

David W Fletcher, Spring 2005

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NATIVE AMERICAN MASCOTS IN SECONDARY SCHOOLS, PROFESSIONAL SPORTS, AND COLLEGES AND UNIVERSITIES

This paper will survey the legal issues raised by the use of Indian mascots in secondary schools, professional sports, and colleges and universities. As Vine Deloria Jr. suggests, “Sports mascots have come under increasing fire by American Indians as they try to achieve equal status as an identifiable ethnic group within American society. No other group faces this particular problem, and the unique nature of the situation calls for serious deliberations. Why are Indians singled out as a group of people devoid of the sentiments that characterize other groups? No team in any sport has its logo or slogans used to demean another identifiable ethnic, religious, or economic group.”¹ Deloria rightly has identified a complex question about Indian identity in modern American society. Others have written ably about the role that Indian mascots play in defining race, power, and culture.² This brief, however, will look at recent challenges to traditional use of mascots, the legal issues involved, and some guidance for colleges and universities as a result of judicial decisions.

¹“Forward” in Richard King and Charles Fruehling Springwood, eds., *Team Spirits: The Native American Mascots Controversy* (Lincoln, Nebraska: University of Nebraska Press, 2001), ix.

²See Cornel D. Pewawardy, “Educators and Mascots: Challenging Contradictions,” in King and Springwood, eds., *Team Spirits*, 257-278; C. Richard King, “Borrowing Power: Racial Metaphors and Pseudo-Indian Mascots,” *New Centennial Review* 4 (Spring 2004): 189-209; Jason Edward Black, “The ‘Mascotting’ of Native America: Construction, Commodity, and Assimilation,” *American Indian Quarterly* 26, no. 4 (2002): 605-622.

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Indian mascots have been around a long time. They have come under attack in recent years by the American Indian Movement, Conference on the Elimination of Racist Mascots, National Indian Education Association, National Congress of American Indians, ALANA (African, Latino, Asian and Native American), various Indian tribes and their inter-tribal councils, vocal individuals, and other protest groups. Three broad contexts or arenas define current battlegrounds for controversy over Indian mascots: elementary and secondary schools, professional sports, and colleges and universities. Each context deals with legalities peculiar to its own circumstances even though some legal issues parallel.

In 1972, the Cleveland Indian Center filed suit against the Cleveland Indians in the first legal action that challenged use of a Native American mascot by a professional sport organization. The offended group sought injunctive relief to change the stereotypical smiling caricature of Chief Wahoo, red-faced and hooked-nosed, to a more positive portrayal of an Indian.³ In the context of this lawsuit, Russell Means remarked, "That Indian looks like a damn fool, like a clown and we resent being portrayed as either savages or clowns."⁴ Based on the

³For an excellent, brief history of the Cleveland Indians franchise and the development of the Chief Wahoo mascot, see Jack Achiezer Guggenheim, "The Indians' Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark," *Cleveland State Law Review* 46 (1998): 214-215.

⁴King, "Borrowing Power," 195, quoting William M. Carley, "Is Chief Noc-a-Homa Racist? Many Indians Evidently Think He Is," *Wall Street Journal* (27 January 1972).

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principle of group libel, the case was not settled until 1983. But the mascot remains in use by the baseball club and still is controversial.⁵

Since then, two legal issues have been at the forefront of this ongoing debate. First, trademark rights for Indian mascots have been challenged on the basis of certain limits to free speech (commercial speech) as provided for in section 2A of the Lanham/Trademark Act (1946).⁶ Second, opponents of Indian mascots have appealed to Title II of the Civil Rights Act (1964) and its prohibition of discrimination on the basis of race, color, religion, and national origin in places of public accommodation.⁷ In these legal battles, opponents of Native American mascots have made some significant gains. For example, in April 1999 the three-judge panel of the Patent and Trademark Office's TTAB (Trademark Trial and Appeal Board) ordered cancellation of federal registration of the Washington (District of Columbia) Redskins' seven

⁵Other concerns in the Chief Wahoo controversy include the possibility of state-sponsored discrimination, violation of equal protection under the Fourteenth Amendment, racist speech, and "disparaging" and "scandalous" trademarks. Guggenheim, "Indians' Chief Problem," 216ff.

⁶*Pro-Football, Inc. v. Harjo* 284 F. Supp. 2d 96 (2003); *Commerce and Trade: Trademarks, the Principal Register, U.S. Code*, vol. 15, sec. 1052(a) (1994). For interpretation, see Kristine A. Brown, "Native American Team Names and Mascots: DisParaging and Insensitive Or Just a Part of the Game?" *Sports Lawyers Journal* 9 (Spring 2002): 115ff.; Justin G. Blankenship, "The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?" *Colorado Law Review* 72 (Spring 2001): 415ff.; Jack Achiezer Guggenheim, "Renaming the Redskins (and the Florida Seminoles?): The Trademark Registration Decision and Alternative Remedies," *Florida State University Law Review* 27 (Fall 1999): 287ff.

⁷*United Church of Christ v. Gateway Economic Development Corporation of Greater Cleveland* 383 F. 3d 449 (2004); "Note: A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports," *Harvard Law Review* 112 (February 1999): 904ff.

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trademarks.⁸ In October 2003, the U.S. District Court in Washington subsequently overturned TTAB's ruling. Nevertheless, teams like the Atlanta Braves, Chicago Blackhawks, Cleveland Indians, Kansas City Chiefs, and the Washington Redskins will have to contend with their anti-mascot antagonists on such matters in the future.

In regard to secondary schools, a case came to the courts over use of offensive mascots in June 1994. Barbara Munson and three of her children, a Native American family, filed suit in circuit court of Marathon County, Wisconsin. The Munson youth, former students at Mosinee High School, alleged discrimination on the basis of race, national origin, and ancestry. The school used the nickname "Indians" and had a pseudo logo of "an Indian wearing a full feather headdress or 'war bonnet' in the 'Plains Indians' Style" that did not represent accurately "an American Indian from any particular tribe from Wisconsin." The youth also had been taunted frequently and called names like "stupid Indian" or "the squaw." And, at school pep rallies, students would mimic Indian dances and war whoops. In the suit, the plaintiffs sought relief from racial harassment and asked that the Indian logo and nickname be discontinued.⁹

⁸Earlier that same year, on the basis of a reasonable person standard, the Utah Supreme Court ruled that "Redskin" was too offensive for the state's vanity license plates. *McBride v. Motor Vehicle Division of Utah State Tax Commission* 977 P. 2d 467 (1999); Andre D. P. 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 Reasonable Person," *California Western Law Review* 36 (Fall 1999): 11ff.

⁹*Munson v. State Superintendent of Public Instruction* 217 Wis. 2d 290; 277 N. W. 2d 387 (1998).

The plaintiffs' case rested primarily on a hostile environment line of reasoning, namely, that the local school district created, encouraged, and tolerated a "racially hostile environment" contrary to Title VI of the Civil Rights Act (1964).¹⁰ For quite technical reasons, both the lower court and the Court of Appeals of Wisconsin decided for the defendants and concluded that Mosinee School District had not violated state or federal nondiscrimination provisions. But in the early 1990s, increase in protests and the growing threat of costly and counterproductive litigation generated concern among educators and, in many cases, prodded state departments of education and local school districts to reexamine their policy on use of Native American mascots.¹¹ In this regard, Native Americans have begun just recently to benefit from the effects of the Civil Rights Movement (1960s) to remove racial prejudice and racist practices from the nation's secondary schools.¹²

For colleges and universities, debate about Indian mascots has gyrate around two basic legal matters: (1) First Amendment claims concerning free speech or, negatively, hate speech;

¹⁰Daniel J. Trainor, "Native American Mascots, Schools, and the Title VI Hostile Environment Analysis," *University of Illinois Law Review* (1995): 971ff.

¹¹See, for instance, "The Elements of Change in Minnesota" in Pat Helmberger, *Indians as Mascots in Minnesota Schools* (Burnsville, Minnesota: Friends of the Bill of Rights Foundation, 1999), 57ff.

¹²John B. Rhode, "The Mascot Name Change Controversy: A Lesson in Hypersensitivity," *Marquette Sports Law Journal* 5 (1994): 141ff. For recent concern of Oklahoma and Vermont legislators, see Andrea Eger, "Bill Would Ban Two Indian Mascot Names," *Tulsa World* (6 February 2005), and Wilson Ring, "Group Wants Legislature to Outlaw Indians as Mascots," *Associated Press State & Local Wire* (14 December 2004).

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and (2) racial discrimination claims that rest on federal, state, and local statutes.¹³ These issues certainly overlap but do not exactly parallel what the courts have decided for secondary schools and professional teams. Courts have acknowledged that students at colleges and universities enjoy full protection of the law as adults and as parties with legal rights based on the student's contractual relationship, stated or implied, with the school. Therefore, students at colleges and universities have a lot of independence and cannot be controlled in the same way that employers and secondary school administrators can exercise authority over those in their care.

This leaves the criteria for evaluation of harassment and discrimination at institutions of higher learning on a different footing. For example, in the opinion of Daniel Trainor, "The legal standards developed under Title VI do not translate . . . to investigations of racial harassment caused by a college's or university's use of a Native American mascot. Accordingly, the Office of Civil Rights should not apply the hostile environment analysis to such claims." Trainor feels that the "hostile environment" tests of severity, pervasiveness, or persistence have more weight in secondary schools. At lower educational levels, school officials usually have notice of negative situations, and the greater impressionability of younger students raises the need for legal protections. At institutions of higher education, though, student autonomy and self-care require fewer such restraints to avoid the unfavorable effects of a hostile environment.¹⁴

¹³Jeff Dolley, "The Four R's: Use of Indian Mascots in Educational Facilities," *Journal of Law & Education* 32 (January 2003): 31-38.

¹⁴Trainor, "Native American Mascots," 991-992.

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But opponents of Indian mascots in secondary schools and professional sports generally have failed to convince the courts of intentional discrimination that excludes or harasses Native Americans as a protected group. As a result, certain legal council suggests that “the movement to get rid of Indian team names and mascots is . . . unsupported by law, inconsistent with sound policy, and reflective of a self-poisoning attitude.”¹⁵ Other legal councillors believe that successful applications of commercial/trademark law and public accommodation and other nondiscrimination statutes will be negligible for colleges and universities. Because of these uncertainties, one legal analyst has reasoned for reliance on state common law and IIED (or, intentional infliction of emotional distress) as a plausible legal ground to do away with the troubling mascots.¹⁶ Nevertheless, since the 1970s, protest groups and Native American activists have persisted in their opposition to use of Indian mascots on campuses in various parts of the country.

Sensing the shift in public opinion and feeling, perhaps, the heat from potential legal action, some schools halted their use of Indian mascots voluntarily. For example, Stanford University changed its mascot from “Indians” to “Cardinals”; Dartmouth College adopted “Big Green” instead of “Indians”; Eastern Michigan State dropped “Hurons” and became “Eagles”; Miami of Ohio replaced “Redskins” with “Redhawks”; and, the University of Oklahoma retired

¹⁵Roger Clegg, “American Indian Nicknames and Mascots for Team Sports: Law, Policy, and Attitude,” *Virginia Sports & Entertainment Law Journal* 1 (Spring 2002): 276.

¹⁶Aaron Goldstein, “Intentional Infliction of Emotional Distress: Attempt at Eliminating Native American Mascots,” *Journal of Gender, Race & Justice* 3 (Spring 2000): 689ff.

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its “Little Red.”¹⁷ But, nicknames that offend and mascots that depict Native Americans inaccurately have lingered, notably at Florida State University (“Seminoles”), the University of North Dakota (“Fighting Sioux”), San Diego State (“Aztecs” and mascot “Monty Montezuma”), and the University of Illinois (“Chief Illiniwek”).¹⁸

The controversy surrounding Chief Illiniwek, a 78-year-old tradition at the University of Illinois, has raged for about thirty years. In March 2001, students and faculty members at the university who opposed use of the Chief Illiniwek mascot filed suit in U.S. District Court. They had voiced their objections on numerous occasions about the university’s mascot “creating a hostile environment, promoting . . . inaccurate information in an educational setting, increasing the difficulty of recruiting Native American students, and contributing to . . . cultural biases and stereotypes.” In this case, they specifically asked for injunctive relief against the “unfettered

¹⁷For others, consult Section VII, How other schools have dealt with issue of Indian designations, in “The Chief Illiniwek Dialogue Report,” n.d. <http://www.uiuc.edu/dialogue/report_files/VII.html> (16 April 2005).

Also, Michelle Diament and Eric Wells mention Southeast Missouri State University’s adoption of “Rowdy the Redhawk” to replace “Indians” for the men and “Otahekians” for the women. “Mascot Watch,” *The Chronicle of Higher Education* (4 March 2005). And Joel Mills refers to Yakima Valley Community College’s opting for “Yaks” instead of “Indians.” “Racist Mascots to Get Hearing at University of Idaho,” *Associated Press State & Local Wire* (30 December 2004).

¹⁸For a good overview of Marquette University’s rationale to drop “Warriors” (and its “Willie Wampum” mascot) and adopt “Golden Eagles” as its official mascot, see Rhode, “Mascot Name Change Controversy,” 153-156. Rhode also notes the difficulties faced by major schools like the University of Wisconsin that create controversy just by scheduling intercollegiate sporting events with schools that use Indian mascots, in the example he cites, the “Scalping Braves” of Alcorn State University.

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prior restraint of speech contained in the [university's] Preclearance Directive.”¹⁹ The directive, based on National Collegiate Athletic Association (NCAA) rules, prohibited contact between university personnel and prospective student athletes who were in the process of deciding where to go to school and play their particular sport. The plaintiffs wanted to contact these prospective student athletes and make them aware that the University of Illinois and its athletic program, in their opinion, used a symbol that degraded the Native American race. They also wanted to give information about the controversy to these individuals and even ask them to reconsider their involvement in a program that was indifferent to racial injustice. When the university would not allow this contact with prospective student athletes to take place, opponents of Chief Illiniwek felt that their First Amendment right to free speech had been infringed.²⁰

The court refused to express any opinion on the Chief Illiniwek controversy itself. That question was not in its immediate purview. But the court decided for the plaintiffs and noted, “The Preclearance Directive is an unlawful prior restraint that results in a chilling of the putative student class’ constitutionally protected speech that cannot be justified by the interests advanced by the university.” Further, the court reasoned that the stipulations of the Preclearance Directive should not apply to university students nor university faculty, since they did not represent the athletic interests of the university and did not intend to recruit prospective student athletes. The

¹⁹Crue v. Aiken 137 F. Supp. 2d 1076 (2001); 204 F. Supp. 2d 1130 (2002); 370 F. 3d 668 (2004).

²⁰Ibid.

issues also were matters of public concern; therefore, the right to free speech under such circumstances should not be infringed.²¹

This case effectively introduced the free speech issue into the legal wrangle over Indian mascots at colleges and universities. Previous attempts to converge these matters failed, chiefly because the courts judged as unproven the negatives so claimed by those offended, precisely, hate speech and racial discrimination.²² Once, however, the primary issue became free speech rights, something positive and generally protected by the courts, the onus of proof shifted to the perpetrators of the contemptible mascots, in this situation, the University of Illinois.²³ Indeed, many commentators have noted the difficulty in balancing the right of institutions and organizations “to engage in free speech by selecting nicknames and related logos and symbols” and the opposing prerogative of “Native Americans to live free from discrimination.”²⁴

²¹Ibid.

²²So *R. A. V. v. City of St. Paul* 505 U.S. 377 (1992). Scott R. Rosner observes, “A university’s attempt to regulate offensive speech based on the fact that it is repugnant to Native Americans likely violates the First Amendment.” “Legal Approaches to the Use of Native American Logos and Symbols in Sports,” *Virginia Sports & Entertainment Law Journal* 1 (Spring 2002): 263. Note also the good survey of issues in Richard Delgado and Jean Stefancic, *Understanding Words that Wound* (Boulder, Colorado: Westview Press, 2004).

²³Compare the interpretation by Brendan S. Crowley, “Resolving the Chief Illiniwek Debate: Navigating the Gray Area Between Courts of Law and the Court of Public Opinion,” *DePaul Journal of Sports Law & Contemporary Problems* 2 (Spring 2004): 38-57.

²⁴Rosner, “Legal Approaches,” 259. In *Pitillo v. L. A. Unified School District* C. D. Cal. (6 April 1998), supporters of the school’s nickname, the “Braves,” claimed the district’s decision to change the mascot violated their free speech rights. *Los Angeles Times* (7 April 1998).

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The debate no doubt will remain a hot one and will swirl around free speech concerns.²⁵ One author states, “Only limited possibilities exist for addressing the problem of demeaning ethnic team names and symbols using legal means.”²⁶ She looks at five of those possibilities: permit denials or revocations, statutes denying funding, hate speech codes, pupil discrimination laws, and trademark cancellations. She fittingly concludes that the American system places a “higher value” on the need to preserve freedom of speech when that liberty collides with expressions of unfair discrimination. She advocates, “Perhaps it is true that the best way to counter such undesirable speech is through the use of better speech by attempting to educate people about the harmfulness of ethnic stereotypes.”²⁷ All colleges and universities, as well as secondary schools and professional sport organizations, would do well to follow such advice.

²⁵On the most recent case against Chief Illiniwek, filed in March 2005 in Cook County Circuit Court, see Dave Newbart, “Native American Lawyers Sue U. of I. Over Mascot,” *Chicago Sun-Times* (16 March 2005).

Bellecourt v. Cleveland 104 Ohio St. 3d 439 (2004) describes the case of protestors who burned Chief Wahoo in effigy outside the Cleveland Indians’ Jacobs Field on opening day, April 1998. They were arrested but later filed suit against the city on the basis of free speech claims. One of the protestors reportedly said, “If we allow flag burning in this country, we should certainly allow Chief Wahoo effigy burning. Our flag stands for over 200 years of freedom and unity; Chief Wahoo stands for 56 years (and counting) of baseball futility.” “Supreme Court of Ohio, Public Information Office, Opinions and Case Summaries,” n.d. <http://www.sconet.state.oh.us/Communications_Office/summaries/2004/1215/031202.asp> (16 April 2005).

²⁶Cathryn L. Claussen, “Ethnic Team Names and Logos—Is There a Legal Solution?” *Marquette Sports Law Journal* 6 (Spring 1996): 422.

²⁷*Ibid.*

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