Indian Mascot World Series Tied 1 - 1: Who Will Prevail as Champion?

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Introduction

There seems to be a never ending debate over whether the use of the Indian as a team mascot is or is not racist, derogatory, offensive, and/or vulgar (or, as seen by some, all of the aforementioned). What some people view as a harmless representation of a team, others view as a mockery of American Indian culture. Supporters of teams that define themselves by the Indian mascot claim that its use is an honorable one. Opponents argue that the mascot fosters disparagement and insensitivity for a culture that plays an important part of American history. The hostility is mainly channeled to the five professional sports teams that, despite harsh public outcry, continue to be represented by American Indian names and symbols: the Atlanta Braves, Chicago Blackhawks, Cleveland Indians, Kansas City Chiefs, and Washington Redskins. These teams, their owners and/or corporate personnel have been berated because of their choice to retain their mascots and not succumb to the demands of what appears to be a minority of the public and the American Indian population. While those objecting could be more tactful, they may be justified in their objections. American Indians feel their cultural and religious symbols and names are being exploited, not only an economical level, but also a social level as certain stereotypical attributes derived from the mascot’s actions are equated with American Indians. It is these stereotypical images and actions that often create the basis for litigation and relief for those in opposition to the practice. The other main cause of action includes the racist and offensive uses of the terms. However, it seldom seems that anyone will go the extra inning to determine why the teams selected their particular mascot and the meaning it holds for each member of the team. Quarter 1 of the present comment discusses the arguments opposing and supporting the use of the Indian mascot. Quarter 2 outlines the methods of recovery that have been used to seek relief as well as new legal approaches that are currently being suggested. Quarter 3 examines four of the five professional teams’ histories and characteristics in an attempt to determine if their use of the Indian mascot is meant to be offensive to American Indians. Finally, Quarter 4 ends with

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what is hoped to be an unbiased, inoffensive opinion as to why the professional teams using the Indian as their mascot do not intend to be racist or derogatory.

I. The Kick Is Up and It’s . . . Arguments Opposing and Supporting the Use of an Indian Mascot

As in any game, there are two teams with team one being those who oppose the Indian mascot use and team two being those who support the Indian mascot use. The teams are poised, ready to play a strategic game of which team can outsmart the other, with each hoping to secure a win at the end of the game. And whereas, in most games, there is an unmistakable winner, in the game of the Indian mascot, unfortunately, there is not.

A. . . . No Good — Arguments Opposing the Use of the Indian Mascot

Though opponents have numerous arguments as to why the use of Indian mascots should not be allowed, the two most often cited are: (1) the terms associated with the Indian mascot are vulgar, derogatory, profane, or obscene, and (2) the use of Indian images is stereotypic, racist, and discriminatory.

In a country historically marked with racial issues, many, especially those belonging to the American Indian culture, wonder why offensive and derogatory language, speech, and symbols are still prevalent in society, specifically with the use of the Indian mascot.¹ More people are beginning to recognize that the terms are severely damaging to American Indians. Such recognition came about on January 29, 1999, when the Utah Supreme Court handed down an important and historic opinion where it held that the term “redskin” may be too offensive a word to appear on vanity license plates in its state.² In McBride v. Motor Vehicle Division of Utah State Tax Commission,³ three Utah resident Washington Redskins fans ordered and displayed personalized license plates that read respectively, “REDSKIN,” “REDSKN,” and “RDSKIN.”⁴ Two American Indian petitioners challenged the license plates asserting them to be “offensive and derogatory, and express[ing]
contempt and ridicule toward their heritage, ethnicity, and race.”

The petitioners claimed the license plates violated section 41-1a-411(2) of the Utah Code, which states that the [Motor Vehicle] Division may not issue personalized license plates containing a “combination of letters, words, or numbers with any connotation that is vulgar, derogatory, profane, or obscene.” Section 41-1a-411(2) also states that “the division may refuse to issue any combination of letters, numbers, or both that may carry connotations offensive to good taste and decency or that would be misleading.”

The commission denied the petitioners’ request, sparking a dynamic debate before the Utah Supreme Court regarding whether the term “redskin” was derogatory, vulgar, or obscene, as set forth in the state statute, or whether it was inoffensive nickname of a professional sports team. The Utah Supreme Court reversed the commission’s decision and remanded the case, ordering the commission “to determine, in light of all the evidence presented, whether an objective, reasonable person would conclude that the term ‘redskin’ contains any vulgar, derogatory, profane, or obscene connotation.”

In Associate Chief Justice Durham’s dissenting opinion, he criticized the majority’s failure to consider the significance of the term “redskin” as it was historically viewed:

The facts, ignored by the majority, are that in 1755, the British Crown offered a bounty for the scalps of Native American men, women, and children living in the New England colonies. To demonstrate that there had been a kill, soldiers were required to skin the body of the Native American and bring in the “red skin.” “Redskin” is in particular a horrifying reminder of what amounted to genocide of many of the Native American people. They are acutely aware of its meaning. Thus, the Washington Redskins football team (and the would-be owners of the personalized Utah license plates at issue here) utilizes the name and symbol of the genocidal practice of paying white soldiers a bounty for the bloody skins of murdered Native Americans.

5. Id.
7. UTAH CODE ANN. § 41-1a-411(2), quoted in McBride, 977 P.2d at 468.
9. Id. at 471.
10. Id. at 472.
Following Associate Chief Justice Durham's view of "redskin," many would agree that the terms associated with the Indian mascot are indeed vulgar, derogatory, profane, or obscene.

The second main argument concerns the images of the Indian as being stereotypical, racist, and discriminatory. "Too often, depictions associate Native Americans with images formulated during the frontier settlement" (i.e., the qualities of the warrior role). These depictions portrayed by Indian mascots only further a negative image of the American Indian. Stereotypical representations of American Indians often create destructive effects by eroding the fundamentals of equality while undermining self-esteem and confidence of American Indians. To many American Indians, the use of certain slang terms (i.e., "redskin") is symbolic of racism. The use "symbolizes a continuing lack of understanding the complete and diverse cultures and the heritage of native peoples, and it is offensive to anyone aware of the history of native peoples in North America." Disregarding the setting of the displayed Indian team name does not alleviate the promoted racial insensitivity. Due to our society's increased attention to sports, Americans frequently witness the racist portrayals of American Indians. For young American Indians who attend schools or watch sports games with teams that have names such as Indians, Redskins, etc., and witnessing "a distorted and historically inappropriate caricature" of an American Indian on a school gym wall, participating takes on a new connotation. This often requires "the swallowing of cultural pride, suppression of anger against insensitivity, and the giving up hope of being understood as to their heritage." By continuing to discriminate against American Indians in athletics, teams will aid the promotion of "social discrimination against American Indians" along with sustaining "latent racism for future generations."

Further supporting the argument is a comprehensive report created by the Michigan State Civil Rights Commission (the Commission) after an

12. Id.
13. Id.
14. Id. at 40.
15. Id.
16. Id. at 40-41.
17. Id. at 41.
18. Id. at 41-42.
19. Id. at 42.
investigation on the use of American Indian names by sports teams.\textsuperscript{20} The Commission based their study on "the perceived negative impact" that the stereotypical depictions of the American Indian were creating in an educational setting.\textsuperscript{21} The Commission reported "that the proliferation of negative imagery of American Indians indicated that there is a generally low level of sensitivity toward Indian images, which exist in this society, and a generally high level of racism toward American Indian people."\textsuperscript{22} It was upon these premises that the Commission decided to conduct a study from the results of surveys that were issued to schools having an American Indian reference in their mascots, nicknames, or logos, and to American Indian tribes and affiliations for their thoughts on such use.\textsuperscript{23} Relying on the survey results, the Commission came to the conclusion that using American Indian images creates "stereotypic, racist, and discriminatory perceptions" and "that the perpetration of such images was due, at least in part, to a media-created caricature commonly accepted by the general public."\textsuperscript{24} With findings such as these, it is difficult to not think that these images are stereotypical, racist, and discriminatory which cause the general public to have negative opinions toward American Indians.

\textbf{B. . . Good — Arguments Supporting the Use of the Indian Mascot}

Despite the outrage over Indian terms and symbols being used as mascots, several arguments have been offered in support of their use. The main ones are: (1) the Indian mascot actually honors American Indians by celebrating their culture and traditions; (2) teams choose Indian mascots for the positive attributes (i.e., dedication, courage, and pride) associated with American Indians; and (3) the Indian mascot is backed by tradition and an important part of team pride and identity.

Most supporters feel that the use of the Indian mascot honors American Indians by celebrating their culture and traditions. \textit{USA Today} sports

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\item[20.] Kristine A. Brown, \textit{Native American Team Names and Mascots: Disparaging and Insensitive or Just a Part of the Game?}, 9 \textit{SPORTS LAW. J.} 115, 118 (2002). The Michigan Department of Civil Rights published the \textit{Michigan Civil Rights Commission Report on Use of Nickname, Logos, and Mascots Depicting Native American People in Michigan Education Institutions} (1988), in which it stated its adamant opposition to the use of American Indian references in the realm of school mascots, nicknames, etc. It also recommended that Michigan schools should eradicate the use of American Indian mascots, logos, and names.
\item[21.] \textit{Id.}
\item[22.] \textit{Id.}
\item[23.] \textit{Id.}
\item[24.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
commentator Lytreshia Green-Bell states, "Through all their hardships, American Indians have managed to stay unified and strong."25 Using the Indian as a mascot helps to promote the unity that the American Indians have displayed throughout history. Some of these mascots were adopted with the clear intention of honoring Indian nations and heroes.26 For example, the Chicago Blackhawks chose to celebrate the Sauk Chief Blackhawk, and the Cleveland Indians, by a fan vote, desired a name to honor Major League Baseball’s first American Indian star, Lou Sockalexis.27 Also argued is that American Indian mascots “present a dignified image of traditional American Indians and preserve the memory of tribes that once thrived in a particular region.”28 These issues raise the question: "If Indian nicknames are inherently oppressive, why do many Indian and Indian-dominated schools use them?"29

Many sports teams select a mascot for the positive attributes associated with it. Qualities, such as courage, pride, and strength, are what teams base their choice of mascot on. Thus, teams may deny the use of racial motivation in choosing their American Indian mascot, arguing instead the choice was made on the basis of American Indians being dignified as symbols of "strength, pride, and courage."30 Those who do not support the movement to eliminate American Indian mascots argue that the mascots pay tribute to American Indians in that the images portrayed reflect bravery and a fighting spirit.31 Supporters of American Indian team names, as well as the teams, will continue to contend that the images exhibit “positive attributes of American Indians, such as dedication, courage, and pride.”32

Supporters also persist in maintaining that the traditional use of the Indian mascot, as well as its importance to team pride and identity, should allow for

27. Id.
29. Leo, supra note 26, at 16.
its continual use. "To supporters, the mascot represents the tradition and heritage of a tribal spirit that awakens with every fan's cheer."33 Throughout history, mascots based on American Indians have become intertwined with the teams they represent causing them to be cornerstones of certain "time-honored traditions."34 Thus, the present American Indian names and mascots should be permitted to remain, especially since complaints about such uses have been minimal until recently.35 The teams presently having American Indian mascots, the Blackhawks, Braves, Chiefs, Indians, and Redskins, are quite determined to maintain possession of their American Indian names.36 Ted Turner, owner of the Atlanta Braves, believes that "[t]here's nothing wrong with [the name] Braves" saying, "It's a compliment," and that he does not plan on changing the name.37 Likewise, after winning Super Bowl XXVI, Redskins owner Jack Kent Cooke stated that, "[t]here is nothing in the world wrong with the name Redskins."38 Also argued is that through long, substantial and widespread use, "Redskins" has acquired a second meaning, being associated with a professional football team, rather than with American Indians.39 The arguments made by those who support the use of Indian mascots show that as there are passionate arguments for prohibiting the use of the Indian as a mascot, there are equally as impassioned arguments by those who support the use.

II. There's a Swing and a Hit and It's Going, Going, It's Gone . . . Methods of Recovery

Several methods to recover from the use of the Indian mascot have been brought to the courts' attentions. Some seemed to have been successful in bringing about the cancellation of Indian mascots and symbols while others have only been suggested as possible remedies. Courts have not yet given any sort of bright line method of recovery against the use of Indian mascots,

33. Trainor, supra note 28, at 973.
35. Loving, supra note 11, at 5.
36. Id. at 14.
meaning those seeking to recover will have to continue to ponder different game plays to score.

A. Those Thought to Have Scored

Those who oppose the use of the Indian mascot have brought claims based on different causes of action. The most frequent claim is that regarding trademark law, specifically, the Lanham Act. "The Lanham Act currently governs federal trademark law." Under the Act,

[T]he term "trademark" includes any word, name, symbol, or device, or any combination thereof —
(1) used by a person, or
(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this [chapter], to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. 41

Section 2 of the Lanham Act generally affords trademark protection to those goods that are "distinguishable from the goods of others." 42 Section 2(a) can also deny trademark protection to "trademarks that are immoral, deceptive, scandalous, or disparaging." 43 For a trademark to be considered "disparaging," there must be two elements: (1) "the trademark must be reasonably understood as referring to the plaintiff; and (2) the trademark must be considered offensive or objectionable by a reasonable person of ordinary standards." 44 It is by the "disparaging" trademark standard that American Indians have attempted to find relief from the offensive Indian mascot.

In Harjo v. Pro-Football, Inc., 45 a group of American Indians brought cancellation proceedings against the Washington Redskins football team, alleging that the team's registered trademarks (i.e., the word "redskin(s)" and

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42. Brown, supra note 20, at 121-22 (explaining the Lanham's Act role in the American Indians' plea to eliminate the using of references to their culture as sports teams' names, mascots, and symbols by claiming that such use constitutes a "disparaging trademark," thus violating one of the Lanham Act's purposes).
43. Id. at 122.
44. Greyhound Corp. v. Both Worlds, Inc., 6 U.S.P.Q.2d (BNA)1635, 1639 (T.T.A.B. 1988). The Trademark Trial and Appeal Board (TTAB) declared in Greyhound the test which is to be used when deciding whether a trademark is to be ruled as "disparaging."

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identified registrations) were disparaging and offensive to petitioners and other American Indians.46 In a lengthy decision, the Trademark Trial and Appeal Board (TTAB) held that the trademarks "Washington Redskins," "Redskins," and "Redskin-ettes" and their associated symbols were disparaging to American Indians and, therefore, cancelled the federal trademark registration for those trademarks.47 By applying a liberal test for determining what constitutes "disparaging," the TTAB decided that a disparaging trademark would be based on the views of the referenced group, rather than the general public, and concluded that the trademarks being challenged were in fact disparaging and therefore not capable of being registered under section 2(a).48 The ruling marked a victory mainly for American Indians and the continued demand for equality including the elimination of racism in our society.49

The victory was short-lived, however, when the United States District Court of the District of Columbia reversed the decision in September 2003.50 The TTAB's test may have been applied too liberally as the district court ruled that parties seeking cancellation of trademark registration on the ground that it may disparage them or bring them into contempt or disrepute, have the burden of demonstrating such effect by a preponderance of the evidence.51 The court ruled that the TTAB's findings as to whether the professional football team's "redskins" symbols were viewed as disparaging to American Indians, and thus subject to registration cancellation, were not supported by substantial evidence.52 It now seems as though an American Indian mascot may still be seen as disparaging, but to determine whether it is or not, a court must not only refer to dictionary definitions, but must also consider the relationship between the subject matter in question and other elements that make up the use in its entirety, nature of goods and/or services, and the manner in which the symbol is used in marketplace in connection with goods and/or services.53

46. Id.
47. Id. at 1708.
48. Id. at 1749.
49. Brown, supra note 20, at 126.
52. Harjo, 2003 WL 22246923.
53. Id.
B. Those in Scoring Position

American Indians should not feel as though they have struck out with the "disparaging" trademark argument as they are still able to look toward other remedies in hopes of scoring. American Indians may be able to cancel the registration and use of American Indian icons on the basis of 15 U.S.C. § 1052(a), a provision that forbids trademark registration which "[c]onsists of or comprises... matter which may disparage or falsely suggest a connection with persons, living or dead."54 American Indians could argue that the trademarks, which unfairly depict the names or culture of American Indians, incorrectly implies a link to American Indians.55 These trademarks could be viewed as signaling that "the goods carrying such marks are produced by, or are in some way associated with, American Indians."56 Recent TTAB decisions seem to suggest that arguments based on 15 U.S.C. § 1052(a) can only succeed if the trademark uniquely refers to American Indians.57

As an alternate route, American Indians may seek a remedy by way of tort actions, mainly defamation and publicity rights, both of which are permitted before tribal courts.58 "A recent tribal decision found that the right of publicity does exist under tribal law."59 The right of publicity protects an individual's right to choose how and if his name and identity will be exploited for commercial use.60 In the case of In re Tasunke Witko, Tasunke Witko's descendants appealed to the legal process of the Rosebud Sioux tribe because of their disapproval of a malt liquor's naming and marketing one of their liquors as "Crazy Horse."61 Though the case was dismissed due to lack of jurisdiction, it was a revolutionary decision as it "established the tribal right

55. Id.
56. Id.
57. Id.; see In re Indian Nation Leather Co., 44 U.S.P.Q.2d (BNA) 1539, 1540 (T.T.A.B. 1997) (showing the application of 15 U.S.C. § 1052(a) when determining whether a trademark is disparaging).
58. Id.
61. Guggenheim, Renaming the Redskins, supra note 54, at 305.
to control publicity of tribal names and identities." Though they have the recognition as being a federally sovereign authority, tribal courts do not completely escape United States government regulation since statutes, such as the Indian Civil Rights Act of 1968, do apply to them. These government regulations pose a major challenge by causing "jurisdictional limitations of the tribal court." Regardless, a non-Indian defendant may still challenge a tribal court's jurisdiction by first submitting the challenge to tribal court, then appealing to the tribal appellate court. The tribal case must first be completed before a jurisdictional challenge may be submitted to federal court.

If the tribal court does not offer reprieve, the Indian Arts and Crafts Act of 1935 (IACA) may. The IACA was created to extend protections to American Indian intellectual property. Congress was successful at expanding protection of American Indian intellectual property by revamping the IACA in 1990 for the purpose of "encouraging [Indian] tribes to register their trademarks and by assisting Native American artisans in marketing their works." The Indian Arts and Crafts Act's underlying policy is "to promote the economic welfare of Native American tribes and to protect consumers through the creation and registration of trademarks of genuineness and quality." Under the IACA, an "Indian Arts and Crafts Board" is created for the purpose of "developing and expanding the market for Native American products."

62. Id. at 305-06.
63. Id. at 306.
64. Id.
66. Guggenheim, Renaming the Redskins, supra note 54, at 306.
The Indian Arts and Crafts Board has the authority to create trademarks of genuineness and quality for Native American products, to establish standards and regulations for the use of such trademarks, to register such trademarks through the PTO [Patent and Trademark Office] at no charge, to pursue or defend in court any PTO determination, and to conduct market research and technical research.\(^2\)

The IACA does provide for numerous relief methods including "injunctive relief, equitable relief, compensatory damages, punitive damages, and attorney's fees."\(^3\) When attempting to score in the future, the American Indian's game plans should include "the false suggestion prohibition of the Lanham Act's section 43(a), tribal court tort actions, or IACA actions, in addition to the Lanham Act's disparaging and scandalous prohibitions, to stop the misappropriation of American Indian cultural names and mark[s]."\(^4\)

C. Those Still on the Bench

Some methods of recovery, though yet to be fully explored, supply a glimmer of hope to those American Indians seeking to end the use of the Indian mascot. One of those methods of recovery falls into the economic considerations of the professional sports industry. It has been said that to hurt someone, they have to be hit where it will hurt the most. "Retail marketing and promotion of items bearing team trademarks such as jackets, t-shirts, hats, and umbrellas, has been transformed into a multibillion dollar industry."\(^5\) If American Indians began a nationwide boycott of these products, resulting in lost profits for the industry, team owners may begin to listen to the outcries against the use of the Indian mascot and possibly change their teams' mascots to something less offensive. However, due to the relatively small American Indian population, the degree of American Indian buying power is lacking compared to mainstream consumer spending, which has been influential in aiding other minority groups' success in changing other objectionable trademarks.\(^6\) Since most businesses do not base their economic success on

\(^2\) Id.; see 25 U.S.C. § 305a(g)(1)-(4) (2000).


\(^4\) Guggenheim, Renaming the Redskins, supra note 54, at 307.


\(^6\) Brown, supra note 20, at 129; see Kimberly A. Pace, The Washington Redskins and the
American Indian patronage, the American Indians protests over the use of certain American Indian names, symbols, and references often go ignored by team owners.\textsuperscript{77}

However, team owners may not be able to dismiss a Title II claim against them. Title II of the Civil Rights Act of 1964 provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."\textsuperscript{78} Included in the "place of public accommodation" definition is "any motion picture house, theater, concert hall, \textit{sports arena, stadium}, or other place of exhibition or entertainment" (emphasis added).\textsuperscript{79} Title II of the Civil Rights Act was passed with the major purpose of removing "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public."\textsuperscript{80} The Supreme Court has approved lower courts' emphases on "the necessity of reading Title II broadly, 'with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act.'"\textsuperscript{81}

The application of Title II to professional sports teams is as follows: (1) "the close link between a team [with an Indian team name] and its home stadium" (2) "den[ies] full and equal enjoyment on the basis of race by discouraging American Indian patronage"; and (3) "[e]mpirical evidence confirms the magnitude of this deterrent effect."\textsuperscript{82}

First, the argument is made that Title II should be applicable to professional sports teams due to the "close link between a team and its home stadium."\textsuperscript{83} "Title II has been held to govern membership organizations that are closely connected to a facility or structure, [such as] an organization’s operation of facilities open to the public, like swimming pools, sports fields, and golf


\textsuperscript{77} Brown, \textit{supra} note 20, at 129.
\textsuperscript{78} 42 U.S.C. § 2000a (2000).
\textsuperscript{79} \textit{Id.} § 2000a(b)(3).
\textsuperscript{82} Note, \textit{supra} note 30, at 907.
\textsuperscript{83} \textit{Id.} at 908.
courses." The "close link" has also been found to be sufficient in situations where private organizations have used "a place of public accommodation to 'carry out its discriminatory practices.' "Thus, [when attempting] to trigger Title II, the entity at issue - for example, a professional sports team - need not itself be a place of public accommodation as long as it is integrally connected to a facility that is." Since most would agree that professional sports teams have sufficiently close connections with their home stadiums, being "linked [to each other] financially and conceptually," permitting the sports teams to use those stadiums would aid in their practices of discrimination and "would [blatantly] violate the clear purpose and intent of Title II." 

Second, it must be shown that "[t]he use of Indian team names and mascots denies American Indians the full and equal enjoyment of a place of public accommodation." "The plain text of [Title II] . . . guarantees 'full and equal enjoyment . . . without discrimination or segregation.'" Because Indian team names and mascots have been accused of (a) "fostering racial stereotyping," (b) "causing low self-esteem among American Indians," and (c) "setting up Indian children as targets for physical harassment by their peers," Title II should be applied to prohibit the use of them. Also worth mentioning is that Title II's text is indicative of its "protection [being not only] . . . limited to incidents of intentional discrimination." And despite the infrequent arising of the issue, "no court has required a showing of discriminatory intent under Title II." 

86. Id. at 909 (internal quotations omitted); see Frank v. Ivy Club, 576 A.2d 241, 256 (N.J. 1990); United States Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1203 (N.Y. 1983); Welsh v. Boy Scouts, 993 F.2d 1267, 1272 (7th Cir. 1993).
87. Note, supra note 30, at 910.
88. Id.
89. Id.
90. Id. (quoting 42 U.S.C. § 2000a(a) (2000)).
91. Id. at 911 (internal quotations omitted).
92. Id. at 912.
Finally, "[a] successful Title II challenge must . . . present empirical evidence of an actual deterrent effect." The most effective evidence showing the "deterrent effect of [the use of] Indian mascots and nicknames is the collective responses of American Indians." The evidence shows that "over five hundred [American] Indian Nations have voiced their unified opposition to Indian mascots and nicknames." Additionally, "five hundred protesters at the 1991 World Series in which the Atlanta Braves participated, and three thousand protesters at the 1992 Super Bowl in which the Washington Redskins participated" should serve as solid evidence of the deterrent effect. Though there are potential objections to the Title II challenge, the approach offers "a new angle, and its aggressive implementation may well provide the elusive legal remedy for a [perceived] continuing societal wrong."

With the recent reversal of the Harjo decision, American Indians seeking to even the score regarding the objectionable use of the Indian mascot may be formulating new strategic plays to obtain a win. There are several arguments yet to be made that have the potential to secure a victory. And because the argument that seemed to have won, now seems to have lost, other possible methods of recovery may soon get their chance to try to score.

**IV. Penalty Marker on the Play for Offensiveness . . . Are the Team’s Mascots Really Meant to Offend?**

It must be questioned whether those who are quick to judge teams with Indian mascots as being racist and discriminatory have ever thoroughly investigated the background of the team’s mascot decision. And if so, can they still maintain that the teams are using their mascots in a derogatory manner? When deciding on a team mascot, it is relatively safe to assume that one will not be picked on a whim. The process is intense as the selected mascot will define the team for the rest of its existence.

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95. *Id.* at 915.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 921.
A. The Selection of the Mascot

As mentioned previously, the decision of a team mascot is an extensive process. Issues such as pride and identity play a significant role in choosing a mascot to represent the team’s characteristics.

The Atlanta Braves began as the Boston Red Stockings in 1871. To avoid confusion with the Cincinnati Reds, the team changed their name in 1883 to the Beaneaters. After a pennant drought and the team’s 1906 record losing streak, the team again changed names to the Boston Doves after the then-owners, the Dovey brothers. Another change came in 1909 as the team adopted the name Pilgrims, but the name change failed to help them out of their losing misfortune. Three consecutive 100-loss seasons fueled the team’s decision to undergo another name change. At the suggestion of John Montgomery Ward, the team became known as the Braves. The name stemmed from club owner James Gaffney’s involvement in Tammany Hall, a political machine that had run New York City since back in the days of Bosses Croaker and Tweed. Tammany Hall was organized as “a New York patriotic organization in American Revolution,” and the name was chosen after “a wise Indian Chief, Tammanend.” “The New York revolutionists, like the Boston Tea Party folks, identified themselves with Native Americans as opposed to British Americans.” The Tammany Hall symbol (or logo)
was an Indian brave after a Delaware Indian Chief. And a member of the Tammany Hall machine was known as a “brave of Tammany Hall.” Could one accurately associate a sports team, which was named after a political organization that recognized American Indians as allies, with acting in a discriminatory and racist manner against American Indians because they use certain Indian symbols? Based on the history of the Atlanta Braves mascot, it is difficult to see where one would come to that conclusion.

The National Hockey League’s Chicago Blackhawks came into existence in 1926 with the mascot chosen by their founder, Frederic McLaughlin. “McLaughlin served as a commander in the 333rd Machine Gun Battalion of the 85th [Blackhawk] division of the U.S. Army” during World War I. The division’s nickname commemorated Blackhawk, a prominent Indian Chief of the early 1800s. McLaughlin chose the Blackhawks for the team’s name in honor of his military unit and the Indian Chief. It is undisputed that the mascot was chosen to honor and respect someone and something McLaughlin highly regarded. Regardless, there are still those who claim that the Blackhawks mascot is offensive and discriminatory.

The current Cleveland Indians began as the Cleveland Forest Citys in 1869, changing to the Cleveland Spiders in 1889 “because there were a number of tall, thin players” on the team. After several other name changes, including the Broncos and the Naps (in honor of a player named Napoleon Lajoie), “a Cleveland newspaper held a contest to rename Cleveland’s baseball team.” The nickname “Indians” was submitted and became the winning entry, named for Louis Sockalexis, “the first American Indian to play major league baseball.” Some may be surprised to find that, again, John Montgomery Ward had a say in the team’s name, referring to Sockalexis as “a marvel”.

109. Id.
110. Id.
111. Chicago Blackhawks History, at http://www.chicagoblackhawks.com/history/index.cfm?cont_id=30592 (last visited Feb. 21, 2005) (allowing Chicago Blackhawks fans to access information regarding the team’s current schedule, standings, statistics, ticket information, team history, and player profiles).
112. Id.
113. Id.
115. Id. at 213-14.
116. Id.
And despite the accusations that their Indian mascot, Chief Wahoo, is blatantly offensive, the team stands firm that “[t]he Cleveland Indians organization is very aware of the sensitivities involved in this issue. We have gone to great lengths to respect those sensitivities. In no way do we intend to demean any group, especially one as proud as Native Americans.”

Perhaps the most controversial mascot is that of the Washington Redskins. The Washington Redskins “franchise originally was located in Boston and was called the Braves until it was purchased by George Preston Marshall in 1932.” Marshall made the decision to change the team’s name in 1933 “in honor of the team’s head coach, William "Lone Star" Dietz, who was an American Indian;” Marshall decided upon the name “the Boston Redskins.”

“The team moved to Washington in 1937”, thus becoming the Washington Redskins. Regardless of whether the name was actually chosen for that reason, protests to and demonstrations of the name’s offensiveness have been consistent and continual. However, the owner of the team, Jack Kent Cook, adamantly denies that the Redskins’ name is “offensive, derogatory, disparaging or demeaning to anyone.” “Cook refuses to change the Redskins’ name claiming, ‘I admire the Redskins name. I think it stands for bravery, courage and a stalwart spirit, and I see no reason why we shouldn’t continue to use it.’” Many agree with Cook’s position, in particular one North Carolina Cherokee chief, who stated, “The Redskin name doesn’t bother us. It gives our people recognition.” Furthermore, Cherokee princess Pale Moon agreed to sing the National Anthem at the beginning of a 1991 Redskins’ game. So, how is the public supposed to make a determination on the subject when there are some American Indians claiming the use is offensive and some American Indians who see no harm in it? It seems that those who are seeking to ban the use of the Indian mascot are placing the

120. Id.
121. Id.
123. Id. at 15.
124. Id.
126. Id.
blame on the wrong parties. Perhaps the blame lies on those fans who have taken the mascot to the extreme (i.e., creating the tomahawk chop) instead of the teams who chose their mascots out of honor and respect.

B. Other Objectionable Mascots?

And what about other mascots whose connotations could be as harmfully construed as the Indian mascot, but instead people choose to overlook them? Mascots, such as the Yankees, Padres, and Canucks, might very well be taken out of context, as the Indian mascot has been, and potentially become "offensive" to some. The American League New York Yankees' nickname came from them being an American League team, and since "Americans are often referred to as Yanks by the British . . . the same thought process was applied."127 The San Diego Padres, a National League baseball team, was named after the padres of a San Diego mission, the Roman Catholic Mission San Diego de Alcala, founded in the 1700s ("padres" is the Spanish word for "priest").128 The team is symbolized by a picture of what appears to be a Catholic priest grinning and swinging a bat.129 The Vancouver Canucks were named after a Canadian folk hero (and great logger), Johnny Canuck, who was also "a skater and a hockey player in his spare time."130 When comparing how these mascots were chosen with how the teams with Indian mascots were chosen, it is difficult to see how is it acceptable for some teams to name their mascots in honor of respected individuals, but it is intolerable for others to do the same. One possible explanation is that those groups that might be affected by the Yankees, Padres, or Canucks' mascots recognize that the mascots were chosen with honor and respect despite the symbols that accompany them. Those objecting to the use of Indian mascots may not believe this to be the case when the Indian mascots were chosen.

C. Previous Team Players

Another reason it does not appear that the teams' mascots are meant to be offensive is the evidence of some of the previous players, founders, and

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129. Id. The website provides a visual graphic of the San Diego Padres alternate logo, which is a picture of a Catholic priest swinging a bat.
managers of the teams. Frank Robinson, who was the first African-American manager in Major League Baseball history, made his debut in 1975 for the Cleveland Indians. Another famous African-American Major League baseball player, Hank Aaron, had an extremely successful career as an Atlanta Brave during a historical period of racist and unfair treatment toward African-Americans. And yet another African-American, Major Frederic McLaughlin, founded the Chicago Blackhawks. All of these men most likely faced some form of racism and/or discrimination at some point during their involvement in professional sports, particularly since they were active during the Civil Rights movement of the 1960s. One could make a rational argument that upon encountering that type of treatment, these individuals would not allow discrimination or play for a team that blatantly discriminated against another minority group because they had been in that identical position. Though no one can give an accurate answer, it would most likely be sufficient to believe that experiencing such disrespectful conduct would make one adamant in refusing to further perpetuate that behavior.

D. Bringing Good to the Indian Mascot

It is quite easy to make cynical statements about using the Indian as a mascot; however, there are numerous positive aspects that are buried under the mound of negativity. Each team is involved in the community, and has individual team foundations which contribute to children and youth outreach programs. The Atlanta Braves Foundation supports several community projects, including neighborhood organizations and events such as Habitat for Humanity, education-focused programs preparing kids for success in life’s big leagues, spreading the spirit of teamwork, and hosting grass-roots clinics for Atlanta’s minority youths.131 The Chicago Blackhawks joined forces with the Robert R. McCormick Tribune Foundation, which matches the generosity of players, coaches, management, and fans, to contribute over $4 million to the community.132 The Blackhawks also have several charities, including the RIC Blackhawks sled program (specifically for those individuals with “limited or no use of their lower extremities”), the Tomahawks (“a hockey program for

131. Atlanta Braves Community, at http://atlanta.braves.mlb.com/NASApp/mlb/atl/community/diamonds_in_the_rough.jsp (last visited Feb. 21, 2005). The team website for the Atlanta Braves has a page specifically dedicated to the community activities in which the Braves' coaches and players are involved.

132. Chicago Blackhawks, In the Community, at http://www.chicagoblackhawks.com/community/ (last visited Feb. 21, 2005). Much like the Atlanta Braves' Community page, the Chicago Blackhawks provide historical text regarding the specific charities they have established along with their community involvement and community program initiatives.

https://digitalcommons.law.ou.edu/ailr/vol29/iss2/5
special needs kids”), and the American Hearing Impaired Hockey Association, all of which are “devoted to expanding the opportunities for youth from diverse backgrounds to play the sport of hockey.”  

Established in 1989, the Cleveland Indians Charities’ (CIC) main endeavor was to positively improve the quality of life by contributing to “thousands of Northeast Ohio youth by providing educational and recreational opportunities.” The organizations benefiting from the CIC include the Boys and Girls Clubs of Cleveland, United Black Fund Larry Doby Reviving Baseball in Inner Cities Program (RBI), Cleveland State University Minority Athletic Scholarship, and the North American Indian Cultural Center. The Washington Redskins have several community outreach programs for the benefit of local youth. Their programs include Redskins All-Stars, which is designed to encourage and promote youth involvement in community service and volunteerism, Redskins Read, which applauds and helps to promote literacy among youth, and 4th and Life, which is “a curriculum-based program conducted by Redskin players and coaches for high school athletes focusing on what it takes to be successful on the field, in the classroom and in the workplace.”

It is apparent that the teams mean no disrespect or dishonor toward American Indians by the use of the Indian as a mascot. The mascots were chosen for honorable purposes with those purposes being upheld through the community involvement in which each team participates. It is the views society has placed upon the mascots that have rendered them as being discriminatory and disparaging toward the American Indian culture, thus causing the teams to take unwarranted ridicule and blame for something that they hold just as highly as those making the allegations. So, will the constant battle over the use of the Indian mascot ever come to an end, or at least, a mutual agreement? Only time will tell.

133. Id.
134. Cleveland Indians Community, at http://cleveland.indians.mlb.com/NASApp/mlb/cle/community/cle_community_cic.jsp (last visited Jan. 25, 2005). The Community page includes a synopsis of the Cleveland Indians Charities (CIC), detailing the purpose of CIC, the contributions it has been able to make, and to what groups CIC has donated.
135. Id.
136. Washington Redskins, Signature Programs, at http://www.redskins.com/community/signatureprograms.jsp (last visited Feb. 21, 2005). The “Community” link on the Washington Redskins’ team site has pages regarding information about the team’s community outreach, charitable foundation, community programs, and signature programs.
Though the arguments demanding the eradication of the use of Indian mascots are quite convincing, to some they are not convincing enough. Watching the live play action, it does appear that some teams may use the mascot in an inappropriate manner, but once one takes a closer look at the instant replay in slow motion, they could make a fair assessment that the teams do not intend in any way for the mascot to be directed toward American Indians in a derogatory manner. It is hoped that the analysis of the selection of the mascot has revealed that the teams who chose the Indian as their mascot hold it in high value with an high degree of respect. However, regardless of how the use of the Indian mascot is intended, there will always be those “fans” who disagree with it. And for those “fans,” several methods of recovery are available if the referee (judge) tends to agree with their claims and rules in their favor. But do not count out the underdog yet; there is always the chance for the home team to pull out the win as the teams that cling onto their beloved mascots have genuine and persuasive arguments for their cause as well. The five professional teams hold their mascots in high regard as evidenced by the selection of them. The teams’ community involvement is also verification of the pride they hold for their team and team name. Still, there are those who choose to believe otherwise. And so the game continues on as one “team” is able to score taking the lead (McBride v. Motor Vehicle Division of Utah State Tax Commission\textsuperscript{138}) until the other “team” retaliates by scoring as well and tying the game (Pro-Football, Inc. v. Harjo\textsuperscript{139}). And as it continues... bring on the extra innings.

\textsuperscript{138} 977 P.2d 467 (Utah 1999).