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Eliminating Indian Stereotypes from American Society: Causes and Legal and Societal Solutions

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ELIMINATING INDIAN STEREOTYPES FROM AMERICAN SOCIETY: CAUSES AND LEGAL AND SOCIETAL SOLUTIONS

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> *1995 World Series Fans were greeted by a billboard, across from the stadium, which depicted a peace pipe broken in half by a three-dimensional tomahawk. The billboard read: "There will be no peace-pipe smoking in Atlanta. Indians beware."****

Introduction

Even in the 1990s, derogatory stereotypes of Native Americans are all too common. In school textbooks,[1] film and television productions,[2] literature[3] and even children's toys,[4] the American Indian is portrayed in a simplistic way: as a relic of the Wild West frontier days. "We're not ignorant, savage or subservient," said Indian activist Charles Tripp.[5] Tripp, a Tulsa attorney and Cherokee Indian, spoke at an Oklahoma conference which was held the day after Thanksgiving to celebrate 1992 as the "International Year of the Indigenous People."[6] He urged Indians and other

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***Macon Morehouse, *200 Indian Protestors Expected*, ATLANTA J. CONST., Oct. 21, 1995, at D11.

1. Arlene B. Hirschfelder, *The Treatment of Iroquois Indians in Selected American History Textbooks*, INDIAN HISTORIAN, Fall 1975, at 32-39 (vol. 8, no. 2); *see also* NATIVE AMERICANS, STEREOTYPES, DISTORTIONS AND OMISSIONS IN U.S. HISTORY TEXTBOOKS (Council on Interracial Books for Children ed., 1977) [hereinafter NATIVE AMERICANS].

2. THE PRETEND INDIANS: IMAGES OF NATIVE AMERICANS IN THE MOVIES (Gretchen M. Bataille & Charles L. P. Silet eds., 1980); RALPH BRAUER & DONNA BRAUER, THE HORSE, THE GUN, AND THE PIECE OF PROPERTY: CHANGING IMAGES OF THE TV WESTERN 171-94 (1975) (chapter titled "Indians, Blacks, Old People, Long Hairs, and Other Assorted Deviants").

3. John Lowell Bean, *The Language of Stereotype, Distortion, and Inaccuracy*, INDIAN HISTORIAN, Fall 1969, at 56 (vol. 2, no. 3).

4. CHILDREN'S MEDICAL CTR. OF NEW YORK FUND, GUIDELINES ON CHOOSING TOYS FOR CHILDREN 1-3 (1977).

5. Jim Killackey, *Team Names Mock Indians, Speaker Says*, DAILY OKLAHOMAN, Nov. 27, 1993, at 9.

6. *Id.*

minorities, as well as whites, "not to buy into the image" which portrays Indians as "less than intelligent," and "to stop, learn and understand" the harmful effects of stereotyping.[7] "We're not just afterthoughts," Tripp emphasized, "We didn't die off in the 19th Century. We're living people."[8]

However, despite the efforts of civil rights groups, Indian leaders, and other concerned citizens, many people continue to tolerate discrimination against Native Americans.[9] Traditional legal remedies such as equal protection claims under the Fourteenth Amendment have failed to eliminate derogatory stereotypes. Courts reason that "no right or privilege accorded to others is denied the Indians."[10] Protests, education and legislation have achieved mixed results in the battle to end the use of Indian caricatures, nicknames and mascots, but this cannot end the struggle. The consequences of these discriminatory images are far-reaching. In fact, the derogatory portrayal of Indians which is perpetuated by sports mascots, advertisements, movies, literature, and children's toys has been linked to many serious problems in Indian society.[11]

This comment examines the progress made towards eliminating derogatory Indian stereotypes from American society. To provide a framework for examining current reform efforts, this article begins in part I by providing a brief historical look at the evolution of the modern Indian stereotypes.[12] Examples of derogatory Native American images from the early days of European Exploration, Indian Reorganization, Termination and Relocation, and Self-Determination and Self-Governance[13] are listed, corresponding to the different eras in U.S. Indian Policy. Part I then exam-

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7. *Id.*

8. *Id.*

9. The American Indian Movement (AIM) highlights the much higher tolerance level towards racially biased images portraying Native Americans, as compared to other ethnic minorities. Julie Cart, *What's in a Nickname? The Ability to Stir Players and Fans Is Taking Back Seat to Heightened Sensibilities*, L.A. TIMES, Oct. 24, 1991, at 1C. Billy Tiac, from AIM's Washington, DC office, believes that most people in the United States simply do not understand that derogatory stereotypes such as "redskins" are just as offensive to Native Americans, as other more well known ethnic slurs.

10. El-Em Band of Pomo Indians of Sulpher Bank Rancheria v. 49th Dist. Agric. Fair Ass'n, 359 F. Supp. 1044 (N.D. Cal. 1973).

11. Gregory Huskisson, *Logo Flap Symbolizes Deeper Indian Worries*, DETROIT FREE PRESS, Nov. 3, 1988, at 1B.

12. This listing is not a complete chronology. For a more detailed description, see RAYMOND W. STEDMAN, SHADOWS OF THE INDIAN: STEREOTYPES IN AMERICAN CULTURE 15 (1982).

13. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 47 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

ines the modern Indian stereotype and the effect it has on Indians and non-Indians with a focus on what non-Indians are taught. The link between negative stereotypes and other Indian problems such as alcoholism, teen suicide and other health concerns is also examined.

Part II surveys the growing movement to remove Indian stereotypes from society, focusing on the current issues — sports mascots, team and product names. Additionally, part II examines the means used today to increase awareness, including protests, legislation, advertising campaigns, and legal action.

Finally, part III examines the legal (constitutional and legislative) aspects to Indian stereotypes, highlighting the similarities between the unresolved issues created by derogatory stereotypes and existing case law. The analysis further illustrates why constitutional arguments have been unable to provide relief. Part III also examines other, more promising avenues to eliminating derogatory stereotypes in specific instances under the Public Accommodations Act and Trademark law and new legislative initiatives.

The bulk of the analysis of this comment focuses on the progress made by current Indian leaders, civil rights organizations, legislators and private citizens, with an emphasis on what remains to be accomplished in the future. Specifically: What possible legal remedies are available? What responsibility does the media have to correct or refuse to portray negative Indian stereotypes? How can the public be made conscious of the inherent racism in these images?

The fight to eliminate American Indian stereotypes is far from over. Activists and leaders such as Michael Haney,[14] Sen. Ben Nighthorse Campbell,[15] and Vernon Bellecourt[16] have made an impact and gained recognition for the movement in many different ways. Others have made less noticeable, but equally important contributions. Additionally, there has also been a surge of complaints filed with various state and federal agencies, arguing that the use of Indian symbols is offensive and demeaning to Native Americans.[17]

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14. *See* Wes Smith, *Fighting For His People: Michael Haney Stands Up to Those Who Would Trivialize the Heritage of American Indians*, CHI. TRIB., Mar. 28, 1993, at C11.

15. Sen. Ben Nighthorse Campbell (R.-Colo.) is responsible for introducing legislation to block stadium construction until the Redskins change their team name. *See* S. Res. 1207, 103d Cong., 2d Sess. (1992).

16. Vernon Bellecourt founded the American Indian Movement (AIM), and is active in the coalition of minority groups opposing Indian mascots. *Minority Coalition Wants Braves to Be Renamed*, S.F. CHRON., Oct. 18, 1991, at D4.

17. Complaints have been filed generally with Human Relations and Trademark authorities.

I. Images of the Indian in American History

A. Sources of Stereotypes

The stereotypical portrayal of Native Americans is not a modern phenomena. From the time the first Europeans encountered Indians in North America, the culture, religion and traditions of Native Americans have been misunderstood. With no understanding of such a foreign people and by regarding Indians as savages and animals, not a race of people, it became easy for the early white settlers to feel justified and guiltless about pushing Indians off their lands.[18] Subsequent generations of children have been permitted to reduce Indians to playground characters, perpetuated by literature and popular entertainment such as movies, cartoons, and television which portrayed the Indian as a villainous savage who attacked the white hero or the wagon train.[19] The result has been a culmination of delegitimization and desensitization of their culture which only in the last twenty years has been addressed.[20]

B. Historical Images Through the Eras of Indian Policy[21]

One cannot understand the realities of the modern Indian without understanding the popular images.[22] The collection of materials describing the depiction of Native Americans is enormous, with entire volumes focusing on stereotypes in specific mediums, themes or time periods. Author Raymond William Stedman has done extensive research into images of the Native American.[23] Using Stedman's extensive research, the chronology in Table 1 is offered, not to provide a complete account of the portrayal of Native Americans throughout history, but merely to provide a backdrop for current reforms.

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18. STEDMAN, *supra* note 12, at 10; *see* ROY H. PEARCE, SAVAGISM & CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND 68 (Johns Hopkins Paperbacks ed. 2d prtg. 1971). *See generally* Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

19. STEDMAN, *supra* note 12, at 10.

20. *See generally* STEDMAN, *supra* note 12.

21. *See* COHEN, *supra* note 13. This revision of Cohen's 1942 work lists the eras of Indian policy. *See also* STEDMAN, *supra* note 12 (examples of historic Indian stereotypes).

22. Rennard Strickland, *Foreword*, *in* STEDMAN, *supra* note 12, at ix.

23. Raymond W. Stedman traces prevailing images of the American Indian from 1493, when Columbus wrote about "Los Indios," through modern films such as "A Man Called Horse." *See* STEDMAN, *supra* note 12. Stedman uses literature and film to illustrate how stereotypes, both modern and historical, make this "illusory Indian" seem more authentic to many Americans than the citizens of the many diverse tribes who make up the Native American population. *Id.* at xv.

TABLE 1 - CHRONOLOGY OF IMAGES

Era:	Events:	Predominant Indian Stereoptypes
(1532-1789) Exploration, Settlement & the Struggle for Empire	Legal precedents established by European colonists provided the framework for U.S. legal policy.[24]	• In *Des Cannibales*, Michel de Montaigne portrays the Indians of "Brazil" as Noble Savages.[25] • Pocahontas (as Lady Rebecca) delights the English court.[26] • Daniel Defoe's *Robinson Crusoe* introduces the faithful Indian servant and companion, complete with garbled English.[27]
(1789-1871) The Formative Years	The Constitution was adopted and Congress used statutes and treaties to deal with Indians.[28]	• James N. Barker's *The Indian Princess, or La Belle Savage*, is staged in Philadelphia. This drama about Pocahontas is the first "Indian play" to reach the footlights.[29] • James Fenimore Cooper introduces *The Last of the Mohicans*, in which Indians are characterized as "good" (Algonquin-Delaware) or "bad" (Iroquois-Huron).[30] • Buffalo Bill is introduced to the world of fiction in a dime novel by Ned Buntline.[31]
(1871-1928) Allotment and Assimilation	Treaty making is terminated for political reasons and Congress abolishes the creation of reservations by executive order.[32] "The zealous humanitarian reformers of the period desired that the Indian be absorbed into the mainstream of American life and the 'savagery' represented by tribal autonomy be destroyed."[33]	• Sitting Bull is killed and the Massacre at Wounded Knee is carried out by the Seventh Cavalry, while the Buffalo Bill combinations evolve into outdoor Wild West shows.[34]

24. COHEN, *supra* note 13, at 50.
25. STEDMAN, *supra* note 12, at 254.
26. *Id.*
27. *Id.* at 255.
28. COHEN, *supra* note 13, at 62.
29. STEDMAN, *supra* note 12, at 256.
30. *Id.* at 257.
31. *Id.* at 258.
32. COHEN, *supra* note 13, at 127.
33. *See* DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS, *quoted in* COHEN, *supra* note 13, at 128-29.
34. COHEN, *supra* note 13, at 259.

TABLE 1 - CHRONOLOGY OF VALUES (cont.)		
Era	**Events**	**Predominant Indian Stereotypes**
(1928-1942) Indian Reorganization	The Meriam Report was introduced, with "[t]he central recommendation [to make] Indian Policy broad enough for Indians to be absorbed into the prevailing civilization at least in accordance with a minimum standard of health and decency."[35]	• Chingachgook is partly reanimated through the Lone Ranger's Tonto.[36] • The howling Indian returns to prominence in motion pictures such as *Drums Along the Mohawk* and *Kit Carson.*
(1943-1961) Termination and Relocation	This period was characterized by "the most concerted drive against Indian property and survival since the removals following the acts of 18390 and the liquidation of tribes and reservations following 1887."[37]	• *Broken Arrow* signals a several-year trend toward noble Hollywood Indians.[38]
(1961-present) Self-Determination	Increased concern for civil rights is reflected in Indian Affairs.[39]	• Moviemakers concoct a pseudofactual melange of anthropological errors and white supremacy in *A Man Called Horse.*[40]

C. The Modern Indian Stereotype

The stereotypical Indian is alive and well. While an abundance of examples can be seen in commercial products, literature, television, movies and children's toys, popular sports mascots, nicknames, and even official team names provide especially vivid examples. High school teams as well as professional sports organizations use Indian tribal names and mascot "likenesses" of Native Americans to symbolize their ferocious athletic teams.[41] These nicknames and mascots illustrate the heightened tolerance which exists for racist stereotypes aimed at Native Americans. Beverly Clark, vice-chairman of the Michigan Civil Rights Commission, explains that "these nicknames and logos suggest that Native Americans are warlike, savage people who attack without mercy and fight to the death."[42]

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35. OTIS, *supra* note 33, at 6.

36. STEDMAN, *supra* note 12, at 260.

37. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 349 (1970), *quoted in* COHEN, *supra* note 13, at 153.

38. STEDMAN, *supra* note 12, at 260.

39. COHEN, *supra* note 13, at 180.

40. STEDMAN, *supra* note 12, at 260.

41. Larry Lipman, *Indians Upset by Sports Stereotypes: Native Americans Resent Fan's Tomahawks, War Paint*, S.F. CHRON., Oct. 15, 1991 at B4.

42. Huskisson, *supra* note 11, at 1B.

With respect to the image of Native Americans in sports today, there seems to be a final delegitimization into a market item.[43] Seen as part of the issue of team names and included in the complaints are the mascots and symbols (assorted "chiefs" and "Indians"), paraphernalia (tomahawks, war bonnets, war paint, and scalps worn by fans), and actions by the fans and club (war whoops and "Indian chants" set to organ music, flashing words such as "scalp them," the marketing of Indian-style souvenirs, and the sanctioning of men coming out of teepees and doing dances). The motivation for marketers of products with stereotypical Indian images is simple. A demand exists, and sales of these items can be incredibly lucrative.[44] This profit motive has driven entrepreneurs to produce an assortment of items displaying Indian stereotypes. T-shirts, pennants, and even toilet paper and boxer shorts with tribal symbols are proudly displayed by Redskins, Chiefs and Braves fans.[45]

Many Native Americans are disheartened that, although sensitivity to other ethnic groups seems to be increasing, offensive epithets characterizing Indians are not only tolerated, but widespread. Although the mascots and nicknames seem extremely prejudicial when closely examined, the fact remains that many Americans simply do not realize these stereotypes are even derogatory. A total of 86% of Michigan residents surveyed by the *Detroit Free Press* did not find names such as "Redskins," "Braves," or

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43. Indian peoples are reduced to team names. A good example are the Florida State University Seminoles.

44. The simple rubber tomahawk used for the "tomahawk chop," is an excellent example of the financial rewards made possible by marketing promotional items featuring Indian stereotypes. Walencia Konrad, *200,000 Foam Tomahawks: That's Not Chopped Liver*, BUS. WK., Nov. 11, 1991, at 48. This arm motion, which mimics chopping behavior in the air to show team support, originated in the 1980s among football fans of the Florida State Seminoles. *Id.* When the chop was revived by Atlanta Braves baseball fans in 1992, Paul Braddy took advantage of the opportunity. *Id.* A foam-bedding salesman from Tennessee, Braddy designed a small rubber tomahawk and began sales through the concessionaire at the Atlanta Fulton County Stadium in 1991. *Id.* By November 1991, he had 23 employees, a distribution network that spanned 20 states, and had sold 200,000 of the foam tomahawks at an average wholesale price of $3.00 each. *Id.* His clients now include K-Mart Corporation and Wal-Mart Stores, Inc. *Id.*

Not surprisingly, many Indian groups are less than pleased by the sight of thousands of baseball fans chopping the air with little rubber tomahawks and whooping "war chants." Cart, *supra* note 9, at 1C. Braves President Stan Kasten has agreed to discuss the mascot issue and the use of the tomahawks with Native American groups. Konrad, *supra*, at 48. But in case Kasten acquiesces to the Indian leaders, the originator of the rubber tomahawks has an alternative marketing plan ready. *Id.* He is negotiating with the National Basketball Association, and is already shipping tomahawks to colleges and universities with Indian mascots. *Id.* Clearly the availability of such a large market and the enormous potential profits are powerful motivators. Demand for products with derogatory Indian images must be considered when searching for a solution.

45. The likeness of the Indian hero, Crazy Horse, has even been used to advertise malt liquor. Konnie LeMay, *Oglalas Find Crazy Horse Brand Hard to Swallow*, LAKOTA TIMES, Apr. 15, 1992, at A1.

"Chiefs" offensive.[46] Some participants actually considered these images to be a compliment to Native Americans.[47] Even some Native Americans themselves are not offended by these nicknames and mascots and find the issue unimportant.[48]

D. Effect of Indian Stereotypes

1. Effect in General

Many negative stereotypes are internalized long before the first exposure to the sports team stereotypes "Chiefs" or "Redskins." Exposure to derogatory, inaccurate Indian stereotypes begins, for many Americans, in early childhood and continues through adolescence and into adulthood. "The image of Indians as savage and warlike, created by white settlers to justify exploitation, creeps into all elements of society," said Arthur Stine of the Michigan Department of Civil Rights.[49] "Such depictions can erode self-image among Indians, hamper their achievements and trivialize sacred and religious customs."[50]

Low self-esteem can lead to serious consequences. "These [stereotypical Indian] symbols are a vehicle for giving tremendous power," said Arthur Taylor, a sports psychologist at Northeastern University.[51] As a result of this power, many Native Americans believe derogatory Indian stereotypes are directly linked to health risks such as increased rates of suicide, homicide and alcohol abuse.[52] The National Congress of American Indians emphasizes the serious consequences of these negative images: "The continued insensitive projection of false stereotypes has resulted in untold harm to, and discrimination against, the American Indian. Such portrayals have resulted in real socioeconomic handicaps and loss of self-esteem

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46. *Should Indian Symbols Used as Team Logos be Modified or Eliminated?*, DETROIT FREE PRESS, Oct. 11, 1988, at 11A.

47. *Id.*

48. Navajo spokesperson Duane Beyal believes that the mascot images are not offensive. Tim Giago, *Vengeance Is Mine Sayeth the Great Spirit*, INDIAN COUNTRY TODAY, Oct. 20, 1993, at A4. He said, "So what if the word is the white man's? It has a connotation I can live with. We embraced [the word] because when you say 'Redskin,' everyone knows you mean a fierce warrior." *Id.* Harry Command, director of American Indian Services in Michigan, also believes the logo issue is of secondary importance. Huskisson, *supra* note 11, at 1B. "If this were an issue in the Indian community, I think I would have been the first to know it. I think it's an issue with the media," Church said. *Id.* "Our priorities are developing a Native American economy, providing adequate health and human services, autonomy and education." *Id.*

49. Rogers Worthington, *Indian Groups Split on What's in a Name*, CHI. TRIB., Apr. 16, 1989, at 26C.

50. *Id.*

51. Cart, *supra* note 9, at 1C.

52. Antonia C. Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Image of a Native American Hero*, 38 S.D. L. REV. 14 (1993).

among members of the Indian population."[53] JoAnn Morris, a Native American educator, describes the impact of stereotyping on Native Americans:

> Up until the present day, the American public has been fed, and has accepted as fact, inaccurate information about Native Americans. . . . The damage that can be done by attributing stereotyped characteristics to another, or to oneself, is immeasurable. When looked at through image-colored glasses, an individual is never seen as an individual; he is not seen for what he is but for what he "ought" to be.[54]

As Morris's description points out, these stereotypes can lead to negative self-esteem and cause serious problems throughout the Indian population. Documentation of the long-term consequences of these stereotypes among Native Americans is desperately needed.

2. The Stereotypical Indian and Children

> *Libby gave Barney a teasing glance. "Red earth, white clouds and blue water — Daddy, are you patriotic!"*
>
> *"Well, now Punkin, I guess you're right. This really is a piece of our American life, right among the Indians. You wait and see, some day they'll be real fine American citizens."*
>
> *"Oh, Daddy, not those savages."*
>
> *"They've got a lot of things to learn, too, honey. Give them time. They've got lots of good in them."*[55]

The passage above, with its patronizing attitude and message that Indians may be "good" despite the fact that they are "savages," is not uncharacteristic of many children's books that remain in school libraries today. This distorted stereotypical "Indian" is readily apparent in children's literature, toys and even in school textbooks.[56] When viewed as a whole, the overwhelming derogatory impact of these characterizations on children cannot be ignored. Yet this is precisely what is happening. The consequences of indoctrinating children with these racially biased stereotypes are not recognized by a majority of Americans. This section discusses the impact of stereotypical Indian images portrayed to children. The major

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53. *Letters to the Editor*, NCAI SENTINEL, Aug. 1969, at 3.

54. JoAnn Morris, *Stereotypes: Neither Side is Open or Free*, TALKING LEAF, Aug. 1975, at 13.

55. TRADING POST GIRL (n.d.), *reprinted in* Mary Gloyne Byler, *Introduction to American Indian Authors for Young Readers*, *in* AMERICAN INDIAN STEREOTYPES IN THE WORLD OF CHILDREN: A READER AND BIBLIOGRAPHY 35, 38 (Arlene B. Hirschfelder ed., 1982) [hereinafter AMERICAN INDIAN STEREOTYPES].

56. *See generally* AMERICAN INDIAN STEREOTYPES, *supra* note 55.

influence which children's books and commercial toys can have in the development of future attitudes and prejudices is emphasized. Specific products illustrate the most common stereotypical images and serve as concrete examples. The impact of children's exposure to these materials cannot continue to be overlooked and underestimated.

Sociological studies have shown that racial awareness begins at a very young age. In his 1954 work, *The Nature of Prejudice*,[57] Gordon Allport emphasized the importance of the childhood years in the development of racial attitudes. "The first six years of life are important for the development of all social attitudes," he said, "though it is a mistake to regard early childhood as alone responsible. A bigoted personality may be well under way by the age of six, but by no means fully fashioned."[58]

After examining the distorted images of Indians that children are exposed to from a very young age, it is not difficult to understand why many sports fans don't find mascots like "Chief Wahoo" or team names such as "Redskins" offensive. How can we expect adults to redevelop healthy attitudes about racial differences when taught differently as children? Mary Ellen Goodman, a cultural anthropologist, has done significant research concerning children's awareness of race differences and the development of racial prejudice.[59] Her research supports the conclusion that children develop racial awareness at a very early age.[60] Goodman suggests that racial prejudices can be well formed by the age of five years, and that adult attitudes about race are usually established by the age of seven.[61]

Despite what many children are still taught, "I" does not stand for Indian. As many experts in children's literature and in culture's of indigenous peoples realize, "I" often stands for Ignorance.[62] Native Americans are continually portrayed, not as citizens of the many diverse tribes that exist in the modern United States, but as one-dimensional caricatures of wild savages or as stoic historical relics. Instead of "men" and "women," Indians in many children's books are referred to as "braves," who invariably seem to be "whooping" while standing on one leg, or as "squaws" carrying a "papoose" on their backs.[63] The Indians seen in many children's books bear no real relationship to an identified tribe or even to a specific time period.[64] Most likely, the story revolves around a depersonalized Indian character who wears fringed buckskins, beaded moccasins and a feathered

57. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954).
58. *Id.* at 297.
59. *See* MARY ELLEN GOODMAN, RACE AWARENESS IN YOUNG CHILDREN (rev'd. ed. 1964).
60. *Id.*
61. *Id.* at 254.
62. Michael A. Dorris, *Foreword*, *in* AMERICAN INDIAN STEREOTYPES, *supra* note 55, at vii.
63. *Id.*
64. AMERICAN INDIAN STEREOTYPES, *supra* note 55, at 5.

headband, as he attacks peaceful settlers with a bow and arrow.[65] Many Indian characters are not even named but just referred to as "the Indians," while white characters in the same book have personal names, vivid personalities and are described in detail.[66]

Another common characteristic of these books is the ridicule of Indian life and customs.[67] Themes commonly ridicule traditions such as the name-giving practices of certain tribes and the practice of giving an eagle feather as a symbol of honor and courage.[68] The religious and cultural practices of Native Americans are turned into whimsical children's tales which distort their true significance and meaning. This lack of respect for Native American culture exists even in textbooks, further perpetuating myths about Indians, and in many children's eyes, adding an air of authority to these inaccurate portrayals.[69] Although some progress has been made,[70] there is much more work to be done.

For example, many textbooks refer to Indians as the "first immigrants," based on the theory that they migrated from Asia to Alaska over a "land bridge."[71] This theory is essentially unproven, and serves to justify the European conquest of the New World. The implication conveyed is that the Indians possess no greater claim to the land than later immigrants from Europe, the Indians were merely "there first."[72] "Native Americans should be portrayed as the original inhabitants of the continent," states the Council on Interracial Books for Children.[73] Scientific facts are simply not compatible with the notion that Indians were simply the first in a long line of immigrants.[74] "In fact, evidence of 'modern man' existing in the Americas over 70,000 years ago predates knowledge of such life in Europe."[75]

Another common fault is the gross oversimplification of every facet of Indian life. Diverse tribes are lumped together into regional groups, and then, misleading and highly inaccurate generalizations are made about entire groups.[76] The simple fact that Native North American societies contained

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65. *Id.* at 6.

66. *Id.* at 5.

67. *Id.* at 6.

68. *Id.*

69. *See generally* NATIVE AMERICANS, *supra* note 1.

70. *See generally Bibliography: Section 2: Corrective Material, in* AMERICAN INDIAN STEREOTYPES, *supra* note 55, at 269.

71. AMERICAN INDIAN STEREOTYPES, *supra* note 55, at 81 (quoting D'ARCY MCNICKLE, THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN (2d ed. 1975)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. School textbooks have been guilty of this type of scholarship. For example, one textbook stated:

more than 300 distinct languages and more then 500 separate cultures,[77] emphasizes the magnitude of oversimplification which exists. The oversimplifications, inaccuracies and blatantly racist portrayals of Native Americans in textbooks highlight the completely Eurocentric perspective conveyed to many children, under the guise of a history lesson.

These "history" lessons often include terms such as "advanced culture"[78] to describe European society. Indians are described as "primitive," and characterized as "friendly" or "unfriendly."[79] The emphasis in many textbooks is on the Indian of the past, implying that modern Indian society is nonexistent or unimportant. These cultures have not disappeared, but are alive and well in hundreds of dynamic, contemporary societies.

Perhaps the most pervasive theme in these textbooks is the equation of Native Americans with warlike behavior and violence.[80] In fact, many of the behaviors which were perceived as violent and aggressive by the white settlers, whose views are reflected in the history texts, were actually caused by the European conquest.[81] For example, when Indians fought back as their homes and lands were taken from them by force, this was characterized as warlike behavior. As white settlers invaded the territory of certain tribes, these tribes were forced onto the traditional lands of other Indians, causing much of the intertribal conflict and aggression.[82]

Derogatory Indian stereotypes are not relegated to the world of literature. Unfortunately, many children have a distorted image of Native Americans

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> The Eastern Woodland Tribes lived in the region east of the Mississippi River, from Canada to Florida. . . . The Indians hunted for their food and clothing. . . . The Eastern Woodland Indians were farmers, too, and they grew corn, beans and squash. They lived in buildings called longhouses, which were rows of apartments, shared by several families. The men hunted and fished; the women tended the fields and gathered the fruit. They had money called wampum, which consisted of bits of seashells strung together like beads.

AMERICAN INDIAN STEREOTYPES, *supra* note 55, at 85.

77. *Id.*

78. School textbooks have also stated:

> A conflict of cultures. *The Eastern Woodland Indians did not develop a highly advanced culture.* But their culture did make it possible for them to live in ways suited to their needs. . . . Beginning in the mid-1600's, the world of the Eastern Woodland Indians suddenly changed. *The Indians faced Europeans, who were people with more advanced cultures.*

Id. at 85 (emphasis added).

79. Another textbook contained the following passage: "A *friendly Indian* named Squanto helped the colonists. He showed them how to plant corn and how to live on the edge of the wilderness. A soldier, Captain Miles Standish, taught the Pilgrims how to defend themselves against *unfriendly Indians.*" *Id.* at 94 (emphasis added).

80. "War was a part of the way of life of these southeastern Indians." *Id.*

81. DAVID R. WRONE & RUSSELL S. NELSON, WHO'S THE SAVAGE? A DOCUMENTARY HISTORY OF THE MISTREATMENT OF THE NATIVE NORTH AMERICANS 18 (1973).

82. *Id.*

even before they reach history class. Some of the most inaccurate, oversimplified and demeaning images of Indians are meant for very young children. Children's toys such as "play Indian villages," blocks with Indian caricatures, and toy bows and arrows provide concrete examples of this stereotypical imagery.[83] These toys introduce young children to an ethnocentric and unrealistic portrayal of Native American history, culture and modern life, setting the stage for history book embellishment once the children enter school.

This racist portrayal of American Indians has a major effect on both Native American children as well as children from other ethnic backgrounds. For the child who is never given the opportunity to learn about the many diverse Indian cultures, lifestyles and religions, the "Indian" can take on a frightening connotation with no relevance to the real world. For example, when the parents of a five-year-old boy in St. Louis tried to explain to him the Indian heritage of his newly adopted sister, he asked them, "Will [she] kill us when she grows up?"[84] John Fadden, who works at the Six Nations Indian Museum in upstate New York, reports that it is not uncommon for "children [to] refuse to come onto the grounds of the museum because of an intense fear of possibly meeting an Indian. Some actually cry and scream."[85] These children are being denied access to a vast amount of knowledge applicable to modern life. For example, many children will never know that most Indians were not roaming hunters, but lived in villages with agricultural societies,[86] or that decision-making power in many tribes rested equally with men and women.[87] Lessons learned by studying traditional Indian societies could provide insight into understanding modern life. To deny children the opportunity to learn from the advanced and diverse peoples, who lived on this continent for tens of thousands of years, is to provide them with an incomplete account of American history.

For Native American children, the effects of these stereotypical images are often even more tragic. Many of these children can, and do internalize these stereotypes and hostile attitudes towards Indians.[88] This greatly interferes with the child's development of a positive self image and racial identity, and can discourage the child from developing his or her potential

83. Arlene B. Hirschfelder, *Toys with Indian Imagery, in* AMERICAN INDIAN STEREOTYPES, *supra* note 55, at 144.

84. Robert B. Moore & Arlene B. Hirschfelder, *Feathers, Tomahawks and Tipis: A Study of Stereotyped "Indian" Imagery in Children's Picture Books, in* UNLEARNING INDIAN STEREOTYPES (Council on Interracial Books for Children eds., 1977).

85. *Id.* at 47.

86. AMERICAN INDIAN STEREOTYPES, *supra* note 55, at viii.

87. *Id.*

88. *Id.* at 145.

skills and talents, thus turning the negative stereotype into a self-fulfilling prophecy.[89]

Sandy Nowack, counselor for a group of Native American boys in Norman, Oklahoma, sees a wide variation in self-esteem levels.[90] In a recent after-school discussion, she asked the boys to tell the group their name, their tribe, and why they liked being a Native American. "It was easy to tell which boys had bought into the Indian stereotypes," Nowack said.[91] Her favorite answer was, "I like being a Native American because we're sacred."[92] But all responses were not that positive. One child said, "I like being an Indian because we get to shoot bows and arrows."[93] Nowack believes that, to some Native American children, the images of the stereotypical Indians seem so real that these children actually believe they're supposed to wear "war paint" and "scalp" people.[94]

There have been recent changes. The second-graders at Purcell Elementary School didn't learn about Pilgrims or the "friendly Indian, Squanto," this Thanksgiving. Instead, they met Native American guests from three different tribes, learned about the people who were living in North America when the Europeans arrived, and even got to sample traditional tribal cooking. "I think it's really important for the different cultures in this classroom to be represented," said their teacher, Kelley Chandler.[95] "We're very fortunate to have three different tribes represented, and I'm grateful to the family members who took the time to come and speak with my class."[96] Efforts such as these can make a difference in how children perceive themselves and others of different races. Other approaches, such as public protests, use of the media, and utilization of the legal system can also be effective.

II. Change Through Social Pressure: A Survey of Current Battles

A. Mascots and Nicknames

The issue of sports team names and mascots is perhaps the most visible sign of the ongoing struggle against Native American stereotypes. In the 1970s, a campaign by various Native American leaders resulted in many colleges scrapping their Indian nicknames.[97] Many colleges then followed

89. *Id.*

90. Interview with Sandy Nowack, Editor-in-Chief, *American Indian Law Review*, in Norman, Okla. (Nov. 21, 1994).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Interview with Kelley Chandler, Schoolteacher, Purcell School District, in Purcell, Okla. (Oct. 11, 1993).

96. *Id.*

97. *Native Americans Sue to Stop Kansas City Chiefs From Using Indian Mascot*, UPI, Dec.

the lead of Stanford University, which changed its nickname from the Indians to the Cardinals. Recently, there has been a renewed push for the removal of Indian names from professional athletic teams, thanks in part to the prominence of such teams as baseball's Atlanta Braves and the National Football League's Washington Redskins.[98] Unfortunately, these steps toward equality must be assessed against a backdrop of determined resistance posed by holdout organizations. The following examples highlight the continuing efforts.

1. Atlanta Braves

Demonstrations held in Minneapolis, Minnesota during the 1991 World Series, to protest the Atlanta Braves baseball team's use of Indian symbols as mascots focused national attention on efforts to end derogatory stereotypes of Native Americans.[99] In filing his Human Rights Commission complaint against the Atlanta Braves, Ojibwe tribal member Fred Veilleux said the team name demeaned Indians.[100] The complaint charged that use of the Braves name as a mascot, along with its tomahawk logo, incites, invites, promotes and provokes the public and the fans into acts that insult Indians and deny them the enjoyment of a public place.[101] His complaint is founded on federal antidiscrimination laws. Specifically, the claim relies on the public accommodations section of the civil rights laws, which provides that a person cannot be denied equal enjoyment of a public facility

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5, 1991, *available in* LEXIS, News Library, Sports File. Stanford University and the University of Oklahoma are two of many schools that have abandoned their Indian mascots.

98. It is certainly no secret that Native Americans received a lot of media exposure due to the high degree of publicity surrounding the Atlanta Braves and the Cleveland Indians reaching the 1995 World Series, as well as the successful seasons enjoyed by the Washington Redskins. *See* Mike Downey, *These Names Are Deserving of Questions*, N.Y. TIMES, Oct. 18, 1995, at C1; Andrew Glass, *World Series Victims or Mascots?*, ATLANTA J. CONST., Oct. 23, 1995, at A11; Macon Morehouse, *200 Indian Protestors Expected*, ATLANTA J. CONST., Oct. 21, 1995, at D11; Gary Pomerantz, *Protest Targets Indian Mascots: Native Americans Return for Series*, ATLANTA J. CONST., Oct. 20, 1995, at E1; Barbara Reynolds, *History Demands End to "Redskins,"* USA TODAY, Feb. 5, 1993, at A11.

99. *See* Steve Jacobson, *WORLD SERIES/Braves vs. Twins; Respect Indians In Home of the Braves*, NEWSDAY, Oct. 20, 1991, at Sports 4. The Atlanta Braves played the Minnesota Twins in the 1991 World Series. There had been complaints for years against mascots Native American's considered offensive, but there had been little, if any media attention. In Minneapolis, where the World Series was played, about 50,000 Indians form the third-largest urban concentration of Indians in the United States. Minneapolis is also the headquarters of American Indian Movement (AIM). *Id.* Various groups were able to organize in larger numbers and take advantage of the World Series media. *Id.*

100. *See Minority Coalition Wants to be Renamed*, S.F. CHRON., Oct. 19, 1991, at D4.

101. *Id.*

because of their race, color, creed, or national origin.[102] Similar protests surrounded the 1995 World Series.[103]

In an attempt by sports officials to broach the subject, quiet negotiation began soon after between Native Americans and the president of baseball's Braves over the team's nickname and the fans' "tomahawk chop" chant. Assurance was received from Braves owner Ted Turner that the concerns would be addressed, although tribal leaders vowed that nothing short of change is the ultimate goal.[104]

2. Iowa

Sioux City, Iowa is a "model of civic progressiveness, according to the *Washington Post*."[105] In February 1993, the Sioux City baseball team (formerly the Sioux City Soos) became the first professional sports organization to change its name in an effort to respect the feelings of Native peoples.[106] The original Sioux City mascot was "Lonesome Polecat," who was depicted as "a cartoon Indian clad in a loincloth, flailing a hatchet and grinning drunkenly."[107] Frank La Mere, a Winnebago who heads the Nebraska Indian Inter-Tribal Development Council, was instrumental in bringing about the change.[108] His response to the arguments of those who support the use of Indian mascots, and to specific articles published in local editorials,[109] is simple and to the point:

> People say that Indians have bigger problems than mascots and use of Native American images, but I disagree. If you can't

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102. Under Title II of the Civil Rights Act of 1964, public accommodations include: any inn, hotel, motel or other establishment that provides lodging to transient guests (except for small boarding houses); facilities that sell food for consumption on the premises, such as restaurants, cafeterias, lunchrooms, lunch counters and soda fountains; gasoline service stations; and places of exhibition or entertainment, such as motion picture houses, theaters, concert halls, sports arenas and stadiums. 42 U.S.C. § 2000a(b) (1988). "Why can't an Indian family go to a ballgame without having to put up with the mockery?" Veilleaux said. Jacobson, *supra* note 99.

103. *See* Macon Morehouse, *200 Indian Protestors Expected*, ATLANTA J. CONST., Oct. 21, 1995, at D11; Gary Pomerantz, *Protest Targets Indian Mascots: Native Americans Return for Series*, ATLANTA J. CONST., Oct. 29, 1995, at E1.

104. Rachel Shuster, *Meetings Open Today in Atlanta on Team Name*, USA TODAY, Nov. 20, 1991, at 3C.

105. Coleman McCarthy, *No New Name, No New Stadium*, WASH. POST, Feb. 20, 1993, at A21.

106. The team is now named the "Sioux City Explorers," in honor of nineteenth-century explorers Lewis and Clark. *Id.*

107. *Id.*

108. *Id.*

109. One article criticizing the name change complained about "the hokey concept of political correctness. I think it is a bunch of garbage . . . If the (Indians) are really concerned about their problems they should be doing something about the lousy health care they receive." *Id.*

> see me as an individual, then how can you understand the problems we have as a people? We have taken much heat, and the backlash has been tremendous, but we can take it. If our children do not have to endure the insults we have endured, then our efforts will have been worth it.[110]

3. Massachusetts

In February 1991, the Massachusetts Commission Against Discrimination supported legislation to change the Massachusetts state seal.[111] The seal depicts an Indian holding a bow and arrow, with an arm holding a sword above the Indian's head. "The emblem depicts [Indians] as war-making . . . ," said the executive director of the State Commission on Indian Affairs. "The Indian is all right, but we'd like to remove that sword from above his head," director John Peters, Sr. added. Peters believes that the involvement of the antidiscrimination commission may elicit a more favorable reaction from legislators on stereotype issues.[112] The commission also appointed a committee to investigate the use of Indian likenesses for school mascots.[113]

4. Minnesota

In April 1989, the Minnesota Civil Liberties Union (CLU) publicly denounced the use of Indian stereotypes, and threatened to take further legal action.[114] Supported by the Board of Education, the organization threatened to sue public schools which refuse to eliminate Indian names or logos for athletic teams.[115] "These symbols are discriminatory and demeaning," said Matthew Stark, director of the Minnesota CLU. Stark emphasized his belief that derogatory Indian stereotypes violate the Equal Protection Clause of the 14th Amendment.[116] However, by late 1993 no action had yet been taken. A review of the ruling is still planned for the mid 1990s.

5. Michigan

Advertising can actually help eliminate discriminatory stereotypes, instead of merely perpetuating them. An Indian parent in Minneapolis, Phil St. John, took action when his sons were embarrassed by a whooping fan

110. *Id.*

111. Efrain Hernandez Jr., *Antibias Panel Backs Legislation to Alter State Seal Indian Image*, BOSTON GLOBE, Feb. 13, 1991, at 23.

112. *Id.*

113. *Id.*

114. Rogers Worthington, *Indian Groups Split on What's in a Name*, CHI. TRIB., Apr. 16, 1989, at 26C.

115. *Id.*

116. *Id.*

dressed as an Indian at a high school basketball game.[117] In March 1987, he hired an advertising agency to create a poster featuring pennants of fictitious teams such as the San Diego Caucasians and the Kansas City Jews next to a Cleveland Indians pennant.[118] The campaign gained attention for the fight against stereotypes, and the Michigan Civil Rights Commission has now denounced Indian nicknames.[119]

6. Missouri

In November 1992, more than 200 Native Americans protested in Kansas City, Missouri, during a conference held by the National Coalition on Racism in Sports and Media.[120] Indian activists included Vernon Bellecourt and Russell Means, founders of the American Indian Movement (AIM).[121] The protest took place before a National Football League game between the Washington Redskins and the Kansas City Chiefs.[122]

Activist Michael Haney took the fight for Native American rights one step further by filing a formal complaint with the Missouri Commission on Human Rights against the National Football League's Kansas City Chiefs in 1991,[123] alleging that the team's willingness to let its fans dress up as Indians and act crazily unlawfully deprived him of the right to enjoy Chiefs' games and that "[t]he negative imagery of mascots and the commercial use of Indian names create a basis of misunderstanding of our people — a misunderstanding which breeds prejudice."[124] Haney claimed the team made him feel "unwelcome because of boisterous and drunken fans [using racist mascots and chants]."[125] Haney sets a remarkable example and this suit could be an indication of a new trend in the fight against discrimination. "Michael has put these issues at the forefront of his life. He speaks actively and symbolically for 2 million of his people. I've always thought of him as an Indian Everyman," said Rennard Strickland, professor of

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117. *Id.*

118. *Id.*

119. *Id.*

120. Reuters, *Protest of "Chiefs," "Redskins": Indians Call Team Names, "Tomahawk Chop" Racist*, S.F. CHRON., Nov. 16, 1992, at A2.

121. *Id.*

122. *Id.*

123. Joseph Keenan, *Once Axed, the Tomahawk Chop Back in Swing at Arrowhead*, Reuters, Oct. 12, 1992, *available in* LEXIS, News Library, Sports File.

124. *Native Americans Sue to Stop Kansas City Chiefs From Using Indian Mascot*, UPI, Dec. 5, 1991, *available in* LEXIS, News Library, Sports File. Targets include the Florida State University "Seminoles," the University of Illinois "Fightin' Illini," the Washington Redskins, the Kansas City Chiefs, the Atlanta Braves, the Cleveland Indians, and the National Hockey League Chicago Blackhawks. There are a wealth of other complaints regarding the use of Indian mascots at the primary and secondary school level. For the purpose of this article, we will be focusing only on the complaints against professional sports teams.

125. *Id.*

American Indian Law and Policy at the University of Oklahoma.[126] "Most Indians feel demeaned by the use of their names and images as sports mascots, but few have Haney's dedication to fighting it," Strickland added.[127]

The Kansas City Chiefs have said the team has no intention of changing its name, but have instead offered some concessions.[128] In the Fall of 1992, the Chiefs, who play their home games at Arrowhead Stadium, said they would not play music that accompanied the arm-wagging tomahawk chop last year and the team's cheerleaders would not participate in the activity.[129] Sales of sponge tomahawks were also banned at stadium concession stands.[130] But fans persisted in chopping their way through games anyway and the team relented and gave its sanction to the chop.[131]

7. Oregon

In February 1992, the *Oregonian* newspaper discontinued the use of "sports nicknames [or logos] that may be offensive to racial, religious or ethnic groups."[132] Included are references to "Braves," "Redskins," "Indians," and "Redmen."[133] Editor William A. Hilliard instituted the change because he believes these images "tend to perpetuate stereotypes that damage the dignity and self-respect of many people in our society and that this harm far transcends any innocent entertainment or promotional value these names may have."[134]

8. Washington D.C.

Michael Haney[135] led a group of almost 2000 protestors in a game-day demonstration outside the Metrodome in Minneapolis, as the Washington

126. Wes Smith, *Fighting for His People: Michael Haney Stands Up to Those Who Would Trivialize the Heritage of American Indians*, CHI. TRIB., Mar. 28, 1993, at 1C.

127. *Id.*

128. Keenan, *supra* note 123.

129. *Id.*

130. *Id.*

131. *Id.* In a paid advertisement in the *Kansas City Star* prior to the Chiefs' home game against the Philadelphia Eagles, the team said it "never meant any disrespect when doing the chop." *Id.* "If no offense is intended, why then must offense be taken?" *Id.*

132. Willaim A. Hilliard, *To Our Readers*, OREGONIAN, Feb. 16, 1992, at D1.

133. *Id.*

134. *Id.*

135. Michael Haney is Seminole and Lakota and extremely visible in the fight for American Indian rights. He believes the mascot issue is of utmost importance and is active in fighting to reclaim the heritage and pride of his people. Haney's activism includes challenging museums to reclaim artifacts from Indian burial sites, preventing the use of Indian land for hazardous waste sites, and fighting for continued use of peyote in Native American Church rituals. Smith, *supra* note 126, at 1C.

Redskins played in the Super Bowl in 1992.[136] On the day before the protest, Haney and fourteen other activists became involved in a struggle with security guards.[137] The group of Indian advocates was attempting to display a banner which read: "Indians are human beings, not mascots for America's fun and games."[138] Haney had his arm broken and two teeth knocked out in the brawl.[139] "I don't mind protecting my First Amendment rights, although I don't always have to get my teeth kicked in," he said when describing the incident.[140]

In September 1993, a small group of about thirty protesters used a bullhorn to chant slogans and passed out leaflets in front of Robert F. Kennedy Memorial Stadium to protest the name "Redskins."[141] One of the demonstrators, Juanita Helphrey, said a man shouted obscenities at her when she offered him a leaflet explaining why Native Americans find the name "Redskins" offensive. "The fans hate change," she said. But "one reason the issue is important is because our children see these images of mascots and they ask if we're really like that."[142] Another protester, Julia Moon Sparrow, pointed out that "ninety-nine percent of the people don't care. Many people have been extremely rude and I think it reflects a great deal of ignorance."[143]

In early 1992, representatives of various Indian groups filed a petition with the U.S. Patent and Trademark Office demanding that the office cancel the team's seven registered trademarks that use the nickname Redskins.[144] In the petition, the petitioners argued "[t]he term 'Redskin' was and is a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person."[145]

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Ruben Casteneda, *Protesters Condemn Redskins Name*, WASH. POST, Sept. 7, 1993, at C5.

142. *Id.*

143. *Id.*

144. Randy Furst, *Indian Activists Seek to Have 'Redskins' Stripped of U.S. Trademark Protections*, MINNEAPOLIS STAR TRIB., Sept. 11, 1992, at 1A. One argument follows that if the trademarks were canceled, the team could still use the nickname, but others could too, which would make it less profitable and thus provide the team with an economic incentive to change the nickname. *Id.*

145. *Id.* In addition to the Washington Redskins, many local teams utilize the same name, which is more offensive than any other sports nickname to many Native Americans. In Oklahoma City, Oklahoma, Capitol Hill High School and Southern Nazarene University, with large numbers of Native American students, both use the nickname "redskins." Jim Killackey, *Team Names Mock Indians, Speaker Says*, DAILY OKLAHOMAN, Nov. 27, 1993, at 9.

Jack Kent Cooke, owner of the team, has said that he would not change the name, which he says is not disrespectful but instead promotes positive characteristics such as bravery.[146] In the complaint, the petitioners laid out a historical case showing that the trademark was derogatory.[147] Among examples cited was a statement written by a colonialist in 1699: "Ye firste Meeting House was solid mayde to withstande ye wicked onsaults of ye Red Skins."[148] The petitioners also noted that the 1991 edition of the *American Heritage Dictionary* said the term "redskin" was "offensive slang."[149] At present, this complaint is still progressing through the Trademark Trial and Review Board.

As Native Peoples protested outside RFK stadium, the Washington Redskins attempted to "honor" their heritage with some less-than-authentic pregame entertainment.[150] While a woman who calls herself "Princess Pale Moon"[151] sang the Star Spangled Banner, a dozen Native Americans in "ceremonial dress" translated the anthem into sign language.

The newspaper headline, "Extra Points Cooke Extends Peace Pipe," describing the event adds to the negative impact by making the whole protest seem trivial or humorous.[152] Making Native Americans the target of yet another joke, or instituting superficial changes such as the Pale Moon pageantry, cannot substitute for true reform.

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146. Furst, *supra* note 144, at 1A. Redskin fan response was also along these lines with such comments as: "They've got their rights, but we do not mean any disrespect by the name"; "This name has been going on for years, so I don't understand why it's an issue now"; "I think it's ridiculous. Should all horses be offended by the Broncos, or all Twins because of the Minnesota Twins?"; "The American Indians ought to be proud. We're wearing an Indian on our backs and this is a winning team." *American Indians Demand Name Change*, Agence France Presse, Jan. 26, 1992, *available in* LEXIS, News Library, Sports File.

147. In a recent issue of *Indian Country Today*, editor Tim Giago responds to Beyal and other Indians who support the use of Indian mascots by reminding them where the term "redskin" originated.

> The term actually came from the early colonial custom of selling beaverskins, bearskins, deerskins, and — when there was a bounty on their heads — "redskins" at the frontier trading post. The colonial government offered so much for an Indian child, woman or man and the proof was usually the scalp of the victim. To most Indians, the word "Redskin" means genocide and it can never be dignified by Vichy compliance.

Tim Giago, *Vengeance is Mine Sayeth the Great Spirit*, INDIAN COUNTRY TODAY, Oct. 20, 1993, at A4.

148. *Id.*

149. *Id.*; *see also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 987 (1983) ("Redskin" defined as "American Indian, usually taken to be offensive.").

150. *Extra Points Cooke Extends Peace Pipe*, NEWSDAY, Nov. 4, 1991, at 111.

151. "Princess Pale Moon" claims Ojibwe and Cherokee lineage but is not enrolled in either tribe. She was unavailable for comment concerning the spectacle. *Id.*

152. *Id.*

9. Wisconsin

In October 1992, Wisconsin Attorney General James Doyle ruled that Indian names and logos such as "Warhawks," "Braves," "Chiefs," "Redmen" and "Redskins" may be discriminatory because they reinforce stereotypes, and their use should be restricted in public schools.[153] The opinion did not prohibit the names completely, but left the decision to change with each school district.[154] However, if a complaint is filed and a school refuses to change the Indian name, the state has the authority to intervene.[155]

III. Analysis of Legal Efforts to End Indian Stereotypes

A. The Constitutional Approach

1. Equal Protection

Equality and equal respect are highly valued principles in our system of jurisprudence. Three Constitutional provisions[156] and a myriad of federal and state statutes are aimed at protecting the rights of racial, religious, and sexual minorities to be free from discrimination in housing, education, jobs, and many other areas of life.[157] Yet the equality principle is not without limits. Rigorous rules of intent, causation, standing, and limiting relief circumscribe what may be done.[158] New causes of action are not lightly recognized.[159]

In *El-Em Band of Pomo Indians of the Sulpher Bank Rancheria v. 49th District Fair Ass'n*[160] Native Americans from a federal reservation in Lake County, California, as well as several individual Native Americans living in Lake County, filed a class action suit on behalf of themselves and all Native Americans in California. The action arose from the use of an Indian caricature, called "Him Konocti," in advertising and promotional materials for the Lake County Fair. The cartoon caricature featured a feather headdress and a profile with a prominent nose.

Plaintiffs sought injunctive relief pursuant to 42 U.S.C. §§ 1983 and 2000a-6 of the Civil Rights Act, as well as the Equal Protection Clause of

153. *Wisconsin Rules on Nicknames*, DETROIT FREE PRESS, Oct. 19, 1992, at 4A.

154. *Id.*

155. *Id.*

156. U.S. CONST. amends. XIII-XV.

157. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 381 (1991).

158. *See* Richard Delgado, *Derrik Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 936 (1988).

159. For example, the legal system has resisted efforts by feminists to have pornography deemed a civil rights offense against women. *See* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

160. 359 F. Supp. 1044 (1973).

the Fourteenth Amendment to the U.S. Constitution. However, the defendants removed all depictions of the name and image after this suit was filed, making the sole remedy of injunctive relief under section 2000a-6 moot.[161] However, the claim under the antidiscrimination provision of section 1983 remained.[162] In addition, plaintiffs sought damages for humiliation and ridicule caused by use of the Indian caricature in advertising promoting the fair.[163]

To state a claim under section 1983, the plaintiffs had to show a violation of some right guaranteed by the Constitution or laws of the United States.[164] The issue turned on whether the use of a racially derogatory stereotype by a public entity violated the Equal Protection Clause of the Fourteenth Amendment, therefore constituting a claim for damages under section 1983.[165] Plaintiffs claimed that the cause of action was one of racial discrimination, because defendant's use of the cartoon caricature portrayed Indians as a subject of ridicule, bringing the claim to a constitutional level.[166]

Distinguishing the cases cited by plaintiffs to support the claim of discrimination from the instant case, the district court stated that plaintiffs' cited cases "all involve[d] a situation in which an identifiable group [was] denied constitutionally protected rights and privileges accorded to other groups."[167] Therefore, the court held that use of an Indian caricature, even if in fact derogatory, is not unconstitutional because it does not deny a constitutionally protected right to a specific group.[168] Merely because the insults were racial, the court reasoned, did not make the rights constitutionally protected.[169] Emphasizing that this was a matter of state concern, the court reasoned that to find this right covered by section 1983 would be "an

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161. *El-Em Band*, 359 F. Supp. at 1045 (citing Adickes v. S. H. Kress & Co., 409 F.2d 121, 126 (2nd Cir. 1968), *rev'd on other grounds*, 398 U.S. 144 (1971)).

162. Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

163. *El-Em Band*, 359 F. Supp. at 1045.

164. *Id.* (citing Johnson v. Hackett, 284 F. Supp. 933, 939 n. 11 (E.D. Pa. 1968)).

165. *Id.* at 1045.

166. *Id.*

167. *Id.* The plaintiffs referred to: Gatson County v. United States, 395 U.S. 285 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Morey v. Doud, 354 U.S. 457 (1957); Kennedy Park Homes Assn. v. City of Lackawanna, 318 F. Supp. 669, 671 (W.D.N.Y.1970), *aff'd.*, 436 F.2d 108, 109 (2 Cir. 1970), *cert. denied*, 410 U.S. 1010 (1971).

168. *Id.* at 1045.

169. *Id.* (citing *Johnson, supra* note 164, at 940).

unwarranted extension by the court of civil rights to include those individual freedoms which heretofore have been matters of state concern."[170] The court found that the use of a racially defamatory stereotype in this situation constituted libel.[171] However, plaintiffs specifically agreed in their memorandum to the court that defamation committed by persons acting under color of law does not violate section 1983.[172] Thus, the complaint failed to state a claim under either 42 U.S.C. § 1983 or 42 U.S.C. § 2000a-6.[173]

The court's holding relied on *Johnson v. Hackett*,[174] which involved racially derogatory comments made by white police officers to a group of black men.[175] The plaintiffs brought suit for deprivation of rights by the police officers. Specifically, the action was based under the Civil Rights Act of 1871.[176] The complaint was dismissed because the police officers

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170. *Id.* (citing CAL. CIV. CODE §§ 44, 45 (West 1995); CAL. CODE CIV. PROC. §§ 830-849 (West 1995)).

171. Libel is defined in California Civil Code § 45 as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." *Id.*

172. *Id.* (citing Heller v. Roberts, 386 F.2d 832 (2d Cir. 1967); Morey v. Independent School District No. 492, 312 F. Supp. 1257, 1262 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970); Sinchak v. Parente, 262 F. Supp. 79, 87 (W.D. Pa. 1966); Hopkins v. Wasson, 227 F. Supp. 278, 280 (E.D. Tenn. 1962), *aff'd*, 329 F.2d 67 (6th Cir. 1964), *cert denied*, 379 U.S. 854 (1964)).

173. *Id.*

174. Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968).

175. The comments made included a statement that an officer "hated blackies," and the expression "What's a dead nigger anyway?" The police officers eventually arrested Arien Johnson, one of the men in the group, for "disorderly conduct." *Id.* at 936.

176. The Act of 1871 provides in pertinent part:

> § 1983: Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> § 1985: Conspiracy to interfere with civil rights — Preventing officer from performing duties.
>
> If two or more persons . . . conspire for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
>
> § 1986: Conspiracy to interfere with civil rights — Action for neglect to prevent officer from performing duties.
>
> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and

were not considered to be acting "under color of law."[177] The court held that neither the police officers' offer to fight the men, nor the racial slurs, violated any right under the U.S. Constitution.[178] Further, the court reasoned that the duty to protect rights such as "enjoy[ment of] integrity of reputation and public right to tranquility" lies with the state, as well as responsibility for "defining and punishing use in public places of words likely to cause breach of peace."[179]

The reasoning from *Johnson*, which was adopted by the court in *El-Em Band*, could apply to the current stereotype controversy. Specifically, the concept that "only limited protection is afforded the right to be free from harmful expression."[180] However, courts have yet to define and apply "harmful expression" in this context. These cases also suggest that there might be a state remedy in libel for some offensive images, possibly including racial stereotypes.

2. The First Amendment

a) Offensive and Political Speech

The First Amendment protects speech which we agree and disagree with.[181] Yet, such things as race-hatred speech implicate powerful social interests in equality.[182] In this area the United States Supreme Court has balanced free speech with the equal-protection values endangered by race-hate speech. In *Beauharnais v. Illinois*,[183] the defendant was convicted under a statute prohibiting dissemination of materials promoting racial or religious hatred. Justice Frankfurter, citing the "fighting words" doctrine of *Chaplinsky v. New Hampshire*,[184] ruled that libelous statements aimed at groups, like those aimed at individuals, are not protected by the First Amendment.[185] Though later decisions such as *New York Times Co. v. Sullivan*,[186] have increased protection for libelous speech,[187] *Beauharnais*

> having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented . . . .

Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. §§ 1983-1986 (1988)).

177. *Johnson*, *supra* note 174, at 939.

178. *Id.*

179. *Id.*

180. *Id.* at 940.

181. Abrams v. United States, 250 U.S. 616, 630 (1919).

182. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 389 (1989).

183. 343 U.S. 250 (1952).

184. 315 U.S. 568 (1942).

185. *Beauharnais*, 343 U.S. at 257-58.

186. 376 U.S. 254 (1964) (holding that libel of public figures requires showing of actual

has never been overruled. Many courts have also afforded redress in tort for racially or sexually insulting language.[188]

Additionally, there are dozens of "exceptions" to free speech. These exceptions include: speech that constitutes "fighting words";[189] speech used to form a criminal conspiracy[190] or an ordinary contract;[191] words used to communicate a criminal threat;[192] speech regarding an official secret;[193] speech that defames or libels someone;[194] speech that is obscene;[195] speech that creates a hostile workplace;[196] speech that violates a trademark or plagiarizes another's words;[197] speech that creates an immediately harmful impact;[198] "patently offensive" speech directed at captive audiences or broadcast on the airwaves;[199] speech that disrespects a judge, teacher, military officer, or other authority figure;[200] speech used to defraud a consumer;[201] words used in price fixing;[202] and untruthful or irrelevant speech given under oath or during a trial.[203]

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malice); *see also* Garrison v. Louisiana, 379 U.S. 64 (1964) (overturning libel judgment won by public official by analogizing case to seditious libel).

187. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 861 n.2 (2d ed. 1988) (citing Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting from denial of certiorari)).

188. *See* Delgado, *supra* note 157, at 377.

189. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

190. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

191. *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

192. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 177-82, 448-52, 1113-15 (3d ed. 1982).

193. Snepp v. United States, 444 U.S. 507 (1980).

194. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952).

195. Roth v. United States, 354 U.S. 476 (1957); *see also* Miller v. California, 413 U.S. 15, 23 (1973) (mailing of unsolicited sexually explicit material not protected by First Amendment). Indecent expression, however, is generally protected. *See* Sable Communications Inc. v. FCC, 492 U.S. 115, 124 (1989) (holding that sale of dial-a-porn messages to adults cannot be criminalized because indecent).

196. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

197. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

198. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Schenk v. United States, 249 U.S. 47, 52 (1919).

199. FCC v. Pacifica Found., 438 U.S. 726 (1978); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

200. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918); *see also* Bethel School Dist. v. Fraser, 478 U.S. 675 (1986). For federal protection of inanimate objects and symbols, see 18 U.S.C. § 707 (1988) (4-H club symbol); 18 U.S.C. § 711 (1988) (Smokey the Bear); 18 U.S.C. § 711a (1988) (Woodsey the Owl); 36 U.S.C. §§ 170-188 (1988) (U.S. flag).

201. *See* PERKINS & BOYCE, *supra* note 192, at 304-08.

202. *See* LAWRENCE A. SULLIVAN, ANTITRUST 29-30, 132-34 (1977).

203. *See, e.g.*, MCCORMICK ON EVIDENCE 544-48 (Edward W. Cleary ed., 1984).

At the opposite end of the spectrum is political speech which include statements surrounding government action, major social and public policy issues, and persons connected with such matters.[204] Political speech is given full First Amendment protection[205] because such expression is considered the basis of the First Amendment.[206] Other types of expression are also entitled to First Amendment protection.[207] As the Supreme Court has observed, "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters — to take a nonexhaustive list of labels — is not entitled to full First Amendment protection."[208] The Court has also stated that expression on matters of "public concern" are covered as well.[209] In this case, writers, musicians and commentators are entitled to rely on the Freedom of Speech or Press Clauses regardless of whether the work is of a political nature.[210] Thus, offensiveness, without more, cannot serve as a constitutional basis for imposing liability.[211]

The issue is whether the social interest in controlling racially offensive speech is as great as that which gives rise to these "exceptional" categories, and whether the use of racially offensive language has speech value.[212] The First Amendment perspective yields no definite solution. Society has a strong interest in seeing that expression is as free as possible, yet the kind of expression under consideration has no great social worth and can cause serious harm.

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204. *See* Texas v. Johnson, 491 U.S. 397, 404-05 (1989) (holding that flag burning may be expressive action protected by first amendment); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (holding that first amendment requires that public figures and public officials prove "actual malice" on behalf of publisher to recover for tort of intentional infliction of emotional distress); First Nat'l Bank v. Bellotti, 435 U.S. 765, 784-86 (1978) (holding that first amendment protects speech made by corporate representatives on behalf of corporation criticizing proposed legislation); New York Times Co. v. Sullivan, 376 U.S. 254, 269-71 (1964) (holding that first amendment protects criticisms of public officials where no actual malice involved).

205. *See, e.g., Johnson, supra* note 204, at 409-10.

206. *Id.*; Boos v. Barry, 485 U.S. 312, 318 (1988) (holding that content-based restriction on picketing in front of foreign embassy violative of First Amendment).

207. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (theatrical production); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (issues of public concern); Memoirs v. Massachusetts, 383 U.S. 413, 417 (1966) (works of literature).

208. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

209. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-60 (1985).

210. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (parody concerning public figure); Time, Inc. v. Hill, 385 U.S. 374 (1967) (magazine article about play); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (movie).

211. *See* Cohen v. California, 403 U.S. 15, 25 (1971).

212. *See* Delgado, *supra* note 157, at 380.

b) Commercial Speech

Not all constitutionally shielded speech receives the extensive protection accorded political speech. Current constitutional interpretation indicates a distinction between noncommercial speech, which is potentially entitled to full protection, and commercial speech, which receives less than full protection. Until 1976, speech classified as commercial was long regarded as being outside the scope of the Freedom of Speech and Press clauses.[213] In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[214] the Supreme Court brought commercial speech under the First Amendment umbrella but declined to give it the full protection accorded political speech and its equivalents.[215] The test now establishes the degree of constitutional protection for the subject speech.[216]

"Commercial speech" is usually defined by the Supreme Court as expression that does "no more than propose a commercial transaction."[217] Advertising to sell a product is a common example.[218] Sometimes, however, the Court has broadened the definition of commercial speech to include expression that is solely in the economic interest of the speaker and the audience.[219] This latter definition may allow the commercial speech label to be assigned to certain speech that does more than merely propose a commercial transaction.[220] A speaker's expectation of profit from his statements does not by itself make the expression commercial speech.[221] If speech is to be classified as partially protected commercial speech or as

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213. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (noting that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising").

214. 425 U.S. 748 (1976).

215. *Id.* at 771-72 n.24.

216. *See* Bigelow v. Virginia, 421 U.S. 809, 818-22 (1975); Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376, 389 (1973). *Compare* Virginia Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding limited first amendment protection for commercial speech) *with* Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding no First Amendment protection for commercial speech).

217. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983); *Virginia Bd. of Pharmacy*, 425 U.S. at 762.

218. *See, e.g.*, Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328 (1986); *Bolger*, 463 U.S. 60 (1983); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Virginia Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

219. *Central Hudson*, 447 U.S. at 561.

220. *See Bolger*, 463 U.S. at 68 (finding commercial speech present even though advertisements at issue contained some speech that did not propose commercial transaction); *see also* Friedman v. Rogers, 440 U.S. 1, 11 (1979) (holding that trade name that does not by itself seem to propose commercial transaction but does seem solely in economic interest of speaker and audience is commercial speech).

221. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 756 n.5 (1988); *Pittsburgh Press Co.*, 413 U.S. at 385; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952).

wholly unprotected expression, factors other than the economic motivation of the speaker must justify the classification.[222] Assuming, that speech restricted by government action is properly classified as commercial, a court charged with determining the validity of the government action must make suitable allowances for the partially protected status of commercial expression.

The Supreme Court's recognition of the public interest in the free flow of commercial information was the basis for the holding in *Virginia Board of Pharmacy* that commercial speech merits constitutional status.[223] However, this protection extended to commercial speech was conditioned on the expression's being truthful and about a lawful activity.[224] Left undermined were the specific means of implementing commercial speech's partial First Amendment protection. That task was undertaken in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[225] The *Central Hudson* Court developed a four-part test for determining the constitutionality of government action that restricts commercial speech.[226]

The first element of the *Central Hudson* test asks whether the affected commercial speech pertains to a lawful activity and is nonmisleading.[227] If this question is answered negatively, there is no need to apply the remaining parts of the test because the government action will not violate the First Amendment.[228] If the question posed in the first part of the *Central Hudson* test is answered affirmatively, the affected commercial speech is entitled to First Amendment protection. However, the government action may be upheld if it clears the hurdles posed by the remaining three parts:[229] (1) whether the government had a "substantial" underlying interest

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222. Although the Supreme Court has been less than clear concerning what other factors besides the mere existence of a profit motive are necessary in order for speech to be considered commercial speech, the closer the speech comes to the sale of goods or services — as opposed to the context of the "sale" of ideas, as in a newspaper, book, or movie — the more likely it is that the speech will be considered commercial speech. *See Bolger*, 463 U.S. at 66-68 (holding that speech that contains some noncommercial aspects but is primarily advertising of commercially sold product should be treated as commercial speech for first amendment purposes).

223. *Virginia Bd. of Pharmacy*, 425 U.S. at 763. The *Virginia Board of Pharmacy* Court struck down a state regulation that effectively prohibited pharmacists from advertising the prices they would charge for prescription drugs. *Id.* at 749-50, 752.

224. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270-73 (1964) (holding that falsity of speech does not necessarily cause loss of first amendment protection); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech about unlawful activity protected by first amendment unless speech is both directed to incite and likely to incite imminent lawless activity).

225. 447 U.S. 557 (1980).

226. This test was designed to give substance to the partial First Amendment protection contemplated by Virginia Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

227. *Central Hudson*, 447 U.S. at 566.

228. *Id.*

229. *Id.*

to further in taking the action; (2) whether the government action directly advanced the underlying interest; and (3) whether the government action was no more extensive than necessary to serve that interest.[230]

A lessening of First Amendment protection was signaled in *Board of Trustees v. Fox*.[231] In *Fox*, the Court focused on the final element of *Central Hudson*'s four-part test for determining whether government action that restricts commercial speech violates the First Amendment.[232] As formulated in *Central Hudson*, the final element inquired whether the government action was no more extensive than necessary to serve the underlying government interest. Some of the Court's previous commercial speech decisions seemed to indicate that this element effectively required a "least restrictive means" analysis.[233] Writing for the *Fox* majority, Justice Scalia stated that no such analysis was contemplated or required by *Central Hudson*.[234] The majority reasoned that the references in prior decisions to a least restrictive means approach were dicta because the Court had never actually established that a government restriction on commercial speech must be absolutely the narrowest means of furthering the underlying government interest.[235]

In rejecting the least-restrictive means analysis, the *Fox* Court held that the final element of the four-part test merely requires that when the government regulates commercial speech, its means must be "narrowly tailored to achieve [its] desired objective."[236] Justice Scalia observed that

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230. *Id.* In Board of Trustees v. Fox, 492 U.S. 469 (1989), however, the Supreme Court lessened the rigor of the fourth element of the *Central Hudson* test. The Court discarded *Central Hudson's* "no more extensive than necessary" inquiry, substituting an inquiry as to whether the government action was "narrowly tailored" to serve the underlying interest. *Id.* at 480. For present purposes, however, it is sufficient to say that affirmative answers to each of the questions posed in the last three elements of the four-part test would enable the government action to withstand the first amendment challenge, whereas a negative answer to any of the three questions would make the action unconstitutional.

231. 492 U.S. 469 (1989).

232. *Id.* at 475-81. *Fox* dealt with a state university's regulation that restricted private parties from holding "Tupperware parties" in students' dormitory rooms. *Id.* at 472. The student plaintiffs alleged that the regulation unconstitutionally deprived them of their rights to receive commercial speech. *Id.*

233. *Id.* at 475-81.

234. *Id.* at 476-77.

235. *Id.* at 478-80.

236. *Id.* at 480. The *Fox* trial court had ruled for the university, but the court of appeals reversed and remanded because the trial court had not considered whether the university regulation was the least restrictive means by which the university could further its substantial interests in preserving an educational environment and in minimizing the risk that students would be taken advantage of by unscrupulous merchants. Fox v. Board of Trustees, 841 F.2d 1207, 1213-14 (2d Cir. 1988), *rev'd*, 492 U.S. 469 (1989). The Supreme Court reversed and remanded because the court of appeals had erroneously required a "least restrictive means" analysis. *Fox*, 492 U.S. at 484-86.

the Constitution mandated a "reasonable" fit, "not necessarily [a] perfect" fit, between the regulation and the underlying government interest.[237] After *Fox*'s reformulation of the *Central Hudson* test, a regulation that is more extensive than necessary to serve an underlying government interest may now pass First Amendment muster. Under *Fox*'s "narrowly tailored" approach, a restriction that sweeps more broadly than the narrowest possible regulation may still be "reasonably" suited to the advancement of the government interest.[238]

Fox's definite lessening of the protection afforded by the commercial speech test signifies that government restrictions on commercial speech will be less likely to be struck down on First Amendment grounds than they would have been under *Central Hudson.* Although the recent interpretation of the commercial speech test translates into a lessening of the First Amendment protection afforded commercial speech, the *Fox* Court failed to acknowledge that it was effecting such a shift. Instead, the Court purported merely to clarify the degree of scrutiny given to government action that limits commercial speech.[239] Furthermore, the Court expressly denied that *Fox* amounted to an adoption of a lenient "rational basis" test for determining the constitutionality of restrictions on commercial speech.[240]

Although *Fox* should not be regarded as having eliminated First Amendment protection for commercial speech, it did lower commercial speech protection to a level that is still "intermediate," yet farther removed from the highest level of First Amendment protection. Political speech and its noncommercial equivalents are reserved at the highest level. *Fox* signals a widening of the gulf between the respective levels of First Amendment protection for noncommercial and commercial speech and thus a potentially higher chance of protecting Indians from offensive commercial speech such as advertising that uses Indians or the nicknames and mascots of teams.[241]

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237. *Fox*, 492 U.S. at 480.

238. *See id.* at 477-81.

239. *See id.* at 479-81.

240. *Id.* at 480. The rational basis test is often used to determine whether the equal protection clause of the Fourteenth Amendment has been violated by an economic regulation that did not affect a suspect class or the exercise of a fundamental right. Under this test, an economic regulation will be sustained if it is reasonably related to a legitimate government purpose. The regulation will normally be upheld when this test applies because the government can establish "reasonable relation" with ease. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 530 (3d ed. 1986). Despite the Court's disavowal of the rational basis test in *Fox*, the Court's focus on a "reasonable" fit between the regulation and the underlying government interest seems akin to adopting a rational basis type of review. *See Fox*, 492 U.S. at 480.

241. In *Fox*, Justice Scalia stated that the decision actually strengthened "the essential protections of the First Amendment" by confirming that a meaningful distinction was kept between fully protected noncommercial speech and less-valued commercial speech. *See Fox*, 492 U.S. at 481. The Court's recent endorsements of noncommercial (as opposed to commercial)

c) Commercial Speech and Trademark Law

With regard to First Amendment protection to trademarks, there is limited protection. In *Friedman v. Rogers*, the Supreme Court has held that trademarks do not receive an unlimited amount of First Amendment protection.[242] Trademarks are purely commercial speech: there is no intent to communicate an idea apart from solicitation for a commercial transaction and any associations which have developed from the name can be expressed directly.[243]

The decision in *Central Hudson*[244] suggests that discriminatory commercial speech does not receive any First Amendment protection. The case mentioned that the government can ban commercial speech which relates to illegal activity. It then explained that in order for commercial speech to receive First Amendment protection, it must concern lawful activity.[245] Thus taken together, it is possible to draw the conclusion that the First Amendment protection given to a trademark which caused discrimination would be minimal.

d) Application of the First Amendment to Native Americans

The various complaints filed by Native Americans using the First Amendment and commercial speech issues share a pattern similar to complaints filed in the late 1970s by African Americans against the "Sambo's Restaurant" chain.[246] In interpreting the Supreme Court's opinions, some of the negative images of Native Americans may themselves be constitutionally protected under First Amendment. In the 1981 decision, *Sambo's Restaurants, Inc. v. City of Ann Arbor*,[247] a restaurant owner sought declaratory and injunctive relief for alleged constitutional violations. The court held that using the name "Sambo's"[248] for a restaurant, although perhaps offensive to African Americans, was commercial speech protected

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speech highlight this distinction. *See* Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

242. 440 U.S. 1, 9-10 (1979).

243. *Id.*

244. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n., 447 U.S. 557 (1980).

245. *Id.* at 563-64.

246. *See generally* Sambo's of Ohio, Inc. v. City Council of Toledo, 466 F. Supp. 177 (N.D. Ohio 1979); Sambo's of Massachusetts, Inc. v. Smith, C.A. No. 78-5490 (Middlesex County, Mass. Super. Ct. 1979).

247. 663 F.2d 686 (6th Cir. 1981).

248. The restaurant logo is derived from *The Story of Little Black Sambo*, which was written in 1899. It is a narrative describing the adventures of Little Black Sambo, who loses his red coat, blue trousers, purple shoes and green umbrella to a group of tigers. The tigers fight over the clothes and run around and around a tree, turning themselves into a pool of butter. Little Black Sambo and his parents use the butter to prepare a pancake supper. *Sambo's Restaurants*, 663 F.2d at 687 n.1.

under the First Amendment, where [the] city had produced no evidence to demonstrate that the operation of the restaurant under such name had retarded or impeded achievement or furtherance of its goal of racial equality."[249] The district court considered the substantial financial investments made to advertise the Sambo's logo, as well as the goodwill associated with the image.[250] Money invested in advertising and the goodwill value of logos would most likely be factors considered by the court if a similar question arose within the context of Indian stereotypes used for commercial purposes, such as professional sports team logos and names, as well as the wide range of products sold to fans.

In *In re The Urban League of Rhode Island, Inc. v. Sambo's of Rhode Island, Inc.*,[251] "Sambo's" was ordered to cease commercial use of the name because the "Sambo's" trademark denied African American citizens full and equal accommodations, due to the offensive nature of the trademark to African Americans and its subsequent deterrence factor. This case involved complaints filed with the Rhode Island Commission for Human Rights against "Sambo's of Rhode Island" alleging, among other charges, that "Sambo's" violated the Rhode Island Public Accommodations Act.[252] Many of the witnesses brought before the commission alleged that they believed the "Sambo's" logo was offensive to them (African Americans).[253] Several witnesses described examples of prejudice which occurred in school after the "Sambo" story was told.[254] Many witnesses also testified that

249. *Id.* at 695.

250. *Id.* at 687.

251. File Nos. 79 PRA 074-06/06, 79 ERA 073-06/06, EEOC No. 011790461 (R.I. Comm'n for Human Rights 1981) [hereinafter *Urban League of Rhode Island*].

252. Hotels and Public Places, R.I. GEN. LAWS § 11, ch. 24 (1956). This act ensures that "[a]ll persons within the jurisdiction of the state shall be entitled to full and equal accomodations . . . ." *Id.* § 11-24-1. In this case, the use of the name "Sambo's" resulted in an indirect refusal, withholding and denial of the accommodation facilities and privileges of respondent's places of public accommodation to black persons because of their race. Such advertising had the effect of notifying black persons that the accomodations, advantages, facilities and privileges of respondent's places of public accommodation would be denied to them because of their race. Many blacks considered it a deterrent to patronage. *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

253. *The Story of Little Black Sambo* was written and drawn about 100 years ago by the English writer, Helen Bannerman. The pictures show a black child wearing multicolored clothes and having encounters with tigers. *Urban League of Rhode Island, supra* note 251, at para. 6. Most of the witnesses read the book when they were in grade school. All of the black American witnesses who read the book stated that they found the book to be offensive. *Id.* at para. 7. Several of the witnesses testified that they were offended by the reaction which the book inspired in whites. *Id.*

254. Many of the witnesses testified that when the story was read to the class in school, the white students would make fun of the black students (including the witnesses). 1 Transcript, June 30, 1980, at 97, *Urban League of Rhode Island*; 2 Transcript, July 1, 1980, at 85, 86, 163, *Urban League of Rhode Island.*

"Sambo" brought to mind an offensive stereotype,[255] and an image of slavery.[256]

More than two-thirds of the African Americans who testified has been called a "Sambo" or had been present when another African American was called a "Sambo."[257] The name-calling was always done in a derogatory manner.[258] One witness testified that when he entered the restaurant, he was verbally accosted.[259]

Sambo's management knew the name offended a significant percentage of African Americans in the area.[260] It was also aware that the name was recognized by the Attorney General of Massachusetts as being offensive to the African American people of Massachusetts.[261] Sambo's could not prove that its name was necessary for the safe and efficient operation of its business.[262]

One of the issues that arose in this case was whether the First Amendment[263] protected the owner of an offensive trademark. The Commission concluded that the First Amendment to the Constitution did not prohibit it from ordering Sambo's to stop using that name for it's restaurant when it violated the Public Accommodations Act.[264] In holding that the First Amendment did not prevent all regulation of speech, the Commission said that an action can violate a statute even if it involves speech, saying "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or

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255. One witness stated that the word evoked a stereotype of

> black people having certain features and black — certain features which at the time might develop when I was a kid having a big nose and thick lips, and nappy hair, such as I have now, you weren't so beautiful, but now I'm beautiful, that came about, but there is the fact that those kinds of images with the smiling face and the kind of running around half-scatterbrained was really a negative — is really a negative kind of an image of black people.

2 Transcript, July 1, 1980, at 109, *Urban League of Rhode Island.*

256. *Id.* at 159.

257. *Urban League of Rhode Island, supra* note 251, at para. 10.

258. *Id.*

259. A witness testified that in November 1979, after discussion with friends, they entered a Sambo's because it was the only place open at that hour. 1 Transcript, June 30, 1980, at 191-93, *Urban League of Rhode Island.* He testified that as he and his friends sat down, one of the other patrons said, "They'll let anybody in here," and another patron said, "Well, what do you expect, it's a Sambo's." Another patron said, "I'd like to shoot 'em, I'd like to shoot all of them." *Id.* at 194.

260. *Urban League of Rhode Island, supra* note 251, at para. 15.

261. 1 Transcript, June 30, 1980, at 146, *Urban League of Rhode Island.*

262. *Urban League of Rhode Island, supra* note 251, at para. 16.

263. *Id.* at pt. C.

264. *Id.* at pt. D.

printed."[265] Courts have also held that speech can be enjoined if the speech constitutes or promotes an illegal action.[266]

To determine whether the First Amendment prohibited regulation of particular language, the Commission weighed the First Amendment interest in free speech against the public interest in regulating the speech.[267] According to this Commission, the weight of the First Amendment interest in free speech varied with the type of speech involved. Political speech merited a great deal of First Amendment protection; commercial speech received a limited amount of First Amendment protection.[268]

With regard to First Amendment protection to trademarks, there is limited protection. The Commission cited the Supreme Court's holding in *Friedman* that trademarks do not receive a large amount of First Amendment protection.[269] Trademarks, concluded the Commission were purely commercial speech, there was no intent to communicate an idea apart from solicitation for a commercial transaction and any associations which have developed from the name can be expressed directly.[270] In the *Urban League* case, the restaurant said it used the name "Sambo's" to tell the public that "good wholesome food served at reasonable prices in a family atmosphere" could be obtained at its restaurants.[271] The Commission felt that "Sambo's" could have conveyed this message without the "Sambo's" name.[272] Thus, according to the criteria developed in *Friedman*, the First Amendment protection afforded to the trademark of "Sambo's" was limited.[273] Using the Supreme Court's holding in *Central Hudson*, the Commission held further that discriminatory commercial speech did not receive any First Amendment protection.[274] The case mentioned that the

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265. *Id.*; *see* Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 502 (1949); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (holding that state may regulate a lawyer's conduct in soliciting clients even though such regulation entails regulation of speech.).

266. *Urban League of Rhode Island, supra* note 251, at pt. C; *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). In *Professional Eng'ers*, a district court had found that a society's canon of ethics which forbade competitive bidding violated the Sherman Antitrust Act. The court's order required the society to refrain from adopting any official opinion, policy, statement or guideline stating or implying that competitive bidding was unethical. The U.S. Supreme Court held that the district court did not violate the First Amendment as the order was a reasonable method of eliminating the consequences of the illegal conduct. *Id.* at 698.

267. *Urban League of Rhode Island, supra* note 251, at pt. D; *see* Bigelow v. Virginia, 421 U.S. 809 (1975).

268. *Urban League of Rhode Island, supra* note 251, at pt. D; *see Ohralik*, 436 U.S. at 456. *See supra* notes 213-45 and accompanying text.

269. *Urban League of Rhode Island, supra* note 251, at pt. D (citing Friedman v. Rogers, 440 U.S. 1, 16 (1979)).

270. *Id.*

271. Memorandum in Support of Respondent's Motion to Dismiss at 3, *Urban League of Rhode Island.*

272. *Urban League of Rhode Island, supra* note 251, at pt. C.

273. *Id.*

274. *Id.* at pt. D (citing Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557,

government may ban commercial speech which relates to illegal activity including discriminatory speech.[275] It then explained that in order for commercial speech to receive First Amendment protection, it must concern lawful activity.[276]

The Commission in the *Urban League* case decided that the public interest in preventing an illegal act of racial discrimination justified regulation of the name "Sambo's." The Supreme Court has held that the public interest in regulating speech which is misleading or untruthful outweighs the First Amendment interest in protecting free use of trademarks.[277] The interest in preventing discrimination is as important a public interest as the prohibition of deceptive speech. The Commission also cited the Supreme Court's dealing with the weight of the public interest in preventing discrimination in *Pittsburgh Press Co. v. Commission on Human Relations*.[278] This case indicated the court's movement from the doctrine that purely commercial speech receives no First Amendment protection in *Valentine v. Chrestensen*[279] to the current doctrine that commercial speech receives a limited amount of First Amendment protection.[280] In *Pittsburgh Press*,[281] the Supreme Court held that the public interest in preventing an illegal discriminatory act (publishing job opportunities by sex) outweighed the respondent's claim to First Amendment protection. Thus, the Supreme Court has held that the public interest in preventing illegal acts of discrimination is sufficient to outweigh the First Amendment protection given to commercial speech.[282]

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566 (1980)).

275. *Central Hudson*, 447 U.S. at 563.

276. *Id.* at 563-64. *See supra* notes 213-45 and accompanying text.

277. Friedman v. Rogers, 440 U.S. 1 (1979).

278. 413 U.S. 376 (1973).

279. 316 U.S. 52 (1942).

280. *Friedman*, 440 U.S. at 9.

281. 413 U.S. 376 (1973).

282. Sambo's tried to counter this theory by offering Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), in which the Supreme Court struck down an ordinance which prohibited the use of "for sale" signs on residential property even though the town claimed that the ordinance was designed to prevent "white flight" and promote integration. That case was distinguishable on two major grounds. First, the town did not prove that it had a problem with "white flight" or that the ordinance would prevent the problem if it existed. *Id.* at 95, 96. Second, the information conveyed, the availability of homes for sale, did not constitute or promote illegal racial discrimination. *Id.* at 97. In the Sambo's case, the complainants proved that the name caused racial discrimination in public accommodations so that the language was prohibited only after it was proved that it caused harm. *Id.* Two other cases, Sambo's of Ohio, Inc v. City Council of Toledo, 466 F. Supp. 177 (N.D. Ohio 1979), and Sambo's of Massachusetts, Inc. v. Smith, C.A. No. 78-5490 (Middlesex County, Mass. Super. Ct. 1979), were rejected as well. These cases concerned the denial of a license or permit to Sambo's because the names were offensive. These courts held that the First Amendment prohibited regulation of speech when the justification for the regulation was that the language offended the citizens. In the Rhode Island

e) Hypothetical

From the above analysis, it is possible to construct an argument for Native Americans seeking to remove athletic team mascots and symbols. If we assume that a team mascot or symbol is a trademark of some type, then an argument could be made along the lines of *Sambo's of Rhode Island* that preventing illegal acts of discrimination is sufficient to outweigh what little First Amendment protection is given to commercial speech. In this case, the deep-seated goal of society to stamp out discrimination. While the Equal Protection Clause would argue for a tough standard for enforcement, subsequent cases such as *Fox* would appear to make the Native American's case easier to win in that commercial speech protection under the First Amendment in *Fox* was so limited. Assuming a mascot is proven to be racist or discriminatory, *Central Hudson* offers a solution in that if the mascot or symbol is discriminatory, it represents illegal commercial speech and thus the athletic team would lose its protection. Additionally, the Public Accommodations Act covers sports events at a stadium, so application of a Federal law to protect a person's civil rights would apply without question. Many of the above-mentioned protests are at municipal stadiums. Other potential problems arise when the stadium is privately owned and operated.

The main problem lies in (1) making the connection that the mascot or symbol is the team trademark and (2) if so, determining whether the mascot or symbol is offensive to a few "sensitive" people or to all who see it. The *Sambo's of Rhode Island* decision seemed to side with a fair majority of African Americans who found the term "Sambo's" offensive and racist.[283] As for Native Americans and White Americans, terms such as "Braves" and "Chiefs" do not readily conjure up ideas of Sambo-type images. To a large extent, such terms are honorable by themselves as many of the team owners have argued. The question then becomes whether the peripheral conditions surrounding the names constitute a substitute for the name being less than offensive? For example, Cleveland calls its team the "Indians" (recognizing Columbus's misnomer for Native Americans) and that alone is not generally offensive. However, "Chief Wahoo" (the Indian's mascot on ballcaps) and

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case, the complainants proved that the name caused racial discrimination in public accommodations in violation of Rhode Island law. Hotels and Public Places, R.I. GEN. LAWS § 11, ch. 24 (1956). The public interest in the enforcement of statutes prohibiting racial discrimination requires more consideration than the public interest in avoiding language which will offend a section of society.

283. Not all Indian groups, however, support AIM. The Eastern Band Cherokees manufacture rubber tomahawks, spears, moccasins, bows and arrows and drums, all of which are sold as sports souvenirs. Chief Johnathan Ed Taylor said, "We believe in economic development. We're not standing in line at the BIA [Bureau of Indian Affairs] wanting a handout. I think we can still keep our identity and live, too." Anne Gowen, *Taking AIM at Emblems: Indian Group on Offense Against Teams that Sport Ethnic Names*, WASH. TIMES, Jan. 23, 1992, at E1.

his big nose and toothy grin represent the team. Additionally, at just about every stadium mentioned above there is a common tradition to dress up, swing an arm or ax and chant. Vernon Bellecourt, cofounder of the American Indian Movement, has argued along the same lines that such names are offensive to Native Americans because they are the stimulus for offensive stereotype characters and behavior.[284] But do these events justify denial of a trademark? A valid argument also exists that the term "Redskins" is equivalent to "Negro" or "Nigger" in degree of offensiveness (describing a physical trait to separate from the norm rather than a human title of honor) and could therefore pass muster if challenged along the lines of Sambo.

B. Legislative Action

1. Using Indian Stereotypes to Sell Products

In March 1992,[285] a caricature of the revered Oglala Sioux leader, Chief Crazy Horse, appeared on the label for a new brand of malt liquor bearing his name.[286] This marketing campaign clearly targeted Native Americans,[287] adding a new dimension to the stereotypical image debate. The fact that the products marketed are clearly hazardous to health differentiates this use of a Native American stereotype, making the risk of permanent harm even greater. The forty-ounce bottle, marketed by Hornell Brewing Company, bears a label depicting ancient medicine symbols and a profile of an Indian warrior in a headdress.[288] An advertisement describing imagery of the Wild West frontier and encouraging consumers to drink Crazy Horse characterized the advertising campaign, as well as appeared on the label.[289]

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284. *Chief Wahoo Under Attack*, UPI, Sept. 20, 1992, *available in* LEXIS, News Library, Sports File. Bellecourt believes that because of the names, Native Americans are singled out for ridicule when fans pretend to tomahawk an opponent with one hand while holding a beer in the other, and that if a stereotype demeaning to another race was utilized people would not stand for it. *Id.*

285. James Bovard, *The Second Murder of Crazy Horse*, WALL ST. J., Sept. 15, 1992, at A16.

286. LeMay, *supra* note 45, at A1.

287. *Id.*

288. *Id.*

289. The label stated:

> The Black Hills of Dakota, steeped in the history of the American West, home of proud Indian Nations, a land where imagination conjures up images of blue-clad Pony Soldiers and magnificent Native American warriors. A land still rutted with wagon tracks of intrepid pioneers. A land where wailful winds whisper of Sitting Bull, Crazy Horse, and Custer. A land of character, of bravery, of tradition. A land that truly speaks of the spirit that is America.

Id.

The Surgeon General requested that the company discontinue the label and change the bottle size, citing a concern about alcoholism within the Indian community.[290] They emphasized evidence that this type of advertising links alcohol to Indian culture and religious tradition.[291] Studies indicate that the incidence of alcoholism among Native Americans, compared to the population at large, is very high.[292] A large percentage of Native Americans die before age forty-five,[293] with at least four of the six major causes of death linked to alcohol use.[294]

The six main causes of death among Native Americans are unintentional injuries, cirrhosis, homicide, suicide, pneumonia, and complications related to diabetes.[295] Unintentional injuries are the leading cause of death for men younger than forty-five, and the second leading cause of death overall.[296] A total of 75% of these injuries are alcohol-related, and 54% involve motor vehicle accidents.[297] Alcohol also plays a role in the homicide rate, which is 60% higher than the average for the general United States population.[298] The overall suicide rate for Native Americans is 28% higher than the national average, with rates among some tribes much higher than this.[299] Cirrhosis and diabetes rates, both noticeably higher among Native Americans than other Americans, are also closely tied to alcohol abuse.[300]

Alcohol is clearly a major health risk for the Native American population. One study estimates that 95% of Native American families are affected by a family member's alcohol abuse.[301] In addition to the alcohol-related injuries and illnesses mentioned above, the incidence of Fetal Alcohol Syndrome for Native Americans ranges up to thirty times the national average.[302] The Crazy Horse controversy illustrates the negative impact stereotypes can have on an ethnic group.

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290. H.R. 5488, 102d Cong., 2d Sess. (1992). *See infra* note 299 (statistics on alcoholism among Indian people).

291. *Id.*

292. *See generally* C.C. Lugan, *Alcohol-Related Death of American Indians*, 267 JAMA 1384 (Mar. 11, 1992).

293. U.S. DEP'T OF HEALTH & HUMAN SERV., PUB. NO. (PHS) 91-50213, HEALTHY PEOPLE 2000: NATIONAL HEALTH PROMOTION AND DISEASE PREVENTION 38 (1990) (citing INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERV., TRENDS IN INDIAN HEALTH (1989)).

294. 1 U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE SECRETARY'S TASK FORCE ON BLACK AND MINORITY HEALTH 132-33 (1985) (Executive Summary).

295. *Id.*

296. *Id.* at 132.

297. *Id.* at 132-33.

298. *See id.* at 160.

299. *Id.* at 161.

300. M.P. Laplant, *Data on Disability*, NATIONAL HEALTH INTERIM SURVEY 1983-1985, at 10-11 (Nat'l Inst. on Disability & Rehabilitation Research 1988).

301. Antonia C. Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Image of a Native American Hero*, 38 S.D. L. REV. 14, 14 (1993).

302. *Id.*

Although significant progress has been made in combatting alcoholism and related health problems among Native Americans, negative stereotypes reinforce these problems, creating a vicious cycle. In a recent issue of the Journal of the American Medical Association, Dr. Carol Lugan of Arizona State University, noted that stereotypes perpetuate alcohol-related problems among Native Americans.[303] "[G]eneralized drinking patterns . . . reenforce negative stereotypes and can have the unintended impact of promoting excessive drinking among Indians."[304] Dr. Lugan argues that many Native Americans lack the knowledge to evaluate the validity of these negative stereotypes, and accept them as true.[305]

Motivated by documented health problems and the correlation to negative Indian stereotypes, Congressional leaders joined the Surgeon General and Indian groups in opposing the sale of Crazy Horse Malt Liquor.[306] They urged the sale be discontinued on the ground that "[t]o accept this product, which makes a stronger linkage to a widely respected cultural symbol than past marketing schemes using Indian names,[307] is to simply encourage a mental association between alcohol and Indian culture — an association that can only continue to harm the Native American community."[308]

Rep. Frank Wolf (R.-Va.) introduced an amendment to a House appropriations bill prohibiting any company from naming any alcoholic beverage after any person who was deceased.[309] The amendment did not prohibit derogatory stereotypes of any particular ethnic group, but focused on preventing deceased people from being portrayed in a degrading manner.[310] This bill sparked a movement that eventually led to the ban preventing the U.S. Bureau of Alcohol, Tobacco, and Firearms from approving any additional Crazy Horse labels.[311]

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303. Lugan, *supra* note 292, at 1384.

304. *Id.*

305. *Id.*

306. Then-Rep. Ben Nighthorse Campbell (D-Colo., now a Republican U.S. Senator), Rep. Frank Wolf (R.-Va.), and Rep. Pat Schroeder (D.-Colo.) were key figures in defeating the sale of Crazy Horse. 138 CONG. REC. S16,087 (daily ed. Oct. 1, 1992).

307. Other alcoholic beverages named after Indians include "Thunderbird" wine and "Chief Oshkosh" lager. Antonia C. Novello, *Crazy Horse Malt Liquor Beverage: The Public Outcry to Save the Image of a Native American Hero*, 38 S.D. L. REV. 14, 16 (1993).

308. *Id.* at 14.

309. 138 CONG. REC. H5769 (daily ed. July 1, 1992) (statement of Rep. Wolf); *see also* Dennis Gale, *Crazy Horse Bill Passes House*, RAPID CITY J. (Rapid City, S.D.), July 10, 1992, at A5. "The original amendment said the government could keep alcoholic beverage companies from using the names or likenesses of deceased people in a degrading or disparaging way." *Id.*

310. *Id.* at H5769.

311. 138 CONG. REC. H9586 (daily ed. Sept. 28, 1992). Specifically, the bill denied funds from the act "for approval of any certificate of label approval which authorizes the use of the name Crazy Horse on any distilled spirit, wine or malt beverage product." *Id.*

Negotiations attempted between the manufacturers of Crazy Horse Malt Liquor and the Oglala Sioux Tribe failed to elicit a compromise concerning voluntary withdrawal of the product or replacement of the label.[312] As a result, Sen. Tom Daschle (D.-S.D.) proposed another amendment to the appropriation bill, which was adopted by the Senate on September 10, 1992.[313] The House then passed the Senate amendment, and it became part of Public Law 102-393 on October 6, 1992.[314] The simple purpose of the amendment was to ban the Crazy Horse label.

Hornell Brewing Company challenged the constitutionality of the law in the United States District Court for the Eastern District of New York.[315] Plaintiffs claimed that the law suppressed free speech in violation of the First Amendment and violated the Equal Protection Clause of the Fifth Amendment, as well as other constitutional violations.[316] A report issued on February 5, 1993, granted summary judgment to the plaintiffs on the First Amendment challenge and to the government on all other claims.[317] The court reasoned that although the government had shown a "substantial interest in protecting the health of Native Americans, the evidence failed to prove that the ban on Crazy Horse labels advanced that interest."[318]

However, the Congressional Research Service at the Library of Congress prepared a memorandum in response to the First Amendment challenge and the magistrate's recommendation, stating that the ban did not violate the First Amendment.[319] The memo suggested that the United States Supreme

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312. 138 CONG. REC. S13,235 (daily ed. Sept. 10, 1992).

313. H.R. 5488, 102d Cong., 2d Sess. § 4 (1992). The amendment read:

> Upon the date of enactment of this Act, the Bureau of Alcohol, Tobacco, and Firearms (ATF) shall deny any application for a certificate of label approval, including a certificate of label approval already issued, which authorizes the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product: Provided, that no funds appropriated under this Act or any other Act shall be expended by ATF for enforcement of this section and regulations thereunder, as it relates to malt beverage glass bottles to which labels have permanently affixed by means of painting or heat treatment, which were ordered on or before September 15, 1992, or which are owned for resale by wholesalers or retailers.

Id.

314. Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, § 633, 106 Stat. 1729, 1777 (1992). Novello, *supra* note 301, at 14.

315. Hornell Brewing Co., Inc. v. Brady, 819 F. Supp. 1227 (E.D. N.Y. 1993).

316. Plaintiffs also claimed the law violated the principles of separation of powers, constituted a deprivation of property without due process of law and without just compensation, and constituted a bill of attainder. *Id.*

317. *Id.*

318. *Id.* at 1236. *See also* Konnie LeMay, *Crazy Horse Marketer Goes to Court*, INDIAN COUNTRY TODAY, Jan. 28, 1993, at A1.

319. Memorandum from Henry Cohen, Legislative Attorney, Congressional Research Service, Library of Congress, to Sen. Tom Daschle at 7 (Feb. 16, 1993) (discussing *Hornell Brewing* challenges to the statute), *cited in* Novello, *supra* note 301, at 14. The memorandum states:

Court would probably not consider the name "Crazy Horse" to be protected commercial speech under the First Amendment.[320] Thus the court would not use a heightened standard of review and the government could justify the ban by showing a "legitimate reason" it should be passed.[321] Therefore, the district court could find in favor of the government on the First Amendment issue.[322] The final result in this action will indicate whether this type of legislation will be one among successful methods to combat negative stereotypes in the future.

The Crazy Horse legislation illustrates what can be accomplished when legislatures respond to concerns about negative stereotypes. In the words of Antonia C. Novella, Surgeon General of the Public Health Service, "We must tell the alcohol industry and their highly paid marketeers that we have had enough disease, enough disability, enough addiction, and enough death. We must not let a proud Indian Nation be brought to its knees by alcoholism and other health problems."[323] However, the Crazy Horse legislation was very fact specific. If any change in these negative images is to be made through legislative efforts, much broader legislation is needed. The causal relationship between negative images and other Native American health problems is becoming better defined, and similar changes are needed in many areas including literature, children's toys, television and print advertising, and motion pictures.

2. Public Accomodations

Sen. (then Rep.) Ben Nighthorse Campbell has introduced a bill to block construction of a new stadium for the Washington Redskins until the team changes its name.[324] The proposed $206 million, 80,000-seat stadium would be constructed on federal land adjacent to RFK Stadium.[325] By blocking the federal land transfer, Congress could force Redskins owner Jack Kent Cooke to choose a new name in order to build the new stadium.[326] Senator Campbell introduced Senate Bill 1207,[327] "to amend the

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> [T]his case could go either way. Because of the lack of elaboration in the summary of the magistrate's recommendation, it is difficult to evaluate his opinion that banning the use of the "Crazy Horse" label violates the First Amendment. It does appear, however, that a fairly strong case can be made that a ban does not violate the First Amendment.

Id.

320. *Id.*

321. *Id.*

322. *Id.*

323. Novello, *supra* note 301, at 18.

324. *NFL Notes Say Redskins Say Nickname is Positive*, S.F. CHRON., Oct. 24, 1991, at D2.

325. *Id.*

326. Ruben Casteneda, *Protestors Condemn Redskins Name*, WASH. POST, Sept. 7, 1993, at C5.

327. S.R. 1207, 103d Cong., 2d Sess. (1992).

District of Columbia Stadium Act of 1957 to authorize the construction, maintenance, and operation of a new stadium in the District of Columbia, and for other purposes," on June 30, 1993.[328] It has now been referred to the Committee on Energy and Natural Resources. The bill reads in pertinent part:

> SECTION 3: PROHIBITION ON THE USE OF CERTAIN DESIGNATIONS.
>
> The District of Columbia is prohibited from allowing the stadium constructed pursuant to section 2 to be used by any person or organization exploiting any racial or ethnic group or using nomenclature that includes a reference to real or alleged physical characteristics of Native Americans or other group of human beings.[329]

If Senator Campbell's bill succeeds, it will be a major accomplishment for opponents of Indian mascots, logos and other stereotypical images. Even though the bill is limited in scope, it could be a sign of a new approach to eliminating derogatory images. Broader legislation of this type could greatly restrict the use of derogatory Native American images, and force commercially motivated organizations to reweigh the profit gained from using these stereotypes.

Conclusion

Protests, as well as education, legal action, and legislation, can make a difference in the fight to correct negative Indian stereotypes. The first step is to increase awareness of the significant consequences related to negative racial stereotypes. Protests and educational efforts by groups such as the American Indian Movement (AIM) and the Concerned Indian Parents, as well as action by Wisconsin Attorney General James Doyle, the Minnesota Civil Liberties Union, and the Michigan Commission on Civil Rights are steps in the right direction.

These efforts are evidence of the trend across the United States to replace discriminatory stereotypes used as mascots, logos, or nicknames. The action of the Wisconsin Attorney General, allowing the state to enforce restrictions if necessary, is an important step because it gives additional clout to the recommendation. This ensures that these stereotypes will not be perpetuated in the Wisconsin public school system, and could prompt reforms in other states. Michael Haney's complaint to the Missouri Commission on Human Rights also indicates a new approach in the struggle to eliminate Indian stereotypes, particularly sports mascots. However, public awareness and

328. *Id.* at pmbl.
329. *Id.* § 3.

participation by Native Americans and others must be increased to make a noticeable impact with these complaints.

With First Amendment protection specifically applicable to commercial speech, and the lack of a specific right denied Native Americans, constitutional arguments have not fully emerged as a valid solution to the problem of discriminatory Indian stereotypes. Other legal remedies such as individual complaints filed with civil rights organizations and possible defamation actions hold more promise, but can vary greatly from state to state. There is sufficient case law to conclude that Native Americans could be successful at removing offensive mascots and symbols of athletic teams. The question remains as to whether certain Native American terms are offensive. Unlike "Sambo," there are arguments both for and against such use, even if the word itself is not offensive. The peripheral actions can be just as damaging as an offensive word. Thus part of the solution rests back with the perception the rest of America has towards Native Americans and the need for respect for Native cultures.

The enormous commercial incentives to rely on these discriminatory images must not be ignored. Public boycotts of these products could make the lucrative financial rewards tied to the exploitation of Indian stereotypes much less attractive. Legislation must also play a role. Specific legislation broad enough to reach more than just the Redskins or the producers of Crazy Horse Malt Liquor is needed. Realistically, the proposal must be gradual and involve a time frame in which to change the advertising and promotional strategies of the companies involved.

Eventually, the use of derogatory American Indian stereotypes, whether to sell liquor, promote sports teams or advertise county fairs, must be made less profitable and therefore less attractive to advertisers, school boards, textbook publishers and the business community at large. The legislature has the power to mandate this change. Educational efforts, protests and legal action help to demonstrate that these images must be eliminated, and that the public supports this change.

Negative Indian stereotypes can become a thing of the past. The efforts of activists such as Michael Haney are proof. Evidence of progress is documented each time a school changes a nickname or an editorial denounces the Redskins. A new generation of Americans does not have to perpetuate this discrimination. They should serve as examples to those Americans who still think Indian nicknames are a "compliment." To Cheyenne Stansberry,[330] a five-year-old with blonde hair and blue eyes, whose mother teaches in the Red Rock School District,[331] Indians are the people she plays with and sees every day. When she saw stereotypical

330. Cheyenne was named after the Wyoming town where her parents married, not the Indian tribe.

331. Red Rock's school population is more than 50% Native American.

Native Americans in quasi-ceremonial dress on television, she was quick to exclaim, "Mommy, those aren't Indians!" Cheyenne knows the truth. Indians are not cartoon characters, mascots, storybook figures, or historical relics. They are real people, and they are alive and well.