [T]he use of the registered service marks [in the challenged registrations] by the Washington Redskins football organization, has always been and continues to be offensive, disparaging, scandalous, and damaging to Native Americans.<sup>67</sup>

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60. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1999 WL 375907, at \*18-\*19 (T.T.A.B. 1999).

61. *Id.* at \*39-\*40.

62. *Id.* at \*40.

63. *Id.* at \*40-\*41.

64. *Id.* at \*41. For the images of the original Redskins’ logos, see *id.* at \*1-\*2.

65. *Id.* at \*18.

66. *Harjo*, 50 U.S.P.Q.2d (BNA) 1705, 1999 WL 375907, at \*18 (alteration in original).

67. *Id.* at \*19 (emphasis added).

The NCAI today is comprised of more than five hundred federally recognized Indian tribes in the United States.<sup>68</sup>

Other organizations representing minorities and interest groups have already expressed their support for the Native Americans.<sup>69</sup> Some Jewish organizations have called for the end of the use of the Washington Redskins' name and logo, as well as that of the Atlanta Braves.<sup>70</sup> A coalition of minority journalists, including Native Americans, African Americans, Hispanics, and Asians, created a resolution calling for the end to any derogatory team names or mascots in journalism.<sup>71</sup> The support from these groups presents further evidence that minority groups as a whole – and not simply Native American groups – are opponents of the racial stereotyping of Native Americans.

The petitioners provided a history expert who testified that since the 1600s, the continuing “American expansion, government policies and public attitudes towards Native Americans” reinforced the belief that Native Americans are an inferior race.<sup>72</sup> In support, the expert drew attention to the Removal Act of 1830 and other governmental programs and policies that continually forced Native Americans from their lands throughout the nineteenth century.<sup>73</sup> In so doing, he painted a picture of Native American mistreatment throughout the history in the United States not dissimilar to the plight of African Americans since the early days of slavery. Also discussed were various writings from the nineteenth century that indicated and reinforced the historical view that Native Americans are “backward, uncivilized, savage people.”<sup>74</sup> The history expert concluded that the term “redskin,” as generally used, and as used by the NFL team, is “inappropriate and disparaging.”<sup>75</sup>

Experts from the field of social sciences also testified, discussing the effects of the stereotypes on the general Native American population. One educator asserted that the use of Native American stereotypes “has a negative effect on

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68. *Federally Recognized Indian Tribes*, NCAI, <http://www.ncai.org/Tribal-Directory.3.0.html> (last visited Apr. 25, 2011).

69. *Harjo*, 50 U.S.P.Q.2d (BNA) 1705, 1999 WL 375907, at \*20.

70. *Id.*

71. *Id.*

72. *Id.* at \*21.

73. *Id.*; John Gonzalez, *In-Group/Out-Group Dynamics of Native American Mascot Endorsement* (Aug. 2005) (unpublished Ph.D. dissertation, University of North Dakota), available at <http://www.apa.org/pi/oema/resources/native-american-mascot.pdf> (discussing the plight of Native Americans since the time of the Europeans' arrival).

74. *Harjo*, 50 U.S.P.Q.2d (BNA) 1705, 1999 WL 375907, at \*22.

75. *See id.*

the self-esteem of Native American children.”<sup>76</sup> A psychologist also noted that the use of stereotyping “objectifies” and “dehumanizes” the individual.<sup>77</sup>

John Kent Cooke, the vice-president of the Washington Redskins, testified that he had heard the name “redskin” only in relation to “peanuts” and “the football club.”<sup>78</sup> Cooke also testified “that he could not answer the question of whether it would be appropriate to use the word ‘redskin(s)’ in addressing a Native American person.”<sup>79</sup> Not surprisingly, another team executive denied that the term “redskin(s)” was either “disparaging or scandalous” to Native Americans as a group.<sup>80</sup> It was clear from the testimony that those associated with the organization were either clueless or in denial as to the true meaning of the term “redskin.” The court did not mention testimony from other individuals from the NFL.<sup>81</sup>

Linguistics experts testified regarding the origin, use, and meaning of the word “redskin.”<sup>82</sup> One expert figured that it had been used for approximately three hundred years, and that it historically had a “negative association” with Native Americans.<sup>83</sup> The expert could not find a single time that the term had been used with a positive or even a neutral connotation. He noted that “certain words, such as ‘redskin(s),’ carry negative connotations, regardless of the context in which they appear.”<sup>84</sup> In opposition, the team’s linguistics experts declared that, especially in the latter half of the twentieth century, the term “redskin” gained a “positive” meaning through its reference to the Washington, D.C. football team.<sup>85</sup> The court did note that one of the team’s experts was somewhat discredited because, while he found “redskin” benign, he viewed other, non-Indian racial slurs as “almost always offensive and disparaging.”<sup>86</sup>

The court examined newspaper and other print media from the late 1800s through the 1960s to examine the history of the term “redskin(s)” and its

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76. *Id.* at \*23.

77. *Id.* For an expanded discussion on the psychological effects and on new studies regarding the stereotyping of Native Americans, see *infra* Part III.

78. *Harjo*, 50 U.S.P.Q.2d (BNA) 1705, 1999 WL 375907, at \*24.

79. *Id.*

80. *Id.* at \*25.

81. *Id.*

82. *Id.*

83. *Id.* at \*26.

84. *Id.*

85. *Id.* at \*27.

86. *Id.* at \*25 n.74.

general use and acceptance (or lack thereof).<sup>87</sup> The vast majority of the evidence presented in this respect portrayed Native Americans negatively.<sup>88</sup>

The court “conclude[d] that the marks in each of the challenged registrations consist of or comprise matter . . . which may bring Native Americans into contempt or disrepute.”<sup>89</sup> The court did find that the term “redskin(s)” is linked to Native Americans, but did not consider it “scandalous.”<sup>90</sup> The case resulted in the court cancelling the trademark, effectively nullifying the protection of the Washington Redskins’ team name and mascot. Ultimately, the important point to take from the decision is that the court was sympathetic to both sides of the argument, but was convinced that Native Americans indeed suffer as a result of the continued use of the Washington Redskins’ team name and logo.

The TTAB’s decision took an in-depth look at the concern of the Native American petitioners. The court thoroughly considered both sides of the argument and took into account the “voluminous” amount of evidence and expert testimony provided.<sup>91</sup> Not surprisingly, the experts seemed to align with the interests of their respective parties.<sup>92</sup> Much of the evidence presented by the petitioners, however, was, at the very least, difficult to twist in the team’s favor because the term “redskin,” as applied to Native Americans, can have very few positive connotations. It is a generally recognized racial slur<sup>93</sup> in which Native Americans see little “honor.”

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87. *Id.* at \*26, \*43-\*44.

88. *Id.* at \*43-\*45.

89. *Id.* at \*47.

90. *Id.* at \*48 (“In particular, we find that, based on the record in this case, petitioners have not established by a preponderance of the evidence that the marks in respondent’s challenged registrations consist of or comprise scandalous matter. We find that the evidence, as discussed above, *does* establish that, during the relevant time periods, a substantial composite of the general population would find the word ‘redskin(s),’ as it appears in the marks herein in connection with the identified services, to be a derogatory term of reference for Native Americans. But the evidence *does not* establish that, during the relevant time periods, the appearance of the word ‘redskin(s),’ in the marks herein and in connection with the identified services, would be ‘shocking to the sense of truth, decency, or propriety’ to, or ‘giv[e] offense to the conscience or moral feelings [of,] excit[e] reprobation, [or] call out for condemnation’ by, a substantial composite of the general population.”) (alteration in original).

91. *Id.* at \*46.

92. *Id.* at \*29.

93. *See id.* at \*49.

### 3. *The Use of Laches as a Defense*

Laches is “the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought.”<sup>94</sup> There is no fixed period for when laches should apply, but it requires “evidence to support [the] assertion that the time lag between knowledge of the potential action and the filing of the action was unreasonable in length. Mere delay alone will not establish laches.”<sup>95</sup> Laches was used in the *Harjo* case and was allowed as a defense in the district court.<sup>96</sup> In the opinion, the court decided that the best time to file the case was around 1967, when the Redskins’ trademark was first registered.<sup>97</sup> But it was not until 1984 that one of the petitioners, Romero, reached the age of majority,<sup>98</sup> and the case was filed approximately eight years thereafter.<sup>99</sup> A delay period of approximately eight years between reaching the age of majority and filing the claim was characterized by the court as a “lack of diligence” on the part of the petitioner.<sup>100</sup>

The court noted that there are three factors in determining whether the defense of laches can be applied: “(1) a substantial delay by a plaintiff prior to filing suit; (2) a plaintiff’s awareness that the disputed trademark was being infringed; and (3) a reliance interest resulting from the defendant’s continued development of good-will during this period of delay.”<sup>101</sup> The claim will bar a proceeding where there is “an inexcusable delay in bringing suit,” or where “material prejudice would result to the defendant as a result of the delay.”<sup>102</sup> Courts, however, have held that although the doctrine of laches bars a damages award, it does not act as a bar to permanent injunctive relief.<sup>103</sup> In the *Harjo* case, permanent injunctive relief in the form of a cancellation of the Redskins’ team name and logo is precisely what the petitioners were seeking.<sup>104</sup> They

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94. BLACK’S LAW DICTIONARY 953 (Bryan A. Garner ed., 9th ed. 2009).

95. *Huseman v. Icicle Seafoods, Inc.*, 471 F.3d 1116, 1126 (9th Cir. 2006) (citation omitted).

96. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 112 (D.D.C. 2003).

97. *Id.* at 136.

98. *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882 (D.C. Cir. 2009).

99. *Id.*

100. *Id.*

101. *Pro-Football, Inc. v. Harjo*, 284 F. Supp.2d 96, 136 (D.D.C. 2003) (quoting NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985)).

102. *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 185 n.12 (3d Cir. 2001).

103. *Conan Props., Inc. v. Conans Pizza, Inc.*, 752 F.2d 145, 152 (5th Cir. 1985); *Anvil Brand, Inc. v. Consol. Foods Corp.*, 464 F. Supp. 474, 482 (S.D.N.Y. 1978) (citing *James Burrough Ltd. v. Sign of the Beefeater*, 572 F.2d 574, 578 (7th Cir. 1978)).

104. *Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d (BNA) 1828, 1994 WL 262249, at \*1

were not seeking monetary damages or fame, but rather relief from psychological damage that had long plagued their people.

The plaintiffs in the case hoped that the Supreme Court would hear their case and potentially overrule the court of appeals, based on a circuit court decision written by now-Justice Samuel Alito. In his opinion for the Third Circuit, Alito found that the defense of laches did not effectively bar a plaintiff's cause of action for failure to make a timely filing.<sup>105</sup> In *Marshak*, then-Judge Alito discussed a "common situation in which the plaintiff's less egregious delay will bar its claim for accounting for past infringement but not for prospective injunctive relief."<sup>106</sup> Judge Alito was referring to a case in which the plaintiffs allegedly failed to act on their claim for nearly fifty years.<sup>107</sup>

The Redskins' trademark was initially registered in 1967.<sup>108</sup> The amount of time that passed between the registration of the trademark and the earliest point in time at which the suit could have been filed was seventeen years – Mateo Romero, one of the plaintiffs, "was only a year old in 1967" and did not reach the age of majority until 1984.<sup>109</sup> But the amount of time between when the suit *could have been filed* and when it was actually filed was a mere eight years – the time lapse between when Mateo Romero turned eighteen and when the suit was filed.<sup>110</sup> In light of the *Marshak* decision and considering this much smaller time delay than that alleged by the Redskins, a successful appeal to the United States Supreme Court would have presented an interesting discussion of the application of laches, particularly considering that Alito still resides on the Court.

The Native American mascot controversy will not subside anytime soon. It is possible that the Court could follow Justice Alito's reasoning from his *Marshak* decision regarding laches. A decision to disregard the equitable defense of laches would promote civil rights in the United States. There is no denying that the Redskins may suffer some pecuniary losses therefrom. But when one considers its advantages for Native Americans and civil rights, the benefits outweigh the costs.

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(T.T.A.B. 1994).

105. *Marshak v. Treadwell*, 595 F.3d 478, 497 (3d Cir. 2009).

106. *Id.* at 496 (quoting *Univ. of Pittsburgh v. Champion Prods., Inc.*, 686 F.2d 1040, 1044 (3d Cir. 1982)).

107. *Id.*

108. *Harjo v. Pro Football Inc.*, 30 U.S.P.Q.2d (BNA) 1828, 1994 WL 262249, at \*1 (T.T.A.B. 1994).

109. *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882 (D.C. Cir. 2009).

110. *Id.*



### *III. Finding a Common Ground for Native Americans and Sports Fans Alike*

The results of recent studies by numerous psychological organizations highlight the dangerous effects that the stereotypical use of Native American team names and mascots have on Native American children and young adults.<sup>111</sup> The studies demonstrate that their continued use leads to continued discrimination.<sup>112</sup> A number of these studies and their findings are documented in a few of the *amicus curiae* briefs filed with the Supreme Court on behalf of the petitioners in *Harjo v. Pro-Football, Inc.*<sup>113</sup>

In 2005, the American Psychological Association (APA) adopted the "APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations."<sup>114</sup> With the resolution, the APA acknowledged the continued racism in the United States, and made several conclusions about the perpetuation of Native American stereotypical mascots. These conclusions included that

the continued use of American Indian mascots, symbols, images, and personalities undermines the educational experiences of members of all communities – especially those who have had little or no contact with Indigenous peoples; [] the continued use . . . establishes an unwelcome and often times hostile learning environment for American Indian students that affirms negative images/stereotypes that are promoted in mainstream society; [] the continued use . . . by school systems appears to have a negative impact on the self-esteem of American Indian children; [] undermines the ability of American Indian Nations to portray accurate and respectful images of their culture, spirituality, and traditions; [] presents stereotypical images of American Indian communities, that may be a violation of the civil rights of

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111. E.g., Rob Capriccioso, *Redskins Litigants Win Support from Psychologists, Justice Advocates*, ALLBUSINESS (Oct. 28, 2009), <http://www.allbusiness.com/population-demographics/demographic-groups/13354820-1.html>.

112. *Id.*

113. *Id.*

114. *Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pubs/journals/releases/ResAmIndianMascots.pdf> (last visited Apr. 25, 2011) [hereinafter APA Resolution].

American Indian people; [] is a form of discrimination against Indigenous Nations that can lead to negative relations between groups; [] is a detrimental manner of illustrating the cultural identity of American Indian people through negative displays and/or interpretations of spiritual and traditional practices; [] is disrespectful of the spiritual beliefs and values of American Indian nations; [] is an offensive and intolerable practice to American Indian Nations that must be eradicated; [and] has a negative impact on other communities by allowing for the perpetuation of stereotypes and stigmatization of another cultural group.<sup>115</sup>

The resolution carries great weight, considering that it is based on the studies and conclusions of the APA. The information relied upon in the resolution contained previously undocumented or new information to which the TTAB did not have access at the time of its ruling. Outside the confines of the *Harjo* case, however, the information is equally relevant, as it provides empirical evidence that the perpetuation of these stereotypes is detrimental to Native American youth.

In addition to the APA, the Society of Indian Psychologists of the Americas similarly called for an end to the use of Native American mascots.<sup>116</sup> The Society's stated reasons for so advocating are that the team names and mascots "establish[] an unwelcome academic environment for Indian[s] . . . and contribute[] to the miseducation of all members of the (campus) community regarding the cultural practices and traditions of an entire ethnic group."<sup>117</sup> The problem with this type of misinformation is that it can distract children from learning, and can promote stereotypical views of Native Americans, as well as other minorities.<sup>118</sup> The goal logically should be to combat these recognized problems at an early age, when children are at their most impressionable.

Because of the modern over-exposure to popular culture, including television, radio, video games, and the internet, children at a much younger age are able to access multitudes of information – far surpassing what children could access even a decade ago. Researchers for the American Indian Historical Society previewed over three hundred books nationwide that were used in schools, and "concluded that not one book could be considered a

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115. *Id.* (citations omitted).

116. *Statement Supporting the Retiring of All Indian Mascots*, SOC'Y OF INDIAN PSYCHOLOGISTS OF THE AMERICAS (Jan. 27, 1999), <http://www.aics.org/mascot/society.html>.

117. *Id.*

118. *Id.*

reliable or accurate source of Native American history and culture.”<sup>119</sup> Movies and television similarly have acted as a catalyst to perpetuate the stereotypical image of an Indian “savage.” For example, before World War II, Native Americans were often portrayed as villains in motion pictures.<sup>120</sup> Such characterizations in movies and television present cause for concern because these media outlets are “two primary sources of information” for individuals of all ages.<sup>121</sup>

The effects of stereotyping are of great concern to the emotional well-being of the affected individuals. Many nations, including the United States, historically have used prejudice and discrimination to oppress and enslave “weaker” cultures.<sup>122</sup> It is no secret that, unlike the African American Civil Rights Movement of the 1960s, the racism affecting Native Americans largely has gone unaddressed. Similar to other ethnic groups, Native Americans have “become acutely aware of the [negative] evaluations of their ethnic group by the majority white culture.”<sup>123</sup> Even if the existence of these prejudices remains unspoken, the Native American children thus presumably are still aware of and plagued by them.

Stereotyping and racism often follow the young Native Americans into adulthood. In one study, the majority of the Native American students enrolled at a Midwestern university discussed negative instances of racism and prejudice experienced on campus.<sup>124</sup> These experiences doubtless have an impact on the learning environment and quality of life of the affected individuals. Complementing this study, research suggests that the on-campus use of Indian mascots is “harmful to both Natives and non-Natives.”<sup>125</sup> Native Americans “endure the psychological damage of seeing cartoon-like caricatures of themselves embodied in the mascots.”<sup>126</sup> But “Native American mascots may also harm non-Natives, for they perpetuate stereotypes that impair students from learning accurate accounts of American history and Native/European American relations throughout the post-contact era.”<sup>127</sup> The ubiquitous use of Native American sports mascots and logos “exclude[s] contemporary Native Americans from full citizenship by treating them as signs

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119. Gonzalez, *supra* note 73, at 8.

120. *Id.* at 9.

121. *Id.* at 8.

122. *Id.* at 22.

123. *Id.*

124. *Id.* at 24.

125. *Id.* at 25.

126. *Id.*

127. *Id.*

rather than as speakers, as caricatures rather than as players and consumers, as commodities rather than as citizens.”<sup>128</sup>

Aside from stereotyping and subjection to racial slurs, another problem confronting Native Americans is a loss of identity.<sup>129</sup> Many Native Americans grow accustomed to seeing depictions of “themselves” in television and popular culture, and often struggle to find their own identity.<sup>130</sup> In opposition to the common claim that the mascots somehow honor Native Americans, it is noteworthy that, at the time at which many of the mascots were adopted, Native Americans had far fewer rights than they do today.<sup>131</sup> Some of the problems noted about the mascots are that they often portray Native Americans as “caricature-like” or “cartoon-like” – consistently out of touch with the real Native Americans they allegedly portray.<sup>132</sup> But the “cartoonish” portrayals of Native Americans are not limited to sports teams.<sup>133</sup> A study conducted at the University of North Dakota – the “Fighting Sioux” – explores the notion that the reactions to mascots and team names differ vastly between Natives and non-Natives.<sup>134</sup> The study found that “the more years in attendance at UND, the more distress from the ‘Fighting Sioux’ nickname/logo [] experienced by students.”<sup>135</sup>

Far too often, opponents of name changes claim that there are other, more challenging problems facing the tribes. But “if mainstream Americans can’t understand the problem of Native-themed mascots, nicknames, and logos, they can’t understand sovereignty or other issues affecting the quality of life for American Indian communities.”<sup>136</sup> Consistently, the groups opposing the

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128. Pauline Turner Strong, *The Mascot Slot: Cultural Citizenship, Political Correctness, and Pseudo-Indian Sports Symbols*, 28 J. OF SPORT & SOC. ISSUES 79, 83 (2004).

129. Angela R. LaRocque, *Indian Sports Mascots: Affective Difference Between American Indian and Non-Indian College Students 4* (n.d.) (unpublished Ph.D. dissertation, University of North Dakota), available at <http://www.apa.org/pi/oema/resources/affective-difference.pdf> (last visited Apr. 25, 2011).

130. *Id.*

131. *Id.* at 5.

132. *See id.* at 7.

133. Letter from Tex Hall, President, NCAI, to the *Milwaukee Journal Sentinel* (Apr. 17, 2003), available at [http://ncai.org/ncai/resource/documents/governance/wisconsin\\_gop\\_cartoon.pdf](http://ncai.org/ncai/resource/documents/governance/wisconsin_gop_cartoon.pdf).

134. LaRocque, *supra* note 129, at 11.

135. *Id.* at 23.

136. Jesse A. Steinfeldt et al., *Legislative Efforts to Eliminate Native-Themed Mascots, Nicknames, and Logos: Slow but Steady Progress Post-APA Resolution*, AM. PSYCHOL. ASS’N, (Aug. 2010), <http://www.apa.org/pi/oema/resources/communique/2010/08/native-themed-mascots.aspx>.

“political correctness” of the name changes argue one of two positions: “such mascots represent important school or community traditions, [or] such mascots are meant to honor Native Americans.”<sup>137</sup>

There are valid arguments for both sides of the controversy. But when there are whole tribes of Indians calling for the repeal of the use of Native American team names and mascots, the argument that the teams are somehow “honoring” the tribes weakens dramatically. It thus seems that the individuals responsible for the use of the mascots ignored the perspectives of the tribes at the time the mascots were chosen, as they continue to do today. Anecdotal evidence from a few nonconforming Native Americans cannot defeat the abundance of anti-mascot support from organizations such as the NCAI, APA, and the U.S. Commission on Civil Rights. Additional research indicates that there is far more than a simple scintilla of evidence showing that Native Americans are in fact harmed by the repeated use of stereotypical team names and mascots.<sup>138</sup>

One author stated well the need for a change in the way in which Native Americans are treated:

Because cultural competency is increasing, and knowledge of Native American history is expanding, some mascots and logos that once were viewed as entertaining are not considered racist and disrespectful. If even a small group of people find a mascot or logo to be offensive, it should be remove[d] or phased out immediately. Cultural respect is far more important than maintaining imagery for the sake of entertainment; moreover, it is incredibly important to be culturally sensitive if we are to progress as a society that embraces diversity.<sup>139</sup>

It is this type of progressive thinking that paves the way for a richer understanding of the Native American.

And this type of thinking is not merely quixotic. The University of Oklahoma, for example, had an unofficial Indian mascot from 1953 all the way

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137. C. Richard King et al., *Of Polls and Race Prejudice: Sports Illustrated's Errant "Indian Warriors"*, 26 J. SPORTS & SOC. ISSUES 381, 392 (2002).

138. See, e.g., *APA Search Results for "Mascot,"* AM. PSYCHOL. ASS'N, <http://search.apa.org/search?query=mascot> (last visited Apr. 25, 2011).

139. Joanna Plichta Boisen, *Grassroots Movement Pursuing Ban on Native American Mascots, Logos*, NATIVE AM. LEGAL UPDATE (Feb. 25, 2009), <http://www.nativelegalupdate.com/2009/02/articles/tribal-law-and-justice/grassroots-movement-pursuing-ban-on-native-american-mascots-logos/>.

up until 1970.<sup>140</sup> “Little Red,” as the mascot was called, would dress in Native American garb, including a headdress, and dance along the sidelines during games.<sup>141</sup> Little Red was banished by then-university president J. Herbert Hollomon in 1970,<sup>142</sup> just a few years after the NCAI began its campaign to address Native American stereotypes “in print and other media.”<sup>143</sup> Since the end of the Little Red era, the amount of Native American references nationwide has dropped from more than 3,000 to less than 1,000.<sup>144</sup> Other teams and universities, recognizing the harmfulness of such mascots, similarly have elected voluntarily to drop their mascots.<sup>145</sup> One author notes that the reason for such action is political correctness,<sup>146</sup> but the author fails to address the possibility that the universities themselves may be more aware and sympathetic to the problems faced by Native Americans. But regardless of the reasons for so doing, the universities that have elected to replace their Native American mascots are pioneering the way and lending support to the goal of ending stereotypical and derogatory depictions of the Indian in everyday culture.

In 2001, “[t]he U.S. Commission on Civil Rights call[ed] for an end to the use of Native American images and team names by non-Native schools.”<sup>147</sup> The Commission is yet another organization that recognizes the problems attending the perpetuation of such stereotypical depictions.

“In August of 2005, the American Psychological Association Council of Representatives adopted the APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations,” despite minor opposition because of “the scarcity of scientific evidence of the harm perpetrated on American Indian and Alaska Native people by the use of Native-themed mascots, nicknames, and logos.”<sup>148</sup> But as one group of

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140. RAY DOZIER, *THE OKLAHOMA FOOTBALL ENCYCLOPEDIA* 220 (2006).

141. *Id.*

142. *Id.*

143. *See* NCAI Timeline, *supra* note 8.

144. Wise, *supra* note 40, at 2.

145. Kenneth B. Franklin, *A Brave Attempt: Can the National Collegiate Athletic Association Sanction Colleges and Universities with Native American Mascots?*, 13 J. INTELL. PROP. L. 435, 443 (2006).

146. *Id.*

147. Press Release, U.S. Comm’n on Civil Rights, Statement of U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols (2001), available at <http://www.usccr.gov/press/archives/2001/041601st.htm>.

148. Steinfeldt et al., *supra* note 136.

researchers commented, the reason that scientific studies examining the harmfulness of Native American mascots are lacking is because “Native communit[ies] [have no incentive to] agree to participate in research conducted by the very institutions that have, and do, perpetrate harm on their members.”<sup>149</sup> Within the studies that do exist, they find that sports-related representations of Native Americans are detrimental because they “misuse sacred cultural symbols and spiritual practices; [] perpetuate racist stereotypes of American Indians; [] deny American Indians control over societal definitions of themselves; and [] create a racially hostile environment for all students.”<sup>150</sup> Of great benefit, new studies are being developed by Native American scientists that finally provide a more empirically supported record of the harms inflicted upon Native Americans through the perpetuation of these stereotypes.<sup>151</sup>

New research indicates that exposure to one type of racial stereotyping makes individuals more prone to similar racial stereotyping.<sup>152</sup> “Stereotypes are belief systems or categories used to organize other people cognitively.”<sup>153</sup> The problem with stereotypes is that they have the potential to “negatively influence academic performance, memory, leadership aspirations, and self-esteem,” and they falsely identify certain individuals as having preconditioned negative characteristics.<sup>154</sup> In another study, researchers found that when individuals are initially exposed to stereotypical images and depictions of Native Americans, their tendency to stereotype other individuals (Asian Americans) increased.<sup>155</sup> This information alone should indicate to others that, at the very least, the concern of tribes and individual Indians opposed to the stereotyping of Native Americans through team names and mascots is a legitimate one.

But not all empirical research has generated results favoring the stance of those advocating to retire Native American team names and mascots. In 2002, the widely popular sports magazine, *Sports Illustrated*, released an article

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149. *Id.*

150. *Id.*

151. *Id.*

152. Tom Jacobs, *Chief Wahoo's Revenge: One Stereotype Begets Another*, MILLER-MCCUNE (April 22, 2010), <http://www.miller-mccune.com/culture-society/chief-wahoos-revenge-one-stereotype-begets-another-14785/>.

153. Chu Kim-Prieto et al., *Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group*, 40 J. APPLIED SOC. PSYCHOL. 534, 535 (2010).

154. *Id.* (citations omitted).

155. *Id.* at 544.

containing a poll that claimed that many Americans and Native Americans do not oppose the use of mascots and imagery depicting Native Americans in less than traditional ways.<sup>156</sup> The *Sports Illustrated* article claimed that, of the general Native American population, eighty-one percent did not believe that high school and college teams should stop using the mascots, while eighty-three percent felt the same way about professional sports teams.<sup>157</sup> This number decreased slightly to sixty-seven percent (though still a majority) for Native Americans living on reservations.<sup>158</sup> Of those living on reservations, the article claimed that only thirty-two percent responded that the professional sports teams should stop using the mascots.<sup>159</sup>

The article contains insight from Suzan Harjo, one of the petitioners in the suit against the Redskins. She says that “there are happy campers on every plantation,” but perhaps that is simply an indication that “Native Americans’ self-esteem has fallen so low that they don’t even know when they’re being insulted.”<sup>160</sup> Owners for the Redskins state that the name “symbolizes courage, dignity and leadership and has always been employed in that manner.”<sup>161</sup> This characterization is important to their cause because, had they lost the appeal of the TTAB’s decision, it could have cost the team five million dollars “annually on sales of licensed merchandise.”<sup>162</sup> An economist from George Mason University stated, however, that the team is not “nearly as important to the area’s economy as the World Bank or George Washington University or a host of other institutions.”<sup>163</sup>

Billy Mills, a Native American and former Olympic-gold-medal winner, “insists that a team named Redskins in the capital of the nation that committed genocide against Native Americans is the equivalent of a soccer team in Germany being called the Berlin Kikes.”<sup>164</sup> Additional research from the *Sports Illustrated* article, however, indicates that only twenty-nine percent of Native Americans (forty percent living on reservations) believe that the

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156. S.L. Price, *The Indian Wars*, SPORTS ILLUSTRATED (Mar. 4, 2002), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1025046/index.htm>.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Steven Mufson & Mark Maske, *The Redskins Effect: Fans Spend to Spread Their Home Spirit*, WASH. POST, Nov. 7, 2010, at A4.

164. Price, *supra* note 156.



Washington Redskins should change the team name.<sup>165</sup> The author nonetheless posits at the end of the article that a team's revenue may actually increase upon changing the mascot from a demand for new merchandise.<sup>166</sup>

The argument that a team, specifically the Washington Redskins, will lose money or fans because of a name change is weak, at best. An NBA team located just a few miles from the Redskins changed its name from the Bullets to the Wizards,<sup>167</sup> with no apparent adverse effects. In fact, the revenues for the Wizards increased with the new merchandise on the market.<sup>168</sup> Although many reasons are cited for the name change, including not wanting "to contribute to Washington's reputation for violent crime," and the recent gun-related death of the owner's friend,<sup>169</sup> the primary reason was a negative connotation with the District of Columbia's "longtime ranking at the top of the list of the worst cities for murders and gunshot wounds per capita."<sup>170</sup>

It is difficult to argue that a name change with little potential for detriment to the fans or the team itself outweighs the documented harm to the Indians. Abe Pollin's move to change the team name from the Washington Bullets to the Washington Wizards was motivated by a desire to mollify "Washington's reputation for violent crime."<sup>171</sup> Similarly, Daniel Snyder<sup>172</sup> could change the name of the Redskins to something less disparaging to assuage the legitimate concerns of the Native Americans.

In opposition to the *Sports Illustrated* article, a team of sociologists and a Native American compiled an essay challenging its findings and methodologies.<sup>173</sup> The authors of *Of Polls and Race Prejudice* wrote it because of the following concerns with the *Sports Illustrated* article:

its pronounced bias, seemingly intent to distract from the history and implications of mascots as it derails efforts to challenge them;

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165. *Id.*

166. *Id.*

167. Dan Steinberg, Op-Ed., *Why Abe Pollin Went From Bullets to Wizards*, WASH. POST (Feb. 2, 2010), [http://voices.washingtonpost.com/dcsportsbog/2010/02/why\\_abe\\_pollin\\_went\\_from\\_bulle.html](http://voices.washingtonpost.com/dcsportsbog/2010/02/why_abe_pollin_went_from_bulle.html).

168. Locke Peterseim, *Like Magic, Wizards' Name Becomes Cool*, ESPN (Mar. 15, 2002), <http://espn.go.com/page2/wash/s/closer/020316.html>.

169. Steinberg, *supra* note 167.

170. Peterseim, *supra* note 168.

171. *See id.*

172. *NFL Team Valuations, #2 Washington Redskins*, FORBES (Sept. 13, 2007, 6:00 PM), [http://www.forbes.com/lists/2007/30/biz\\_07nfl\\_Washington-Redskins\\_300925.html](http://www.forbes.com/lists/2007/30/biz_07nfl_Washington-Redskins_300925.html) (owner of the Washington Redskins).

173. *See generally* King et al., *supra* note 137.

[] its use of polling and representations of opinion; [] its pervasive decontextualization of mascots and the controversy over them; [] the impression it undoubtedly leaves on its audience that mascots are unproblematic, particularly because indigenous people say so; and [] the legacies of such inappropriate and inaccurate renderings for public debate and social justice.<sup>174</sup>

The authors were unsuccessful in their attempts to retrieve any of the statistical data from *Sports Illustrated*,<sup>175</sup> and thus were unable to attempt a recreation of the data or studies used by the *Sports Illustrated* team.

King's article argues that the *Sports Illustrated* article spreads and reinforces the hegemonic relationship between the United States (and white men) and the Native American people living in this country.<sup>176</sup> It also suggests that the *Sports Illustrated* article is unscientific and provides no real method to ensure that the individuals polled were actual Native Americans or representative of a group of the "more than 550" federally recognized Indian tribes.<sup>177</sup> One of the article's most glaring problems is that it suggests that popular opinion should determine what is acceptable in society.<sup>178</sup> NCAA spokesman Bob Williams agrees with King that popular opinion and polls cannot be relied upon to determine policy.<sup>179</sup> For instance, the widely popular television show *Mad Men* depicts the male-dominant advertising industry of the 1960s, during which men repeatedly treated women as subhuman and subjected them to overt sexual harassment.<sup>180</sup> Because the show popularizes this treatment of women, should it be accepted by modern day societal standards? The answer is no.

It is also necessary to understand the origin of Native American mascots, which did not arise until the "threat of major rebellion by natives to colonization had been clearly eliminated."<sup>181</sup> Popular culture in American society has played a major role in the desensitization of Americans toward Native American mascots, with the help of the "sports industry, educational

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174. *Id.* at 382.

175. *Id.*

176. *See id.* at 386.

177. *Id.* at 387-88.

178. *Id.* at 390 ("Of course, the greatest error of all may be the idea that polling people on these issues is appropriate from the outset. It suggests that popular opinion can settle troubling questions about prejudice, power, and privilege.").

179. Fears, *supra* note 27.

180. *See* Stephanie Coontz, *Why 'Mad Men' is TV's Most Feminist Show*, WASH. POST, Oct. 10, 2010, at B02.

181. King et al., *supra* note 137, at 391.

institutions, and the media [that] trivialize Indigenous culture as common and harmless entertainment.”<sup>182</sup> It certainly would not be acceptable in today’s society if, instead of children playing “Indian,” they played “Black” or “Jewish.”<sup>183</sup>

[S]tereotypes convey several problematic notions, including that Native Americans (a) are mainly a people who lived in the past; (b) have not adopted contemporary lifestyles; (c) have a single culture (rather than coming from many different native societies with many different cultures); (d) all were and are involved in fighting, are especially spiritual, and are deeply connected to nature; and (e) that non-Native Americans were and are less involved in fighting.<sup>184</sup>

In the end, the *Sports Illustrated* article risks stifling the debate. Because of the overwhelming “scientific” results from the article’s poll, people reading the article could dismiss the Indian activists and their arguments that Native American team names and mascots perpetuate negative stereotypes.

The first state legislature to take hold of this issue is Wisconsin. In May of 2010, a bill passed in the state legislature that allows the filing of grievances against the use of “race-based nickname[s], logo[s], mascot[s], or team name[s],” and further provides a fine of up to \$1,000 for each day the school is in violation.<sup>185</sup> There is a loophole, however, that allows the name to stand, even after a complaint has been filed – “[a] provision in the law says schools with mascots specifically named after a federally recognized tribe could keep it, if they have that tribe’s permission.”<sup>186</sup> This is very similar to the NCAA’s resolution regarding mascots.<sup>187</sup>

Although Wisconsin is the first and only state to introduce and ratify this type of law, it is a welcome catalyst to help other states to adopt an informed view of the damaging effects of these mascots. Hopefully the presence of this type of law in a state’s legislature will alert others to the fact that this remains a legitimate problem. In fact, the statute has already succeeded in stimulating

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182. Charlene Teters, *American Indians Are People, Not Mascots*, NAT’L COALITION ON RACISM IN SPORTS & MEDIA, <http://www.aimovement.org/ncrsm/index.html> (last accessed Feb. 2, 2011).

183. King et. al., *supra* note 137, at 391.

184. *Id.* at 393.

185. WIS. STAT. § 118.134 (2010).

186. Brian Bull, *Race-Based Team Names Not Tolerated in Wisconsin*, NPR (June 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=127987743>.

187. See *supra* notes 25-26 and accompanying text.

change – in October of 2010, Kewaunee High School in Wisconsin changed its name from “Indians” to the “Storm” because of the new law.<sup>188</sup>

It is more than a decade since one author noted that the movement for the denouncement of Native American mascots is gaining momentum.<sup>189</sup> As evidenced by the *Harjo* litigation, this fight continues. A disparaging trademark is one that brings a person or class into “contempt or disrepute.”<sup>190</sup> One commentator indiscriminately suggests that it is ridiculous to bring about the fall of all offensive or harmful mascots because someone expresses a distaste for the mascot.<sup>191</sup> In the case of the Thunder, the Jets, and other benign team names or mascots, the commentator may be right. But where the mascot is “representative” of a particular minority group, the same does not hold true. There are no derogatory terms that apply to neutral mascots. With Native American mascots, the derogatory terms abound.

Native Americans make up about one percent of the United States population,<sup>192</sup> which equals about three million individuals.<sup>193</sup> They have not been the only minority to be used so carelessly in U.S.-brand trademarks.<sup>194</sup> But one reason offensive African Americans trademarks disappeared while those offensive to Native Americans persist is the relatively small presence of Native Americans in the United States, both in population and representation in the legislature.<sup>195</sup> This is yet another reason to listen more closely to the Native Americans concerned with this controversy – they simply do not have a powerful voice.

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188. Associated Press, *Kewaunee High School Looks to Replace Indian Mascot Name*, MILWAUKEE WIS. J. SENTINEL (Oct. 4, 2010), <http://www.jsonline.com/news/wisconsin/104315924.html>.

189. Aaron Strider Colangelo, Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 905 (1999) (“A mounting chorus of protest denounces the use of Indian mascots and team names as a ‘virulently racist practice,’ and the public acknowledgment of impropriety is growing.”) (citation omitted).

190. BLACK’S LAW DICTIONARY, *supra* note 94, at 1631.

191. See John B. Rhode, Comment, *The Mascot Name Change Controversy: A Lesson in Hypersensitivity*, 5 MARQ. SPORTS L. REV. 141, 141 (1994).

192. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Nov. 4, 2010).

193. *Id.*

194. Kimberly A. Pace, *The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 PEPP. L. REV. 7, 7-10 (1994).

195. *Id.* at 16.

When assessing whether a trademark is scandalous, the current standard is whether the trademark is “[s]hocking to one’s sense of . . . propriety.”<sup>196</sup> Courts apply the standard liberally.<sup>197</sup> That the Washington Redskins is a scandalous trademark is easy to contend, particularly when one considers that a substitution of “red” for “black” or “yellow” would certainly offend many.

The number of Native Americans discouraged from attending sporting events because of discriminatory mascots is uncertain, but even a small number is unacceptable. Native Americans make up an entire race of people, wholly distinct from others, and further subdivided into tribes. They deserve the constitutional rights of equal protection and due process afforded to others.

#### *IV. Claims and Defenses*

##### *A. The First Amendment*

Undoubtedly, there will be individuals who attempt to combat any efforts to change the team names or mascots. A strong defense for them will be the First Amendment. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>198</sup> Freedom of speech is one of the most vehemently protected areas of law contained within the Constitution. Rules, regulations, and statutes generally do not fare well when challenged on First Amendment grounds.<sup>199</sup> Wrapped in this First Amendment argument is another argument that, by encouraging society to give into the more progressive and “politically correct” modern attitudes, there is a risk that the freedoms guaranteed by the Constitution will somehow be eroded or abridged.

Generally, “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>200</sup> With respect to noncommercial speech, however, the Supreme Court has carved out specific areas for libel, obscenity, and “fighting” speech.<sup>201</sup> Commercial speech initially was afforded no protection under the

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196. *Id.* at 25.

197. *See id.* at 26-27 (“[W]hether a mark is scandalous or immoral must be determined according to contemporary standards of acceptability. . . . [T]he nakedness of the cartoon mark [i]s not shocking to society’s sense of propriety and involve[s] no threat to present day public morals because contemporary society’s attitude toward obscenity has become increasingly liberal.”).

198. U.S. CONST. amend. I.

199. *Roth v. United States*, 354 U.S. 476, 484 (1957).

200. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

201. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (holding that there “is

Constitution.<sup>202</sup> Beginning in 1975, the Supreme Court began to carve out an area for it.<sup>203</sup> While the Constitution affords protection to commercial speech, it does so with less strength than in other areas.<sup>204</sup> The commercial speech doctrine is mainly focused on the information contained in or portrayed by advertising.<sup>205</sup> “[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or *commercial speech related to illegal activity*.”<sup>206</sup>

The Supreme Court has developed a four-part analysis in the context of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>207</sup>

In the case of sports team mascots, whether they could be considered commercial speech within the confines of First Amendment jurisprudence is arguable. One could argue that the various mascots are not “lawful” because of their racist undertones. But it seems somewhat difficult to fit the team name and mascot into the commercial speech doctrine because neither a team’s name or its logo is “advertising.” While it is true that the merchandise and memorabilia of the teams is advertised to consumers, the actual team name and logo are not advertising because they are not products, but rather representations of the team itself. If challenged, the asserted governmental interest could be to decrease or inhibit the perpetuation of racial stereotypes.

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no constitutional value in false statements of fact”); *Miller v. California*, 413 U.S. 15, 23-24 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

202. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

203. *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975).

204. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980)).

205. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

206. *Id.* at 563-64 (emphasis added) (citation omitted).

207. *Id.* at 566.

In addition, one seeking to claim a legitimate government interest could use the General Welfare Clause of the Constitution<sup>208</sup> for the proposition that retiring the disparaging team names and mascots promotes the health of Native Americans.

If the above government interest(s) are asserted, the type of regulation on the use of the team names and mascots – albeit very minimal – would directly support the proffered government interest without infringing on the rights of others. Using this rationale, the government could legitimize regulating this type of activity or speech because it minimally invades upon areas of protected speech. At the same time, the regulation would help to promote the interests of Native Americans. A simple and narrowly tailored ban on the use of the team names and mascots certainly would be no more extensive than necessary to reach the ultimate goal of eliminating a major form of racism. A ban on their use would be just that, and nothing more. The key to the success of this type of legislation or regulation would be to make it as specific as possible. For instance, a regulation could ban “All Native American, Native Hawaiian, and Alaskan Inuit mascots, logos, symbols, and team names due to their hostile and disparaging attributes, unless expressly endorsed by a governing body of a specific tribe.” Such a regulation would further the asserted government interests without placing an undue burden on sports teams, as there is no causal connection between name changes and variance in fan-based team support.<sup>209</sup>

### *B. Title VI*

Some argue that the use of Native American team names and mascots is a violation of the Civil Rights Act of 1964,<sup>210</sup> which states, in relevant part, that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>211</sup> With the continued use of Native American mascots at sporting events nationwide, professional or otherwise, thousands of Native Americans are potentially discouraged from viewing these competitions because of discrimination. Many feel that the continued use of Native

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208. U.S. CONST. pmbi.; *id.* art. I, § 8, cl. 1.

209. See *supra* notes 167-68 and accompanying text.

210. See generally Lawrence R. Baca, *Native Images in Schools and the Racially Hostile Environment*, 28 J. SPORT & SOC. ISSUES 71 (2004); Daniel J. Trainor, Note, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U. ILL. L. REV. 971.

211. 42 U.S.C. § 2000(d) (2006).

American mascots is an insult to their race.<sup>212</sup> As a result, they may be less inclined to support activities and programs that continue to stereotype their race. The number of fans that attended NCAA football games for the 2009 season was just over forty-eight million.<sup>213</sup> It is impossible to know how many of the forty-eight million were Native Americans, but it is unacceptable that even a handful could be discouraged from attending because of the discomfort engendered by the racist depictions. How many fans have ever felt uncomfortable attending a game at Memorial Stadium in Lawrence, Kansas because of a Jayhawk? The answer is none, highlighting the important distinction between the teams referencing Native Americans and those with neutral names.

In cases of harassment among students, a plaintiff in a Title VI case alleging wrongful race-based harassment must show that: “(1) the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (2) the defendant had actual knowledge of the harassment; and (3) the defendant was deliberately indifferent to the harassment.”<sup>214</sup> Research demonstrates that Native American children often are subject to harassment at school.<sup>215</sup> Repeated abuse doubtless has an effect on the educational opportunities of the individual children.<sup>216</sup> The less they are able to focus at school, the more probability that their academics will suffer, directly impacting their future career opportunities. And, considering the vast unemployment among the Native American population,<sup>217</sup> this is no small concern.

Difficult to prove, however, is whether the individual schools are aware of this type of harassment. Depending on the age group, children may or may not be inclined to tell others of the abuse or mistreatment, usually for a number of reasons, including shame and embarrassment. But once concrete evidence of mistreatment surfaces, it is easy to determine whether school administrators

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212. Monica Davey, *Insult or Honor?*, NEW YORK TIMES UPFRONT, Feb. 8, 2010.

213. 2009 National College Football Attendance, NCAA, [http://fs.ncaa.org/Docs/stats/football\\_records/Attendance/2009.pdf](http://fs.ncaa.org/Docs/stats/football_records/Attendance/2009.pdf).

214. *Maislin v. Tenn. State Univ.*, 665 F. Supp. 2d 922, 931 (M.D. Tenn. 2009) (citing *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258-59 (6th Cir. 2000)).

215. See *supra* notes 115-18 and accompanying text.

216. See *supra* notes 115-18 and accompanying text.

217. Angelique EagleWoman, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 Washburn L.J. 805, 827 (2010) (“While the nationwide unemployment rate hovers around a distressing 10 percent, some reservation[s] face unemployment rates of up to 80 percent.”) (alteration in original).



have implemented sufficient ameliorative programs to educate all students about other cultures, such as the Native Americans. Such programs would benefit all students by raising awareness and engendering familiarity.

### C. Title II

In 2007, the total paid attendance for the regular season in the NFL increased to over 17 million fans,<sup>218</sup> and there is no indication that the popularity will decrease anytime soon. Title II of the Civil Rights Act of 1964 prohibits discrimination in "sports arena[s], [and] stadium[s]." <sup>219</sup> Similar to the NCAA sporting events, the NFL may discourage Native Americans from attending some events because of discomfort or humiliation. Examples of instances in which public places of entertainment were held to violate the Civil Rights Act include amusement parks,<sup>220</sup> sports stadiums,<sup>221</sup> and even neighborhood bars.<sup>222</sup> A Washington Redskins game, therefore, is not an inconsistent extension.

The Act is designed to encourage individuals to attend a variety of entertainment venues throughout the United States without the threat or possibility of being alienated because of race. Its purpose "is to eliminate the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public."<sup>223</sup> The Civil Rights Act of 1964 was instrumental in helping to rid the South of Jim Crow laws and the racial animus directed at African Americans;<sup>224</sup> it could do the same for Native Americans.

It is not essential that the federal government get involved. Many laws that regulate in a manner similar to the Civil Rights Act of 1964 have been found constitutional at the state level as an appropriate exercise of the police power.<sup>225</sup> Even local ordinances are upheld when the particular state in which

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218. *NFL Sets Regular-Season Paid Attendance Record*, NFL, <http://www.nfl.com/news/story?id=09000d5d805b5d53&template=without-video&confirm=true> (last visited Apr. 25, 2011).

219. 42 U.S.C. § 2000a(b)(3) (2006).

220. *Miller v. Amusement Enter., Inc.*, 394 F.2d 342, 353 (5th Cir. 1968).

221. *Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 532 F. Supp. 1088, 1102 (D.N.J. 1981).

222. *United States v. DeRosier*, 473, 752 F.2d 749 (5th Cir. 1973).

223. *Equal Emp't Opportunity Comm'n v. Chicago Club*, 86 F.3d 1423, 1434 (7th Cir. 1996) (internal quotation marks omitted).

224. Matthew D. Lassiter, *Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401, 1407 (2005).

225. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658-59 (2000) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995)).

the municipality is located has delegated such powers.<sup>226</sup> This provides the ability for states and municipalities to take legislative action to demand that teams retire Native American names, mascots, and logos.<sup>227</sup> If left unaddressed by the federal government, the issue must be resolved by the states on a case-by-case basis.

An action for a violation under the Civil Rights Act of 1964 would require actual evidence of detrimental treatment or negative effects on Native Americans.<sup>228</sup> To gather this evidence, one could conduct a poll of Native Americans in areas where sports teams with Native American mascots exist or where teams have played other teams with such mascots. The poll could be used to determine the percentage of Native Americans that were discouraged from attending sporting events because the Native American mascot made them uncomfortable. In turn, this information could be used to prove the detrimental effects of continued use of Native American mascots and team names.

#### *V. Proposed Plan*

Outside the litigation context, an alternative plan could be created that would require concessions on both sides, but ultimately would help to reach a solution to the problems attending Native American team names and mascots. Non-Indians need to cease with the question, "How could the mascots possibly be offensive to Native Americans?," and instead ask the question, "Why are the mascots offensive to Native Americans?" The dialogue between the two groups needs to be open so that non-Indians are able to appreciate the concerns of those actually harmed.

There is no quick fix. But considering that the debate has continued for decades, a swift movement to ban and change team mascots and names may not be realistic. Though idealism would have the Native American mascots throughout the country gone tomorrow, realism suggests that it will take time. But with the scientific evidence on the harmful effects mounting, the opponents similarly must be realistic in realizing that the team names will not last forever. The storied team traditions will move into the history books and the owners will have to come up with new memorabilia to market – a move that may actually increase revenues.

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226. *E.g.*, *Marshall v. Kan. City*, 355 S.W.2d 877, 881 (Mo. 1962).

227. *See supra* notes 185-86 and accompanying text.

228. *See Katzenbach v. McClung*, 379 U.S. 249, 299, 304 (1964).

One could involve the U.S. Commission on Civil Rights or the Department of Education to issue a statement similar to that of the NCAA, declaring the names offensive and advocating replacement. A timeline could be created under which teams must retire the old, offensive mascots, and fashion new, neutral ones. Fines could be issued to teams in noncompliance, similar to those in the Wisconsin statute.<sup>229</sup> Ultimately, the goal will be to progressively phase out team names and mascots that disparage Native Americans.

A workable solution to this problem would be to set a reasonable time limit or deadline by which the trademarks of the sports team organizations will expire. In so doing, the teams will have notice of trademark expiration. This should afford them ample opportunity to develop a new logo and the accompanying merchandise, while easily phasing out the old. Moreover, this will benefit both parties involved: the teams will continue to profit without completely having to forego the profits on merchandise already created, and the Native Americans finally will see an end to the discriminatory and disparaging team-based stereotypes.

### *VI. Conclusion*

Although the Supreme Court passed on the opportunity finally to resolve the issue of whether Native American sports team names are disparaging and have a detrimental effect on Native Americans as a whole, the issue was immediately revived after the denial of certiorari. A new group of plaintiffs filed a similar action claiming the disparagement of Native Americans because of the Washington Redskins logo.<sup>230</sup> It is hoped that this case may make it further in the courts because the procedural bar of laches that plagued the *Harjo* case is nonexistent.<sup>231</sup>

Even if only a small proportion of tribes and individual Indians would be and are offended by the continued use of Native American mascots, logos, and team names, are we truly prepared to sacrifice their feelings and general well-being for the sake of organized sporting events and a continued profit from their likeness and the stereotyping of their culture? The scientific evidence from a variety of scholars and psychologists is palpable. It is time for the Supreme Court, state and local governments, and the American public to resolve the issue in favor of the Native Americans; it is time to place psychological well-being over entertainment-based profit.

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229. See *supra* notes 185-86 and accompanying text.

230. Robert Barnes, *Court Won't Hear Redskins Case*, WASH. POST, Nov. 17, 2009, at 1.

231. *Id.*