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# WIDE RIGHT: WHY THE NCAA'S POLICY ON THE AMERICAN INDIAN MASCOT ISSUE MISSES THE MARK

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AND

SETH E. HARPER \*\*

## I. INTRODUCTION

Of the many civil rights and social justice issues that continue to cloud United States race relations, one persists in relentlessly dividing parties: the use of American Indian mascots and imagery by collegiate and professional athletic teams.<sup>1</sup> Scholars and academics weigh in annually on this divisive issue,<sup>2</sup> while certain university

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\*\* J.D., West Virginia University College of Law, 2006. Thanks to Professor andré cummings for partnering with me on this article, and for his general assistance and guidance. I also thank my family, Curt, Vickie and Waid Harper. I would like to dedicate this article to the memory of my grandmother Bettie Lou McCracken and my uncle John McCracken.

1. See andré douglas pond cummings, *Progress Realized?: The Continuing American Indian Mascot Quandary*, 18 MARQ. SPORTS L. REV. 309, 312 (2008) [hereinafter cummings, *Progress Realized?*] ("Rarely has a symbol, mascot, or moniker meant such completely different things to divergent groups of people. To some, American Indian mascots represent strength, power, reverence, and dignity. For others, Native American mascots are deeply offensive and mock ancient and sacred culture.").

2. See *id.*; see also Kristin E. Behrendt, *Cancellation of the Washington Redskins' Federal Trademark Registrations: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?*, 10 SETON HALL J. SPORT L. 389 (2000); Lauren Brock, *A New Approach to an Old Problem: Could California's Proposed Ban on "Redskins" Mascots in Public Schools Have Withstood a Constitutional Challenge?*, 12 SPORTS LAW. J. 71 (2005); Kristine A. Brown, *Native American Team Names and Mascots: Disparaging and Insensitive or Just a Part of the Game?*, 9 SPORTS LAW J. 115 (2002); Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 CARDOZO J. INT'L & COMP. L. 393 (2003); Brendan S. Crowley, *Resolving the Chief Illiniwek Debate: Navigating the Gray Area Between Courts of Law and the Court of Public Opinion*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 28 (2004); andré douglas pond cummings, *"Lions and Tigers and Bears Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the*

administration officials vigorously defend continued use of Native American mascots and monikers at their institutions.<sup>3</sup> Across the United States, various university officials and alumni debate the continued use of mascots such as the “Fighting Sioux,” the “Running Utes” and “Chief Illiniwek.”<sup>4</sup>

In a broader context, the mistreatment and abuse of American Indians and, for that matter, discrimination against indigenous populations around the world, continue to receive widespread attention.<sup>5</sup> Recently, federal governments in Canada and Australia have acknowledged historical abuse of native populations and have offered official apologies and regrets.<sup>6</sup> Though belated, these

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*Reasonable Person*, 36 CAL. W. L. REV. 11 (1999) [hereinafter cummings, *Lions and Tigers and Bears*]; Christian Dennie, *Native American Mascots and Team Names: Throw Away the Key; The Lanham Act is Locked For Future Trademark Challenges*, 15 SETON HALL J. SPORTS & ENT. L. 197 (2005); Jeff Dolley, *The Four R's: Use of Indian Mascots in Educational Facilities*, 32 J.L. & EDUC. 21 (2003); Aaron Goldstein, *Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots*, 3 J. GENDER RACE & JUST. 689 (2000); Rachel Clark Hughey, *The Impact of Pro-Football, Inc. v. Harjo on Trademark Protection of Other Marks*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (2004); Bruce Kelber, “*Scalping the Redskins: Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?*,” 17 HAMLINE L. REV. 533 (1994); Lynda J. Oswald, *Challenging the Registration of Scandalous and Disparaging Marks Under the Lanham Act: Who Has Standing to Sue?*, 41 AM. BUS. L.J. 251 (2004); John B. Rhode, Comment, *The Mascot Name Change Controversy: A Lesson in Hypersensitivity*, 5 MARQ. SPORTS L.J. 141 (1994).

3. See cummings, *Progress Realized?*, *supra* note 1, at 312–13.

4. See *id.* at 329–332.

5. See CNN.com, *Canadian Leader: Assimilation Policy 'Has No Place.'* <http://www.edition.cnn.com/2008/WORLD/americas/06/11/canadian.apology/index.html> (last visited Jan. 30, 2009) (“Canadian Prime Minister Stephen Harper apologized for a defunct policy that attempted ‘to kill the Indian in the child’ by taking native children from their families and placing them in schools to assimilate them.”).

6. See *id.* In detailing the June 13, 2008 apology offered by the Canadian government to its Native American populations, CNN quotes Prime Minister Stephen Harper:

“The treatment of children in Indian residential schools is a sad chapter in our history,” Harper said in an apology on behalf of the government Wednesday. “Today, we recognize this policy of assimilation was wrong, has caused great harm and has no place in our country.” Hundreds of former students were invited to Ottawa to witness the apology, which native leaders called a pivotal moment for Canada’s more than 1 million aboriginals. “For our parents, our grandparents, great-grandparents and all of the generations which have preceded us, this day testifies to nothing less than the achievement of the impossible,” said Phil Fontaine, chief of Canada’s Assembly of First Nations, which represents more than 630 communities of indigenous people.

*Id.* In February 2008, the Australian government offered an apology to its Aboriginal people.

*Id.* CNN reported that:

[Australian] lawmakers unanimously approved the apology, which was publicly read by new Prime Minister Kevin Rudd. For 60 years, the Australian government took mixed-race Aboriginal children from their

governmental acknowledgements of racism, discrimination, hostility and abuse serve as a reminder that indigenous populations, particularly American Indians, suffered incredibly at the hands of white oppressors.<sup>7</sup> Badges, indicia and reminders of this abuse by the United States government and its white citizens remain today.<sup>8</sup>

The National Collegiate Athletic Association (“NCAA”) recognized and acknowledged this holdover effect of discrimination and abuse in the summer of 2005 when it determined that some college and university mascots, monikers and images have the potential to offend American Indians.<sup>9</sup> Those teams with potentially offensive and abusive mascots and imagery included the Florida State Seminoles, the Central Michigan Chippewas, the North Dakota Fighting Sioux, and the University of Illinois Fighting Illini.<sup>10</sup> After the NCAA described these mascots as offensive to Native Americans, the organization

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families and put them in dormitories or industrial schools under the premise of protecting them. As a result of the policy, which ended in 1970, “stolen” children lost contact with their families, lived in harsh conditions and often endured abuse.

*Id.*; see also Rohan Sullivan, *Australia: ‘Sorry’ to Aborigines: Lawmakers Unanimously Back Apology for Grief, Loss*, WASH. POST, Feb. 13, 2008, at A14; Tim Johnston, *Australia to Apologize to Aborigines for Past Mistreatment*, N.Y. TIMES, Jan. 31, 2008, at A10; DeNeen L. Brown, *Canadian Government Apologizes For Abuse of Indigenous People*, WASH. POST, Jun. 12, 2008, at A1; Reuters, *New Zealand: Maori Sign Deal Over Loss of Protected Lands*, N.Y. TIMES, June 26, 2008, at A8; Reuters, *New Zealand Settles Century Old Maori Grievance*, WASH. POST, Jun. 25, 2008.

7. See BURY MY HEART AT WOUNDED KNEE (HBO Films, Traveler’s Rest Films & Wolf Films 2007) (carefully documenting the United States government’s treatment of the Sioux in forcing them onto reservations in 1870s South Dakota and then repeatedly violating treaties signed with iconic Sioux chiefs Red Cloud and Sitting Bull); see also THE WEST (PBS 1996).

8. See Tom Clavin, *Fighting Shinnecoaks’ Alcohol Abuse*, N.Y. TIMES, Mar. 13, 2005, at 14L13; see also *Young Indians Prone to Suicide, Study Finds*, N.Y. TIMES, Mar. 25, 1992, at D24; William Yardley, *In Native Alaskan Villages, a Culture of Sorrow*, N.Y. TIMES, May 14, 2007, at A1; Claire E. Dineen, *Fetal Alcohol Syndrome: The Legal and Social Responses To Its Impact on Native Americans*, 70 N.D. L. REV. 1, 14–16 (1994); Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare In The United States*, 16 B.C. THIRD WORLD L.J. 17, 26–27 (1996).

9. See Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005) available at <http://www.ncaa.org/wps/ncaa?ContentID=1664>.

10. *Id.* The complete list of schools subject to the NCAA policy included: Alcorn State University Braves, Central Michigan University (Chippewas), Catawba College (Indians), Florida State University (Seminoles), Midwestern State University (Indians), University of Utah (Utes), Indiana University-Pennsylvania (Indians), Carthage College (Redmen), Bradley University (Braves), Arkansas State University (Indians), Chowan College (Braves), University of Illinois-Champaign (Illini), University of Louisiana-Monroe (Indians), McMurry University (Indians), Mississippi College (Choctaws), Newberry College (Indians), University of North Dakota (Fighting Sioux), and Southeastern Oklahoma State University (Savages). *Id.*

declared that these schools could no longer use their mascots in postseason athletic contests.<sup>11</sup> In its policy promulgation, the NCAA declared that schools with offensive mascots and imagery could not display their logos on the court or field or on a uniform, nor could they allow students to don the mascot costumes on the sidelines during any postseason play.<sup>12</sup>

However, this policy only prohibited hostile or abusive imagery in mascots during postseason play, meaning that these specific colleges and universities could continue to use these offensive mascots throughout the entire regular season. Essentially, offensive mascots could be used for twelve regular season football games, but would not be tolerated in the postseason, which consists of one additional game for those teams that earn an invitation to a bowl game.<sup>13</sup> These offensive mascots can be used in thirty regular season basketball games, but are not allowed in the NCAA “March Madness” tournament, which includes up to six games for the two teams that make it to the championship game. Furthermore, there are over 300 teams vying for one of 65 positions in the NCAA Basketball Tournament, so the selection process is very competitive. Therefore, compliance under the new policy would only be necessary if an offending university accomplishes the significant feat of making it to postseason play.<sup>14</sup> As might be expected, the NCAA’s policy has been controversial and has captured the attention of academics and scholars.<sup>15</sup>

11. *Id.*

12. *Id.*

13. *See infra* Part IV.C.1.

14. NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA GENERAL INFORMATION BROCHURE 10 (“There are three membership divisions in the NCAA—Division I, Division II, and Division III. Member institutions determine which division is the most appropriate by “sports sponsorship minimum criteria, football and basketball scheduling requirements, academic and eligibility standards, and financial aid limitations.”).

15. *See* Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007). Mezey writes that:

Plenty of cultural historians and anthropologists would argue that Chief Illiniwek was more a product of mainstream white American culture than Native American culture, that he and many other sports mascots are simply the most recent manifestation of a long tradition of whites playing Indian, a form of play that tells us much more about whites than Indians. Indian mascots are generally invented by whites. They borrow from the iconography of various tribal cultures—the regalia, the pipe, sometimes the name, and the dance steps—and are set within a distinctly white cultural ritual of the halftime show and invested with meaning by sports fans.

*Id.* at 2005; *see also* cummings, *Progress Realized?*, *supra* note 1, at 319–21; Ryan Fulda, Note, *Is the NCAA Prohibition of Native American Mascots from Championship Play a*

While the NCAA deserves credit for tackling this divisive issue in an area of consistent debate and contention for the past three decades, the current policy only begins to address the issue and ultimately fails to find a reasonable solution.<sup>16</sup> Instead, this policy can be viewed as the first half-step needed to resolve this problem of abusive and hostile imagery used by NCAA member institutions. If American Indian mascots are genuinely hostile and abusive, then they should be completely eradicated. A mascot cannot be abusive in the postseason but non-abusive in the regular season. If a mascot is abusive, as the NCAA has deemed it to be, then there is no place for it amidst America's academic institutions. The restriction of the NCAA's new rule to postseason play is incongruous. In adopting this new policy, the NCAA has chosen to straddle the fence rather than fully addressing the problem of offensive and hostile American Indian imagery.

This article suggests that the NCAA should completely ban the use of Native American mascots that it has already deemed hostile or abusive. In arriving at this conclusion, the article seeks to provide a comprehensive examination of the history and circumstances that led the NCAA to finally take a stand on one of the divisive civil rights issues of our time. In providing a comprehensive examination into the history and circumstances that led the NCAA to its decision, Part II will provide background information on the Native American mascot quandary and will briefly describe how this quandary became a national issue. Part III will examine past legal challenges to those combating the use of American Indian mascots, both on the college and professional level. Part IV will then examine the NCAA's recent

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*Violation of the Sherman Antitrust Act?*, 31 AM. INDIAN L. REV. 163 (2006); William N. Wright, Note, *Not in Whose Name?: Evidentiary Issues in Legal Challenges to Native American Team Names and Mascots*, 40 CONN. L. REV. 279, 291-92 (2007); Brian R. Moushegian, Comment, *Native American Mascots' Last Stand? Legal Difficulties in Eliminating Public University Use of Native American Mascots*, 13 VILL. SPORTS & ENT. L.J. 465, 465-66 (2006); Kelly P. O'Neill, Comment, *Sioux Unhappy: Challenging the NCAA's Ban on Native American Imagery*, 42 TULSA L. REV. 171, 174-75 (2006); Kenneth B. Franklin, *A Brave Attempt: Can The National Collegiate Athletic Association Sanction Colleges and Universities With Native American Mascots?*, 13 J. INTELL. PROP. L. 435, 445-446 (2006); Regan Smith, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks*, 42 HARV. C.R.-C.L. L. REV. 451, 465 (2007); Jason Finkelstein, *What The Sioux Should Do: Lanham Act Challenges in Then Post-Harjo Era*, 26 CARDOZO ARTS & ENT. L.J. 301, 314-320 (2008).

16. This new policy was adopted by the NCAA Executive Committee, which is the highest ranking committee within the NCAA governance structure. The Executive Committee is empowered to "identify and resolve core issues that affect the Association as a whole." NAT'L COLLEGIATE ATHLETIC ASS'N, 2008-09 NCAA DIVISION I MANUAL 20 (2008) (NCAA bylaw 4.1.2).

policy ruling and the problems it creates. Finally, Part V will propose possible solutions to the identified problems.

## II. A BRIEF HISTORY OF THE AMERICAN INDIAN MASCOT CONTROVERSY

The current controversy over the use of American Indian mascots has simmered since the early 1970s and has been the topic of numerous academic offerings.<sup>17</sup> Those opposed to the use of Native American mascots, which generally include American Indians and activist groups, argue that these mascots are highly insensitive to Native American culture and heritage.<sup>18</sup> Those who support the continued use of the Native American monikers include alumni, athletic boosters, and, in most cases, the majority of an institution's predominantly white student body. Supporters argue that these mascots and images are not offensive to Native Americans, but instead honor them.<sup>19</sup> Many alumni also claim that abandoning these names would leave the school without an identity and would fail to pay homage to the universities' past.<sup>20</sup> The American Indian mascot controversy at Syracuse University demonstrates a common narrative for the dispute between opponents and university alumni.

### A. *The Syracuse Model*

During the 1970s, a number of schools yielded to growing pressure and abandoned their offensive American Indian mascots and chose race neutral, non-offensive alternatives.<sup>21</sup> For example, Dartmouth College changed from the "Indians" to the "Big Green,"<sup>22</sup> Stanford University changed from the "Indians" to the "Cardinal,"<sup>23</sup> the University of Oklahoma retired its mascot, "Little Red,"<sup>24</sup> and

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17. See sources cited *supra* note 2.

18. See cummings, *Progress Realized?*, *supra* note 1, at 311–13.

19. See *id.* at 312.

20. See *id.* at 312–13.

21. CAROL SPINDEL, *DANCING AT HALFTIME 13* (N.Y. Univ. Press 2000).

22. See NAT'L CONGRESS OF AMERICAN INDIANS, *AMERICAN INDIANS AND SPORTS TEAM MASCOTS: A TIMELINE OF CHANGE*, <http://www.ncai.org/ncai/resource/documents/governance/mastimeline.htm> (last visited Mar. 27, 2009) (In 1969, Dartmouth College changed its mascot from the "Indians" to the "Big Green." In 1972, Stanford University discontinued the use of "Indians" as its team name and logo).

23. SPINDEL, *supra* note 21, at 13.

24. *Id.*

Syracuse University dropped its mascot, the “Saltine Warrior” and adopted the moniker “Orangemen” (Syracuse University later changed the name to the “Orange”).<sup>25</sup>

While each scenario is different, the basic narrative for schools such as Stanford University, Dartmouth College, St. Johns University, Miami University (OH), and Marquette University is similar. Generally, a university has some, often strained, connection to local American Indian tribes and chooses to use a Native American image as a mascot. The school then adopts a mascot and logo, often in caricature form, and allows that mascot to represent the school for many years, perpetuating wildly inappropriate stereotypes and abusive images. Then, a small group of concerned individuals (often American Indian students and activists) claim that the name is racially insensitive. The university majority disagrees with the offended activists and shrugs off any claims of racial insensitivity or racism. The majority usually claims that the name is meant to honor American Indians and that any Native American that does not feel honored does not understand the intent.<sup>26</sup> After intense debate, which sometimes involves physical confrontations,<sup>27</sup> the university decides to discontinue the offensive mascot. Rarely, particularly in the early part of the anti offensive mascot movement, has a university decided to change mascots without the impetus of social pressure.

While many colleges followed the above route in changing their mascots to non offensive ones, Syracuse University’s course is particularly noteworthy because the debate that took place over eliminating its offensive mascot proved exceptionally contentious. Examining the history of the Syracuse University mascot’s odyssey will spotlight the challenges faced by other universities and activists.

### *1. The Saltine Warrior*

Syracuse University’s purported connection to its original Native American mascot, the Saltine Warrior, has a tortured history. The school was founded in 1870 and claims ties to American Indians as early as 1884.<sup>28</sup> The class of 1884 produced a student publication

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25. *Id.* at 13–14 Its new name, the Orangemen, was recently changed again in 2003 because the university felt that the name was sexist. Syracuse now competes as the “Orange.”

26. See IN WHOSE HONOR? (New Day Films 1997).

27. See Mike Wise, *The Squabbling Illini: Rallying Cries Lead to Rift*, N.Y. TIMES, Dec. 16, 2003, at D1 (reporting that during a demonstration in favor of Chief Illiniwek at the University of Illinois, some students made threats of violence against a decedent of Sitting Bull who attends the university as a student).

28. Donald M. Fisher, *Chief Bill Orange and the Saltine Warrior: A Cultural History of Indian Symbols and Imagery at Syracuse University*, in TEAM SPIRITS: THE NATIVE AMERICAN



named *The Onondagan*, which purported to honor the Onondaga Native American tribe that lived in the central New York state valley where the university now sits.<sup>29</sup> In 1911, two Syracuse students authored a song titled “The Saltine Warrior” in an attempt to develop a heroic figure whose physical strength could overcome the strength of any football team opponent.<sup>30</sup> Ostensibly, the phrase “Saltine Warrior” was not only meant to honor the American Indians of that area, but also to recognize the importance of the salt mines that were located near Syracuse.<sup>31</sup> In addition, Syracuse University competed against local Native American football teams from 1902–1914, furthering the school’s tenuous connections to Native Americans and their history.<sup>32</sup>

These connections were purportedly strengthened in 1931 when, while building a new gymnasium for the gymnastics team, construction crews allegedly unearthed American Indian artifacts including arrowheads, flint instruments, and beads that were believed to have belonged to the Onondaga Indians.<sup>33</sup> Discovering these artifacts served to reinforce the link that students and staff believed Syracuse University had to the Onondaga Indians and the belief that the university’s athletic programs had a special relationship to these American Indians that preceded the university’s presence in central New York State. The same year as the aforementioned discovery, the Syracuse University community officially adopted Big Chief Bill Orange as its mascot, whose nickname was the Saltine Warrior.<sup>34</sup>

The university only sporadically used Big Chief Bill Orange as its mascot until after World War II, when sports enthusiasts resuscitated the Saltine Warrior.<sup>35</sup> In 1951, fraternities, the football team, and most of the university community resurrected their temporarily forgotten mascot by using Native American statues and figures.<sup>36</sup> One such statue was a wooden Indian that the team used at football games and upon which they would make tally marks to commemorate the opponents they defeated or “scalped.”<sup>37</sup> The tradition of a human mascot emerged in 1955 when a transfer student

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MASCOT CONTROVERSY 26–27 (C. Richard King & Charles Fruehling Springwood eds., Univ. of Nebraska Press 2001).

29. *Id.* at 27.

30. *Id.* at 28.

31. *Id.*

32. *Id.* at 29.

33. *Id.*

34. *Id.* at 30.

35. *Id.* at 31.

36. *Id.* at 32.

37. *Id.*

from Springfield College played the part of the first Native American human mascot at Syracuse University, replacing the inanimate figures.<sup>38</sup> While the transfer student was not Native American, he had studied Native American culture and insisted, at least while he played the role, on the authenticity of the Saltine Warrior.<sup>39</sup> In subsequent years, this attempted “authenticity” dwindled as the mascot became increasingly loud and boisterous and its dancing failed to resemble anything that could be legitimately recognized as a tribute to traditional Native American culture.<sup>40</sup>

Throughout the 1960s, Big Chief Bill Orange devolved into a nonsensical caricature of American Indians that increasingly emulated the drunken behavior that existed primarily in white student fraternity houses.<sup>41</sup> The mascot’s behavior reached such levels of disrespect that then chancellor Melvin Eggers commented on its wild performances:

In the spirit of libertarians doing their thing as they saw fit, the person of the Saltine Warrior took on more extreme forms of behavior that could be interpreted as making fun of the real thing, whether it be noises or antics of some sort or another . . . He would take off into the stands and run around making the “whooping” sounds attributed to Indians and their war dances. He would go through a mock form of native Indian dancing. It was clear that the person doing it didn’t know or have any respect for the art form at all.<sup>42</sup>

Thereafter, students and faculty began to not only question the behavior of the mascot, but whether such a mascot, in any form, was ever appropriate.<sup>43</sup>

## *2. Retiring the Saltine Warrior*

Opposition to the extreme Saltine Warrior mascot reached an apex in the mid-1970s and led Syracuse University’s Vice-President of Student Affairs, Charles Willie, to ask the university to rethink and reevaluate its use of Native American imagery.<sup>44</sup> A university

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38. *Id.* at 33.

39. *Id.* at 33.

40. *Id.*

41. *Id.* at 34.

42. *Id.*

43. *Id.* at 36–37.

44. *Id.* at 35.

newspaper story buttressed this request when it reported that the purported discovery of Native American artifacts in 1931 was fabricated.<sup>45</sup> The discovery shocked the campus. By 1977, the university community was divided into pro-Warrior and anti-Warrior camps, a split that currently exists on most college campuses that have attempted to take on the subject of Native American mascots.<sup>46</sup> At that time, “those who supported the continuation of their mascot included the fraternities, the alumni, and two-thirds of the undergraduate students at Syracuse.”<sup>47</sup> Pro-Warrior supporters claimed that the mascot was meant to honor American Indians and that abandoning the mascot would leave Syracuse University without an identity.<sup>48</sup> Those seeking to eliminate Big Chief Bill Orange claimed that continued use of the Saltine Warrior was disrespectful to Native Americans, perpetuated racial stereotypes, and was inappropriate for any venue but especially as the representative of an academic institution.<sup>49</sup>

In 1977, the two camps reached an impasse.<sup>50</sup> The group supporting the Saltine Warrior was willing to negotiate, but the group seeking elimination of Big Chief Bill Orange would accept nothing less than a new mascot free of American Indian imagery. Opponents convinced then Vice-President of Student Affairs Melvin Mounts to discontinue the use of Big Chief Bill Orange as the official Syracuse University mascot at the end of the Spring semester in 1978.<sup>51</sup>

Mounts’ decision to retire Syracuse University’s controversial mascot drew the ire of many students, alumni, and even members of the Syracuse local community, including those who had not attended the university. These angry supporters of the Saltine Warrior flatly denied any accusations of racism and condemned what they perceived to be the whimsical casting aside of deeply rooted traditions simply because a vocal minority advocated for such action.<sup>52</sup> In an attempt to appease those upset with the elimination of Big Chief Bill Orange, Syracuse University announced that the new mascot would be a Roman warrior, not a Native American warrior, and would still be

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45. *Id.* Seaman Jacobs, the editor of the paper in 1931, did not give a reason for creating the hoax, but did take pride in the fact that a small group of people had influenced Syracuse so much. *Id.*

46. See *IN WHOSE HONOR?* (New Day Films 1997).

47. See Fisher, *supra* note 28, at 36.

48. See *id.*

49. *Id.*

50. *Id.* at 37.

51. *Id.*

52. *Id.*

known as the Saltine Warrior.<sup>53</sup> However, because the new mascot lacked any ties to American Indians and the contrived connection between the University and the Onondaga Indian tribe, the university community rebelled against it, forcing university officials to abandon the Roman warrior idea.<sup>54</sup> Eventually, the university developed the nickname the Orangemen and began using a giant orange as its mascot. In 2004, Syracuse University abandoned the name Orangemen because it was thought to be sexist, and Syracuse University became the Orange, with a giant orange as its mascot.<sup>55</sup>

While the Syracuse University mascot narrative is representative of how other universities arrived at the decision to abandon offensive and racially insensitive mascots, logos and imagery, many institutions and organizations continue to resist the push to eliminate these culturally offensive markers. Activists have instituted numerous legal challenges against universities, high schools and professional sports organizations that resist changing their culturally offensive mascots to racially neutral ones.

### III. LEGAL CHALLENGES TO OFFENSIVE AMERICAN INDIAN MASCOTS

In recent years, advocates have attempted an interesting assortment of legal theories to eliminate offensive and hostile American Indian mascots at both the collegiate and professional level. This section will examine some of the ways advocates have challenged the use of these offensive mascots through the use of trademark law, First Amendment challenges, statutory objections and a theory of intentional infliction of emotional distress.

#### *A. (Temporary) Trademark Success*

Opponents of the use of American Indian mascots once considered trademark law the single most effective means of eliminating such use. The cases discussed below initially achieved some degree of success.

##### *1. Harjo v. Pro-Football Inc.*

In *Harjo v. Pro-Football Inc.*,<sup>56</sup> the petitioners, a group of American Indians led by Suzan Shown Harjo, sought cancellation of

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53. *Id.* at 38.

54. *Id.*

55. Mike Janela, *Syracuse Changes Nickname, Logo*, DAILY ORANGE, May 12, 2004.

56. 50 U.S.P.Q.2d 1705 (Trademark Tr. & App. Bd. 1999).

the trademarks held by the Washington Redskins, a National Football League (NFL) participating club. The petitioners claimed that some of the trademarks the Washington professional football club had registered were disparaging and in violation of Section 2(a) of the Lanham Act.<sup>57</sup> Section 2(a) of the Lanham Act prevents the registration of trademarks depicting “immoral, deceptive, or scandalous matter; or which may disparage or falsely suggest a connection with persons . . . beliefs . . . or bring them into contempt or disrepute.”<sup>58</sup> The *Harjo* petitioners asserted that “the word ‘redskin(s),’ or a form of that word, appears in each of the trademarks registrations” of which they sought cancellation.<sup>59</sup> Harjo argued that “the word ‘redskin(s)’ was and is a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person . . . and that registrant’s use of the [trade]marks in the identified registrations ‘offends’ petitioners and other Native Americans.”<sup>60</sup> The petitioners further contended that “the [trade]marks in the identified registrations consist of or comprise matter which disparages Native American persons, and brings them into contempt, ridicule, and disrepute” and, therefore, clearly violate section 2(a) of the Lanham Act, 15 U.S.C. 1052.<sup>61</sup>

One source of the term “redskin” is the practice wherein the English Crown offered a bounty for killing American Indians in the 1700s.<sup>62</sup> To receive payment and as proof of the kill, bounty-collectors were required to bring the bloody skin or scalp of the murdered Native American to a specified location.<sup>63</sup> The Washington NFL football club respondents in *Harjo v. Pro-Football, Inc.* argued that because the mark had been widely used and disseminated through the media for over fifty years, the term “redskin” had acquired a secondary meaning, referring only to the Washington professional football club.<sup>64</sup>

Because this suit was filed under trademark law, the Trademark Trial and Appeals Board (TTAB) first determined whether the challenged mark was disparaging. The traditional test consists of two elements: (1) the trademark must be reasonably understood to refer to

57. *Id.* at 1708.

58. 15 U.S.C. § 1052(a) (2000).

59. *Harjo*, 50 U.S.P.Q.2d at 1708.

60. *Id.*

61. *Id.*

62. See Cummings, *Lions and Tigers and Bears*, *supra* note 2, at 13; see also THE WEST (PBS 1996).

63. See Cummings, *Lions and Tigers and Bears*, *supra* note 2, at 13.

64. *Harjo*, 50 U.S.P.Q. 2d at 1708.

the plaintiff, and (2) the trademark must be considered offensive or objectionable by a reasonable person of ordinary sensibilities as set forth in *Greyhound Corp v. Both Worlds, Inc.*<sup>65</sup> In *Harjo*, the TTAB used a new approach. Rather than have a reasonable person determine what is offensive to a particular group, the TTAB announced that the affected group should determine what is disparaging.<sup>66</sup> Once the TTAB adopted this standard to evaluate disparagement, from the perspective of the offended American Indians, it determined that these challenged trademarks were in fact disparaging to Native Americans.<sup>67</sup> Since the marks were disparaging, the trademarks should not have been registered and the TTAB ordered that the trademarks be cancelled.<sup>68</sup> Much attention and fanfare accompanied this victory.<sup>69</sup>

The success *Harjo* achieved was short lived. The U.S. District Court for the District of Columbia reversed the decision of the TTAB in 2003.<sup>70</sup> The district court held that the TTAB's factual findings were not supported by substantial evidence.<sup>71</sup> Furthermore, the *Harjo* court ruled that the case was properly barred by laches.<sup>72</sup> The court declined to "venture into th[e] thicket of public policy" that permeates the American Indian mascot debate.<sup>73</sup> The court indicated that to determine whether a trademark is disparaging, a court must not only look to dictionary definitions, something upon which the TTAB relied heavily, but must also consider "the relationship between the subject matter in question and the other elements that make up the mark in its

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65. 6 U.S.P.Q.2d (BNA) 1635, 1639 (Trademark Tr. & App. Bd. 1988).

66. *Harjo*, 50 U.S.P.Q.2d at 1743; compare with *cummings, Lions and Tigers and Bears*, *supra* note 2, at 20 (discussing the Supreme Court of Utah's use of the reasonable person standard in *McBride v. Motor Vehicle Div. of Utah State Tax Comm'n*, 977 P.2d 467 (Utah 1999)).

67. *Harjo*, 50 U.S.P.Q. 2d at 1743.

68. *Id.* at 1749.

69. See *Court Finds Name May Be Disparaging*, N.Y. TIMES, Apr. 3, 1999, at D7. In 1999, the New York times reported:

A three-member Federal trademark panel ruled yesterday to revoke the Redskins' Federal trademark protection, saying the team's name may disparage American Indians or bring them into disrepute . . . The board's decision strips the club and the National Football League's NFL Properties Inc. of Federally protected exclusive rights for using and licensing the "redskins" name and logos for merchandising.

*Id.*; see also Karlyn Barker, *Redskins Name Can Be Challenged: Appeals Court Ruling Keeps Trademark Battle Alive*, WASH. POST, July 16, 2005, at B1.

70. *Pro Football Inc. v. Harjo*, 284 F.Supp. 2d 96, 99 (D.D.C. 2003).

71. *Id.* at 144-45

72. *Id.* at 145.

73. *Id.* at 99.

entirety; the nature of the goods and/or services; and the manner in which the mark is used in the marketplace.”<sup>74</sup>

Harjo watched her case take a long and slow road through the federal courts, with a recent 2008 ruling finding that after a sixteen year court battle, the petitioners waited too long to bring their objections and were, therefore, barred by laches.<sup>75</sup>

The ruling in *Harjo* and the subsequent reversal provide guidance for those hoping to bring challenges against racially offensive mascots. The *Harjo* modification to the second prong of the disparagement test, whether a reasonable group of American Indians would find offense, might be used to successfully challenge offensive professional mascots, nicknames and monikers. Time will tell whether the federal district courts will approve the reasonableness standard outlined by the TTAB.

## 2. *McBride v. Utah State Tax Commission*

In *McBride v. Utah State Tax Commission*,<sup>76</sup> three residents of the state of Utah who were Washington Redskins fans applied for and received vanity license plates that read, “REDSKIN,” “REDSKNS,” and “RDSKIN,” which they proudly displayed on their automobiles.<sup>77</sup> Utah State law requires (like all states in the U.S.) that all vehicles operated within the state apply for, receive, and affix license plates to the front and back of the vehicle. The petitioners were American Indians who felt that the vanity plates were offensive and derogatory toward Native Americans. They claimed that these particular vanity plates violated a state statute that prohibited vanity license plates that are “offensive and derogatory, and expresses contempt and ridicule toward their heritage, ethnicity, and race in violation of Utah Code Ann. § 41-1a-411” and also violated Utah Administrative Code R873-22M-34, an administrative rule that forbade plates that included “vulgar, derogatory, profane or obscene” terms.<sup>78</sup>

74. *Id.* at 125.

75. *Pro Football Inc. v. Harjo*, 567 F. Supp. 2d 46, 61 (D.D.C. 2008); *see also* Associated Press, *Judge Says American Indians Waited Too Long to Sue Redskins*, ESPN.COM, Jul. 11, 2008, available at <http://sports.espn.com/espn/print?id=3483483&type=story> (last visited Feb. 4, 2009). A thorough examination of the *Harjo* case is beyond the scope of this article.

76. *McBride v. Motor Vehicle Div. of Utah State Tax Comm’n*, 977 P.2d 467 (Utah 1999).

77. *Id.* at 468.

78. *Id.*

The defendants argued that while the name at one time may have been offensive, over the years it had lost its offensive meaning.<sup>79</sup> The plate owners claimed that they did not intend to offend Native Americans; rather, they wanted to show their support and enthusiasm for their favorite team.<sup>80</sup>

The Utah Supreme Court reversed the Tax Commission's original holding that the term "redskin" was not an offensive term and ordered the Tax Commission to apply a "reasonable person" standard to determine if any of the phrases on the challenged license plates had any negative connotation.<sup>81</sup> Following this Utah Supreme Court's reversal, the case was remanded to the Tax Commission to re-evaluate the facts using the appropriate standard. The Tax Commission then returned a unanimous decision, finding that the term "Redskin" did have at least one connotation that was offensive or derogatory.<sup>82</sup> Therefore, the court found that the vanity license plates violated an administrative rule and statute of the state of Utah, and the vanity plates were revoked.<sup>83</sup>

Chief Justice Christine M. Durham authored a spirited dissent, arguing that the Utah Supreme Court did not go far enough in reversing the Tax Commission and rejecting the Tax Commission's holding that the term "redskin" did not violate state law when it found that the term was not offensive, derogatory, vulgar or obscene.<sup>84</sup> The dissent argued that the majority's holding was weak by only insisting that a "reasonable person" standard should apply and that remand was necessary. Instead, Justice Durham posited that the time had come to adopt a reasonableness standard connected to the effect on members of the targeted or offended group.<sup>85</sup> In addition, the dissent argued that the Supreme Court should have boldly found that the term "redskin" was offensive to a reasonable American Indian based on the overwhelming evidence proffered by the petitioners.<sup>86</sup>

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79. *Id.*; see also cummings, *Lions and Tigers and Bears*, *supra* note 2.

80. See *McBride*, 977 P.2d at 468.

81. *Id.* at 470–71.

82. See Ray Rivera, *Panel Revokes 'Redskins' Plates Deemed as Slur*, S.L. TRIB., Mar. 4, 1999, at A1 ("The four-person commission, which includes three new panel members, voted unanimously to reverse its 1996 decision allowing the personalized plates, which said 'REDSKIN,' 'REDSKNS,' and 'RDSKIN.' The change of heart came a month after the Utah Supreme Court ruled the commission should have considered what an 'objective, reasonable' person would find offensive.").

83. *Id.*

84. See *McBride*, 977 P.2d at 472–73.

85. *Id.* at 473; see also cummings, *Lions and Tigers and Bears*, *supra* note 2, at 26–33.

86. See *McBride*, 977 P.2d at 473.



In both *Harjo* and *McBride*, the plaintiffs were initially successful in arguing that the challenged terms were offensive and demeaning to American Indians under trademark and state law. Despite the short lived success of *Harjo*, future litigants may find lasting success with more focused strategies and differing factual scenarios.

### B. First Amendment Challenges

In addition to trademark and state administrative law, opponents have used the First Amendment to challenge the use of American Indian mascots and nicknames. In *Crue v. Aiken*, advocates used the First Amendment to challenge the use of an American Indian mascot on the collegiate level.<sup>87</sup> The University of Illinois has used the image and caricature of Chief Illiniwek as a mascot since 1926.<sup>88</sup> Until recently, Chief Illiniwek was present at almost all university football and basketball games and appeared at various sporting events and functions campus-wide. Supporters of Chief Illiniwek say that he is not just a mascot to fans of the Fighting Illini,<sup>89</sup> but is something more than a student in a “traditional” costume—he is a symbol that depicts athletic teams that compete with honor, courage, and bravery and pays homage to Native Americans.<sup>90</sup> Fans of the Fighting Illini distinguish Chief Illiniwek from other hostile or abusive mascots by arguing that the Chief is “authentic,” both in dress and action.<sup>91</sup> Chief Illiniwek supporters claim that their Chief honors Native Americans, unlike the offensive caricature Chief Wahoo of Major League Baseball’s (MLB) Cleveland Indians or the linguistically offensive nickname of the Washington NFL football club.<sup>92</sup> Still, since the 1970s there has been a concerted movement on the University of Illinois campus to have the school retire and eliminate Chief Illiniwek.<sup>93</sup>

The plaintiffs in *Crue v. Aiken* were students and faculty members at the University of Illinois who publicly opposed Chief

87. *Crue v. Aiken*, 204 F. Supp. 2d 1130 (C.D. Ill. 2002).

88. *See* SPINDEL *supra* note 21, at 80–81.

89. Mike Wise, *The Squabbling Illini: Rallying Cries Lead to Rift*, N.Y. TIMES, Dec. 16, 2003. John Gadaut, a lawyer in Champaign, refers to himself as Native American even though he is white. His basis for doing so stems from the fact that he was raised in Illinois and the chief has special meaning to him as well. *Id.*

90. SPINDEL *supra* note 21, at 21.

91. *Id.*

92. *Id.* at 14. Some Native Americans refer to the mascot of the Washington franchise as the Native American “n-word.” *Id.*

93. *Id.* at 18–19.

Illiniwek as the university mascot and moniker because its presence created a hostile environment for American Indian students on campus.<sup>94</sup> The plaintiffs also claimed that the use of Chief Illiniwek promoted the inappropriate dissemination of erroneous, discriminatory and stereotypical information in a collegiate educational setting.<sup>95</sup> When anti-Chief protests and op-ed arguments found no traction, students and faculty members strongly opposed to the continued use of Chief Illiniwek determined that they would contact prospective student athletes that the various Illinois athletic teams were recruiting, and describe to the athletes the hostile campus environment they would be joining if they decided to attend the University of Illinois.<sup>96</sup>

The defendant in *Crue* was then Chancellor Michael Aiken. In March 2001, Chancellor Aiken sent an e-mail, the Preclearance Directive, to all students and faculty in response to the anti-Chief group's decision to contact prospective student athletes.<sup>97</sup> The Preclearance Directive warned that if the students and faculty members wished to contact prospective student athletes for any reason, including the hostile environment warning, they needed the permission of the Director of Athletics or the university would suffer NCAA imposed sanctions for violating NCAA rules in connection with contacting prospective student athletes.<sup>98</sup>

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94. 204 F. Supp. 2d 1130, 1134 (C.D. Ill. 2002)

95. *Id.*

96. *Id.*

97. *Crue*, 204 F. Supp. 2d at 1134–35.

98. *Id.* The text of the Preclearance Directive is reproduced below:

Questions and concerns have been raised recently about potential contacts by employees, students or others associated with the University with student athletes who are being recruited by the University of Illinois. As a member of the National Collegiate Athletics Association (NCAA) and the Big Ten Athletic Conference, there are a number of rules with which all persons associated with the University must comply. For example, the NCAA regulates the timing, nature and frequency of contacts between any University employee and prospective athletes. It is the responsibility of the coaches and administration in the Division of Intercollegiate Athletics to recruit the best student athletes to participate in varsity sports at the University of Illinois. No contacts are permitted with prospective student athletes, including high school and junior college students, by University students, employees or others associated with the University without express authorization of the Director of Athletics or his designee. The University faces potentially serious sanctions for violation of NCAA or Big Ten rules. All members of the University community are expected to abide by these rules, and certainly any intentional violations will not be condoned. It is the responsibility of each member of the University to ensure that all students, employees and others associated with the University conduct themselves in a sportsmanlike manner. Questions about the rules should be addressed to Mr. Vince Ille, Assistant Director

The Preclearance Directive caused an uproar that Chancellor Aiken sought to quell by addressing the faculty senate and attempting to discuss the First Amendment free speech concerns posited by students and faculty.<sup>99</sup> In his statement, Aiken reiterated the University of Illinois' commitment to abide by NCAA regulations, and added that the university did not wish to interfere with the free expression of ideas regarding matters that could be deemed of public concern.<sup>100</sup> After a court issued a temporary restraining order, Chancellor Aiken retracted the Preclearance Directive's decree that "no contacts are permitted with prospective student athletes . . . by University students, employees, or others associated with the University without express authorization of the Director of Athletics or his designee."<sup>101</sup> Even though Aiken, per court order, retracted some of the Preclearance Directive, the anti-Chief plaintiffs brought a lawsuit claiming that the initial issuance of the Preclearance Directive had violated their First Amendment rights through an impermissible prior restraint of speech.<sup>102</sup>

The *Crue* court agreed with the anti-Chief plaintiffs, holding:

While the Chancellor's ban might at first blush appear to be content neutral as it purported to apply to all speech, the fact that the directive applied only to the audience of prospective student athletes and was subsequently clarified by Mr. Ille to apply to at least two classes of purely content based speech, that being 1) speech for the purpose of addressing any issue related to athletics and 2) speech for the purpose of addressing the prospective student's possible participation in intercollegiate athletics, indicates that

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for Compliance, Bielfeldt Athletic Administration Building, 1700 S. Fourth Street, Champaign, IL 61820, (217) 333-5731, E-mail: ille@uiuc.edu.

*Id.*

99. *Id.* at 1135–36.

100. *Id.* The chancellor included in his remarks:

The University values and defends the principles of free speech and academic freedom for members of the University community. The University does not seek to interfere with the expression of views regarding matters of public concern. However, we also are a member of the NCAA, and are committed to controlling our intercollegiate athletics program in compliance with the rules and regulations of the NCAA.

*Id.*

101. *Id.* at 1136.

102. *Id.* at 1137.

the ban was in fact content-based, as it unquestionably imposed a substantial burden on a particular type of expressive activity.<sup>103</sup>

The court went on to hold that the “Preclearance Directive clearly constituted a content based prior restraint on speech as a matter of law,” making it an unconstitutional ban on free speech.<sup>104</sup>

The *Crue* court found that just because a prospective student athlete is contacted, that does not necessarily mean that the university has violated the NCAA’s contact regulation. The court gave examples of situations where the NCAA declared that contact with a prospective student athlete would be permissible and not subject to NCAA sanctions,<sup>105</sup> including: (1) a student purchasing season tickets to athletic events, (2) the anti-Chief plaintiffs sending communications to prospective student athletes by a professor, (3) the plaintiffs sending correspondence that the university was either unaware of or acted reasonably to prevent, and (4) the plaintiffs sending their “hostile environment” communications, by telephone or in person, to a prospective student-athlete.<sup>106</sup>

The outcome in *Crue v. Aiken* provides guidance to those seeking to oppose the use of Native American mascots at the collegiate level. Motivated faculty and students may express concern to potential students about a hostile environment on campus perpetuated by mascots and imagery still in use at Florida State University (Seminoles), the University of North Dakota (Fighting Sioux) and the University of Utah (Runnin’ Utes). Concerned activist groups can initiate grass roots efforts to inform recruits about the university’s unwillingness to change an offensive mascot that creates a hostile campus environment. However, backlash by alumni and boosters against protesting groups can be severe and combative.

### *C. Innovative Strategies in Challenging American Indian Mascots*

Recently, commentators have suggested that an intentional infliction of emotional distress (IIED) claim might be successful in challenging the athletic organizations that use or sponsor American Indian mascots.<sup>107</sup> The elements of IIED are: (1) the conduct involved

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103. *Id.* at 1138.

104. *Id.* at 1141.

105. *Id.* at 1142.

106. *Id.*

107. See Goldstein, *supra* note 2.

must be truly extreme and outrageous; (2) the actor must either intend that his conduct inflict severe emotional distress, or should have known that there was a high probability such distress would occur; and (3) the conduct must in fact cause severe emotional distress.<sup>108</sup>

The Restatement (Second) of Torts § 46 defines extreme and outrageous conduct, the first element of IIED, as “conduct . . . so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.”<sup>109</sup> Racial slurs, unless accompanied by some other conduct, are usually not enough to meet the first factor of the IIED test.<sup>110</sup> Courts generally require the presence of some other circumstance, although courts differ as to exactly what is required, before determining that the conduct at issue qualifies as extreme and outrageous.<sup>111</sup>

There are several examples that demonstrate how the use of American Indian mascots constitutes outrageous behavior to the extent that it can be categorized as extreme and outrageous. First, because of limited population and political power, American Indians remain the last racial minority in the United States that society still feels

108. See generally *Spahn v. Int'l Quality & Productivity Center*, 211 F. Supp. 2d 1072, 1076 (N.D.Ill., 2002).

109. RESTATEMENT (SECOND) OF TORTS §46 cmt. d (1965).

110. See Goldstein, *supra* note 2, at 702; see also *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (holding that a supervisor repeatedly uttering epithets toward a Mexican-American employee was not extreme and outrageous conduct and thus not intentional infliction of emotional distress); *Lay v. Roux Lab., Inc.*, 379 So.2d 451, 452 (Fla.App. 1980) (holding that a supervisor threatening to terminate a subordinate and uttering racial epithets was not sufficiently outrageous or atrocious to state an intentional infliction of emotional distress claim); *Taylor v. Metzger*, 152 N.J. 490, 706 A.2d 685, 703 (N.J. 1998). See generally *Briggs v. North Shore Sanitary Dist.*, 914 F. Supp. 245, 252 (N.D. Ill. 1996):

Briggs claims that she suffered extreme emotional distress and anguish because of the hanging pickaninny doll in her office, her subjection to racial slurs, her exclusion from office social activities, her placement on probation, and the refusal by the defendants to train her properly . . . While such conduct is deplorable, under Illinois law it cannot provide the basis for a claim of intentional infliction of emotional distress.

*Id.*

111. See Goldstein, *supra* note 2, at 702; see also *McGrath v. Fahey*, 533 N.E.2d 806, 809 (1988) (“Liability [for intentional infliction of emotional distress] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of human decency.”). The Court in *McGrath* continued:

It is thus clear that the tort [of Intentional Infliction of Emotional Distress] does not extend to “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities” . . . [t]he degree of power or authority which a defendant has over a plaintiff can impact upon whether that defendant’s conduct is outrageous.

*Id.*

comfortable publicly demeaning or insulting.<sup>112</sup> Native American religion, culture, and heritage remain fair game for those inclined toward racism and discrimination in contemporary society.<sup>113</sup> It is difficult to imagine a contemporary university or professional sports franchise using a nickname or mascot that disparages or disrespects African Americans, Hispanics or Asians.<sup>114</sup> Yet, mascots that are offensive to American Indians are adopted and recklessly used in contemporary society under the tired justifications of honor and inspiration.<sup>115</sup> The Tomahawk Chop, Seminole War Chant, and the name “Redskins” can be every bit as offensive to Native Americans as the “n-word” is to African Americans and the term “wetback” is to Hispanics.<sup>116</sup>

Second, the sheer number of times that these mascots are shown or mentioned on television or at stadiums tends to show how outrageous the use of these mascots is. American Indian mascots are not just words that represent a university’s name or a football franchise’s location. These terms are used to promote games on

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112. See Indian Country Today, *Native Americans Upset with OutKast: Oneida Nation Says Grammy Performance Used “Racial Stereotypes.”* MSNBC, Feb. 14, 2004, <http://www.msnbc.msn.com/id/4250399> (“Hip hoppers OutKast insulted American Indians with their show-ending performance on the Grammy broadcast Sunday night, and CBS allowed it.”). MSNBC reported that:

Both share culpability for a production number that reinforced stereotypes and undermined all of the good work being done in the entertainment industry to embrace and promote diversity and unify all people through music . . . . At the end of the program, OutKast performed their hit “Hey Ya” against a backdrop of a futuristic Indian teepee. Singer Andre “3000” Benjamin came out in a headdress accompanied by scantily-clad dancers with feathers in their hair. These may have been costumes to OutKast and the producers of the show, but to American Indians they were the latest in a long line of insults, caricatures drawn from history.

*Id.*; see also Kim Chandler Johnson & John Terrence Eck, *Eliminating Indian Stereotypes From American Society: Causes and Legal and Societal Solutions*, 20 AM. INDIAN L. REV. 65 (1996) (“Even in the 1990s, derogatory stereotypes of Native Americans are all too common. In school textbooks, film and television productions, literature and even children’s toys, the American Indian is portrayed in a simplistic way: as a relic of the Wild West frontier days.”); andré douglas pond cummings, *A Shifting Wind?: Media Stereotyping of American Indians and the Law*, in LOST AND FOUND: AMERICAN INDIANS AND THE MASS MEDIA (forthcoming 2010) (University of Oklahoma Press)..

113. See Johnson & Eck, *supra* note 112, at 66.

114. See Brown, *supra* note 2. Brown opines “[t]he Washington Redskins. The Cleveland Indians. The Atlanta Braves. The Kansas City Chiefs. Are these names offensive? Maybe, but consider such names as the Miami Spics, the New York WASPS, the Mississippi Sambos, or the Los Angeles Gooks.” *Id.*

115. See IN WHOSE HONOR? (New Day Films 1997) (detailing the controversy of Chief Illiniwek at the University of Illinois, including the justifications by white administrators and white alumni that the moniker and costumed Chief honors Native Indian tribes in Illinois).

116. See SPINDEL *supra* note 21, at 14.

television, are prominently displayed in end zones and other areas during games, are used as an integral part of half time shows, and are displayed during the highlights of athletic contests on nationwide sports broadcasts. The disparaging mascots and the humiliation and psychological damage they potentially inflict are unavoidable. The images of these mascots, in college and professional leagues, are everywhere—on television, radio, billboards, and clothing. Because such terms are highly offensive to some American Indians and are displayed constantly, their continued use could be construed as outrageous conduct and may meet the first prong of the test for IIED.<sup>117</sup>

Under the second prong of the IIED test, “the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that this conduct will cause severe emotional distress.”<sup>118</sup> Those responsible for continuing to perpetuate the use of hostile and abusive mascots have certainly been put on notice that American Indian citizens and others find these images offensive and disparaging.<sup>119</sup> There has been increasing support for the movement against the use of Native American mascots.<sup>120</sup> The plethora of newspaper articles that were published when the NCAA unveiled its new policy evidenced the strength of this movement,<sup>121</sup> as did the numerous scholarly articles published in response to the policy.<sup>122</sup>

Those who oppose the use of hostile and abusive American Indian mascots have staged protests, participated in sit-ins, and sent

117. See generally Goldstein, *supra* note 2 and *Harjo*, 50 U.S.P.Q.2d 1705 (1999).

118. See Goldstein, *supra* note 2, at 700; see also RESTATEMENT (SECOND) OF TORTS §46 cmt. i (1965).

119. *Id.*

120. See cummings, *Progress Realized?*, *supra* note 1, at 313; see also cummings, *Lions and Tigers and Bears*, *supra* note 2, at 34.

121. See generally Andrew Aragon and Lauren Gustus, *Utah Fans Have Plenty To Say*, SALT LAKE TRIB., Aug. 6, 2005, at D2; Ken Davis, *NCAA Rejects ‘Hostile’ Images; Events Will Ban Native American Mascots, Logos*, HARTFORD COURANT, Aug. 6, 2005, at A1; Martin Fennelly, *FSU Lawsuit Just Starting To Heat Up*, TAMPA TRIB., Aug. 11, 2005, at 1; Arnold Hamilton, *Will Indian Mascots Still Have a Place on the Team? NCAA Review Starts Today, and Even Some Tribes are Split*, DALLAS MORNING NEWS, Aug. 3, 2005, at 1A; Leslie Linthicum, *Some Welcome NCAA Ban on Native Mascots; Others Say Nicknames are OK if they are Respectful of Indians*, ALBUQUERQUE JOURNAL, Aug. 6, 2005, at D1; Jim McLaurin, *A Noble Debate Can Alter Attitudes*, THE STATE, Aug. 12, 2005; Dave Newbart, *U. of I Weighing Options on Ban; University: ‘Fighting Illini’ Does Not Refer to Tribe, but to 1919 Football Champs*, CHI. SUN-TIMES, Aug. 24, 2005, at 4; Don Walker, *No post-season for Indian mascots; NCAA ban goes into effect Feb. 1*, MILWAUKEE JOURNAL SENTINEL, Aug. 6, 2005, at C1.

122. See *supra* note 15.

thousands of letters expressing their opposition. The university presidents, board of trustee members, and owners of professional sports franchises who continue to use the antiquated and offensive mascots are aware of the opposition to their teams' names.<sup>123</sup> This clear opposition could be used to show that administrators and owners in positions of power are aware that the team names they use are offensive and abusive, and have detrimental effects on Native Americans. Therefore, those who wish to challenge the use of these images might be able to meet the second prong of IIED.

Under the third prong, plaintiffs must show that they have suffered severe distress. Courts generally expect medical evidence to prove the existence of distress.<sup>124</sup> The case of Charlene Teeters serves as one example of how plaintiffs can prove severe emotional distress.<sup>125</sup> Ms. Teeters, an American Indian student at the University of Illinois, was one of the first to begin protesting and campaigning against Chief Illiniwek and his mocking use of sacred headdress, costumes, spiritual rituals and dances.<sup>126</sup> Teeters asserted that the continued use of Chief Illiniwek at the University of Illinois caused her to eventually move away from Champaign.<sup>127</sup> So too, the tears she cries whenever the subject of Native American mascots surfaces indicates the pain and suffering she and her children have endured.<sup>128</sup>

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123. See *IN WHOSE HONOR?* (New Day Films 1997).

124. See Goldstein, *supra* note 2, at 704; see also *Harris v. Jones*, 380 A.2d 611 (Md. 1977); see also *Czajkowski v. Meyers*, 172 P.3d 94, 100 (Mont. 2007) ("It is well-established that emotional distress can manifest in both physical and non-physical harm. Comment k to §46 addresses physical harm. Understandably, it is easier to conclude that emotional distress is genuine where there is discernible bodily harm that is attributable to the emotional distress, such as gastrointestinal disorders, elevated blood pressure, hair loss or ulcers."); *Alcorn v. Ambro Engineering, Inc.*, 468 P.2d 216, 218 (Cal. 1970) ("Plaintiff's allegations that defendants intentionally inflicted emotional distress for the purpose of causing plaintiff to suffer emotional and physical harm, and that plaintiff did suffer physical illness, shock, nausea and insomnia as a result thereof, meet the requirements of the foregoing authorities. The physical consequences of shock or other disturbance to the nervous system are sufficient to satisfy the requirement that plaintiff has suffered physical injury from defendants' conduct."); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 285 (Cal. 1952).

125. See Goldstein, *supra* note 2, at 709; see also *IN WHOSE HONOR?* (New Day Films 1997) (detailing the plight of Charlene Teters at the University of Illinois who boldly protested the use of Chief Illiniwek and was subjected to humiliation, abuse and threats).

126. See *cummings, Progress Realized?*, *supra* note 1, at 309–12 (describing the white male students that dress in American Indian regalia and mock native dance and costuming in order to provide entertainment for football and basketball fans as Chief Illiniwek at the University of Illinois and Chief Osceola at Florida State University); see also *IN WHOSE HONOR?* (New Day Films 1997) (recounting Charlene Teters' campaign against Chief Illiniwek, the emotional damage that the hostile environment created by the Chief inflicted upon her children and the threats and abuse she endured based on her protests).

127. See Goldstein, *supra* note 2, at 709.

128. *Id.*; see also *IN WHOSE HONOR?* (New Day Films 1997).



Charlene Teeters received harassing phone calls and e-mails and was physically confronted and menaced because she dared to protest against the continued use of the hostile and abusive mascot Chief Illiniwek in Champaign.<sup>129</sup>

The use of IIED could prove to be a most effective challenge to the teams and universities that insist on clinging to racially insensitive images. Professional sports teams create enormous amounts of revenue.<sup>130</sup> This is also true to a lesser extent on the collegiate level.<sup>131</sup> The mascots will, more likely than not, continue to be used until it is no longer fiscally advantageous to do so. Successful IIED claims with large damage awards could hit the owners and school presidents where it hurts most—in the pocket.

While there is some potential that plaintiffs could find redress by challenging American Indian mascots in the courts, in 2005, the NCAA addressed the issue directly, presumably in an attempt to avoid similar litigation, by enacting a policy that bans the use of hostile and abusive mascots during postseason play.

#### IV. THE NCAA'S AMERICAN INDIAN MASCOT POLICY

##### *A. The Power of the NCAA*

The NCAA is a voluntary organization of public and private colleges and universities that belong to various athletic conferences.<sup>132</sup>

129. See Goldstein, *supra* note 2, at 709.

130. See Jarrett Bell, *NFL Tug-of-War Over Revenue*, USA TODAY, July 5, 2004 (“The NFL’s 32 teams—with a combined value exceeding \$20 billion—split most of the revenue. Including the eight-year, \$17.6 billion television package that expires after the 2005 season, the NFL and its franchises generate about \$5 billion in annual revenue and share roughly two-thirds of that amount equally.”).

131. See NAT’L COLLEGIATE ATHLETIC ASS’N, REVISED BUDGET FOR FISCAL YEAR ENDED AUGUST 31, 2008, <http://www.ncaa.org/wps/ncaa?ContentID=4> (follow “Current Budget” hyperlink) (last visited Mar. 28, 2009). The NCAA expected to generate approximately \$540 million in television and licensing revenue and another \$54 million from championship events in 2007-2008. NAT’L COLLEGIATE ATHLETIC ASS’N, 2007-08 NCAA BUDGETED REVENUES, <http://www.ncaa.org/wps/ncaa?ContentID=4> (follow “Current Budgeted Revenues Chart” hyperlink) (last visited Mar. 28, 2009).

132. About the NCAA, <http://www.ncaa.org/wps/ncaa?ContentID=2> (last visited Mar. 28, 2009) (“The National Collegiate Athletic Association (NCAA) is a voluntary organization through which the nation’s colleges and universities govern their athletics programs. It is comprised of institutions, conferences, organizations and individuals committed to the best interests, education and athletics participation of student-athletes.”); see generally Mathew Keegan, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for Change In the NCAA Enforcement Procedures*, 25 N. ILL. L. REV. 297, 299 (2005).

The organization is a “membership-led association of colleges and universities with athletics programs committed to: protecting the best interests of student-athletes; . . . ensuring a quality education for student-athletes; . . . and supporting athletics participation opportunities for student-athletes.”<sup>133</sup> The basic purpose of the NCAA is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>134</sup>

The NCAA is governed by a complex and intricate system of bylaws and rules.<sup>135</sup> It is the responsibility of the individual schools to make certain that the principle of “institutional control” is upheld, and that all people involved comply with the rules and bylaws of the NCAA.<sup>136</sup> Member institutions are required to enforce the rules that the NCAA promulgates, and the penalties the NCAA imposes are applied when a school fails to do so.<sup>137</sup>

Ostensibly, the NCAA is a voluntary membership organization, but oftentimes colleges and universities have no other choice than to join the NCAA, and thus be subject to its iron-fisted governance. The enormous amount of money that NCAA member schools can make essentially mandates that schools join or be left out of the financial windfall.<sup>138</sup> The lack of alternatives for member institutions makes it especially important that any NCAA governance policy is sound, fair, thoughtful, and equally applicable to all members.

The U.S. Supreme Court opined that colleges and universities have alternatives to joining the NCAA when it announced its decision in *Nat’l Collegiate Athletic Ass’n v. Tarkanian* in 1988.<sup>139</sup> Coach Jerry Tarkanian, former men’s basketball coach for the University of Nevada, Las Vegas (UNLV), argued that the NCAA’s power was so overwhelming that university administrations were left with no other choice than to comply with NCAA regulations, including those that

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133. *Id.*

134. *Id.*; see also Our Mission, <http://www.ncaa.org/wps/ncaa?ContentID=1352> (last visited Mar. 28, 2009) (“[The NCAA’s] purpose is to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”).

135. See Keegan, *supra* note 132; see generally NAT’L COLLEGIATE ATHLETIC ASS’N, 2007-08 NCAA DIVISION I MANUAL, available at [http://grfx.cstv.com/photos/schools/stan/genrel/auto\\_pdf/2007-08\\_d1\\_manual.pdf](http://grfx.cstv.com/photos/schools/stan/genrel/auto_pdf/2007-08_d1_manual.pdf).

136. See Keegan, *supra* note 132.

137. See *id.* at 299–300.

138. See *infra* notes 162–163 and accompanying text.

139. 488 U.S. 179 (1988).

deprive parties of constitutionally protected rights.<sup>140</sup> Justice John Paul Stevens, in announcing the Court's majority holding, declared that "[t]he University's desire to remain a powerhouse among the nation's college basketball teams is understandable and non-membership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent."<sup>141</sup> At bottom, the *Tarkanian* case cemented the nearly unfettered power of the NCAA when it held that the NCAA, as a voluntary, private membership organization did not have to comply with due process and other constitutional requisites when dealing with its voluntary membership institutions.<sup>142</sup>

While theoretically logical, the reality is that breaking away from the NCAA is not a viable option for any member institution. Membership in the NCAA is almost mandated because: (1) the amount of money that would be lost is too great for universities to ignore, (2) non-membership would result in a lack of quality opponents to fill an athletic contest schedule, and (3) not joining the NCAA would mean that there would be no method of creating finality to a season and crowning a champion.<sup>143</sup> Therefore, members are faced with no viable option other than to abide by the rules the NCAA promulgates because breaking away from the NCAA would spell the death knell for any university's athletic department. Furthermore, the rules and policies that the NCAA promulgates have very little play in the joints. Member schools must either abide by the rules and policies the NCAA promulgates or face significant fines and penalties.

### *B. The 2005 American Indian Mascot Policy*

On August 5, 2005, the NCAA Executive Committee, a body that consists of Presidents or Chancellors from major Division I, Division II and Division III institutions, pursuant to the power given it

140. *Id.* at 465.

141. *Id.* at 465 n.19.

142. *See id.* at 465–66.

143. *See* Dana Mallozi, *Dominicans in the News: An Exciting Opportunity for Dominican University*, MARIN IND. J., Jun. 19, 2008. ("Joining the NCAA is both a golden opportunity and a challenge for Dominican. It changes the program's competitive dynamics, sending Penguin teams on the road. The league includes colleges in Hawaii, Utah and Arizona. But it also boosts Dominican's image and the reputation of its athletic programs. Both should help attract students and help build support for its sports teams and the university beyond its campus boundaries."); *see also* Jonathan Jenkins, *A Need for Heightened Scrutiny: Aligning the NCAA Transfer Rule with its Rationales*, 9 VAND. J. ENT. & TECH. L. 439, 446 (2006).

through NCAA by-law 4.2.1.,<sup>144</sup> unveiled a new policy that would govern member institutions that continued to use Native American mascots.<sup>145</sup> Even though the NCAA may have joined the battle at a

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144. See *supra* note 16.

145. NAT'L COLLEGIATE ATHLETIC ASS'N, MINUTES OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION EXECUTIVE COMMITTEE, AUGUST 2005, available at <http://www.ncaa.org/wps/ncaa?ContentID=3815> (last visited Mar. 28, 2009). The text of the policy is as follows:

(1) There are certain events in intercollegiate athletics, such as NCAA championship competition, that are more of a public forum rather than home contests. Therefore, for those institutions that choose not to remove all references to Native American culture, the subcommittee outlined specific recommendations.

It was VOTED: "That the Association shall implement a policy, effective February 1, 2006, that institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery will be prohibited from hosting any NCAA national championship competition.

"Effective February 1, 2006, institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery must take reasonable steps to cover up any of these references at any predetermined NCAA championship competition site that has been previously awarded. The financial responsibility to take reasonable steps rests on each institution and these reasonable steps must be taken in timely manner.

"Effective August 1, 2008, institutions displaying or promoting hostile or abusive racial/ethnic/national origin references on their mascots, cheerleaders, dance teams, and band member uniforms or paraphernalia are prohibited from wearing this material at an NCAA championship competition site.

"Effective February 1, 2006, institutions with student-athletes wearing uniforms or paraphernalia with hostile or abusive racial/ethnic/national origin references must ensure that those uniforms or paraphernalia are not worn during NCAA championship competition."

(2) Further, in the context of nonchampionship activities, the Committee strongly encouraged institutions that continue to use hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery to adopt the following best practices:

(a) Model specific institutions. Institutions should consider emulating the examples of institutions that do not support the use of Native American mascots or imagery such as the University of Iowa and the University of Wisconsin System, which do not schedule regular season, nonconference competition with institutions that use Native American nicknames, mascots or imagery.

(b) NCAA publications. Institutions should design their publications and campus materials in a manner that removes all hostile or abusive racial/ethnic/national origin references. The Committee noted that this is the current policy of the NCAA national office.

(c) Education/appreciation/outreach. Institutions should place an emphasis on understanding and awareness of the negative impact of hostile or abusive symbols, names and imagery. Further, institutions are encouraged to create a greater level of understanding and knowledge of Native American culture. Outreach to Native American tribes, organizations and students or faculty in their local areas is a start. However, further outreach

late hour, it is to be commended for wading into the fray. However, for reasons that will be discussed below, the NCAA policy does not go far enough.

This new policy, which took effect on February 1, 2006, was adopted to “prohibit NCAA colleges and universities from displaying hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships.”<sup>146</sup> A key aspect of the policy is that any school that uses a nickname or mascot that is hostile or abusive must take steps to cover up those references if that school had previously been granted the right to host a NCAA championship event.<sup>147</sup> The new policy specifically bans the display or promotion of hostile or abusive references in connection with mascots, cheerleaders, dance teams, logos and band uniforms at NCAA championship events as of August 1, 2008.<sup>148</sup> Finally, the policy stated that effective immediately, colleges and universities with student athletes wearing uniforms or having paraphernalia with hostile or abusive references must ensure that those uniforms will not be worn or displayed at NCAA championship events.<sup>149</sup>

In addition to those specific requirements, the NCAA Executive Committee strongly urged three specific actions that schools should voluntarily consider adopting. The first suggestion is that schools imitate practices that have been adopted by several member institutions that refuse to schedule non-conference games with universities that continue to use hostile or abusive American Indian mascots and imagery.<sup>150</sup> For instance, the University of Iowa and the

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beyond an institution’s local area may be necessary in order to obtain a greater understanding and awareness of issues that concern the Native American community. In addition, the Committee recommends initiatives that would educate the membership via public service announcements and posters. It is important to note that the purpose of education and outreach is to provide institutions with an opportunity to disengage from the use of racial/ethnic/national origin mascots, nicknames or imagery in the near future.

(d) Conference-level collaboration. Institutions should develop a partnership with conference offices in order to address this issue at the institutional level, as well as with the media.

*Id.*

146. *Id.*

147. See Press Release, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review (Sept. 28, 2005), available at <http://www.ncaa.org/wps/ncaa?ContentID=5870> (last visited Mar. 28, 2009).

148. See *supra* note 145.

149. *Id.*

150. *Id.*

University of Wisconsin have a practice of not scheduling athletic competitions with schools that have Native American nicknames, imagery, or mascots.<sup>151</sup> Second, the committee recommended that all schools should review their publications to ensure that they do not contain any hostile or abusive references to American Indians.<sup>152</sup> Third, the NCAA encouraged member schools to develop programs to educate their constituents on the understanding and awareness of the negative impact of hostile and abusive nicknames and symbols and to create a greater level of knowledge of Native American heritage and culture.<sup>153</sup>

Shortly after the NCAA announced its new hostile or abusive Native American mascot policy, it expanded on the language included from its August 5, 2005 press release, stating: “Harrison [Walter Harrison, chair of the Executive Committee and President of the University of Hartford] stressed that institutions affected by the new policy can seek further review of the matter through the NCAA governing structure.”<sup>154</sup> The NCAA established an appeals process for

151. *Id.* While Iowa and Wisconsin do not schedule non-conference games with universities that continue to use hostile Native American mascots, both schools compete in the Big 10 athletic conference and by rule regularly play fellow conference member the University of Illinois (Fighting Illini), a school that for decades has been at the heart of this abusive mascot controversy and has steadfastly refused to eliminate its mascot, that is, until very recently. *See* cummings, *Progress Realized?*, *supra* note 1, at 331–32 (exploring the controversial 2007 decision by the University of Illinois to retire Chief Illiniwek and its half-hearted efforts to comply with the NCAA policy); *see also* andré douglas pond cummings, *Retiring Chief Illiniwek*, SPORTS LAW BLOG, Mar. 8, 2007, <http://sports-law.blogspot.com/2007/03/university-of-illinois-in-recent-move.html>.

152. *See supra* note 145.

153. *See id.*

154. Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), *available at* <http://www.ncaa.org/wps/ncaa?ContentID=1664> (last visited Mar. 29, 2009). *See also* Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Approves Native American Mascot Review Process (Aug. 19, 2005), *available at* <http://www.ncaa.org/wps/ncaa?ContentID=4515> (last visited Mar. 29, 2009). The entire release on the appeals process reads as follows:

Reviews will be directed to Bernard Franklin, NCAA senior vice-president for governance and membership, who will chair an NCAA staff committee designated by the Executive Committee. This staff review committee will consider all of the facts related to each institution’s appeal and is expected to start on the first review early next week. The staff review committee will decide if an institution should remain subject to the policy and the staff’s decisions may be reviewed by the NCAA’s Executive Committee. “This is a complex issue and the circumstances surrounding each institution’s use of Native American mascots and imagery is different,” Franklin said. “Each review will be considered on the unique aspects and circumstances as it relates to the specific use and practice at that college or

member institutions that use hostile or abusive mascots. The “further review” appeals process allows offending institutions to seek review of their use of hostile and abusive mascots and imagery by the NCAA and perhaps allow continued use of these offensive mascots if certain conditions are satisfied.<sup>155</sup> Essentially, the NCAA shut the door, but refused to lock it.

A committee of NCAA staff members, led by Bernard Franklin, the association’s senior vice-president for governance and membership, will hear appeals from the institutions on the NCAA’s list.<sup>156</sup> Decisions by this staff committee are subject to the Executive Committee’s review.<sup>157</sup> One primary factor that the staff committee considers is whether documentation exists to substantiate a claim that a “namesake” tribe has formally approved the institution’s use of the offensive mascot, name, and imagery.<sup>158</sup> The NCAA claims that this “namesake” tribe approval would not be the only factor considered, but failed to elaborate on what other factors might be considered, except to say that tribal approval may not be enough to win an appeal.<sup>159</sup>

### *C. Primary Weaknesses in the NCAA’s Policy*

Again, the NCAA deserves credit for trying to remedy a very public and controversial matter. The fact that the NCAA took action shows that it is ready to deal with a civil and human rights issue that has plagued college campuses nationwide for decades. However, the current policy includes several flaws that must be addressed before it can be deemed effective. Specifically, the NCAA must expand the policy to also ban the use of hostile or abusive mascots during the

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university.”

One primary factor that will be considered in the review is if documentation exists that a “namesake” tribe has formally approved of the use of the mascot, name and imagery by the institution. “It is vitally important that we maintain a balance between the interests of a particular Native American tribe and the NCAA’s responsibility to ensure an atmosphere of respect and sensitivity for all who attend and participate in our championships,” said NCAA President Myles Brand.

*Id.*

155. *See id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *See Michelle Kaufman, A Seminole is still a Seminole: NCAA lifts FSU nickname ban*, MIAMI HERALD, Aug. 24, 2005.

regular season. So too, the appeals process should be revised if not eradicated.

### *1. Not Enough Coverage*

The first flaw in the NCAA's American Indian mascot policy is that it does not go far enough. The NCAA only bans hostile and abusive mascots, imagery, or logos during NCAA postseason championship events.<sup>160</sup> This "penalty" only slightly limits the use of offensive Native American mascots. For the policy to effect an offending institution, the lofty condition that must first be met is that the athletic team must qualify for the postseason.<sup>161</sup> For example, the most prominent championship that this policy covers is the NCAA men's basketball championship, commonly referred to as "March Madness."<sup>162</sup> This tournament has become increasingly popular over the years because of the bracket-style playoff system involved and the increased possibility of major upsets.<sup>163</sup> For the policy to have any effect whatsoever, teams such as Florida State University and the University of North Dakota, and other schools that continue to use abusive or hostile mascots or imagery must first reach the NCAA postseason. This is a difficult feat in and of itself because only 65 of the over 300 NCAA Division I member institutions qualify for the men's NCAA basketball tournament. The policy only applies if one of the offending institutions qualifies for the 65 team tournament. If a member institution fails to qualify for the tournament, then the policy has little effect and the athletic teams and universities can continue to subject the public to their insensitive mascots, abusive imagery and related offensive rituals. Offending member institutions would, however, still be subject to the policy provision that prevents schools with a hostile or abusive mascot from hosting a NCAA championship at their home court or field.<sup>164</sup> That said, most member institution communities have a difficult time hosting and sustaining NCAA championship events as this requires necessary infrastructure not

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160. See *supra* note 9.

161. See *supra* note 145.

162. See Jonathan Gonzalez, *Trademark Goodwill, Brand Devaluation, and the Neo-Political Correctness of College Athletics: Did Marquette's Recent Identity Crisis Cost Them Thousands or Even Millions of Dollars In Brand Value?*, 14 *SPORTS LAW. J.* 195, 202 (2007); see also Richard Sandomir, *Signoff: Why They Call It March Madness*, N.Y. TIMES, Mar. 24, 1996; Matt Villano, *Victory Never Smelled Worse*, N.Y. TIMES, Mar. 25, 2007.

163. In 1999, CBS paid \$6 billion dollars for the exclusive right to broadcast the NCAA men's basketball championship for 11 years. See *March Money Madness: CBS Sports to spend \$6 billion over 11 years for basketball tourney*, CNNMONEY.COM, Nov. 18, 1999, <http://money.cnn.com/1999/11/18/news/ncaa/> (last visited Mar. 29, 2009).

164. See *supra* note 145.



readily available at most locations (i.e. airports, hotels, restaurants, etc.). Thus, this provision, while heartening, leaves numerous unnecessary gaps.

For a short time, the NCAA policy raised a major question regarding whether it would apply to the largest stage, the college football championship. The Bowl Championship Series (BCS), is a process through which a college football champion is crowned, but does not formally come within the purview of NCAA policy because the BCS is an independent organization.<sup>165</sup> The NCAA suggested that the BCS adopt its new policy, but the BCS determined that it was not structurally able to implement the policy, thereby punting the issue back to the NCAA.<sup>166</sup> Thereafter, the NCAA announced that the mascot prohibition would be in force for all BCS football games, as well as all postseason bowl games held throughout the country.<sup>167</sup>

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165. See Timothy Kober, *Too Many Men on the Field: Why Congress Should Punt on the Antitrust Debate Overshadowing Collegiate Football and the Bowl Championship Series*, 15 SETON HALL J. SPORTS & ENT. L. 57, 61 (2005).

166. Doug Lederman, *NCAA Extends the Reach of Mascot Ban*, INSIDE HIGHER ED. Sept. 21, 2005. The article states:

But while the NCAA does not oversee the Bowl Championship Series, which is governed by a coalition of the major football-playing conferences, the association does have the authority to license the Division I-A bowl games that serve as the basis for the championship series. And on Tuesday, the association announced that it would require bowl games to comply with the NCAA's "principles for the conduct of intercollegiate athletics" in the NCAA's constitution, which "contains basic principles for the value of cultural diversity and forms the basis for the mascot policy."

*Id.*; see also *NCAA Extends Indian Mascot Ban to Bowl Games*, USA TODAY, Sept. 21, 2005. USA Today reported that:

The NCAA is requiring bowl games to ban the 'hostile' or 'abusive' use of American Indian nicknames, mascots and logos beginning next year. On Tuesday, the NCAA announced it is extending its prohibition to include bowl games. . . . Although the NCAA does not run bowl games, it does sanction them. So the governing body agreed to add the mascot ban to its list of requirements to be licensed. The prohibition will extend beyond the five BCS bowl games and include all of the postseason games.

*Id.*

167. Despite the BCS bowl prohibition, Florida State University, which has a NCAA identified offensive mascot, played in the 2006 Orange Bowl as the "Seminoles" against Penn State University and the University of Utah, again which has a NCAA identified offensive mascot, played in the 2009 Sugar Bowl as the "Utes" against the University of Alabama, by virtue of successful appeals to the American Indian mascot policy. See Charlie Nobles, *In Battle of Old Lions, Paterno Gets Final Roar*, N.Y. TIMES, Jan. 4, 2006, at D1. See also *NCAA takes Utah off Banned Mascots List*, ESPN.COM, Sept. 3, 2005, <http://sports.espn.go.com/ncaa/news/story?id=2149907>; Associated Press, *Undeclared! Utah Stuns Alabama in Sugar Bowl*, NBC SPORTS, Jan. 3, 2009, <http://nbcsports.msnbc.com/id/28473223/>.

The NCAA policy, in not going far enough, fails to recognize that the American Indian mascots and nicknames are offensive all of the time, not just during the postseason. Offensive terms are not only periodically offensive. For thirty years, opponents of Native American mascots have protested that these names are degrading, not only to American Indians individually, but also to their past, history, and culture. Because these monikers are racist, hostile, abusive and derogatory, all NCAA member institutions should eliminate their use, especially in light of the fact that all of the member institutions are, at core, academic institutions.

The policy, in its current form, fails to fully appreciate the offensiveness of the argument that supporters of Native American mascots make when they claim that the mascots and logos are not meant to denigrate Native Americans, but are meant to honor them.<sup>168</sup> Supporters of offensive American Indian mascots argue that American Indians are wrong to feel that these mascots disparage them and should rather feel honored and respected.<sup>169</sup> However, it is simply inappropriate to instruct Native Americans and other activists on how they should feel when they see rituals, sacred costumes, dances and traditions mocked.<sup>170</sup>

Another argument that supporters of the continued use of the Native American mascots and logos assert is that the abandonment of those mascots and logos would leave the institutions without an identity or unifying commonality. The NCAA policy also fails to expressly reject this argument,<sup>171</sup> which falls far short of constituting a compelling reason for the continuation of hostile or abusive nicknames at institutions that are supposed to encourage academic and social growth. Dozens of institutions have appropriately eliminated their racist and discriminatory mascots and logos and have not only survived but prospered.<sup>172</sup>

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168. See *IN WHOSE HONOR?* (New Day Films 1997) (tracking the justifications that white administrators at the University of Illinois offer for the continued use of Chief Illiniwek. The administrators claim that Chief Illiniwek honors American Indians and any native individuals that do not understand that honor are hypersensitive and do not truly understand the intent of the majority white University).

169. See *id.*

170. See *cummings, Lions and Tigers and Bears, supra* note 2, at 26.

171. See *IN WHOSE HONOR?* (New Day Films 1997) (providing interviews with various University of Illinois alumni who decry those that oppose Chief Illiniwek and describe the tradition and unifying force that the Chief provides Illini fans and alumni).

172. Schools that have changed their mascots, including Stanford University, St. Johns University, Syracuse University, Marquette University and the University of Oklahoma, amongst others, have coped well with the mascot change.

Therefore, the current policy should be revisited and expanded. Member institutions that continue to use hostile or abusive names, logos, imagery and mascots should be banned from using them not only in the postseason, but also during regular season play. The NCAA also needs to ensure that college football programs will be covered under this regulation for the regular season. If a name is hostile or abusive to the point where it is banned from display at NCAA championship events, then it should logically be banned from regular season play as well.

The NCAA argues in response to calls for aggressive corrective action that it does not have the authority or power to implement an outright ban on offensive mascots.<sup>173</sup> Essentially, the NCAA adopts policies and rules through its member institutions, and, like its weak-kneed approach to minority hiring in college football,<sup>174</sup> NCAA leadership essentially posits that it cannot motivate or inspire its member institutions to adopt forward thinking, non-discriminatory policies in the American Indian mascot arena. This is an unfortunate and disingenuous stance.

The NCAA is widely regarded as a rigid, omnipresent organization that engages in heavy-handed governing whenever possible. The depth and breadth of the regulation and control that the NCAA exerts over member institutions is often breathtaking. It is ridiculous for an organization that oversees the adoption of policies that control when a football coach can and cannot observe a practice,<sup>175</sup> when and where athletic recruits can be contacted,<sup>176</sup> how many hours a scholarship athlete can work and how much money a student athlete can earn while employed,<sup>177</sup> to argue that it cannot oversee the adoption of a resolute and unyielding American Indian mascot policy.

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173. *The Lack of Diversity in Leadership Positions in NCAA Collegiate Sports: Hearing Before H. Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Commerce*, 110th Cong. 14–26 (2007) (statement of Myles Brand, President, Nat'l Collegiate Athletic Ass'n).

174. See Andre D. Williams, *Wheels of Diversity Turn Slowly*, THE MORNING CALL, May 6, 2007, (2007); see also andré douglas pond cummings, *whither chizik and kiffin?*, SPORTS LAW BLOG, Dec. 23, 2008, <http://sports-law.blogspot.com/2008/12/whither-chizik-and-kiffin.html>.

175. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2008-2009 DIVISION I MANUAL, at 239.

176. See *id.* at 80.

177. See *id.* at 69.

## 2. *Rethinking the Appeals Process*

The second intrinsic flaw in the NCAA's American Indian mascot policy is the continued existence of an appeals process. By allowing member institutions to continue to use their hostile or abusive nicknames after approval through an appeal, the NCAA undermines the effectiveness of its policy. Through the appeals process, a team on the NCAA's hostile or abusive mascot list<sup>178</sup> can appeal the NCAA's ruling and attempt to show not that its mascot is not hostile or abusive, but that a local American Indian tribe has approved the use of the hostile or abusive mascot.<sup>179</sup> In fact, schools are allowed multiple appeals, since the Executive Committee can review the staff review committee's decision.<sup>180</sup> Since the appeals process has been instituted, multiple member institutions have made use of it and several appeals have been granted allowing the continued use of hostile or abusive American Indian mascots and imagery.<sup>181</sup>

Florida State University and the University of Utah successfully used this appeals process to have their monikers and mascots removed from the list of member institutions that the NCAA has deemed as hostile or abusive.<sup>182</sup> Florida State University appealed the NCAA's determination that its mascot is hostile or abusive on the grounds that its six-decade relationship with the Seminole tribe in Florida was one of mutual respect.<sup>183</sup> Presumably, Florida State University never consulted or considered the Seminole tribe in Oklahoma.<sup>184</sup>

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178. *See supra* note 10.

179. *See supra* note 154.

180. *Id.*

181. Mark Alesia, *NCAA: Illini OK, not chief*, INDIANAPOLIS STAR, Nov. 12, 2005.

182. Doug Lederman, *Following in Florida State's Footsteps*, INSIDE HIGHER ED, Aug. 26, 2005.

183. *Supra* note 159.

184. Conflicting reports exist as to whether the Seminole tribe in Oklahoma (6,000 members) approved the use of the mascot by Florida State University. The New York Times reports that the Oklahoma Seminoles approved the use of Chief Osceola as a mascot. *See* Robert Andrew Powell, *Florida State Can Keep Its Seminoles*, N.Y. TIMES, Aug. 24, 2005, at D1. ("Yesterday, the National Collegiate Athletic Association agreed with the 3,100-member tribe and the Seminole Nation of Oklahoma, which had also endorsed the nickname."). Meanwhile, USA Today contravenes that report, quoting Oklahoma Seminole tribal leaders as stating that the tribe took no official position and was not asked for one by the NCAA, although several leaders of the Oklahoma based Seminoles are adamantly opposed. *See* Steve Wieberg, *NCAA Allowing Florida State to Use Its Seminole Mascot*, USA TODAY, Aug. 23, 2005. USA Today reports that some Seminole Indian leaders in Oklahoma are "appalled" at the NCAA's decision to permit Florida State's continued use of the moniker and mascot:

But dissent has been voiced within the Seminole Nation of Oklahoma, primarily by general council member David Narcomey, but the council has taken no official position on the FSU issue, according to Jennifer

Bernard Franklin, senior vice-president for governance and membership, and head of the staff review committee, stated: “The NCAA Executive Committee continues to believe the stereotyping of Native Americans is wrong. However, in its review of the particular circumstances regarding Florida State University, the staff review committee noted the unique relationship between the university and the Seminole tribe of Florida as a significant factor.”<sup>185</sup> The NCAA offered precious little guidance in explaining why Florida State University was removed from the list of offenders, other than tribal approval. The decision left the distinct impression that, despite the NCAA’s insistence that other factors will be considered, only one factor will be taken into consideration during an abusive mascot appeal: tribal approval. In fact, it appears that only local tribal approval is of concern to the NCAA.<sup>186</sup> Florida State University President T. K. Wetherell seemed to have that impression as well. Following the appeal, Wetherell stated: “It is our understanding that the NCAA’s amended policy now allows for the use of Native American names and symbols by those universities that have received the express support of their ‘namesake’ tribes. I am happy that the will of these namesake tribes now will be respected.”<sup>187</sup> As mentioned above, it is unlikely that Wetherell consulted the Seminole tribal leaders in Oklahoma.<sup>188</sup>

Since Florida State University’s appeal, the University of Utah, Central Michigan University, the University of North Dakota, and the University of Illinois have all pursued review from the NCAA staff review committee.<sup>189</sup> The University of Utah and Central Michigan University both had the support of their namesake tribes and both appeals were granted.<sup>190</sup> The University of North Dakota did not have

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McBee, the tribe attorney general. Narcomey, saying he was voicing his opinion only, wrote in an e-mail to USA TODAY of the decision: “I am deeply appalled, incredulously disappointed . . . I am nauseated that the NCAA is allowing this ‘minstrel show’ to carry on this form of racism in the 21st century.”

*Id.*

185. Press Release, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review (Aug. 23, 2005), available at <http://www.ncaa.org/wps/ncaa?ContentID=5864>.

186. See *supra* note 184 and accompanying text.

187. See Kaufman, *supra* note 159.

188. See *supra* note 184 and accompanying text.

189. See Alesia, *supra* note 181.

190. See Doug Lederman, *Two More Universities Off NCAA’s Mascot List*, INSIDE HIGHER ED., Sept. 6, 2005; see also Associated Press, *NCAA takes Utah off banned mascots list*, ESPN.COM, Sept. 3, 2005, <http://sports.espn.go.com/ncaa/news/story?id=2149907>; Press

the approval of the Standing Rock Sioux tribe in North Dakota and subsequently lost its appeal.<sup>191</sup> The University of Illinois could not find a tribe to support its moniker or Chief Illiniwek and the NCAA subsequently declined to remove them from the list of schools with hostile or abusive mascots.<sup>192</sup> Mr. Franklin, head of the staff review committee stated: “In its review of the particular circumstances regarding Illinois, the NCAA staff review committee found no new information relative to the mascot, known as Chief Illiniwek or the logo mark used by some athletics teams that depicts a Native American in feathered headdress, to remove the university from that list.”<sup>193</sup> Mr. Franklin also stated:

The staff review committee found that over the last decade, the volume and frequency of contentiousness around Chief Illiniwek has increased. Those who oppose continued use of Chief Illiniwek have grown in number and have found national platforms for their argument that the broad range of Native Americans perceives the Chief’s “fancy dance” a demeaning interpretation of their own customs and traditions. Media accounts, letters and e-mail continue to document instances of hostile behavior towards those who oppose the use of Chief Illiniwek.<sup>194</sup>

However, the staff review committee found that the term “Illini” is closely related to the name of the state and not closely associated with any Native American tribe.<sup>195</sup> As such, the University of Illinois was allowed to keep its “Fighting Illini” nickname, but was

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Release, The University of Utah, NCAA’s Ruling on Ute Name (Sept. 2, 2005), available at <http://unews.utah.edu/p/?r=021406-4> (last visited July 1, 2008) (“We are very pleased that the NCAA has recognized our close and mutually respectful relationship with the Ute Tribe and, accordingly, has removed the University of Utah from their list of schools that use Native American names or imagery inappropriately,” stated University President Michael K. Young.”).

191. See *Fighting Sioux Remain on Banned List*, PHILA. INQUIRER, Sept. 29, 2005, at D3; see also Michael Marot, *North Dakota Loses Nickname Appeal*, ST. PAUL PIONEER PRESS, Apr. 29, 2006, at 3D.

192. Press Release, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of Illinois, Champaign Review (Nov. 11, 2005), available at <http://www.ncaa.org/wps/ncaa?ContentID=5872> (last visited March 5, 2007).

193. *Id.*

194. *Id.*

195. *Id.*

required to eliminate Chief Illiniwek and its Illini logo.<sup>196</sup> Because the use of “Illini” has become so closely connected to Chief Illiniwek, the staff review committee suggested that the university undertake an educational program to help its constituents and the general public understand the origin of the term and the lack of any direct association with Native Americans.<sup>197</sup> Thus, while the University of Illinois’ mascot was deemed offensive, the staff review committee allowed the university to continue using its nickname.

The North Dakota Fighting Sioux and Chief Illiniwek controversies have continued unabated. The University of North Dakota has mightily resisted changing its moniker and logo since its appearance on the NCAA hostile or abusive list.<sup>198</sup>

Sentiment in North Dakota runs deep for its ‘Fighting Sioux’.<sup>199</sup> While [one] local Sioux tribe affirmatively and undeniably acknowledged the offensive nature of the North Dakota mascot and moniker,<sup>200</sup> the university [administration] is determined to continue its discriminating tradition.<sup>201</sup> Rather than comply with the NCAA policy and change its mascot, [the University of] North Dakota first appealed [the NCAA’s determination]. Lacking the support of the local tribe, the NCAA rejected North Dakota’s appeal.<sup>202</sup> Still determined to continue as the Fighting Sioux, the University of North Dakota sued the NCAA in federal court seeking an injunction against the NCAA’s action.<sup>203</sup> Facing protracted litigation, the NCAA and

196. *See id.*

197. *See id.*

198. *See* Cummings, *Progress Realized?*, *supra* note 1, at 329; *see also* David Dodds, *NCAA Waits for Tribal Input on UND Mascot: School Appealing ‘Hostile’ Judgment*, ST. PAUL PIONEER PRESS, Sept. 23, 2005, at 5B; Steve Wieberg, *N. Dakota Needs Tribes’ OK for Nickname*, USA TODAY, Oct. 29, 2007, at 13C.

199. *See* Dodds, *supra* note 198.

200. *See* Resolution, Standing Rock Sioux Tribe, Resolution in Opposition to the University of North Dakota’s Use of the Fighting Sioux (November 9, 2007), available at <http://aistm.org/20071109.standing.rock.UND.resolution.htm> (last visited Mar. 29, 2009).

201. *See* North Dakota Suing NCAA Over ‘Fighting Sioux’ Ban, CHI. SUN-TIMES, June 16, 2006, at 39; Dean Spiros, *Sioux Nickname, Logo Ban Upheld by NCAA: University of North Dakota Officials Said They Would Continue to Push Their Point that the School Was “Respectful” of Tribes Affected*, MINNEAPOLIS STAR TRIB., Sept. 29, 2005, at 1C.

202. *See supra* note 191 and accompanying text.

203. *See also* “Fighting Sioux” Lawsuit Delayed, COLLEGE HOCKEY NEWS.COM, Dec. 16, 2006, [http://www.collegehockeynews.com/news/2006/12/16\\_fighting.php](http://www.collegehockeynews.com/news/2006/12/16_fighting.php) (“The North

the University of North Dakota recently settled the lawsuit [on the following terms:] the ‘Fighting Sioux’ has three years to phase out the hostile moniker and mascot or convince the local Sioux tribes to grant their support to the university.<sup>204</sup>

The second avenue negotiated in the settlement, that the University of North Dakota had time to try to convince the local tribes to support its moniker, would allow the mascot to continue to offend.<sup>205</sup>

Recently the Standing Rock Sioux tribal leaders passed a resolution indicating that it is improbable that the University of North Dakota would be able to convince the Standing Rock Sioux tribe to grant its approval. The resolution states: “Therefore Be It Resolved, that the Standing Rock Sioux Tribal Council [“SRST”] hereby states definitively that the SRST opposes the use of the UND ‘Fighting

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Dakota administration has been defiant in its opposition to the NCAA’s ruling, more so than any other university.”).

204. cummings, *Progress Realized?*, *supra* note 1, at 329–30.

205. See cummings, *Progress Realized?*, *supra* note 1, at 330; see also Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Statement on Settlement of University of North Dakota Mascot Lawsuit (Nov. 19, 2007) available at <http://www.ncaa.org/wps/ncaa?ContentID=1264> (last visited Mar. 29, 2009). In announcing the settlement with the University of North Dakota, the NCAA observed:

The NCAA believes, as a general proposition, that the use of Native American names and imagery can create a hostile or abusive environment in collegiate athletics. However, the NCAA did not make any other findings about the environment on UND’s campus. The NCAA also acknowledges that reasonable people can disagree about the propriety of Native American imagery in athletics. The NCAA believes that the time has come to retire Native American imagery in college sports.

*Id.*; see also Libby Sander, *U. of North Dakota and NCAA Settle Lawsuit over ‘Fighting Sioux’ Mascot*, CHRON. OF HIGHER EDUC., Oct. 26, 2007, <http://chronicle.com/news/article/3317/u-of-north-dakota-and-ncaa-settle-lawsuit-over-fighting-sioux-mascot>. The terms of the settlement were described as follows:

Under the terms of the settlement, the university will have three years to obtain approval of the mascot from the two Sioux tribes with a significant presence in the state. If the tribes approve the mascot, the university will receive a waiver from the NCAA’s policy, which bars colleges from using American Indian imagery it deems hostile and abusive.

If the tribes do not approve the mascot, the university must adopt a new logo and mascot that do not violate NCAA policy. If the university keeps the mascot without tribe approval, it will be subject to certain NCAA restrictions.

*Id.*



Sioux' nickname and logo and rejects the notion that UND can 'win the support' of the SRST on this issue."<sup>206</sup>

As discussed above, the NCAA rejected the University of Illinois' appeal to continue to use Chief Illiniwek as its mascot:<sup>207</sup> "Recognizing that its postseason play would be in serious jeopardy if it persisted in using Chief Illiniwek, the president and board of the University of Illinois voted to "retire" its Chief from any further participation on the campus at Champaign."<sup>208</sup> Although some recognized the University's action as positive, University alumni decried the action, claiming that the University merely caved to the pressures of political correctness and repeated the tiresome mantra that Chief Illiniwek was a tribute to local American Indian tribes.<sup>209</sup> Once the university retired Chief Illiniwek, the NCAA removed it from the hostile or abusive mascot list and allowed the university to maintain its nickname, the Illini. However, the NCAA required that the university not only retire Chief Illiniwek, but eliminate its logo which contained an elaborate portrait of a Native American chief in feathered headdress within an orange and blue circle.<sup>210</sup> Although officially retired, Chief Illiniwek continues to appear at official university sporting events and parades.<sup>211</sup> Furthermore, the university now intends to market the offending logo on official throwback or vintage memorabilia and

206. Resolution, Standing Rock Sioux Tribe, Resolution in Opposition to the University of North Dakota's Use of the Fighting Sioux (November 9, 2007), available at <http://aistm.org/20071109.standing.rock.UND.resolution.htm> (last visited Mar. 29, 2009). See also cummings, *Progress Realized?*, *supra* note 1, at n.120.

207. See *supra* notes 192–197 and accompanying text.

208. cummings, *Progress Realized?*, *supra* note 1, at 331; see also *Chief Illiniwek Gone*, GRAND RAPIDS PRESS, Mar. 14, 2007, at D1; *Illinois Trustees Retire Chief Name, Images*, ORLANDO SENTINEL, Mar. 14, 2007, at D3; News Services, *No More Chief Illiniwek: U. of I. Trustees Rescind Controversial Mascot*, CHI. TRIB., Mar. 14, 2007, at 14.

209. cummings, *Progress Realized?*, *supra* note 1, at 331; see also Neil Milbert, *NCAA Ban on Chief "Final": Illinois Must Retire Its Indian Mascot or Lose Opportunity to Host Any Postseason Events*, CHI. TRIB., Apr. 29, 2006, at C3; *NCAA Rejects Appeal on Chief Illiniwek*, ST. LOUIS POST-DISPATCH, Apr. 29, 2006, at A10; *Chief Illiniwek Gone*, *supra* note 208; *Illinois Trustees Retire Chief's Name, Images*, *supra* note 208.

210. cummings, *Progress Realized?*, *supra* note 1, at 332; see also cummings, *Retiring Chief Illiniwek*, *supra* note 151.

211. cummings, *Progress Realized?*, *supra* note 1, at 332; see also Susan Saulny, *University Reverses Policy to Allow Mascot's Return*, N.Y. TIMES, Oct. 28, 2007, at A16 ("Months after the University of Illinois decided to retire the mascot . . . the image of Chief Illiniwek, a buckskin-clad American Indian, was allowed to return to an event . . ."); *Chief Illiniwek OK for Homecoming Parade*, AP NEWS, Oct. 29, 2007, available at <http://www.thefreelibrary.com/Chief+Illiniwek+OK+for+homecoming+parade-a01611403974> (last visited Mar. 29, 2009) (describing Chief Illiniwek's appearance at the University of Illinois' 2007 homecoming).

gear.<sup>212</sup> Thus, while the University of Illinois has complied in letter to the NCAA policy, the spirit of its compliance is badly lacking.<sup>213</sup> Chief Illiniwek still mocks American Indian tradition and culture at Illinois.

While Chief Illiniwek continues to offend at Illinois, a return to Tallahassee, Florida and Florida State University will provide an illustration of why the NCAA's Native American mascot policy appeal process is ineffective. Florida State University has the support of the Florida Seminole tribe, even though the university arguably practices the most egregious "culture" mocking in the nation, including the "tomahawk chop," the in-game "war chant" and their mascot Chief Osceola. The Florida Seminole tribe's support is largely due to Florida State University's extensive education and outreach programs with the local tribe. Florida State University brings members of the Florida Seminole tribe to its campus in Tallahassee and awards scholarships to members of the Seminole tribe.<sup>214</sup> The school also provides materials detailing the history and culture of the Florida Seminoles.<sup>215</sup>

However, Florida State University is clearly not the model for tolerance and racial harmony that it seeks to project. Most members of the Seminole tribe do not live in Florida, but in Oklahoma. The Oklahoma Seminoles do not receive the same benefits, such as scholarships and educational and outreach programs that the Florida Seminoles receive. When asked what would happen if the Oklahoma Seminoles objected to the use of its tribal name by Florida State University, Senator Jim King, Florida State President T.K. Wetherell and trustee Robert McFarlain, showed just how sensitive the Florida State administration really is: believing that the Oklahoma members of the Seminole tribe officially opposed Florida State University's use of the moniker "Seminoles" while the Florida tribe supported it, the three men made disparaging remarks about the Oklahoma Seminoles, whose ancestors were victims of the genocidal U.S. government removal policy of the 1800s, resulting in the Trail of Tears.<sup>216</sup> Trustee McFarlain interjected: "They [the Oklahomans] got run out of here, by

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212. cummings, *Progress Realized?*, *supra* note 1, at 332; see also Saulny, *supra* note 211; *UI Does and Doesn't Want Chief*, NEWS GAZETTE (Champaign, Ill.), Jan. 10, 2008, at B5 ("To appease critics of the Chief, the UI promises that it will use [the retired Illiniwek logo] only in a limited way by selling Chief Illiniwek-merchandise over the Internet as part of a profit-making venture related to vintage-logo collegiate clothing.").

213. cummings, *Progress Realized?*, *supra* note 1, at 332.

214. Jim Shore, *Play with Our Name*, N.Y. TIMES, Aug. 27, 2005, at A13.

215. *Id.*

216. *Don't know much about History . . . Our Opinion: Insulting to Make light of Genocide against Indians*, MIAMI HERALD, Aug. 16, 2005.

who was it, Andrew Jackson? The Trail of Tears. The real Seminoles stayed here.”<sup>217</sup> McFarlain added that he could, “care less what the Seminoles in Oklahoma think.”<sup>218</sup> Senator King chimed in that “[t]hey are the ones that gave up and went to the reservation.”<sup>219</sup> And President Wetherell, in a comment about whether the NCAA’s recent decision to ban the nicknames was influenced by pressure from Indian tribes stated: “[M]aybe the Trail of Tears should have gone farther, I don’t know.”<sup>220</sup> What these men did not know was that some members of the Oklahoma Seminoles, at least before these comments, supported Florida State’s use of the Seminole name.<sup>221</sup> The three men have since apologized.<sup>222</sup> Still, the president of a major university and two elected state officials made outrageous assertions disparaging the very American Indians that they each purport to honor and respect.

These statements reveal one of the major flaws in the appeals process. Florida State University has the support of the Florida Seminole tribe, presumably because of the education and outreach programs offered to members of the tribe. The supporters of the university’s continued use of Chief Osceola and the offensive imagery claim that their use was meant to honor the Seminoles. However, the three men in positions of power were quick to insult and disparage not only the Oklahoma Seminoles, but all American Indians, with their comments steeped in white privilege and tainted with racism.<sup>223</sup> Relying solely on the support of local tribes allows officials at these universities to pander to those local tribes to gain their support, while still perpetuating an unacceptably insensitive and racist atmosphere.<sup>224</sup>

The Florida State University community may actually respect the Florida Seminole tribe, but the continued use of these mascots

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*; see also Powell, *supra* note 184.

222. See *supra* note 216.

223. See Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999) (“White privilege is the pervasive, structural, and generally invisible assumption that white people define a norm and Black people are ‘other,’ dangerous, and inferior.”); see also Richard Delgado, *Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 149–150 (1998) (“[I]nformal set of privileges, favors, and courtesies we extend each other and from which blacks and Mexicans are almost entirely excluded . . . . These are all examples of white privilege, an invisible system of courtesies and favors that has been going on for centuries and that constitutes, in one way of looking at it, history’s largest affirmative action program: benefits, jobs, and other forms of help awarded not on the basis of merit but acquaintance, friendship, or other morally irrelevant, nonmeritocratic criteria.”).

224. See generally *supra* notes 216–220 and accompanying text.

creates an environment that is hostile and disparaging to Native American citizens as a whole. By allowing Florida State University to continue to use its mascot, the NCAA is really cementing the university's own insensitivities toward a nation of American Indians. One need only witness a home football game at Doak Campbell stadium in Tallahassee, Florida to appreciate the spectacle of mockery and indecency perpetuated at each home football game. Fans stand and engage in a "war chant" throughout the game, particularly if the team is winning; young children and college aged fraternity brothers wear feathered headdresses and "war paint"; spectators perform a tomahawk chop in support of the "war chant"; the typically white male student functioning as Chief Osceola rides around the stadium on a white horse carrying a burning spear and whooping and hollering, attempting to whip the crowd into a frenzy.<sup>225</sup> This activity purports to honor American Indians. This ongoing activity is unacceptably stamped with the imprimatur of the NCAA.

While some proponents of Native American mascots claim that opponents are hypersensitive and that bowing to the pressure of political correctness has run amok,<sup>226</sup> a policy that allows a few tribal members to approve and permit massive disrespect to an entire citizenry, with the likely probability that this demeaning and disparaging behavior will be seen in homes and on computer screens and cell phone screens across the country, appears short sighted and naïve.

### 3. *Eliminating the Appeals Process*

The appeals process places too much emphasis on tribal approval of an abusive or hostile mascot or nickname. Had the NCAA contacted the Oklahoma Seminoles and had the Oklahoma Seminoles taken an official position in opposition to Florida State University's continued use of the Seminole mascot, what would the outcome have been? Would a NCAA committee or a court of law have to determine who the "true" Seminoles are? If the relationship between Florida State University and the Florida Seminole tribe sours and the Florida

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225. See Cummings, *Progress Realized?*, *supra* note 1, at n.1–n.8 and accompanying text (describing conduct taken by universities across the nation by using Native American traditions, clothing and customs to mimic their culture in furtherance of sport mascots).

226. See John Rhode, *The Mascot Name Change Controversy: A Lesson in Hypersensitivity* 5 MARQ. SPORTS L.J. 141, 158–60 (1994) (“[A]nalyz[ing] the controversy and suggest[ing] that the entire debate is truly a foolish waste of time and we ought to move on to more important issues”); see also Editorial, *Broken Spirit: NCAA Wrong to Put Chill On Traditions*, THE ARIZONA REPUBLIC (Aug. 11, 2005), available at <http://www.azcentral.com/arizonarepublic/opinions/articles/0811thur2-11.html>

Seminole tribe withdraws its support of the university's discriminatory and hostile mascot and activities, would the NCAA place the university back onto the hostile or abusive mascot list? Is Florida State University now allowed to return to the days of "Sammy the Seminole" or "Chief FullaBull" because the Florida Seminole tribe signed off on Florida State University's use of the tribe as a caricature and mascot?<sup>227</sup> What exactly has the Florida Seminole tribe given Florida State University permission to do? Because these and other questions lack clear answers, the NCAA should reexamine the current appeals process and ideally eliminate it completely. If the NCAA deems a mascot and its attendant imagery hostile or abusive, then the school using that mascot and imagery should retire them. It is untenable for the NCAA to determine that certain mascots and logos are hostile or abusive, yet still provide an avenue for the hostility and abuse to continue.

The NCAA's recent policy concerning Native American mascots, if nothing else, demonstrates that the NCAA is prepared to deal with a lingering civil rights problem. The question remains: how comprehensively does the NCAA want to address racism and discrimination amongst its member institutions? If the NCAA truly wants to remove hostile and abusive nicknames and mascots from the realm of collegiate athletics, it must mandate two things: first, the NCAA must instruct its member institutions to adopt policies that will require the eighteen member institutions found to use hostile or abusive imagery and monikers to eliminate the offending mascot and logo and adopt a race neutral mascot and nickname. Second, the NCAA must eliminate its current appeals process and dam any avenue for appeal. By adopting these two suggested rules, the NCAA will accomplish a great and worthy goal—eliminating all hostile or abusive imagery from the landscape of collegiate athletics.

## V. CONCLUSION

On August 5, 2005, the NCAA took a tentative first step towards addressing a difficult and controversial quandary facing American athletics—the use of Native American mascots and imagery by collegiate athletic teams. The NCAA, in joining a worldwide movement toward equality and correcting past injustices thrust upon

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227. Shore, *supra* note 214. Sammy the Seminole was a caricature used by Florida State mascot during the 1960s and 1970s. The university discontinued its use after the Florida Seminole tribe requested they stop using Sammy because he was disrespectful. *Id.*

American Indians and indigenous populations globally,<sup>228</sup> stepped up to the plate and promulgated a promising policy. This policy bans the use of hostile or abusive American Indian mascots during NCAA sanctioned postseason play. Although the NCAA should be recognized for this effort, the organization's attempt to rectify the issue falls far short of what is necessary. The policy currently has two major problems: (1) it only bans mascots from postseason play and (2) it allows schools to circumvent the policy through an appeals process. In order for the Native American mascot policy to truly be effective, the NCAA must amend its rule so that the ban functions throughout the regular season. If a mascot is deemed abusive during postseason play, it is abusive during the regular season as well. In addition, the appeals process should be eradicated.

The NCAA must impress upon member institutions that insist on maintaining mascots and imagery that disparage Native Americans and their culture that mimicking costumes, dances, chants and war-like behavior does not honor American Indian citizens. If the member institutions refuse to adopt a more enlightened approach, the NCAA must wield its considerable power to inspire its members to adopt regulations that will respect all students and constituents. If the NCAA fails to so act, American Indian citizens and opponents of hostile mascots will look elsewhere for a legal remedy. As detailed in Part III, there are legal theories that opponents can use when challenging universities' offensive mascots and logos, including the use of trademark law, First Amendment protections and tort law. Still, the best hope of eliminating hateful and racist mascots, logos, imagery and monikers once and for all at collegiate institutions rests with the NCAA, which has both the power and the wherewithal to right this particular wrong.

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228. *See supra* notes 5–7 and accompanying text (detailing the recent recognition of historical discrimination against native populations by the governments of Australia and Canada and the official governmental apologies elicited).

