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# Beyond Trademark: The Washington Redskins Case and the Search For Dignity

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BEYOND TRADEMARK: THE WASHINGTON REDSKINS CASE  
AND THE SEARCH FOR DIGNITY

VICTORIA F. PHILLIPS\*

I. INTRODUCTION

The Indian you see most often in Washington, D.C., is at a football game—at the expense of real Indians, real history, real culture. The petty stereotype has become expected.

— Kevin Gover, Director, National Museum of the American Indian<sup>1</sup>

For more than sixty years, Native American activists have been involved in discussions and protests over the appropriation and use of tribal references in sports names, logos, and mascots. During this same period, many of these uses have since been changed, driven by civil rights struggles and a growing awareness of the proven social harms and racism inherent in these references. Despite a gradual movement towards abolition and evolving signs of cultural understanding, many mascots invoking Native names and imagery persist today across professional, collegiate, and local school district sports. These mascots and team names, and the trademarks associated with them, are harmful not only because they reinforce negative stereotypes about Native peoples, but also, and perhaps more perniciously, because they misappropriate and commodify Native peoples' cultural identities and the subsequent depictions of those identities by others out in the world.

Perhaps no effort has received more public attention than the longstanding battle over the Washington NFL football team's name and its federally registered "Redskins" trademarks. The team's trademarks have been the subject of organized protest and litigation for decades. Between 1967 and 1990, the team's owner, Pro-Football, Inc., registered six trademarks containing the word "redskins."<sup>2</sup> The word "redskin" is a racial slur

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1. Moni Basu, *Native American Mascots: Pride or Prejudice?*, CNN (Apr. 4, 2013, 3:36 PM), <http://inamerica.blogs.cnn.com/2013/04/04/native-american-mascots-pride-or-prejudice/> [<https://perma.cc/N3TY-Y2S2>].

2. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1709 (T.T.A.B. 1999).



that refers to Native Americans.<sup>3</sup> Yet, the team maintains that its use of the mark is, and always has been, honorific. Native people do not see it that way. They maintain that that the term is a genocidal slur—referring to the time when bounties were offered to those delivering the bloodied scalps of Native people. Responding to petitions first filed in 1992 by Native American plaintiffs, the United States Patent and Trademark Office has twice cancelled all six of the franchise’s federally registered trademarks using the slur.<sup>4</sup> The agency found that cancellation was necessary based on a federal trademark law prohibiting the federal registration of any marks “which may disparage . . . persons . . . or bring them into contempt, or disrepute.”<sup>5</sup> The law did not restrict the use of such offensive terms—but denied them any federal property rights. Since that cancellation decision, the team’s appeals have left the trademarks in use in commerce and in the federal trademark registry for all these years.<sup>6</sup> The Supreme Court recently invalidated the trademark law’s prohibition on disparaging marks in another case leading to the dismissal of the longstanding challenge by the Native petitioners.

This article looks beyond the challenge under federal trademark laws and explores whether the appropriation and commodification of the racial slur “redskins” and associated cultural imagery by the continued federal registration of the Washington team’s trademarks should be deemed a dignity taking. In her pioneering book, *We Want What’s Ours: Learning from South Africa’s Land Restitution Program*, Professor Bernadette Atuahene employs a detailed ethnographic study of South Africa’s land restitution program to develop the concept of a dignity taking.<sup>7</sup> To constitute a dignity taking under her framework, there must be an involuntary property loss as well as either dehumanization or infantilization. In this project, I extend the application of her theory to the taking of intangible property. While her framework was focused on the taking of land, this article extends her analysis to intangible property rights and argues that the misappropriation of cultural identity and imagery for use as a federal trademark can also constitute a dignity taking in certain cases.

3. *See id.* at 1719.

4. *Id.* at 1749 (cancelling Registration Nos. 1,606,810; 1,085,092; 987,127; 986,668, 978,824, and 836,122); *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1114 (T.T.A.B. 2014) (cancelling the same six Registrations).

5. *Blackhorse*, 111 U.S.P.Q.2d at 1088 n.33 (quoting 15 U.S.C. § 1052(a) (2012)).

6. *Id.* at 1091 n.44 (“[T]he Board’s jurisdiction is limited to the question of registrability. The Board does not have the power to enjoin use.”).

7. *See generally* BERNADETTE ATUAHENE, *WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM* (2014) [hereinafter *ATUAHENE, WE WANT WHAT’S OURS*].



After a brief review of the developments in the decades-long dispute against the federal trademarks of the Washington football team and some of the related literature in this area, this article explores how under Atuahene's analytical framework, the harm suffered by Native people through the federal trademark registration and the marks' commodification should be deemed a dignity taking. This article first argues that the continued federal registration and use of these trademarks by the team constitutes both a direct and indirect taking of property sanctioned by the state. The federal registration sanctions a misappropriation of the identity, cultural rights, and personhood of Native people. This article then argues that the federal property right granted as a result of the taking of this racial slur and its associated cultural imagery has led to cognizable harms to the dispossessed Native population. Studies demonstrate that Native self-esteem, self-confidence, and self-identity are degraded by the federally-sanctioned misappropriation of these names and mascots. The pervasive use and commodification of this particular slur fosters an environment causing the Native community to experience forms of infantilization and dehumanization.

After chronicling the trademark litigation, the article next turns to first person interviews conducted for a 2014 report I co-authored for the Center for American Progress. That report documented the harms associated with the use of Native mascots including the Redskins trademarks, particularly the very real emotional harm caused to Native youth. This article also incorporates some of the stories told by Native youth in field hearings including questions on this topic and chronicled in a 2015 White House and Department of Education report. This article employs these narratives to illustrate how Atuahene's dignity takings framework applies to the appropriation of cultural identity and imagery through the continued registration and use of the Redskins trademarks.

## II. THE TRADEMARK LITIGATION AND RELATED LITERATURE

### *A. The Longstanding Dispute Against the Redskins Trademarks*

In 1992, prominent Native<sup>8</sup> leaders led by Suzan Shown Harjo (Cheyenne and Muscogee) first challenged the team's Redskins trademarks marks as disparaging under federal trademark law.<sup>9</sup> The petitioners claimed that at the time of their registration, the Redskins trademarks consisted of matter that both "may disparage" a substantial composite of Native Ameri-

8. I use the terms Native Americans and Native people throughout this article to refer interchangeably and collectively to American Indian, Alaska Native, and Native Hawaiian peoples.

9. See *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1705 n.1 (T.T.A.B. 1999).



cans and scheduled the cancellation of the registrations under Section 2(a) of the Lanham Act. In a long-running, trial-like proceeding at the Trademark Trial and Appeal Board (TTAB) of the U.S. Patent and Trademark office (USPTO), they petitioned to cancel the federal registrations under this provision by presenting publicly-available evidence—including dictionary definitions, newspaper clippings, movie clips, scholarly articles, and other reference works—to demonstrate that the term denotes an ethnic slur. In addition, they produced testimony of linguists, survey evidence, and various resolutions by Native American groups condemning the term. They also put forth plentiful evidence of the team and its fans using the term in a derisive and offensive manner.

Seven years later, in 1999, the agency agreed and ordered all the registrations for these trademarks cancelled.<sup>10</sup> However, the team successfully appealed the decision in the D.C. federal courts.<sup>11</sup> The trial court held that since the trademarks in question had been used for forty-five years and registered some twenty-five years before the action was brought, the Native American plaintiffs' claims were barred due to the challenger's unjustifiable delay in bringing the action.<sup>12</sup> The appellate courts agreed and the U.S. Supreme Court declined to take the case on appeal, ending the first challenge by the Harjo petitioners.<sup>13</sup> To overcome the defense of unjustifiable delay, Harjo recruited a group of younger Native petitioners to bring another challenge to the registered marks.<sup>14</sup> This challenge succeeded in convincing the TTAB to order cancellation of the team's registrations for a second time. In June 2014, the agency found again that at the time of their registrations the Redskins marks consisted of matter that both "may disparage" a substantial composite of Native Americans and again scheduled the cancellation of the registrations under the Lanham Act's Section 2(a).<sup>15</sup> Again the team filed an appeal, this time in in the Eastern District of Virginia, seeking a *de novo* review of the decision and claiming that the disparagement provision of the trademark law was unconstitutional under the First Amendment.<sup>16</sup> On review, the district court affirmed the cancellation

10. *Id.* at 1749.

11. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 50 (D.C. Cir. 2005).

12. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 139, 145 (D.D.C. 2003).

13. *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 62 (D.D.C. 2008) (reiterating its prior conclusion that petitioner's claim barred by laches), *aff'd*, 565 F.3d 880 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1025 (2009).

14. *See generally* *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080 (T.T.A.B. 2014).

15. *Id.* at 1088 n.33 (quoting 15 U.S.C. § 1052(a) (2012)).

16. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 447 (E.D. Va. 2015).

of the marks declaring that federal trademark registrations are a form of “government speech . . . exempt from First Amendment scrutiny.”<sup>17</sup>

The team appealed to the U.S. Court of Appeals for the Fourth Circuit and also filed a Petition of Certiorari with the Supreme Court asking to be considered as “an ideal and essential companion” to the pending petition in the *In re Tam* case, another case based on the Section 2(a) disparagement clause.<sup>18</sup> This case challenges the USPTO’s refusal to register a band name, The Slants, finding the term a slur which disparaged Asian-Americans. The team argued that the Court should consider the cases together to fully examine whether the ban on disparaging trademarks violates the Constitution. In September 2016, the Supreme Court granted the petition in *Tam* but denied the team’s petition; the case remained pending before the Fourth Circuit and was stayed pending the decision in the *Tam* case.<sup>19</sup> In June 2017, the Court issued a unanimous decision in *Tam*, finding that the disparagement clause of the Lanham Act constitutes viewpoint discrimination and is unconstitutional.<sup>20</sup> “We now hold that this provision violates the Free Speech Clause of the First Amendment,” Justice Samuel Alito wrote in his opinion.<sup>21</sup> “It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”<sup>22</sup> As a result of this ruling, both the Native petitioners challenging the team name and the Department of Justice have written to the Fourth Circuit acknowledging that the Court’s decision in *Tam* is controlling and asking the court to reverse the judgment and remand the case with instructions to enter judgment in favor of Pro-Football and confirm the validity of their trademarks.<sup>23</sup> The USPTO has also recently issued guidance noting that the fact that a trademark may “disparage . . . or bring . . . into contempt, or disre-

17. *Id.* at 454.

18. Notice of Appeal, *Pro-Football, Inc. v. Blackhorse*, No. 1:14-cv-1043-GBL-IDD (E.D. Va. Aug. 4, 2015); Petition for Writ of Certiorari Before Judgment at 10, *Pro-Football, Inc. v. Blackhorse*, 137 S. Ct. 44 (2016) (No. 15-1311), 2016 WL 1659323, at \*10; *see In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *aff’d sub nom. Matal v. Tam*, 137 S. Ct. 1744 (2017) (plurality opinion).

19. Order Placing Case in Abeyance, *Pro-Football, Inc. v. Blackhorse*, No. 15-1874 (4th Cir. Nov. 15, 2016), ECF No. 121. *See* Petition for Writ of Certiorari Before Judgment, *supra* note 18.

20. *See Tam*, 137 S. Ct. at 1749 (plurality opinion).

21. *Id.* at 1751.

22. *Id.*

23. *See* Answer to Notice Requesting Resp. from Dep’t of Justice, App. Civil Div. at 1, *Pro-Football, Inc. v. Blackhorse*, No. 15-1874 (4th Cir. June 28, 2017), ECF No. 127; Answer to Notice Requesting Resp. from Appellee at 1, *Pro-Football, Inc. v. Blackhorse*, No. 15-1874 (4th Cir. June 29, 2017), ECF No. 128.

pute” is no longer a valid ground on which to refuse registration or cancel a registration.<sup>24</sup>

While the case may have been dismissed under *Tam* and the team’s trademark registrations reinstated, the numerous judicial decisions in the long-running Harjo and Blackhorse litigations are filled with evidence of the offensiveness of the term and the real harms caused to Native people. The TTAB in its *Blackhorse* opinion found that by 1985, all major dictionaries were unanimous in their definition of “redskin” as an offensive term used to describe Native people.<sup>25</sup> The Eastern District of Virginia decision cited eleven dictionaries denouncing “redskin” as offensive or contemptuous.<sup>26</sup> The TTAB included excerpts from several letters submitted by Blackhorse in its decision. In these letters, Native Americans wrote to encourage the team to abandon its Redskins marks.<sup>27</sup> One letter notes that the term “reinforces a negative stereotype that is unjust and unwarranted . . . [from] a period when there was a bounty on the heads of Indians and they were scalped . . . a period in our history that every American should be ashamed of . . . and [that the] offensive term is an abomination.”<sup>28</sup>

The judicial decisions cite the distress felt by the petitioners themselves by the use of the term. Suzan Harjo herself recounts “one especially upsetting and painful occasion” during elementary school where a teacher angrily attacked her family history and called her grandfather a “redskin” before pushing her into a rosebush.<sup>29</sup> Harjo estimated the slur had been used against her “at least 100 times.”<sup>30</sup> Other petitioners remember being called “dirty redskin[s]” on the playground and having the word used as a form of bullying on the field during sporting events.<sup>31</sup> The decisions also quote former Native U.S. Senator Ben Nighthorse Campbell saying “the name Redskins . . . brings to mind a negative image of an uncivilized person and has no positive meaning.”<sup>32</sup> For these reasons, in 1993 the National Congress of American Indians (NCAI) passed a resolution on the name that

24. See U. S. PATENT & TRADEMARK OFFICE, EXAMINATION GUIDE 01–17, EXAMINATION GUIDANCE FOR SECTION 2(A)’S DISPARAGEMENT PROVISION AFTER *MATAL V. TAM* AND EXAMINATION FOR COMPLIANCE WITH SECTION 2(A)’S SCANDALOUSNESS PROVISION WHILE CONSTITUTIONALITY REMAINS IN QUESTION (2017), <https://www.uspto.gov/trademark/guides-and-manuals/trademark-examination-guides> [<https://perma.cc/AHL5-X2HZ>].

25. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1095 (T.T.A.B. 2014).

26. *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 473 (E.D. Va. 2015).

27. See *Blackhorse*, 111 U.S.P.Q.2d at 1103–04.

28. *Id.* at 1104.

29. *Pro-Football, Inc.*, 112 F. Supp. 3d at 483.

30. *Id.*

31. *Id.* at 482.

32. *Blackhorse*, 111 U.S.P.Q.2d at 1104.

has been cited in decisions as indicative of the fact that the term disparages a “substantial” portion of Native Americans.<sup>33</sup> The NCAI held: “[T]he term REDSKINS is not and has never been one of honor or respect, but instead it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].”<sup>34</sup>

*B. The Long Campaign Urging Abolition of the Use of Native Names and Imagery*

This high-profile controversy and legal battle over the Washington football team’s trademarks was only the latest chapter in a much larger and longer history of Native protest of the use of racist sports mascots across the country. Just after the turn of the twentieth century, the practice of professional sports teams selecting official nicknames became widely embraced.<sup>35</sup> The trend at the time was to select names that suggested aggressive qualities.<sup>36</sup> During the decades that followed, college teams and then gradually local school teams began to formally adopt Native team names based on the association in the public mind between Natives and athletic skill.<sup>37</sup> In later years, the use of Native names and imagery evolved to emphasize the ferociousness of the players and many of the team names, logos, and mascots evolved to evoke this new message.<sup>38</sup> Most of the appropriated Native imagery was based on a false historical narrative and highly exaggerated caricatures. Many of the portrayals included fictitious, savage, and violent imagery.<sup>39</sup>

The NCAI began to set its sights on the elimination of negative Native stereotypes as early as 1940, and in the late 1960s, the organization started to focus in on the harm done by Native sports mascots.<sup>40</sup> In 1969, the National Indian Education Association (NIEA) also started to work to organize Native educators, school board members, parents, and students around the cause of removing of all “Indian” names, symbols, and behaviors asso-

33. *Blackhorse*, 112 F. Supp. 3d at 483.

34. *Id.*

35. J. Gordon Hylton, *Before the Redskins Were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports*, 86 N.D. L. REV. 879, 896 (2010).

36. *Id.*

37. *Id.* at 890–91.

38. *Id.* at 891.

39. *Id.* at 901.

40. *History of Progress*, CHANGETHEMASCOT.ORG, <http://www.changethemascot.org/history-of-progress/> [<http://perma.cc/5JJB-9U4X>].



ciated with sports teams.<sup>41</sup> They also started to educate the country on the very real harms experienced by Natives and society as a whole as a result of such uses. Documented harms of racialized team names and mascots in sports surfaced by NIEA at the time included: “[p]erpetuating false, stereotypical images of indigenous cultures and histories”; “[c]ontributing to anti-Indian racism in the United States”; “[t]errorizing [Native] peoples”; [p]reventing [Natives] from full and equal enjoyment of public accommodations”; “[f]ostering racial harassment”; “[u]ndermining equal treatment;” “[f]ostering ‘racial microaggression’ by transforming ‘learning environments into hostile environments’”; “[a]llowing the dominant society to ‘define Indianness, undermining indigenous identity, tradition, and sovereignty’”; “[a]busing indigenous spirituality, misusing sacred objects—such as eagle feathers—and rituals for the sake of school spirit and local traditions, and promoting divisiveness and factionalism in Native nations.”<sup>42</sup>

Inspired by the civil rights movements brewing around the country, in 1963, the National Indian Youth Council and others had already begun the process of organizing on college campuses to start the campaigns to remove Native sports stereotypes embodied in mascots.<sup>43</sup> They first started with the University of Oklahoma and its racist mascot “Little Red.”<sup>44</sup> The first Native-inspired tradition during Oklahoma football games, beginning in the 1930s, involved the crowning of an “Indian Princess” and the dancing of a “Young Indian” during halftime. Native members of the football team also became known as “Big Red,” a name which later became the team’s official moniker. Around the same time, a Native member of the marching band began to dress in full Native costume and took on the name

41. NAT’L CONG. OF AM. INDIANS, ENDING THE LEGACY OF RACISM IN SPORTS & THE ERA OF HARMFUL “INDIAN” SPORTS MASCOTS 20 (2013), [http://www.ncai.org/resources/ncai-publications/Ending\\_the\\_Legacy\\_of\\_Racism.pdf](http://www.ncai.org/resources/ncai-publications/Ending_the_Legacy_of_Racism.pdf) [<http://perma.cc/YQ8C-6BRD>].

42. ERIK STEGMAN & VICTORIA F. PHILLIPS, CTR. FOR AM. PROGRESS, MISSING THE POINT: THE REAL IMPACT OF NATIVE MASCOTS AND TEAM NAMES ON AMERICAN INDIAN AND ALASKA NATIVE YOUTH (2014), <https://ssrn.com/abstract=2472075> [<https://perma.cc/KAA8-R4XQ>]. For modern studies that document harm the harm of associating Natives with sports, see Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED PSYCHOL. 208 (2008), and Chu Kim-Prieto et al., *Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group*, 40 J. APPLIED SOC. PSYCHOL. 534 (2010).

43. Jeff Kettle & Chelsea Masters, *University of Oklahoma*, in RACIST STEREOTYPES AND CULTURAL APPROPRIATION IN AMERICAN COLLEGE SPORTS: CHANGING THE MASCOT AT DARTMOUTH, STANFORD, OKLAHOMA AND SYRACUSE 3–28 (Am. Univ. Wash. Coll. of Law Glushko-Samuelson Intellectual Prop. Clinic ed., 2014), <https://ipclinic.org.files.wordpress.com/2014/07/changing-the-mascot-at-dartmouth-stanford-oklahoma-and-syracuse1.pdf> [<http://perma.cc/ZH6Z-EQSZ>] [hereinafter RACIST STEREOTYPES AND CULTURAL APPROPRIATION] (citations to the PDF pagination); NAT’L CONG. OF AM. INDIANS, *supra* note 41, at 20 (referencing the 1963 formation of the National Indian Youth Council).

44. RACIST STEREOTYPES AND CULTURAL APPROPRIATION, *supra* note 43, at 4.

“Little Red.” Jack Redbird, a member of the Pride of Oklahoma, was the first to dress up as Little Red and began the tradition of appearing on the field as a mascot. Sometime in the late 1950s, “Little Red” became official and was sponsored by the school. Sources discussing the “Little Red” recruitment process noted that “Little Red” should be of Native descent.<sup>45</sup> Protests against the mascot argued that “Little Red” served as a symbol of the physical oppression and cultural degradation suffered by the Native community. Oklahoma students used stereotyped and inaccurate Native war calls when cheering on Little Red and the team. Like some of the claims made in defense of the use of Native mascots and imagery today, some Oklahoman Natives objected to these protests claiming that the name and mascot were not insulting but instead honored the Native people of the state.

In addition to the early efforts at Oklahoma, some of the first universities and colleges to remove Native imagery from their sports programs were Dartmouth College, Stanford University, and Syracuse University.<sup>46</sup> This imagery had taken strong hold in each of these athletics programs and change did not come easy. Dartmouth ironically was founded with the stated purpose of “the education and instruction of youth of the Indian tribes in this land in reading, writing, and all parts of learning.”<sup>47</sup> At the turn of the twentieth century when Dartmouth formed a football team, the sports section of the yearbook depicted Native warriors kicking footballs.<sup>48</sup> The idea of the Dartmouth Indian quickly spread across the athletic teams on campus and Native imagery started to appear on uniforms. Dartmouth fans would also display stereotypical mohawks as they cheered on their Indians. Although the standard image and logo of the Stanford mascot varied over the years, the Stanford Indian was represented both by a caricature of a small Native man with a large nose and a profile view of a Native man in a head-dress. Timm Williams, a member (and later Chief) of the Yurok Tribe of California, played “Prince Lightfoot” during Stanford athletic events, continuously performing traditional Yurok dances in traditional dress. At Syracuse University, students created fake scalps to represent other team’s mascots, and affixed them to the belt of a Native statue after their Syracuse Orangemen football team and its mascot, the Saltine Warrior, would defeat the opposing team.

45. *Id.* at 3.

46. *Introduction to RACIST STEREOTYPES AND CULTURAL APPROPRIATION*, *supra* note 43, at 1–3.

47. Ashley Rorrer & Corsica Smith, *Dartmouth College*, in *RACIST STEREOTYPES AND CULTURAL APPROPRIATION*, *supra* note 43, at 47.

48. *Id.* at 49.

There were a number of common issues and concerns that came into play in all these early college mascot debates of the 1960s and 1970s. The decades were filled with the civil rights struggles and the emerging national conversation about racial and cultural difference. These decades also saw a welcome expansion of federal, state, and local relationships with Native tribes. Each school wrestled with the risks and costs associated with any mascot and team name change, including the potential loss of support from students, fans, and valued alumni. Each school also had to consider the additional costs associated with rebranding their teams with new names and mascots. The concerns and costs in the case of each of these schools were ultimately found to be far outweighed by the very real harms to Native people created by the disparaging nature of mascots and associated imagery. In 1970, Oklahoma retired “Little Red,” becoming among the first school to end the official use of any Native sports stereotype.<sup>49</sup> In 1972, Stanford removed the “Indian” mascot and ended the live performances of Prince Lightfoot.<sup>50</sup> In 1974, the Dartmouth Board of Trustees responded to student and Native activism on campus and found the Indian inconsistent with the founding institutional objectives of advancing Native education.<sup>51</sup> In 1978, after student protests, Syracuse removed the offensive Saltine Warrior, finding it inconsistent with the school’s values.<sup>52</sup>

The growing movement to abandon Native mascots at the university, college, and high school levels gained even more momentum when national professional organizations and government agencies began to call for change. The NAACP passed a resolution in 1999 calling for the end of the use of Native names, images, and mascots.<sup>53</sup> In 2001, the U.S. Commission on Civil Rights called on all non-Native schools to stop using Native mascots and imagery.<sup>54</sup> The Commission warned that the “stereotyping of any racial, ethnic, religious or other groups when promoted by public educa-

49. NAT’L CONG. OF AM. INDIANS, *supra* note 41, at 20. *See also* Kettle & Masters, *supra* note 43, at 20.

50. John Nappi & Caroline Jamet, *Stanford University*, in RACIST STEREOTYPES AND CULTURAL APPROPRIATION, *supra* note 43, at 33.

51. Rorrer & Smith, *supra* note 43, at 53.

52. Brandon Marsh & Amer Raja, *Syracuse University*, in RACIST STEREOTYPES AND CULTURAL APPROPRIATION, *supra* note 43, at 72–73.

53. Press Release, Champaign Cty. Branch NAACP, Resolution in Opposition to Native American Mascots (Apr. 28, 1999), [http://aistm.org/naacp\\_1999\\_resolution.htm](http://aistm.org/naacp_1999_resolution.htm) [<https://perma.cc/6XJK-SWAR>].

54. Press Release, U.S. Comm’n on Civil Rights, Statement of U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols (2001), <http://www.usccr.gov/press/archives/2001/041601st.htm> [<https://perma.cc/B6E7-F6AR>].

tional institutions, teach all students that stereotyping of minority groups is acceptable, a dangerous lesson in a diverse society.”<sup>55</sup>

The real turning point for this issue in college sports came in 2005, when the National Collegiate Athletic Association (NCAA) announced that it would ban the use of Native mascots by teams participating in any of its postseason tournament play.<sup>56</sup> While the NCAA considered the use of mascots to be an internal institutional matter, it ruled that it would enforce the ban for any events under its control. It acknowledged and respected the sovereignty of tribal governments to make their own decisions regarding their relationships with school and university teams and created an exception allowing universities to keep their Native names and imagery if they were based on a specific tribe and they had the permission of that tribe. However, the NCAA made clear that it encouraged institutions to change their mascots in order to promote the core values of the organization.<sup>57</sup> These values included cultural diversity, ethical sportsmanship, and non-discrimination.<sup>58</sup> In addition, the association encouraged institutions to promote understanding and awareness of the negative impact of hostile or abusive symbols, names, imagery, and culture through outreach efforts.<sup>59</sup> This powerful and influential ban took effect in 2006.<sup>60</sup>

### *C. The Harms of Cultural Misappropriation: Research and Literature*

The term “Redskins” is a dictionary-defined slur. It originates from a time when Native people were actively hunted and killed for bounties and their skins were used as proof of an Indian kill.<sup>61</sup> Bounties were issued by European companies, colonies, and some states, most notably California. By the turn of the twentieth century, it had evolved to become a term meant to disparage and denote what was considered inferiority and savagery in American culture.<sup>62</sup> As Atuahene observes in her work on dignity takings,

55. *Id.*

56. *NCAA American Indian Mascot Ban Will Begin Feb. 1*, ESPN (Aug. 12, 2005, 10:53 AM), <http://sports.espn.go.com/ncaa/news/story?id=2125735> [<https://perma.cc/RN3H-SLGC>].

57. News Release, Nat’l Collegiate Athletic Ass’n, *NCAA Executive Committee Issues Guidelines for Use of Native Am. Mascots at Championship Events* (Aug. 5, 2005), <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2BExecutive%2BCommittee%2BIssues%2BGuidelines%2Bfor%2BUse%2Bof%2BNative%2BAMmerican%2BMascots%2Bat%2BChampionship%2BEvents.html> [<https://perma.cc/98VY-9SG2>].

58. *Id.*

59. *Id.*

60. *Id.*

61. Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 860–61 (2016).

62. *See generally id.*

a fundamental premise underlying social contract theory is that men are born free and live as such in the state of nature, but European powers considered nonwhite people to be savages born “unfree and unequal.”<sup>63</sup> This subordinate status was legally codified and was then perpetuated by both individuals and institutions. It was based on the belief that non-whites did not have the capacity to reason and were fit only for despotism. As such, they were subordinated within the social contract and denied their dignity. For centuries, non-Native populations have appropriated Native culture and imagery for their own purposes with little to no regard for Native people.

Cultural symbols have been borrowed by majority societies for their enjoyment, for profit, and even to expressly harm minorities. One such way in which this kind of taking can occur is through cultural appropriation, or “the taking—from a culture that is not one’s own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge.”<sup>64</sup> Cultural appropriation serves to deprive one group, who traditionally is often the target of racism or inequality, of their culture and of the very roots of their identity, and it results in a commodification that seriously undermines their personhood. Professor Madhavi Sunder cautions that cultural appropriation creates two distinct concerns: first, “that non-owners of a culture may misrepresent another culture, and thereby damage the culture being distorted,” and, second, “that outsiders will exploit the cultural resources of a people, with the people losing the economic benefit of their cultural production.”<sup>65</sup> Rosemary Coombe describes how the use of the imagery of “others,” especially Eskimos, Hawaiians, Indians, and Blacks, was predominant in the creation of mass markets.<sup>66</sup> That these takings were from disenfranchised populations was no coincidence, but the terminology and imagery was intentionally employed. Mass advertising that accentuates the ethnic differences of Natives and other ethnic groups deemphasizes the cultural differences of others and helps to reinforce the definition of an “American.” This mass advertising is particularly problematic where legal rights, such as those vested through trademark ownership, are concerned because, according to Coombe, by “legitimizing authorship, deeming meaning to be value properly redounding to those who ‘own’ the signature or proper name, without regard to the contributions or interests of those others in whose

63. ATUAHENE, WE WANT WHAT’S OURS, *supra* note 7, at 25.

64. Bruce Ziff & Pratima V. Rao, *Introduction* to BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 1 (Bruce Ziff & Pratima V. Rao eds., 1997).

65. Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 73 (2000).

66. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 174–75 (1998).

lives it figures.”<sup>67</sup> This ownership, in turn, “enables and legitimates practices of cultural authority that attempt to contain the expression of difference (and difference) in the public sphere.”<sup>68</sup>

In his book *Playing Indian*, Native scholar Philip Deloria describes how white Americans used the idea of “the Indian” to help create their own national identity, both identifying with Indians as liberated New World inhabitants and at the same time opposing them as a savage other.<sup>69</sup> He observes that American culture has an awkward tendency to define itself by what it is not. American culture is born out of an abandonment of the culture from which it came, quickly becoming haunted “by the fatal dilemma of ‘wanting to have [its] cake and eat it too,’ of wanting to savor both civilized order and savage freedom at the same time.”<sup>70</sup> Native Americans were quickly embraced as the symbol for the American desire to preserve traditional civility while simultaneously embracing the “savage” freedom.<sup>71</sup> Appropriation of Indian identity made colonists feel as though they embodied an understanding of Native customs about freedom, naturalness, and individualism that were conflated with the American continent itself, eventually working its way into the American psyche and creating a sense of connection with the new land.<sup>72</sup>

Cultural appropriation has been particularly problematic where trademark rights are concerned because, in addition to the psychological harm felt by Native people, when a group’s cultural identity is legally owned by another, a more sinister harm can occur. Although the team attempts to justify its cultural appropriation as an honor, the ownership and commodification of Native slurs, names and mascots invites dangerous stereotyping. Fans are invited to dress and mock Native traditions and culture. Trademarks based on negative stereotypes ultimately harm the larger society. Native scholars Kristen Carpenter and Angela Riley have written eloquently on this topic arguing that the United States legal system has historically facilitated the taking of all things Indian for others’ use.<sup>73</sup> The courts have sanctioned systemic cultural appropriation, like the football team’s trademark to the detriment of all Native people. Just as lands were once stripped from tribes, the appropriation and commodification of Native slurs and

67. Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 472 (1998).

68. *Id.*

69. PHILLIP J. DELORIA, *PLAYING INDIAN* 6–7 (1998).

70. *Id.* at 3.

71. *Id.* at 184.

72. *Id.*

73. Riley & Carpenter, *supra* note 61, at 930.

imagery compounds the loss and harmful misrepresentation of Native cultural identity.

Unquestionably, the harmful and negative stereotypes perpetuated by the use of racial slurs and imagery have a damaging impact on the Native community. Dr. Stephanie Fryberg, a preeminent cultural and social psychology scholar and an enrolled member of the Tulalip Tribe, published a study in 2004 demonstrating that the use of American Indian-based names, mascots, and logos in sports have a negative psychological effect on Native people while at the same time having a positive psychological effect for European Americans.<sup>74</sup> She concludes that the use of these mascots have had lasting negative effects on race relations in the United States.<sup>75</sup> When exposed to these images, the self-esteem of Native youth is detrimentally impacted, their self-confidence erodes, and their sense of identity is severely damaged. These stereotypes have an outsized effect on how Native youth view the world and their place in society. Conversely, they also affect how society views Native people. Fryberg's study finds that American Indian social representations were associated with lower self-esteem for Native communities and higher self-esteem for non-Native communities.<sup>76</sup> The high rates of hate crimes against Natives may well have roots in the pervasiveness of this dehumanizing terminology and imagery. United States Department of Justice statistics demonstrate that members of Native communities are more likely than people of other races to experience violence at the hands of someone of a different race.<sup>77</sup>

National professional groups have also come to these same conclusions. The American Psychological Association issued a statement in 2005 affirming that "the continued use of American Indian mascots, symbols, images, and personalities . . . is a form of discrimination against Indigenous Nations that can lead to negative relations between groups . . . [and] has a negative impact on other communities by allowing for the perpetuation of stereotypes and stigmatization of another cultural group."<sup>78</sup> That same year,

74. Stephanie A. Fryberg, Stanford Univ., American Indian Social Representations: Do They Honor or Constrain American Indian Identities?, Presentation to the University of Kansas Conference 50 Years After Brown vs. Board of Education: Social Psychological Perspectives on the Problems of Racism and Discrimination (May 14, 2004), [http://www.indianmascots.com/ex\\_15\\_-\\_fryberg\\_brown\\_v.pdf](http://www.indianmascots.com/ex_15_-_fryberg_brown_v.pdf) [https://perma.cc/Y9RN-HGEC].

75. *See id.*

76. *Id.* at 8.

77. *See generally* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE 1992-2002 (2004), <https://www.bjs.gov/content/pub/pdf/aic02.pdf> [https://perma.cc/4TGA-CPEN].

78. Am. Psychological Ass'n, APA Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities,

the American Counseling Association passed a resolution opposing the use of Native names and symbols in sports.<sup>79</sup> A coalition of psychologists filed a friend of the court brief in support of Harjo's appeal to the Supreme Court, arguing that racially charged trademarks have negative impacts on minority populations.<sup>80</sup> Research in this area suggests that the use of ethnic slurs, whether intentionally or unintentionally, "conveys hatred and hostility toward the target group."<sup>81</sup> According to the authors, the use of Native American mascots: "(1) perpetuate a narrow and false public perception of American Indian culture and identity, thereby diminishing and degrading such identity; (2) diminish the self-esteem of American Indian individuals; and (3) correspondingly enhance the self-esteem of European Americans, at the expense of American Indians."<sup>82</sup> Ethnic slurs and stereotypes have invidious public and private impacts. Professionals writing in this area are unanimous in their view that exposure to Native American mascots depresses the self-esteem, erodes the self-confidence, damages the sense of identity, diminishes the feelings of community worth, and limits the aspirations of Native people, especially Native youth.

### III. DO THE REDSKINS REGISTERED TRADEMARKS CONSTITUTE A DIGNITY TAKING?

#### *A. The Team's Continued Use of the Federal Trademarks is a Taking*

A taking under Atuahene's framework, exists when a person, entity, or state confiscates, destroys, or diminishes rights to property without the informed consent of rights holders.<sup>83</sup> She acknowledges that takings differ in terms of who is doing the taking, what types of property rights are taken, how those rights are taken, what constitutes lack of consent, who the person or community experiencing the taking is, and the rights the community

Athletic Teams, and Organizations (2005), <https://www.apa.org/about/policy/mascots.pdf> [<https://perma.cc/7RJ4-9XN3>].

79. Am. Counseling Ass'n, Resolution: Opposition to Use of Stereotypical Native American Images as Sports Symbols and Mascots (Dec. 2, 2001), <http://aistm.org/2001aca.htm> [<https://perma.cc/H9AW-BDYK>].

80. See Brief of Psychology Professors as Amici Curiae in Support of Petitioners, *Harjo v. Pro-Football, Inc.*, 558 U.S. 1025 (2009) (No. 09-326), 2009 WL 3359185.

81. *Id.* at \*11; see also *id.* at \*14–20.

82. See *id.* at \*14–15.

83. Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 173 (2016) [hereinafter Atuahene, *Takings as a Sociolegal Concept*]; see also Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework to Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 817 (2016).





might have to the property.<sup>84</sup> “Property” includes a broad range of rights and interests, but broadly captures the right to possess, use, and enjoy things that one owns, free from interference from others. For purposes of this analysis, I argue that the definition of property in Atuahene’s analysis includes cultural identity and imagery. Salman Rushdie wrote, “[t]hose who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless.”<sup>85</sup> A new body of scholarship examines and weighs the advantages and disadvantages of the increasing propertization and commodification of certain creative work bound up with identity or personhood.<sup>86</sup> These scholars worry about the risks associated with the increasing appropriation of traditional knowledge, cultural production, and indigenous identities. In the realm of intellectual property, identity, knowledge, and culture are often at the heart of the contested commodities. Madhavi Sunder has observed that property law, at its core, is based on the recognition of a set of “complex negotiations between equity and liberty, the desire for freedom and community, the right to exclude and the right of access, and tradition and modernity.”<sup>87</sup>

In an examination of the intentions of the parties responsible for the taking in this case, the official statements and agency record makes clear that both the USPTO and the offending team are responsible for the involuntary loss of the intangible property rights. In this case, the government’s registration of the trademarks and the continued use and commodification by the Washington football team is a taking of the cultural right of Native people to both their identity and their cultural imagery. The initial registration of the trademark and the agency’s failure to act in a meaningful and timely manner under existing trademark law to rectify the loss perpetuates the message that Native people are sub-human sports mascots, not equals. Today, over 60,000 fans attend a typical NFL football game each week and more than 10 million households watch the contests on television. Sadly, most Americans have likely never met a Native person, so what they learn and believe about them is from the imagery and stereotypes purveyed through the media and trademarks that dominate our commercial media landscape. The team’s continued misappropriation despite protests and

84. *See id.*

85. SALMAN RUSHDIE, *One Thousand Days in a Balloon*, in *IMAGINARY HOMELANDS* 430, 432 (1991).

86. *See generally* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter RETHINKING COMMODIFICATION].

87. Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION, *supra* note 86, at 164, 172–73.

failed government efforts to cancel the marks further perpetuates and extends the harm from the taking.

*B. The Redskins Trademark: Honoring or Dehumanizing?*

To satisfy the second prong of Atuahene's analysis, the taking must also be from those who are infantilized or dehumanized, making their dignity invisible.<sup>88</sup> Infantilization "is the restriction of an individual or group's autonomy based on the failure to recognize and respect their full capacity to reason."<sup>89</sup> Dehumanization is "the failure to recognize an individual or group's humanness."<sup>90</sup> The presence or absence of the dehumanization or infantilization that forms the basis of a dignity taking is to be interrogated through empirical research. As dehumanization or infantilization can be either an intentional or unintentional act, Atuahene urges a two-prong research strategy. The following two-part analysis first examines the intentions of the parties responsible for the taking as gleaned from the court proceedings and media accounts. The second section next describes the intended and unintended consequences of the taking based on first-hand accounts from the Native population through interviews and statements made at the White House Initiative's listening tours.

1. Native Mascots: A Story of Dignity

Pro Football, Inc. has made numerous attempts to justify its use of a racist moniker as the name of its professional football team. In the legal controversy surrounding the Redskins trademarks, the team often points to the circumstances surrounding the selection and early use of the name.<sup>91</sup> In its TTAB briefing, the team provided the history of the name beginning in 1933 when it was selected by then-owner George Preston Marshall.<sup>92</sup> Originally, the team was dubbed the Boston Braves, with Marshall changing it to the Boston Redskins to accommodate a branding conflict with the Boston Braves baseball team.<sup>93</sup> The team also claims that the name was specif-

88. ATUAHENE, WE WANT WHAT'S OURS, *supra* note 7, at 33.

89. *Id.* at 32.

90. *Id.* at 33.

91. See Registrant's Trial Brief in Opposition to the Petition to Cancel Registrant's Trademark, *Blackhorse v. Pro-Football, Inc.*, Cancellation No. 92/046185 (T.T.A.B. Oct. 11, 2012), *aff'd*, 112 F. Supp. 3d 439 (E.D. Va. 2015), *appeal docketed*, No. 15-1874 (4th Cir. Aug. 20, 2015), *cert. denied*, 137 S. Ct. 44 (2016), <http://ttabvue.uspto.gov/ttabvue/v?pno=92046185&pty=CAN&eno=188> [<https://perma.cc/R2VL-L397>] [hereinafter Registrant's Trial Brief, *Blackhorse v. Pro-Football, Inc.*].

92. *Id.* at 5.

93. *Id.*; Kevin Paul Dupont, *Redskins Name Debate Traces to Boston*, BOS. GLOBE (Dec. 29, 2013), <https://www.bostonglobe.com/sports/2013/12/29/redskins-wonder-what-name-the-answer-traces-back-boston/GmfYbPTnHx1Ht5NgqN1EOM/story.html> [<https://perma.cc/BTP6-MF2D>].

ically chosen to honor then-coach William “Lone Star” Dietz, a Sioux.<sup>94</sup> Despite Dietz’s false identity as an American Indian being exposed in a federal court proceeding and an extensive FBI investigation, the Washington franchise persists in its mythology that the team was named to honor Dietz, who actually turned out to be German, and was “adopted out of respect for Native American heritage and tradition and was never intended to belittle or insult.”<sup>95</sup> The team has also highlighted Native American players throughout the years since the name was adopted. For example, in 1953, the team drafted Eagle Day, a member of the Cherokee Nation, who was quoted in a 1959 newspaper expressing his excitement to “play for the Redskins.”<sup>96</sup> In 1940, they note that the Sioux officially accepted Charlie Malone, another Redskins player, into their tribe through a traditional, formal ceremony.<sup>97</sup>

The team argues that the use of the name and imagery has been “consistently respectful” and that its representations of Native Americans are done in a “reserved and tasteful” manner that results in a “respectful and serious cultural portrayal.”<sup>98</sup> The Chief of the Choctaw Nation of Oklahoma is cited by the team as “admir[ing]” the Redskins “because they are winners, leaders, and producers, attributes the Indian people can be proud to be identified with.”<sup>99</sup> They also note instances of Native Americans themselves utilizing the term in a variety of ways ranging from using “Redskin” as the team nickname for a Navajo Reservation high school to a “Redskin Motel” on the Cherokee Reservation to suggest that the name cannot be disparaging when Native Americans have chosen to use it in their own communities.<sup>100</sup>

These very arguments justifying the taking and commodification of the slur as an act that bestows dignity can arguably be viewed as evidence of the very “infantilization” identified by Atuahene in her dignity takings framework. Despite making this honorific claim on behalf of the Native community, the sentiment of most Native people and organizations were never actually surveyed by the team at the time and in reality paint an entirely different picture. The team’s position is founded on its fundamental

94. Registrant’s Trial Brief, *Blackhorse v. Pro-Football, Inc.*, *supra* note 91, at 5.

95. John Barr, *Was Redskins’ First Coach a Fraud?*, ESPN (Sept. 3, 2014), [http://www.espn.com/espn/otl/story/\\_/id/11455467/was-washington-redskins-first-coach-fraud](http://www.espn.com/espn/otl/story/_/id/11455467/was-washington-redskins-first-coach-fraud) [https://perma.cc/6QD2-PGUS]. See also Registrant’s Trial Brief, *Blackhorse v. Pro-Football, Inc.*, *supra* note 91, at 5.

96. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d (BNA) 1080, 1105 (T.T.A.B. 2014).

97. Registrant’s Trial Brief, *Blackhorse v. Pro-Football, Inc.*, *supra* note 91, at 35.

98. *Id.* at 29.

99. *Id.* at 33 n.116.

100. *Id.* at 45.

failure or unwillingness to recognize and respect the full capacity of Native people to reason and recognize that use of this slur by a football team in Washington, D.C. is not honoring at all, but rather demeans the Native community. Even if some Natives do find the term inoffensive, and even if some Native sports teams choose to re-appropriate the term, as Ray Halbritter, current Nation Representative of the Oneida Nation, has observed, “[we] should be able to define the terms that we want to be called. Every people should have that right and do have that right.”<sup>101</sup>

## 2. Native Mascots: A Story of Taking Dignity

This long-running trademark litigation against the Washington football team and the on-and-off national conversation about the issue has ignored the fundamental threat to human dignity caused by the federal registration and widespread commercial use of the team’s trademarks. The National Congress of American Indians made this very clear in a 2013 statement on mascotting, noting:

[W]hen exposed to these images, the self-esteem of Native youth is harmfully impacted, their self-confidence erodes, and their sense of identity is severely damaged. Specifically, these stereotypes affect how Native youth view the world and their place in society, while also affecting how society views Native peoples. This creates an inaccurate portrayal of Native peoples and their contributions to society. Creating positive images and role models is essential in helping Native youth more fully and fairly establish themselves in today’s society.<sup>102</sup>

Following that lead, many tribes have issued similar statements and resolutions urging the removal of Native names and mascots.<sup>103</sup> They are all rooted in the research that racist and derogatory mascots and team names have real and harmful effects on Native people every day. Young people are most at risk. As the first person narratives below illustrate, the ongoing fight to change the name and cancel the trademark of the Washington football team represents a broader, long-standing struggle for Native people to define themselves—instead of being defined and dehumanized by others.

In July 2014, I co-authored a report with Erik Stegman for the Center for American Progress (CAP) addressing how the continued use of Native

101. *Native American Leader Responds to Washington Post “Redskins” Poll*, NPR (May 21, 2016), <http://www.npr.org/2016/05/21/479001688/native-american-leader-responds-to-washington-post-redskins-poll> [https://perma.cc/3UBT-B64K].

102. NAT’L CONG. OF AM. INDIANS, *supra* note 41, at 5.

103. *Id.* at 6.

mascots creates a hostile learning environment which negatively impacts the self-esteem and general wellbeing of Native youth. In “Missing the Point: The Real Impact of Native Mascots and Team Names on American Indian and Alaska Native Youth,”<sup>104</sup> we used first person interviews with Native youth to assess the real effects of such names and mascots.<sup>105</sup> On the heels of the release of this report, the White House Initiative on American Indian and Alaska Native Education and the Department of Education Office of Civil Rights conducted several listening sessions across the country in order to hear directly from Native populations about the challenges and opportunities faced by Native students. The final White House report, released in October 2015, contained numerous accounts from students and parents alike, of their experiences and reactions to the use of Native imagery in school mascots.<sup>106</sup> The testimony during the listening sessions illustrated how stereotypical imagery and symbolism harms all students, especially Native students, by interfering with self-identity, perpetuating negative stereotypes, encouraging bullying and teasing, and creating unhealthy learning environments. Listening session participants also urged the federal government to do more to assist schools and institutions in understanding the harmful effects that stereotypes, including imagery and symbolism in the form of mascots or logos, have on all students.

In the CAP report, Dakota Kicking Bear Brown (Wilton-Miwok) describes the dehumanizing environment at his California high school halftime shows during games between Brown’s high school, the Argonaut Mustangs, and its rival, the Calaveras Redskins: “Our cheerleaders dressed up one of our own [students] in a Halloween ‘Pokeahottie’ costume and tied her to a stake after dragging her out on the field in shackles against her will. They proceeded to dance around her, acting as if they were beating her and treating her like a slave.”<sup>107</sup> This type of behavior is so endemic in interscholastic sports that Brown notes that most students did not realize how offensive the actions were. “With so many around me, I felt ganged up on, but at the same time, all of these screaming fans don’t know how offensive they are, or that they are even in the presence of a Native.” When considering the worst of the perpetrators, Brown says that it was the Calaveras rival schools who often shouted the most offensive comments. “I have

104. STEGMAN & PHILLIPS, *supra* note 42.

105. *Id.*

106. *See generally* WHITE HOUSE INITIATIVE ON AM. INDIAN & ALASKAN NATIVE EDUC., U.S. DEP’T OF EDUC., SCHOOL ENVIRONMENT LISTENING SESSIONS: FINAL REPORT (2015), <http://sites.ed.gov/whiaiane/files/2015/10/school-environment-listening-sessions-final-report.pdf> [<https://perma.cc/7L69-RBAW>].

107. STEGMAN & PHILLIPS, *supra* note 42, at 4.

heard my own friends yelling around me, ‘Kill the Redskins!’ or ‘Send them on the Trail of Tears!’”

The White House Report shares a similar story told by Amanda Anderson (Choctaw). Her high school experience was reminiscent of Dakota Brown’s experience. “In high school, my mascot was the ‘Redskins,’” she said. “I had to watch my classmates make posters saying we are going to ‘skin’ our sports opponents. The other teams would make posters that said they are going to send us home on a ‘trail of tears.’ I’m now in college, and I recently had to write a peer-review paper, and I wrote on the mascot issue. I had a classmate say that Natives don’t exist anymore, so no one should be upset by the mascot issue. I asked, ‘Well, am I real?’ He said, ‘You don’t live in a teepee, so no.’ It’s still a slap in the face every time. I thought I had moved on, but it still hurts every time.”<sup>108</sup>

The callous dismissal of Native history and culture boils down to a lack of respect for Native people, notes National Congress of Native Youth Cabinet member, Cierra Fields (Cherokee). “When I see people wearing headdresses and face paint or doing the tomahawk chop, it makes me feel demeaned. The current society does not bother to learn that our ways, customs, dress, symbols, and images are sacred. They claim it’s for honor, but I don’t see honor in non-natives wearing face paint or headdresses as they are not warriors who have earned the right. My heritage and culture is not a joke. My heritage and culture is not a fashion statement.”<sup>109</sup> Fields acknowledges that non-Natives who use elements of Native culture claim to do so out of respect. But Sarah Schilling (Little Traverse Bay Bands of Odawa Indians) recalls a troubling discussion heard on radio talk show.<sup>110</sup> The host and callers were discussing the potential change of a local Michigan high school mascot which negatively depicted Native people. Given the subject, it would only seem appropriate for Native people to have a significant voice in the conversation. But as Schilling recalls, it was primarily non-Native people calling in to dominate the air waves. “They all spoke about school and community pride, or of fond high school memories. A Native American mascot seemed to have nothing to do with actual Native American people to them. A white person’s pride was put above a Native American person’s sense of identity. A white person’s fond memories were more important than a Native American youth attending a school with a mascot representing oppression.”<sup>111</sup>

108. WHITE HOUSE INITIATIVE ON AM. INDIAN & ALASKAN NATIVE EDUC., *supra* note 106, at 41.

109. STEGMAN & PHILLIPS, *supra* note 42, at 8.

110. *Id.* at 17.

111. *Id.*

Schilling's concern for Native youth is well-founded. During its stop in Oklahoma City, the White House Listening Tour heard from several Native students who expressed not only feelings of degradation and dehumanization, but also fear. Alecia Onzawah (Kickapoo) observed "some people say that we have more important issues to worry about. I believe that the dehumanization caused by the use of derogatory mascots is a major contributing factor as to why we have more important issues to worry about."<sup>112</sup> She told representatives at the Oklahoma City listening session that, "[t]he use of derogatory and stereotypical caricatures to falsely depict Native Americans . . . holds an eerie resemblance to the caricature-like pictures of people with exaggerated facial features . . . used in old Nazi propaganda newspapers which were used to influence and incite negative public opinion, and thus [dehumanize] the Jewish people. . . . It's dangerous because it ignores atrocities. . . . We are not just offended. We are scared."<sup>113</sup>

Sarah Adams-Cornell (Choctaw) told the listening tour, "[the use of racist school mascots represent] bullying at its worst because it is done openly . . . and our youth, who face some difficult challenges and often struggle to find a reason not to exit this world by their own hand, see that an entire school, an entire community, an entire nation, allows it. . . . When will this nation accept our word as truth for how derogatory mascot[s] and imagery affects us and our children? When will the truth be admitted that the 'redskins' term was historically used as a reference for the outright genocide of our people by the offering of monetary rewards for the bloody scalps of our men, women, and children? When discussions occur that reference historical atrocities, Native people are often told, 'get over it; it's in the past,' but the belief that it is in the past is erroneous. It is not in the past when we are reminded of the brutal genocide on a daily basis. . . . How is a . . . Native child supposed to feel safe in a world where a term once used to offer monetary rewards for the bloody scalps of children is so acceptable?"<sup>114</sup>

That fear hit close to home for Jacob Tsotigh, whose grandsons have endured teasing while attending a school with a Native mascot. At the time of the listening session, Tsotigh said his youngest grandson had recently called him asking to come home from school because the other students kept referring to him as the mascot.<sup>115</sup> "They are the only Native kids there,

112. WHITE HOUSE INITIATIVE ON AM. INDIAN & ALASKAN NATIVE EDUC., *supra* note 106, at 43.

113. *Id.*

114. *Id.* at 43–44.

115. *Id.* at 42.

and so they are alone,” Tsofigh said. “That’s exactly why I have been an advocate for change all these years because of kids who have to endure this type of discrimination. Seemingly harmless kidding can have a lasting impact.”<sup>116</sup> Tosawi Saddler (Chippewa/Cree) reported: “I am afraid to attend any football games in the community I live in because I’m not sure how I would react toward those expressing derogatory remarks or behavior toward my race. . . . I do not feel honored or respected and fear for any young indigenous [people] still finding themselves.”<sup>117</sup> Sometimes the “harmless kidding” can evolve into something more overtly demeaning and violent. In 2014, Native students at Burney Junior-Senior High School in northern California found notes saying “Watch Your Redskinned Back” and “White Pride Bitch” on their lockers.<sup>118</sup> Pit River tribe parents alleged systemic, racially charged abuse of their children.<sup>119</sup> Despite the Native children routinely reporting the racial harassment by their classmates, according to one parent, the school faculty just passes the behavior off as “kids being kids.”<sup>120</sup>

Many parents of Native youth are doing what they can to fight the use of derogatory mascots. In 2012, Langhorne, Pennsylvania became the site of a significant rally against the use of Neshaminy High School’s Redskins mascot. One parent wrote numerous letters and repeatedly appeared before the school board arguing the negative impact of such a mascot on Native students.<sup>121</sup> The parent initially garnered support from the school newspaper, which attempted to ban the use of the slur in its publications.<sup>122</sup> However, students and faculty invoked their free speech rights and challenged the legality of the newspaper editorial board’s decision.<sup>123</sup> In late 2014, the Neshaminy School Board voted in a district policy which prevented the school newspaper from editing the term “Redskin” out from letters to the editor and advertisements.<sup>124</sup> As of now, no new move has been made to change the school’s mascot.

116. *Id.*

117. *Id.* at 43.

118. STEGMAN & PHILLIPS, *supra* note 42, at 19.

119. *Id.*

120. *Id.*

121. *Id.* at 17.

122. *Id.*

123. *Id.*

124. Todd Quinones, *Neshaminy School Board Votes Student Newspaper Ban on ‘Redskins’ Can Stand, but Only in Certain Sections*, CBS PHILLY (June 26, 2014, 11:30 PM), <http://philadelphia.cbslocal.com/2014/06/26/neshaminy-school-board-votes-student-newspaper-ban-on-redskins-can-stand-but-only-in-certain-sections/> [<https://perma.cc/FYH4-4ALQ>].



Sometimes activism has come at a price. Marsha J. Beggs Brown, a former teacher, told the listening tour, “[after complaining about the school mascot], our country mailboxes were destroyed, two windshields in our cars were smashed, and I received anonymous letters and phone calls calling me scurrilous names. . . . Comments in the news articles locally, statewide, and even nationally were unbelievable. Much hatefulness and untruth was printed. A pickup truck filled with people drove past my house shouting ‘Indians forever.’ Four years later there are many, many local residents who refuse to speak to me, even to just nod. . . . Although many residents have moved on to a healthier place with a non-racist name, a few continue to remind me through their actions of their extreme unhappiness because I ‘took away their Indians.’ As a 67-year-old white woman, I feel able to remain in my home. I can live with those poor, sad, uneducated adults who continue to be angry with me. Can you imagine what life would have been like and would continue to be like for a First Nation adult, or worse, a student? I can’t.”<sup>125</sup>

Even though many schools, such as Stanford University, have long since abandoned the use of a Native mascot, the effects linger. Dahlton Brown (Miwok) notes, “[a]s a Stanford University student, the effects of the long-gone Stanford Indian are still felt in the Native American community. Every year, without fail, some student group decides that it would be really awesome to have a ‘throwback’ shirt with the Stanford Indian mascot on it. Many students know the mascot is wrong, but don’t understand the ‘why.’ Even with a thriving Native American Cultural Center, Stanford students still don’t get the issues that come hand-in-hand with the Indian mascot. Long before Native Americans were admitted to Stanford, the sole Native representation was that of the Stanford Indian. Each year, as the Stanford Indian reveals its ugly history, the Native Americans of Stanford University are reminded of our troubled and short history at Stanford.”<sup>126</sup> Similar “bring back the Indian” movements have also taken place among students and alumni at Dartmouth over the years.<sup>127</sup>

Despite sports team claims that Native names and mascots are intended to honor Native people, the interviews and narratives described above echo and confirm years of social science research demonstrating that the use and presence of Native mascots directly results in lower self-esteem for

125. WHITE HOUSE INITIATIVE ON AM. INDIAN & ALASKAN NATIVE EDUC., *supra* note 106, at 44.

126. STEGMAN & PHILLIPS, *supra* note 42, at 14.

127. Scott Jaschik, *Dartmouth Apologizes for Indian Incidents*, INSIDE HIGHER ED (Nov. 27, 2006, 4:00 AM), <https://www.insidehighered.com/news/2006/11/27/dartmouth> [<https://perma.cc/Q3HD-3TB6>].

Native youth. They also make clear that the continued use of these mascots ultimately undermine societal attitudes and harm all of us, particularly those with little or no contact with indigenous and Native people. With no first-hand contact with this community, these stereotypical representations are too often understood as factual representations and lead to the development of cultural biases and prejudices. The taking of Native identity through the federal trademark rights, use, and commodification of genocidal slurs like Redskins and accompanying Native imagery continues to deprive Native people of their dignity under Atuahene's framework.

#### IV. IS DIGNITY RESTORATION POSSIBLE IN THIS CASE?

This article attempts to document that the taking and the harms related to the federal registration and use of the Redskins trademark rises to the level of a dignity taking under the framework developed by Atuahene's important work. In these cases, she has argued that the appropriate remedy is something more than mere compensation for things taken. "Dignity restoration," must go further by providing material compensation to the dispossessed in a process that re-affirms their humanity and re-establishes their agency.<sup>128</sup> It is beyond the scope of this project to address the potential for dignity restoration in this particular case, but the possibilities for meaningful restoration are certainly worthy of further study.

#### V. CONCLUSION

For members of the Native community who have been working to change these racist and harmful mascots across the country, to have the football team in our nation's capital continue the commercial use of a derogatory slur sends a particular symbolic message of disrespect and disregard for their community. The appropriation is even more dangerous in this case since, with the imprimatur of the federal government, Native cultural identity and imagery has been appropriated, owned, and commodified by another. With the continued federal registration of this particular term and imagery, the governmental is sending all of us the message that the Native community is somehow sub-human and therefore can be owned. By owning a federal property right in this term, the team continues to control and exploit the use of the cultural slur and an entire people's identity. The interviews and other reported accounts in the litigation and White House

128. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 83, at 179.



report detailed above make clear that the harm done to the Native community is very real and rises to the level of a dignity taking.

The Universal Declaration of Human Rights states that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>129</sup> Atuahene’s dignity takings framework provides a useful lens and a jumping off point to further theorize the fundamental right of dignity, this particular takings controversy, and other disputes involving harms caused by the misappropriation of both tangible and intangible forms of cultural property.

129. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

