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BETWEEN A TOMAHAWK AND A HARD PLACE: INDIAN MASCOTS AND THE NCAA

I. INTRODUCTION

In a segment of “The Daily Show,” which aired on September 25, 2014, Comedy Central interviewed four die-hard Washington Redskins¹ fans about the controversy over the team’s name.² Unbeknownst to the four fans, the show lined up eight Native American activists and arranged a confrontation between the groups during the interview.³ The objective of the segment was to explore whether the fans would say the same things to Native Americans that they would say to a lone reporter.⁴ When the four fans met the Native Americans, the fans were taken aback, and a heated debate ensued.⁵ After the interview, one of the four fans claimed he “felt in danger” and was worried he would be defamed.⁶ Another fan left the set in tears and “felt so threatened that she later called the police” and asked *The Daily Show* to remove her from the segment.⁷ The show refused, and the segment aired.⁸

The media has been filled with updates on this heated controversy over professional football’s use of the Redskins mascot. The following is a sample of headlines from some of the many Redskins-related articles published online about this controversy:

¹ The Washington D.C. NFL football team is currently known as the “Redskins.”

² *The Redskins’ Name: Catching Racism*, THE DAILY SHOW (Sept. 25, 2014), <http://thedailyshow.cc.com/videos/189afv/the-redskins--name---catching-racism>.

³ *Id.*

⁴ See Ian Shapira, *The Daily Show Springs Tense Showdown with Native Americans on Redskins Fans*, WASH. POST (Sept. 19, 2014), http://www.washingtonpost.com/local/the-daily-show-springs-showdown-with-native-americans-on-redskins-fans/2014/09/19/c6c5f936-3f73-11e4-b03f-de718edeb92f_story.html.

⁵ *Id.*

⁶ Shapira, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

- “This Holiday Season Let’s Replace Disparaging Slurs”⁹
- “Revoke NFL’s Nonprofit Status”¹⁰
- “How Washington’s Football Team Creates a Hostile Environment for Native American Students”¹¹
- “In Minnesota, thousands of Native Americans protest Redskins’ name”¹²
- “There’s Never Been a Trademark as Offensive as Redskins”¹³
- “Washington team meets ‘Change the mascot’ protestor in Denver”¹⁴
- “Dan Snyder’s Fight to Save Redskins’ Name Has Been One Long PR Disaster”¹⁵

The media’s attack on the Washington football team’s name has generated growing interest in this issue.

Since the term “Redskins” is viewed by some as disparaging, it has faced much opposition.¹⁶ But, this is only

⁹ Netta Avineri & Bernard Perley, *This Holiday Season Let’s Replace Disparaging Slurs*, AMERICAN ANTHROPOLOGICAL ASSOCIATION (Dec. 4, 2014, 4:59 PM), http://www.huffingtonpost.com/american-anthropological-association/in-this-holiday-season-le_b_6262672.html.

¹⁰ Robbie Couch, *Cory Booker: Revoke NFL’s Nonprofit Status, Give the Funds to Domestic Abuse Prevention*, THE HUFFINGTON POST (Sept. 18, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/09/18/cory-booker-nfl_n_5837716.html.

¹¹ Amanda Terkel, *How Washington’s Football Team Creates a Hostile Environment for Native American Students*, THE HUFFINGTON POST (July 22, 2014, 10:59 AM), http://www.huffingtonpost.com/2014/07/22/washington-redskins-native-americans_n_5607082.html.

¹² John Woodrow Cox, *In Minnesota, Thousands of Native Americans Protest Redskins’ Name*, WASH. POST, http://www.washingtonpost.com/local/in-minnesota-native-americans-march-rally-to-protest-redskins-name/2014/11/02/fc38b8d0-6299-11e4-836c-83bc4f26eb67_story.html (last visited Oct. 22, 2015) (“[A] throng of Native Americans, students . . . and other activists chanted, sang, banged drums and waved banners: ‘Change the Name Now’ and ‘Stop Racism in the NFL.’ University of Minnesota police put the estimated crowd at 3,500 to 4,000.”).

¹³ Jillian Berman, *There’s Never Been a Trademark as Offensive as Redskins*, THE HUFFINGTON POST (June 19, 2014, 4:59 PM), http://www.huffingtonpost.com/2014/06/19/redskins-trademark_n_5509239.html.

¹⁴ Mark Maske, *Washington Team Meets ‘Change the Mascot’ Protestor in Denver*, WASH. POST, <http://www.washingtonpost.com/blogs/football-insider/wp/2013/10/27/washington-team-meets-change-the-mascot-protest-in-denver> (last visited Oct. 22, 2015).

¹⁵ Brian Frederick, *Dan Snyder’s Fight to Save Redskins’ Name Has Been One Long PR Disaster*, THE HUFFINGTON POST (Aug. 18, 2014, 5:59 AM), http://www.huffingtonpost.com/brian-frederick/dan-snyders-fight-to-save_b_5508212.html.

¹⁶ *Proud to be*, YOUTUBE (last visited Nov. 11, 2015), <https://www.youtube.com/watch?v=mR-tbOxlhvE>.

the tip of the iceberg; the Native American mascot controversy is much deeper than a disparaging name. The controversy encompasses the very use of any Native American mascot because the use of such mascots arguably furthers stereotypes of Native Americans.

A distinction needs to be made about some mascots that refer to a specific tribe, such as the University of Utah “Utes,” which refers to the Ute Indian tribe,¹⁷ and mascots such as “Indians,” “Redskins,” “Redmen,” and “Braves,” which do not specifically refer to a particular Indian tribe but to all Native Americans generally. The use of a specific tribal name is arguably less offensive than a general term for all Native Americans. This is because a general term for all Native Americans, like the “Redskins,” could be seen as a nickname, whereas a specific tribal name could more likely be seen as a legitimate attempt to honor a named tribe. However, although terms like “Braves” and “Indians” might not seem disrespectful on their face, some people may nevertheless believe the terms are derogatory.

Regardless of whether the team name is disparaging, this Comment argues that the use of any Indian name as a mascot is harmful to society, given that using Indian mascots furthers a stereotypical image of Native Americans. Specifically, this Comment argues that courts should hold agreements made between colleges and Native American tribes, which further the use of Indian mascots, unenforceable because they violate public policy. Courts find many different types of agreements to be unenforceable because they contravene public policy,¹⁸ including agreements made to avoid judgment creditors and agreements to “renounce, for pecuniary consideration, the right to act in such a fiduciary capacity as that of executor, administrator, guardian, or trustee.”¹⁹ However, courts have not yet considered whether agreements between colleges and Indian tribes that condone use of Indian mascots should be added to the list.

Courts should find these agreements to be unenforceable

¹⁷ *Memorandum of Understanding between the Ute Indian Tribe and the University of Utah*, THE UNIVERSITY OF UTAH, <http://admin.utah.edu/ute-mou> (last visited Oct. 22, 2015) [hereinafter *Memorandum*]; *Ute Tribe Location*, UTE INDIAN TRIBE, <http://www.utetribe.com> (last visited Oct. 22, 2015).

¹⁸ 17A AM. JUR. 2D *Contracts* § 293.

¹⁹ *Id.*

because these agreements further a stereotypical image of Native American tribes. These stereotypes cause harm to Native Americans because they mock sacred Indian culture, portray Native Americans as inferior people, and influence the way people think and act towards Native Americans—both on a conscious and an unconscious level. These negative effects arguably outweigh the interests served by the sports tradition of using Native American mascots.

Also, some tribal mascot-use agreements should be ruled as unenforceable if it can be shown that they were not entered into voluntarily by Indian tribes. Many Indian tribes are currently dealing with high levels of poverty; their strong financial need, coupled with the lavish monetary incentives dangled by the various sports and educational institutions in exchange for authorized use of the tribal name, calls into question “the degree of voluntariness” surrounding the formation of these agreements.

Although courts should find these agreements to be unenforceable, a person’s standing to bring a case may prevent a case about this issue from being brought to court at all. These issues are addressed early in the Comment because if standing problems cannot be overcome, then the enforceability of these contracts is irrelevant.²⁰

Part II of this Comment addresses the ban that the National Collegiate Athletic Association (NCAA) has on Indian Mascots, along with the appeals process created by the NCAA to allow schools to challenge the ban. The NCAA is more willing to allow an exception for an Indian mascot if the namesake Indian tribe lends its support of the mascot. Currently, five schools have received exemptions from the NCAA’s mascot ban; these exemptions are discussed briefly. Part II is not meant to attack any specific school. Rather, the purpose of Part II is to describe the NCAA mascot policy and discuss the five schools that have received NCAA approval for use of their Indian mascots.

Part III of this Comment discusses potential standing barriers. Although standing issues may bar a claim, this Comment explains potential avenues to overcome such barriers.

Part IV of this Comment discusses the stereotypical

²⁰ See *infra* Part III.

images—for example, Indians as noble savages—that are furthered by the use of Native American mascots.

Part V provides an overview of the harmful effects of these stereotypes and discusses how the use of Native American mascots:

- Mocks sacred Indian culture;
- Downgrades Native American people;
- Leads to greater tolerance for discrimination and violence;
- Creates a more hostile learning environment in schools;
- Influences unconscious beliefs about Native Americans; and
- Adds to the challenges that Native Americans are currently facing.

These harms are important factors that a court would weigh when determining the enforceability of agreements made between Indian tribes and schools.

Part VI discusses how the agreements between Indian tribes and schools may not have been entered into voluntarily by the Indian tribes. Voluntariness is a crucial factor that courts consider when determining whether a contract should be enforced.

Part VII discusses the enforceability of agreements that are against public policy. In making this public policy determination, courts employ a balancing test to weigh the benefits of enforcing the agreements against the harm of enforcement. The social harms furthered by the use of Indian mascots should be a preeminent consideration in the balancing test. These social harms are especially troublesome when a public school is involved because the harms will be analyzed in the context of the fiduciary responsibilities that the United States federal government owes to Indian tribes.

This Comment is not meant to target any specific school or to accuse schools that use Indian mascots of being racist; many proponents of Indian mascot use in sports feel that these mascots honor Native American tribes. In fact, certain schools and tribes even devote substantial amounts of time and resources into proclaiming their cultural pride.²¹ This Comment

²¹ *Utah Athletics is Ute Proud! November Celebrates Native American Heritage*

is meant, however, to shed light on the potential negative effects of allowing schools to use Indian mascots. This Comment will explain why the use of these mascots is harmful and why agreements allowing Native American mascots in schools should not be tolerated.

II. BACKGROUND: THE NCAA'S INDIAN MASCOT BAN AND THE APPEALS PROCESS

On August 5, 2005, the NCAA announced its policy to eliminate the use of “Native American mascots, nicknames, and imagery” at any NCAA championship game.²² The new mascot policy²³ was effective as of February 1, 2006, and initially affected the following eighteen schools:²⁴

- Alcorn State University (“Braves”)
- Central Michigan University (“Chippewas”)
- Catawba College (“Indians”)
- Florida State University (“Seminoles”)

Month, UNIVERSITY OF UTAH, <http://www.utahutes.com/trads/ute-proud.html> (last visited Oct. 22, 2015) (noting that the University of Utah devotes an entire month to celebrating the Ute Indian tribe); *FSU News: Florida State University Thanks Seminoles for Historic Vote of Support*, FLORIDA STATE UNIVERSITY, <https://www.fsu.edu/news/2005/06/17/seminole.support> (last visited Oct. 22, 2015) (noting traditions of Florida State University that honor the Seminole tribe).

²² 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), <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2Bexecutive%2BCommittee%2BIssues%2BGuidelines%2Bfor%2BUse%2Bof%2BNative%2BAmerican%2BMascots%2Bat%2BChampionship%2BEvents.html> [hereinafter *Aug. 5 Press Release*].

²³ Although it would be better to cite to the actual NCAA mascot policy instead of to the NCAA press release regarding the mascot policy, the actual policy does not appear to be easily accessible to the general public on the NCAA website. Other law review articles also cite to this NCAA press release. For some examples of this, see 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, 464 (2006); Kelly P. O'Neill, *Sioux Unhappy: Challenging the NCAA's Ban on Native American Imagery*, 42 TULSA L. REV. 171, 179 (2006); Ian Botnick, *Honoring Trademarks: The Battle to Preserve Native American Imagery in the National Collegiate Athletic Association*, 7 J. MARSHALL REV. INTELL. PROP. L. 735 (2008); André Douglas Pond Cummings, *Progress Realized?: The Continuing American Indian Mascot Quandary*, 18 MARQ. SPORTS L. REV. 309, 312 (2008); Justin P. Grose, *Time to Bury the Tomahawk Chop: An Attempt to Reconcile the Differing Viewpoints of Native Americans and Sports Fans*, 35 AM. INDIAN L. REV. 695, 699 (2011); S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 128 (2006).

²⁴ *Aug. 5 Press Release*, *supra* note 22, subsequently, Indiana University of Pennsylvania changed their mascot from the “Indians” to the “Crimson Hawks” in 2007.

- Midwestern State University (“Indians”)
- University of Utah (“Utes”)
- Indiana University of 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”)
- Southeastern Oklahoma State University (“Savages”)

Although the NCAA’s mascot policy is not specifically limited to Indian mascots, the policy was created because of Indian mascots and has thus far only affected schools using Indian mascots.

Two weeks after announcing the new mascot policy, the NCAA made an additional announcement: there would be an appeals process.²⁵ The appeals process would allow for schools affected by this policy to seek review of their use of Native American mascots, names, and imagery, in order to determine whether their particular school could receive an exemption from the NCAA’s Indian mascot ban at NCAA championship games.²⁶ A main factor in the appeals process would be permission by the “namesake” Indian tribe:

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. “We recognize that there are many points of view associated with

²⁵ Press Release, Nat’l Collegiate Athletic Ass’n, *NCAA Executive Committee Approves Native American Mascot Appeals Process* (Aug. 19, 2005), <http://fs.ncaa.org/Docs/PressArchive/2005/Announcements/NCAA%2BExecutive%2BCommittee%2BApproves%2BNative%2BAmerican%2BMascot%2BAppeals%2BProcess.html> [hereinafter *Aug. 19 Press Release*].

²⁶ *Id.*

this issue and we also know that some Native American groups support the use of mascots and imagery and some do not; that is why we will pay particular attention to special circumstances associated with each institution.”²⁷

The NCAA appeals process has received criticism by those who oppose the use of Native American names as mascots.²⁸ While the NCAA realizes that the use of Indian mascots can be harmful, it still allows for exceptions to be made to its Indian mascot ban.²⁹ In other words, the NCAA is “shut[ting] the door, but refus[ing] to lock it.”³⁰

Since the appeals process was created, the NCAA has approved the use of Native American names at five schools: Catawba College (“Catawba Indians”), Central Michigan University (“Chippewas”), Florida State University (“Seminoles”), Mississippi College (“Choctaws”), and the University of Utah (“Utes”).³¹ The remainder of this section discusses these five schools and why they received an exception.³²

The most significant factor considered by the NCAA in the appeals process is whether the school obtained approval of the Indian mascot from the namesake Indian tribe. This factor is paramount when analyzing the enforceability of agreements made between Indian tribes and schools, as courts are often unlikely to enforce agreements made involuntarily. Due to many Native American tribes confronting difficulties in areas such as poverty and inadequate education, it is probable that some Native American tribes may have agreed to support a

²⁷ *Id.* (emphasis added).

²⁸ Cummings, *supra* note 23, at 327 (calling the appeals process a “one step forward, two steps back” policy); André Douglas Pond Cummings & Seth E. Harper, *Wide Right: Why the NCAA’s Policy on the American Indian Mascot Issue Misses the Mark*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 135, 164 (2009) [hereinafter *Wide Right*].

²⁹ *Aug. 19 Press Release*, *supra* note 25.

³⁰ Cummings & Harper, *supra* note 28.

³¹ Press Release, Nat’l Collegiate Athletic Ass’n, *Native American Mascot Policy - Status List* (Feb. 16, 2007), <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/Native%2BAmerican%2BMascot%2BPolicy%2B-%2BStatus%2BList.html>; Cummings, *supra* note 23, at 327.

³² Some of the universities discussed maintain Indian names, but do not specifically have an Indian mascot. However, when this paper analyzes mascots, it is implied in this Comment that the same analysis applies to schools that use Indian names only as well as to schools that maintain Indian mascots. This is because the NCAA’s mascot policy applies to nicknames as well as to imagery. *Aug. 5 Press Release*, *supra* note 22.

school's use of an Indian mascot in part or in whole to reap the much-needed proffered financial or educational benefits. Their position of relative inequality at the bargaining table may call into question the voluntariness of such agreements.

A. *Catawba College "Catawba Indians"*

"Catawba Indians" is the nickname used for Catawba College's athletic teams.³³ When Catawba College appealed the NCAA's mascot ban, the NCAA approved the use of the "Catawba Indians" name, but not the use of the name "Indians" standing alone.³⁴

Perhaps the NCAA did not allow the name "Indians" to be used by itself given that there would be no specific namesake Indian tribe from which a school could seek approval. But because the name "Catawba Indians" refers directly to a specific Indian tribe—the Catawba Indian Nation—the NCAA was able to ascertain whether the specific tribe approved of the use of its name. In this instance, the Catawba Indian Nation supported the school's use of the name "Catawba Indians," and the NCAA relied heavily on that approval.³⁵ The NCAA explained that if a tribe "endorses the use of its name and associated imagery," it would defer "to the judgment and will of the [namesake] tribe."³⁶

Catawba College's website is not clear as to what type of agreement exists between the Catawba Indian Nation and Catawba College. Nonetheless, there most likely is an agreement between the school and the Tribe because Catawba College received an NCAA mascot exemption, and a primary factor considered by the NCAA in approving a mascot exemption is that "documentation exists that a 'namesake' tribe has formally approved of the use of the mascot, name and

³³ Robert E. Knott, *NCAA Ruling on Use of "Catawba Indians" for Athletic Teams*, CATAWBA COLLEGE ATHLETICS, <http://gocatawbaindians.com/page.asp?articleID=3355> (last visited Oct. 22, 2015).

³⁴ Press Release, Nat'l Collegiate Athletic Ass'n, *Statement By NCAA Senior Vice-President For Governance And Membership Bernard Franklin On Catawba College Review* (May 30, 2006), <http://fs.ncaa.org/Docs/PressArchive/2006/Official%2BStatements/Statement%2Bby%2BNCAA%2BSenior%2BVice%2BPresident%2Bfor%2BGovernance%2Band%2BMembership%2BBernard%2BFranklin%2Bon%2BCatawba%2BCollege%2BReview.html>.

³⁵ *See id.*

³⁶ *Id.*

imagery by the institution.”³⁷

B. Central Michigan University “Chippewas”

The NCAA also approved Central Michigan University’s use of the nickname “Chippewas” for its athletic teams. When the NCAA reviewed Central Michigan’s appeal, “the NCAA staff review committee noted the *relationship* between the University and the Saginaw Chippewa Indian Tribe of Michigan . . . as a *significant factor*” in approving Central Michigan University’s appeal.³⁸ This relationship is evident from the resolution between the Saginaw Chippewa Indian Tribe of Michigan and Central Michigan University.³⁹ The resolution between the University and the Tribe states, in part, that this “mutual relationship is evident in the Saginaw Chippewa Tribal Council continuing its support of Central Michigan University’s ‘Chippewas’ nickname, which the university uses as a sign of pride, honor, and respect for the tribe’s rich heritage.” The resolution also discusses some of the benefits that Central Michigan University provides to the Saginaw Chippewa Indian Tribe of Michigan:

The tribe and university jointly promote educational assistance and opportunities for Native American students at the primary, secondary, and collegiate levels, including implementing a pilot Native American middle school mentoring program, signing an articulation agreement between the Saginaw Chippewa Tribal College and [Central Michigan University] and increasing scholarship opportunities for Native American students at [the University]⁴⁰

Although not mentioned in the resolution, Central Michigan University also signed an agreement “provid[ing] easy transfer for tribal college students who wish to complete their studies towards a baccalaureate degree” at Central Michigan

³⁷ *Aug. 19 Press Release, supra* note 25.

³⁸ Spencer D. Kelly, *What’s in A Name: The Controversy Surrounding the NCAA’s Ban on College Nicknames and Mascots*, 5 WILLAMETTE SPORTS L.J. 17, 28 (2008) (citation omitted) (internal quotation marks omitted).

³⁹ *The Saginaw Chippewa Indian Tribe and Central Michigan University: Committed to Honor, Dignity, and Respect*, SAGINAW CHIPPEWA INDIAN TRIBE & CENTRAL MICHIGAN UNIVERSITY, https://www.cmich.edu/office_provost/OID/NAP/Documents/CMU=TribeResolution.pdf (last visited Oct. 22, 2015).

⁴⁰ *Id.*

University.⁴¹

Although the NCAA “continues to believe the stereotyping of Native Americans is wrong,” the NCAA considered the “particular circumstances” surrounding Central Michigan and the Saginaw Chippewa Indian tribe of Michigan and determined that “[t]he decision of a namesake sovereign tribe . . . must be respected.”⁴² It appears that the authorization from the Saginaw Chippewa Indian Tribe of Michigan was a primary factor in the NCAA’s decision to approve the use of the Indian mascot.

It should be noted that even though this agreement between the Tribe and this University is termed a “contract” or a “resolution”, the mere document labeling should not affect the analysis of the agreement’s validity. The resolution effectively functions as a contract between the University and the Tribe, stating the expectations of both parties and the benefits provided by the University in exchange for approval to use the Chippewa name. In essence, the document functions like a contract, regardless of the label.

Another potential problem with the NCAA’s decision is that it was based on approval by the Saginaw Chippewa Indian Tribe of Michigan and not from Chippewa Indian tribes located in other places. This is particularly troubling with respect to Chippewa Indians because Chippewa Indians are one of the largest Indian groups in North America with over 150 groups spread throughout the area.⁴³ Other Chippewa Indian tribes are located in places such as Wisconsin, Minnesota, and parts of southern Canada.⁴⁴ Although approval was obtained from the Saginaw Chippewa Indian Tribe of Michigan, it appears that the NCAA may not have considered the views of other Chippewa Indian tribes.

⁴¹ *About the CMU and Tribal Relationship*, CENTRAL MICHIGAN UNIVERSITY, https://www.cmich.edu/office_provost/OID/NAP/HP—ToBeAChippewa/Pages/CMU_and_Tribal_Relationship.aspx (last visited Oct. 22, 2015).

⁴² Press Release, Nat’l Collegiate Athletic Ass’n, *Statement By NCAA Senior Vice-President For Governance And Membership Bernard Franklin On Central Michigan University And University of Utah Reviews* (Sept. 2, 2005), <http://fs.ncaa.org/Docs/PressArchive/2005/Official%2BStatements/Statement%2Bby%2BNCAA%2BSenior%2BVice%2BPresident%2Bfor%2BGovernance%2BAnd%2BMembership%2BBernard%2BFranklin%2Bon%2BCentral%2BMichigan%2BUniversity%2Ba.html> (last visited Oct. 22, 2015 [hereinafter *Sept. 2 Press Release*]).

⁴³ *Chippewa Indians*, INDIANS.ORG, <http://www.indians.org/articles/chippewa-indians.html> (last visited Oct. 22, 2015).

⁴⁴ *Id.*

C. *Florida State University “Seminoles”*

Florida State University’s “unique relationship” with the “Seminole Tribe of Florida” also played a “significant factor” in the NCAA’s approval of the college using the Indian mascot.⁴⁵ The Tribal Council from the Seminole Tribe of Florida presented Florida State University with a resolution giving full support of the University’s use of the name “Seminoles” and of the Seminole logo.⁴⁶ Although the agreement is also labeled as a “resolution” and not as a “contract”—like the resolution between the Chippewa Indian tribe and Central Michigan University—it should be treated like a contract because the labeling does not effectively change the analysis. The Seminole Tribe’s resolution states, in relevant part, as follows:

[The] Seminole Tribe of Florida has an established relationship with Florida State University, which includes its permission to use the name, ‘Seminole,’ as well as various Seminole symbols and images, such as Chief Osceola, for educational purposes and the Seminole Tribe of Florida wishes to go on record that it has not opposed, and, in fact, supports the continued use of the name ‘Seminole.’⁴⁷

The Seminole Tribe’s resolution makes reference to the university building an authentic “chickee” on its retreat area, and provides that Florida State University has an established “Seminole Scholars” program.⁴⁸

Primarily because the Seminole Tribe of Florida gave its full support for the use of the “Seminoles” mascot in its resolution, the NCAA gave Florida State University an exception to the Indian mascot ban. However, the resolution extends only between the University and the Seminole Tribe of Florida; it does not include the Seminole nation of Oklahoma.⁴⁹

⁴⁵ 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), <http://fs.ncaa.org/Docs/PressArchive/2005/Official%2Bstatements/Statement%2Bby%2BNCAA%2BSenior%2BVice%2BPresident%2Bfor%2BGovernance%2Band%2BMembership%2BBernard%2BFranklin%2Bon%2BFlorida%2BState%2BUniversity%2BRevi.html>.

⁴⁶ *FSU News: Florida State University Thanks Seminole Tribe for Historic Vote of Support*, FLORIDA STATE UNIVERSITY (Oct. 8, 2014, 12:14 PM), <https://www.fsu.edu/news/2005/06/17/seminole.support> (quoting resolution between Seminole Tribe of Florida and Florida State University).

⁴⁷ *Id.* (citation omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* See also *The Great Seminole Nation of Oklahoma*, SEMINOLE NATION OF

Should the NCAA have looked at whether other Seminole tribes—besides the Seminole Tribe of Florida—gave their approval for the use of the “Seminole” mascot? Should a resolution between Florida State University and other Seminole tribes be required for the permission to be valid?

D. Mississippi College “Choctaws”

Mississippi College received approval from the NCAA for its use of the “Choctaws” mascot because the NCAA found that “Mississippi College’s use of the Choctaw name and associated imagery had received the approval of the Mississippi Band of Choctaw Indians.”⁵⁰ After receiving this exemption from the NCAA ban, the president of Mississippi College announced, “We are very appreciative of the Mississippi Band of Choctaw Indians’ support of our use of the Choctaw name, and look forward to continuing our mutual relationship of respect and cooperation.”⁵¹ Again, a primary factor weighed by the NCAA in approving the use of the “Choctaws” mascot was approval of the name by the Mississippi Band of Choctaw Indians.

Like similar resolutions between regional tribes and universities, should the views of Choctaw Indians from other regions have played a role in the NCAA’s decision-making process? Along with the Choctaw Indians of Mississippi, there is also the Choctaw Nation of Oklahoma.⁵² It does not appear that the NCAA or Mississippi College sought approval from Oklahoma, Alabama, or Louisiana Choctaw Indians.⁵³ Given that Mississippi College is in the state of Mississippi and given that the name and mascot therefore most likely refer to the Choctaw Indians of Mississippi, should Mississippi College nevertheless have been required to consider the views of

OKLAHOMA, <http://sno-nsn.gov/> (last visited Oct. 22, 2015).

⁵⁰ Press Release, Nat’l Collegiate Athletic Ass’n, *Statement By NCAA Senior Vice-President For Governance And Membership Bernard Franklin On Mississippi College* (Feb. 17, 2006), <http://fs.ncaa.org/Docs/PressArchive/2006/Miscellaneous/Statement%2Bby%2BNCAA%2BSenior%2BVice-President%2Bfor%2BGovernance%2Band%2BMembership%2BBernard%2BFranklin%2Bon%2BMississippi%2BCollege.html> [hereinafter *Feb. 17 Press Release*].

⁵¹ *Mississippi College Keeps Choctaws Nickname*, ESPN COLLEGE SPORTS (Feb. 17, 2006, 2:11 PM), <http://sports.espn.go.com/ncaa/news/story?id=2334117>.

⁵² *Choctaw Nation of Oklahoma*, CHOCTAW NATION, <http://www.choctawnation.com> (last visited Oct. 22, 2015).

⁵³ *Choctaw Indians*, INDIANS.ORG, <http://www.indians.org/articles/choctaw-indians.html> (last visited Oct. 22, 2015).

Choctaw Indian tribes outside of the state?

Perhaps the tribal name issue matters more in the analysis of whom can receive standing; courts may find that any “Choctaw” Indian, regardless of the tribal location, could receive standing to bring a claim to court about the “Choctaws” mascot issue. This standing issue may change if the mascot were referred to as the “Mississippi Choctaws” instead of just as the “Choctaws.” Obviously, “Mississippi” is not used in this instance, but admittedly, the word “Mississippi” could plausibly be inferred, given the location of the college in conjunction with the mascot.

Mississippi College’s website is unclear as to exactly what type of agreement exists between the Mississippi Choctaw Indians and Mississippi College, but online articles discuss a resolution between the Tribe and the college in which the Tribal Counsel gives the college approval to use its name.⁵⁴ If there is a resolution, it does not appear to be online or accessible to the general public. However, some type of agreement likely exists between Mississippi College and the Mississippi Band of Choctaw Indians because the NCAA stated that it was approving the mascot in large part because of the tribe’s approval.⁵⁵

E. University of Utah “Utes”

Like other colleges using Indian mascots, the NCAA approved the University of Utah’s use of the “Utes” as a mascot mainly because of the “relationship” between “the Northern Ute Indian tribe” and the University of Utah.⁵⁶ The *Memorandum of Understanding between the Ute Indian Tribe and the University of Utah (Memorandum)*, which discusses this relationship, is located on the University of Utah’s website.⁵⁷ In this *Memorandum*, the Northern Ute Tribe of Utah gives its full support of the University of Utah’s use of the

⁵⁴ *Letter: Mississippi Choctaws Not Asked About Mascot*, INDIANZ.COM (Mar. 23, 2006), <http://www.indianz.com/News/2006/013111.asp>; *Mississippi College Will Remain Choctaws*, SIOUXSPORTS.COM (Feb. 18, 2006, 1:45 PM), <http://forum.siouxsports.com/topic/5662-mississippi-college-will-remain-choctaws>.

⁵⁵ *Feb. 17 Press Release*, *supra* note 50.

⁵⁶ *Sept. 2 Press Release*, *supra* note 42.

⁵⁷ *Memorandum of Understanding between the Ute Indian Tribe and the University of Utah*, THE UNIVERSITY OF UTAH, <http://admin.utah.edu/ute-mou> (last visited Oct. 22, 2015) [hereinafter *Memorandum*].

name “Utes.” The University of Utah, in turn, pledges to give scholarship benefits to Native American youth attending the university:

The Ute Indian Tribe encourages the University of Utah to use the Ute name for the University’s sports programs with its full support The Ute Indian Tribe acknowledges that its association with the University of Utah . . . raises tribal visibility and community awareness, and generates a source of pride to members of the Ute Indian Tribe. The Tribe desires to reaffirm the long and valued relationship between the University and the Tribe to promote educational benefits for its youth.⁵⁸

Along with providing educational benefits for Native American youth, the University of Utah also makes a promise to the Ute Indian tribe that it will use the “Ute” name with honor and respect. These promises are stated in the *Memorandum* as follows:

[T]he University will use the Ute name in a considered and respectful manner, reflecting the pride and dignity of indigenous people and their traditions In addition, the University will devote human and financial resources toward the Utes and other American Indians to encourage, inspire and support tribal youth to lead healthy lives and to pursue post-secondary education.⁵⁹

On April 15, 2014, the University of Utah and the Ute Indian Tribe renewed their agreement, which will be valid for the next five years and will be reviewed annually.⁶⁰

Again, the main factor in approval for the “Utes” mascot by the NCAA was the approval of its use by the Northern Ute Indian tribe of Utah. However, should the NCAA have considered whether other Ute Indian tribes outside of Utah approved the University of Utah’s use of the “Utes” name? For example, what about the views of the Southern Ute Indian Tribe of Colorado?⁶¹ Does their view matter, even though they are located in Colorado?

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Ute Indian Tribe and University of Utah Renew Agreement*, U NEWS CENTER: THE UNIVERSITY OF UTAH (Oct. 6, 2014, 5:51 PM), http://unews.utah.edu/news_releases/ute-indian-tribe-and-university-of-utah-renew-agreement; *Memorandum*, *supra* note 57.

⁶¹ *The Southern Ute Indian Tribe*, SOUTHERN UTE INDIAN TRIBE, <https://www.southernute-nsn.gov> (last visited Oct. 22, 2015).

Even if a court determined that approval from Ute Indian tribes outside of Utah was not needed, the agreements between the Northern Ute Indian tribe and the University of Utah facilitated NCAA approval for a mascot exception. However, this approval may have been based on a memorandum entered into by the Ute Tribe in an effort to mitigate its financial hardships. If so, that bargaining posture may render the Memorandum as having been entered into involuntarily. This would be a factor a reviewing court could consider in their enforceability analysis.

Does it matter that the agreement between the University of Utah and the Ute Indian tribe is a *Memorandum* instead of a signed contract or other type of oral or written agreement? The fact that the agreement is embodied in a memorandum should not change the analysis. Just like resolutions between Indian tribes and universities, the *Memorandum* clearly states the responsibilities of both of parties and outlines the agreement between the school and the Indian tribe. The label “Memorandum” for the agreement, therefore, does not change the way this agreement functions.

III. FINDING ITS FOOTING: OVERCOMING STANDING BARRIERS

Before an agreement between an Indian tribe and a university is deemed unenforceable, the issue must be brought before a court.⁶² However, standing issues could bar a claim from being heard in court at all. “Standing” in the legal context is the ability to bring a claim to court; thus, standing issues would prevent a court from ruling on whether these agreements are contrary to public policy. However, these barriers could possibly be overcome, allowing courts to decide the enforceability of these types of contracts.

What are the standing barriers? With these types of cases, it is hard to know who—if anyone—has standing to bring a claim to court. Additionally, the NCAA appeals process requirement for approval by a “namesake” Indian tribe also faces a potential standing problem. Who exactly can give permission for use of tribal names? The namesake Indian tribe

⁶² Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1448 (2006) (“[Courts] cannot void contracts that do not come before them.”).

in that same state? Namesake Indian tribes from other locations? Any Indian tribe? Furthermore, whose opinions should matter?⁶³ The opinions of Native Americans? The general public? A specific tribe? Specific tribal leaders? Are these opinions binding? Who would have standing to challenge such opinions?

Also, who would have standing to sue based on a generic Indian mascot name, such as the “Braves”? If “Braves” refers to all Native Americans, does this mean that any Native American could sue on behalf of all Native Americans? It is possible any Native American would have standing, but what about someone with a mixed Native American heritage? Does someone even need to be part Native American in order to bring a claim to court? Could someone who sympathizes with the Native American people bring a claim, even if that person has no Native American ancestors? Would a person need to be recognized as a tribal member by a tribe? By the federal government?

The standing problem can be further illustrated by the example of Florida State University seeking approval for its use of the name “Seminoles” from the Seminole tribe of Florida. In that case, “[c]onflicting reports exist as to whether the Seminole tribe in Oklahoma (6,000 members) approved the use of the mascot by Florida State University.”⁶⁴ Would the Seminole tribe of Oklahoma have standing to challenge the enforceability of the resolution between the Seminole tribe of Florida and Florida State University? Or, are only members of the Seminole Tribe of Florida allowed to bring such a claim? Moreover, what about someone who has a mixed Seminole

⁶³ William N. Wright, *Not in Whose Name?: Evidentiary Issues in Legal Challenges to Native American Team Names and Mascots*, 40 CONN. L. REV. 279, 282–83 (2007) (“To put it in simple terms, it is the issue of whose opinion should matter in the decision whether a Native American mascot or team name should stay or go. In particular, to what extent should the opinions of the general public or the various Indian tribes be taken into account when an Indian team name or mascot is legally challenged and how are those opinions to be quantified?”).

⁶⁴ *Wide Right*, *supra* note 28, at 169 n.184; David Carl Wahlberg, *Strategies for Making Team Identity Change*, in THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK 117, 122 (C. Richard King ed., 2010) (“Florida State University . . . has the support of the Seminole tribe of Florida in its use of the Seminoles’ identity, but was asked by the Seminole tribe of Oklahoma to stop.”); David Karp et. al., *NCAA Will Rethink Seminole Ban*, ST. PETERSBURG TIMES ONLINE (Aug. 12, 2005), http://www.sptimes.com/2005/08/12/Worldandnation/NCAA_will_rethink_Sem.shtml (describing how the Seminole Nation of both Florida and Oklahoma opposed a resolution against the use of the “Seminoles” mascot by an 18–2 vote).

heritage? Would someone who is part Seminole be allowed to bring a claim against Florida State University or the NCAA? What about people from other Native American tribes? Even if the Seminole tribe of Oklahoma would have standing in this instance, there could be other instances where Native Americans of tribes not a party to the agreement would like to challenge the enforceability of agreements between other Indian tribes and universities. And what about other people who are not even Native Americans but who are against the use of the “Seminole” mascot? Do those people have standing to challenge the “Seminole” mascot?

Another issue impacting standing is the differing viewpoints among Native American people. When Indian tribes agree to allow schools to use Indian mascots, the tribal leaders are likely the ones making the agreement. But, who has authority to speak against tribal leaders? Who else besides tribal leaders has authority to speak on behalf of an Indian tribe or on behalf of Native American people in general? Could the federal government speak on behalf of the Indian nation?

If the tribal leaders alone lack authority to make agreements, does that imply the existence of a voting system among the general tribal members? If that is the case, what percentage of Native Americans would need to agree that Indian mascots are disparaging to bring a claim? Would the court look for a majority? Is a minority enough? Would the court need a “substantial composite” of Native Americans to agree, as the United States Patent and Trademark Office requires in determining whether trademarks are disparaging?⁶⁵ If so, what does a “substantial composite” even mean? This is not clear, even in trademark law.⁶⁶ How would such percentages of the Native American population even be calculated?

Although many questions remain about this standing dilemma, it is plausible that such a claim could be brought before a court because, arguably, any type of Indian mascot furthers a stereotype.⁶⁷ As will be discussed later in this Comment, these stereotypes create harm by mimicking sacred Indian culture, treating Native Americans as less than human

⁶⁵ *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q. 2d 1080 (Trademark Tr. & App. Bd. June 18, 2014), *aff'd* 2015 WL 4096277, at *1 (E.D. Va. July 8, 2015).

⁶⁶ *Id.*

⁶⁷ *See infra* Part IV.

beings, creating hostile learning environments for Native American students, and adding barriers for Native Americans trying to overcome the current challenges they face.⁶⁸ Because of this, any Native American may be injured by the use of Native American mascots. Thus, any Native American may have standing to bring a claim to sue in response to a school's use of an Indian mascot.

Furthermore, someone without a Native American heritage also may have standing to bring a claim to court. Part V of this Comment will discuss how stereotypes harm not only Native Americans but also the rest of society. Indian mascots promote racism and encourage people to believe that racial discrimination is acceptable.⁶⁹ Indian mascots might lead anyone, not just a Native American, to treat Native Americans inappropriately.⁷⁰

Even if plaintiffs—Native Americans or not—could have standing to bring a claim to court, who would be the defendant in these cases? The university using an Indian mascot? The NCAA for having an appeals process? The Indian tribe who granted permission to the university for the use of the Indian mascot?

It is unlikely that a school would be the defendant. Schools are clearly not in violation of an NCAA policy since they have received approval from the NCAA. Of course, because the schools are using the Indian mascots, it is plausible they could be the defendant or co-defendant with the NCAA. The NCAA, however, could be a potential defendant since the NCAA bases its approval of Indian mascots on agreements that should not be enforced. Plaintiffs may also choose to sue the namesake Indian tribes in an effort to encourage tribes not to support Indian mascots, regardless of possible financial incentives.

Despite challenges to bringing enforceability claims to court, such barriers could possibly be overcome, and courts may have to decide the issue of whether contracts permitting the use of Indian mascots are against public policy. The next section discusses how the use of Indian mascots furthers Indian stereotypes.

⁶⁸ See *infra* Part V.

⁶⁹ *Id.*

⁷⁰ *Id.*

IV. THE UNAVOIDABLE FURTHERANCE OF NATIVE AMERICAN STEREOTYPES

This section discusses how the use of Indian mascots arguably furthers a stereotypical image of Native Americans. This furtherance of stereotypes can be seen in “the dance, the music, and the symbols” surrounding these Indian mascots.⁷¹ Symbols like “tomahawks, spears, war whoops, and headdresses” portray Native Americans as noble savages.⁷² Additionally, the “wearing of feathers, buckskin, and war paint” adds to the image of Native Americans as war heroes, perpetuating such stereotypical perceptions.⁷³

The symbols implicated by Indian mascots are not the only problem. Another problem is that the Indian mascots play on the stereotypes that people already hold.⁷⁴ They are a dramatic representation for a long history of oppression and racism.⁷⁵ Throughout history, Native Americans have been seen as a “voiceless, oppressed minority.”⁷⁶ The rights of the Native Americans to their own lands were trampled on as the United States was founded and as it expanded.⁷⁷ Because Native Americans were seen as an inferior people, early Americans were able to “justify U.S. expansion and the expropriation of Indian land.”⁷⁸ In fact, the Declaration of Independence reveals much of how early Americans thought of Native Americans, given that it refers to Native Americans as “merciless Indian

⁷¹ Robert Longwell-Grice & Hope Longwell-Grice, *Chiefs, Braves, and Tomahawks: The Use of American Indians as University Mascots*, in *THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK* 5 (C. Richard King ed., 2010).

⁷² *Id.* at 9–10 (“The films we watch and the books we read have grouped Indians into four groups: the noble savage, the generic Indian, the living fossil, and the savage . . . Native American mascots contribute to the problem by playing to the stereotypes that people hold about Native Americans.”).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 4 (“[M]ascot support . . . is also linked to emotional and economic arguments and a long history of society-sponsored racism.”) (citation omitted).

⁷⁶ Wright, *supra* note 63, at 287 (“The usage of Indian images, names, and symbols, particularly as mascots of sports teams, is viewed as an extension of the long history of oppression of American Indians in the United States.”)

⁷⁷ Longwell-Grice & Longwell-Grice, *supra* note 71, at 6 (“Deloria’s work provides many more specific examples throughout the history of America, including the savage Indian image to facilitate the removal of Indians from the east coast in early American times.”) (citation omitted).

⁷⁸ *Id.*

Savages.”⁷⁹ The current Native American mascot controversy brings to light the struggle between those with power and those without, and historically, the Native Americans have been ones without power.⁸⁰

Does allowing Indian tribes to decide whether to give their support of a school’s use of an Indian mascot empower Indian tribes and thus take away from the stereotype that Indians have no voice in society? One of the potential flaws of this reasoning is that some of these agreements may not have been entered into voluntarily by the Indian tribes. This will be further discussed in Part VI.⁸¹

Despite the stereotypes Indian mascots perpetuate, some people do not understand why the use of Indian mascots should raise concerns. Native American mascots may have been chosen to symbolize honor and to embody important values such as persistence, determination, strength, and valor. In fact, Indian mascots have generated “deep support” from a strong fan base and have become a cherished tradition by many American sports fans.⁸²

But Indian mascots were created for athletics, not to honor the Native American people. The very idea that these Indian mascots “honor Native Americans” arguably came simply as “an afterthought to justify their existence.”⁸³ Even though Indian mascots may portray a positive image of Native Americans—an image of deep respect and honor—the image portrayed is still a stereotype.⁸⁴ Furthermore, it is a stereotype that is not representative of Native American culture today and portrays a fantasy version of Indians from the past.

Some schools argue that their use of Native American

⁷⁹ THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

⁸⁰ See Steven R. Latterell, *Stopping the “Savage Indian” Myth: Dealing with the Doctrine of Laches in Lanham Act Claims of Disparagement*, 80 IND. L.J. 1141, 1144 (2005) (“Throughout the history of the United States, American Indians have been marginalized and treated as sub-humans, both at the hands of the United States government and by Euro-American citizens of the United States.”).

⁸¹ See *infra* Part VI.

⁸² Longwell-Grice & Longwell-Grice, *supra* note 71, at 3 (“Attempts to change these [university] mascots have not always been successful because of the deep support these mascots and images engender.”).

⁸³ Wahlberg, *supra* note 64, at 121.

⁸⁴ Barbara E. Munson, *Teach Them Respect Not Racism: Common Themes and Questions About the Use of “Indian” Logos*, in THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK 14 (C. Richard King ed., 2010) (“Why is an attractive depiction of an Indian warrior just as offensive as an ugly caricature? Both depictions present and maintain stereotypes.”).

mascots is non-stereotypical and completely authentic.⁸⁵ However, Dr. Laurel R. Davis, one of the most prominent sports sociologists in the nation who studies Indian mascots,⁸⁶ gives three reasons why this argument fails.⁸⁷ She describes how the stereotypical nature and effects of Native American mascots cannot be avoided, despite a school's efforts to encourage culturally-accurate portrayals of Native Americans. Her first point is as follows:

One [reason why the stereotypical nature of using Indian mascots cannot be avoided] is that a school or team cannot control how others, such as the media and other schools or teams, use their mascot. For example, the media might print a headline announcing an "attack" by the school/team with the Native American mascot.⁸⁸

Hence, Dr. Davis first argues that, although a school may be able to control its own portrayal of an Indian mascot, a school cannot always control the way opposing schools or the media portray its mascot. Though a school may make a valiant effort to portray its Indian mascot in a culturally-accurate and stereotype-free manner, the media could make comments such as, "looks like they put on their war paint today," "that will be another feather for his headdress," or "seems like they got too many chiefs out there and not enough Indians." Moreover, opposing teams could shout comments at games such as "Skin 'em" or "Scalp 'em!"

Dakota Brown, a fifteen-year-old Native American from California, was the 2013 Champion for Change.⁸⁹ He spoke on behalf of the Center for American Progress and the Center for Native American Youth about how he loves playing football for his high school, but how he worries about one game each year, the game against a rival team known as the "Redskins."⁹⁰ He dreads this game because of the Indian drumbeats after

⁸⁵ Laurel R. Davis, *The Problems with Native American Mascots*, in *THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK* 26 (C. Richard King ed., 2010).

⁸⁶ Brief in Support of Complaint at 28, *Gunderson v. Osseo-Fairchild School District*, No. 10-LC-01 (Jun. 21, 2010).

⁸⁷ Davis, *supra* note 85.

⁸⁸ *Id.*

⁸⁹ Center for American Progress, *Missing the Point: The Real Impact of Team Names on American Indian and Alaska Native Youth*, YOUTUBE (Oct. 6, 2014), <https://www.youtube.com/watch?v=fxnW9B14pvA> (fifteen-year-old Native American boy discusses negative effects of having Native American mascots in schools).

⁹⁰ *Id.*

touchdowns, the fans doing tomahawk chops and wearing Indian war paint, and announcements about “a wild party of Redskins on their way to sack the quarterback.”⁹¹ Dakota Brown further described how the most offensive material comes from the schools who play the “Redskins” team,⁹² including his own high school at their annual football game.⁹³ Indeed, his own friends would shout comments such as “Kill the Redskins” or “Send them on the Trail of Tears!”⁹⁴ Even if schools with Indian mascots were able to control the way they represent their own Indian mascots, those schools may have a harder time controlling the way rival teams treat Indian mascots.

Dr. Davis makes a second argument regarding the unavoidability of stereotypes when Indian mascots are used:

Native Americans are a category of people that live in many different societies, each with a different culture, and within each Native American society there is much diversity. Thus, how does one portray what Native Americans are “really like?” Imagine creating a mascot that represented African Americans, Jewish Americans, Puerto Ricans, or European Americans. Because of the wide diversity of people within these categories, any mascot one could imagine would be a stereotype.⁹⁵

Dr. Davis presents valid concerns. It is impossible to accurately portray what a Native American is like given that Indian tribes themselves are so diverse.

This point has its flaws. For example, a school may be seeking to use the name of a specific tribe rather than a generic name describing any Native American tribe. If this were the case, the specific tribal members may not be as diverse as Native Americans from all over the United States. However, not all Native Americans, even those from the same tribe, will act in a similar manner. There could also be Native American tribes from other locations who would have similar names, and this could cause further confusion. Therefore, in spite of the flaws in the argument, Native American stereotypes are unavoidable when Indian mascots are used.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Davis, *supra* note 85, at 26–27.

Thirdly, Dr. Davis argues the following point:

[I]t is inappropriate for non-Natives to imitate Native Americans, even if they do so in a culturally accurate way. We would find it offensive to see a Christian portray . . . himself as Jewish or an European American portray . . . himself as African American, even if the portrayal is culturally accurate (e.g., using an authentic dialect and clothing). Imitating another's culture, even if we do it accurately, seems like we are mimicking and mocking the other, especially if the imitation is done for entertainment, like it is at a sporting event.⁹⁶

In essence, Dr. Davis argues that even if a culturally-accurate portrayal is possible, it is still not appropriate. She argues that a non-Native American's portrayal of a Native American could come across as a mockery of Native American culture, especially if the mascot is used for entertainment purposes.

Although not everyone may see the portrayal of an Indian mascot as a mockery of Indian culture, it is reasonable that some people may view it that way. This is especially true given the sporting environment where Indian mascots are used. It is hard to imagine that a culturally accurate portrayal would take place in a sports context and not come across—at least in part—as being made in jest.⁹⁷ Regardless of whether a school tries to accurately represent Native American culture, the use of Indian mascots arguably furthers the stereotypical image of Native Americans as noble savages.

V. THE HARM

This section will discuss how the furtherance of Indian stereotypes is harmful. Part A will discuss how the use of Native American mascots mocks sacred Indian religion and culture. Part B will discuss the badge of inferiority that Indians receive due to Native American mascots. Part C will discuss how Indian mascots increase society's tolerance levels for discrimination against Native Americans, which may also lead to increased physical violence towards Native Americans. Part D will discuss how schools using Native American mascots may

⁹⁶ *Id.*

⁹⁷ See Munson, *supra* note 84, at 14 (“We are asking that the public schools stop demeaning, insulting, harassing, and misrepresenting Native peoples, their cultures, and their religions for the sake of school athletics.”).

create a hostile learning environment for students. Part E will describe the influence that Indian mascots have on people's unconscious beliefs, which affect the way people are prone to react in situations involving Native Americans. Part F will describe current challenges faced by Native Americans and how a school's use of Native American mascots adds barriers to overcoming such challenges.

This section is meant to expose the harmful effects of furthering Native American stereotypes through the use of Indian mascots. This section is not meant to single out any specific school and is not suggesting that schools using Native American mascots are racist or are purposefully trying to harm Native American people. Indeed, most schools that use Native American mascots do so because of the positive values embodied in the Native American tribe. Schools believe that they are furthering cherished traditions by using Native American mascots. However, this section will go into more depth as to why the use of Indian mascots is hostile and abusive as the NCAA suggests by its Indian mascot ban at NCAA championship games.⁹⁸

A. *Mocking Sacred Indian Culture*

Many of the symbols surrounding Indian mascots (such as feather headdresses) and much of the behavior encouraged by Indian mascots (such as Indian war chants) disrespects important spiritual symbols of the Native American people. Many Native Americans find Indian mascots to be "deeply offensive" since these mascots "mock ancient and sacred culture" by portraying objects that are sacred to Native Americans, such as Eagle feathers, in an irreverent light.⁹⁹ These Indian mascots "mock[] sacred rituals, mimic[] hallowed traditions, and caricaturiz[e] a proud race in debilitating

⁹⁸ *Aug. 5 Press Release, supra* note 22 (The NCAA issued this press release in an effort to "prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships.").

⁹⁹ Cummings, *supra* note 23, at 312; *American Eagle & Native American Indian*, AMERICAN EAGLE FOUNDATION, <http://www.eagles.org/programs/eagle-facts/american-indian.php> (last visited Nov. 7, 2015). ("Most all Native American Indian Peoples attach special significance to the Eagle and its feathers. Images of eagles and their feathers are used on many tribal logos as symbols of the Native American Indian. To be given an Eagle feather is the highest honor that can be awarded within indigenous cultures.")

ways.”¹⁰⁰

The alleged mockery is especially evident given that Indian mascots are used in a sports context. The sacred traditions of Native Americans are mimicked—not during tribal ceremonies for religious purposes—but during sporting events for entertainment purposes. Native American culture and religion is “demean[ed], insult[ed], harass[ed], and misrepresent[ed]” all for “the sake of school athletics.”¹⁰¹ The use of Indian mascots arguably mocks the sacred beliefs and traditions that many Native Americans hold dear.

B. Placing a Badge of Inferiority on Native Americans

Native Americans may also feel that the use of their identity as a mascot serves as a “badge of inferiority” since most other groups of people are not used as mascots.¹⁰² Because Native Americans are singled out for use as mascots, people may come to believe the false conclusion that Indians must be inferior.¹⁰³ If Native Americans feel like their own race is inferior to other races or is viewed that way, then this belief could damage the self-esteem of Native Americans.¹⁰⁴ This problem is particularly grievous when faced by Native American youth. This is certainly cause for alarm, given that Native American teens already have a suicide rate several times greater than the national average teen suicide rate.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ Munson, *supra* note 84, at 14.

¹⁰² Lawrence R. Baca *Native Images in Schools and the Racially Hostile Environment*, in THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK 85 (C. Richard King ed., 2010) (“The Indian child recognizes that using the Indian race as a mascot is a badge of inferiority.”).

¹⁰³ *Id.* (noting the subconscious messages sent to non-Indian students that their culture is not imitated or mocked and so therefore must be superior to Native American culture).

¹⁰⁴ *Resolution Recommending the Immediate Retirement of American Indian Mascots, Symbols, Images, and Personalities by Schools, Colleges, Universities, Athletic Teams, and Organizations*, in THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK 209, 212 (C. Richard King ed., 2010) [hereinafter *Resolution*] (“[T]he continued use of American Indian mascots, symbols, images, and personalities by school systems appears to have a negative impact on the self-esteem of American Indian children The damage to self-esteem and identity are the aspects that appear to be the most severely compromised.”) (citations omitted); Davis, *supra* note 85, at 13 (“The mascots negatively influence the self-image and self-esteem of Native Americans, especially children.”).

¹⁰⁵ Sari Horwitz, *The hard lives — and high suicide rate — of Native American children on reservations*, THE WASHINGTON POST (Mar. 9, 2014), <https://www.washingtonpost.com/world/national-security/the-hard-lives—and-high->

Furthermore, other groups singled out to be mascots are usually animals or objects.¹⁰⁶ Popular mascots of others schools include such things as tigers, dogs, ducks, bulls, elephants, alligators, oranges, and trees.¹⁰⁷ *Sports Illustrated* portrayed this when they created a list of the twenty-five best college mascots.¹⁰⁸ The number one ranked mascot on its list was an Indian mascot, “Chief Osceola,” from Florida State University.¹⁰⁹ Ranked second was the University of Georgia’s stuffed bulldog “Uga.”¹¹⁰ Ranked third was Louisiana State University’s tiger.¹¹¹ Ranked fourth was the University of Texas’s steer.¹¹² Ranked fifth was the University of Oregon’s duck, “Puddles.”¹¹³ Alas, out of the top five mascots, four were animals. One was a Native American.

The issue is further troubling when “Chief Osceola” is compared with other mascots in *Sports Illustrated*’s top twenty-five college mascot list. Some of the other mascots are objects¹¹⁴ such as Stanford University’s unofficial tree mascot, Delta State University’s “Fighting Okra” mascot, and Syracuse University’s “Otto the Orange” mascot.¹¹⁵ Thus Florida State’s Indian mascot was classified not only with animals, but also with trees, okra, and oranges.

Because the use of Native American mascots categorizes Native Americans not only with animals—which is dehumanizing enough—but also with objects, their use advances the view that Native Americans are less than human. This dehumanizing depiction of Native Americans further adds to the badge of inferiority created by a school’s use of a Native American mascot.¹¹⁶

suicide-rate—of-native-american-children/2014/03/09/6e0ad9b2-9f03-11e3-b8d8-94577ff66b28_story.html.

¹⁰⁶ See Munson, *supra* note 84, at 14.

¹⁰⁷ Martin Rickman, *The 25 Best Mascots in College Football*, SPORTS ILLUSTRATED, <http://www.si.com/more-sports/photos/2013/08/12/best-college-mascots> (last visited Oct. 22, 2015) (displaying pictures of twenty-five popular college mascots).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Randy Furst, *Protesters March on Metrodome to Protest ‘Redskins’*, ALBUQUERQUE JOURNAL (Nov, 8, 2013, 12:05 AM),

C. *Increasing Tolerance for Discrimination and Violence*

The use of Native American names as mascots is arguably racial discrimination. It is nonsensical and inappropriate to treat other groups as mascots the way Native Americans are treated. If, for example, the “Washington Redskins or Cleveland Indians are acceptable as team names, should the Miami Spics, New York Fighting Jews, Chicago Blacks, or Los Angeles Gooks also be acceptable?”¹¹⁷ How about the “Washington Niggers” or the “Dallas Wetbacks, [the] Houston Greasers, [or] the Green Bay Crackers?”¹¹⁸ These examples cannot be taken seriously. Why then are Indian mascots taken seriously?¹¹⁹

The argument against using Native American names as mascots goes beyond racial discrimination to include political discrimination. The term “Native American” does not just identify race; “Native American” is a political identity. Native Americans are “*citizens of tribal nations*.”¹²⁰ The relationship between the United States and the Native American tribes is a relationship between separate and distinct governments.¹²¹

Using Native American mascots could actually lead people—especially impressionable children—to tolerate racism and other forms of discrimination.¹²² People may even come to

<http://www.abqjournal.com/297026/news/protesters-march-on-metrodome-to-protest-redskins.html> (noting how some “Redskins” protestors in Minneapolis held up signs reading “Redskin: A Dehumanizing Racial Slur”); David McGrath, *Honoring Indians?: Gimme a Break: Mascots Dehumanize and Ridicule Native Americans*, THE NATIVE PRESS.COM, <http://www.thenativepress.com/sports/mascots.php> (last visited Oct. 22, 2015) (discussing how Indian Mascots are both hurtful and dehumanizing).

¹¹⁷ Wright, *supra* note 63 at 287 (emphasizing how using other ethnic groups as mascots would “clearly be considered unacceptable”).

¹¹⁸ *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014) (citation omitted).

¹¹⁹ Grose, *supra* note 23, at 720 (“It certainly would not be acceptable in today’s society if, instead of children playing ‘Indian,’ they played ‘Black’ or ‘Jewish.’”) (footnote omitted).

¹²⁰ Adrienne J. Keene, *A-Bomb Disease Ruling*, NATIVE APPROPRIATIONS: EXAMINING REPRESENTATIONS OF INDIGENOUS PEOPLES (Oct. 6, 2014, 2:49 PM), <http://nativeappropriations.com/2014/07/shes-so-pale-the-good-and-bad-of-national-exposure.html> (argues that because the Native American identity is a political one that Native Americans “can’t just talk about [their] identities purely in racial terminology”).

¹²¹ Angelina E. Castagno & Stacey J. Lee, *Native Mascots and Ethnic Fraud in Higher Education: Using Tribal Critical Race Theory and the Interest Convergence Principle as an Analytic Tool*, in THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK 97 (C. Richard King ed., 2010) (“[T]he relationship between tribal nations and the U.S. is one of ‘government to government’ in nature.”).

¹²² Munson, *supra* note 84, at 13 (“As long as such logos remain, both Native

feel that such discrimination and dehumanization is acceptable.¹²³ In turn, this may be a factor leading to physical abuse of Native Americans. In fact, a Native American is “four times more likely to be the victim of a violent crime by a person not of his or her race than a person from any other racial or ethnic group.”¹²⁴ This could be due to the perception that when “people are only stereotypes, they are not real.”¹²⁵ Although the correlation does not prove causation, it could be inferred that the use of Indian mascots may lead the public to both view and treat Native Americans as less than human. Therefore, the use of Native American mascots not only leads to increased tolerance of discrimination against Native Americans but could also be a factor leading to increased physical abuse of Native Americans.

D. Creating a Hostile Learning Environment in Schools

In schools at any educational level, the use of Native American mascots may foster a hostile learning environment for Native American students.¹²⁶ This is because schools with Native American mascots will have Indian imagery and characterizations scattered throughout the entire school.¹²⁷ Native American children attending those schools face such imagery on a daily basis.¹²⁸ The following illustration depicts the daily experience of a Native American child attending a school that uses an Indian mascot:

The child arrives at school, and when the child gets off of the bus, he or she is confronted with the 22-foot-tall statue of an American Indian, usually in some form of “warrior” dress, such as a loincloth and nothing more. The “warrior” will wear one or more feathers and most likely hold a spear, club, or tomahawk. The Indian child walks into the school and sees a painting of this same image on the wall outside the principal’s

American and non-Indian children are learning to tolerate racism in our schools.”).

¹²³ *Resolution, supra* note 104, at 213 (“The stereotyping . . . has the potential to teach children and youth that stereotyping of ethnic minority groups is acceptable.”) (citation omitted).

¹²⁴ *Baca, supra* note 102, at 86.

¹²⁵ *Id.*

¹²⁶ *Baca, supra* note 102, at 84–85 (describing the experience of a Native American child who attends a school with an Indian mascot and sees portrayals of the mascot everywhere around the school).

¹²⁷ *Id.*

¹²⁸ *Id.*

office or perhaps a caricature with a large belly and overexaggerated nose, often with a bent feather in a headband. The child goes to class and sees the faux image on the classroom wall and on schoolbook covers. When the child goes to the gym, the same ubiquitous, but not real, Indian is painted on the floor If the child attends a school sporting event, it is likely that a White student will dress up in some form of Indian “costume” and perform fake ritualistic dances for the fans. These events occur daily, weekly, hourly.¹²⁹

The distraction of being constantly faced with Indian stereotypes may make it more difficult for Native American students to focus on their educational pursuits. Instead of enjoying the learning environment at schools, Native American students are faced with a hostile environment filled with Indian stereotypes and discrimination, which may affect the way that they are treated by classmates or even by faculty and staff.¹³⁰ Thus, the use of Native American mascots in schools may stifle the learning environment for Native American students.¹³¹

E. Influencing Unconscious Beliefs

Although people claim they are not personally affected by a stereotypical portrayal of Indians, Indian stereotypes can influence people on a subconscious level. In his book *Blink*, Malcolm Gladwell analyzed the split-second, unconscious judgments that people make.¹³² He found that “split-second decision[s]” are “vulnerable to being guided by . . . stereotypes and prejudices,” even if the person does not even believe in the stereotype portrayed by the image.¹³³

Malcolm Gladwell described people’s attitudes towards race on both a conscious and an unconscious level.¹³⁴

Our attitudes towards things like race or gender operate on two levels. First of all, we have our conscious attitudes. This

¹²⁹ Baca, *supra* note 102, at 84–85.

¹³⁰ Center for American Progress, *supra* note 89.

¹³¹ *Resolution*, *supra* note 104, at 209 (“[T]he continued use of American Indian mascots, symbols, images, and personalities establishes an unwelcome and often times hostile learning environment for American Indian students that affirms negative images/stereotypes that are promoted in mainstream society.”) (citations omitted).

¹³² MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 16 (2005).

¹³³ *Id.* at 233 (internal quotation marks omitted).

¹³⁴ *Id.* at 84–85.

is what we choose to believe [O]ur second level of attitude [is] our racial attitude on an *unconscious* level—the immediate, automatic associations that tumble out before we’ve even had time to think. We don’t deliberately choose our unconscious attitudes. And . . . we may not even be aware of them. The giant computer that is our unconscious silently crunches all the data it can from the experiences we’ve had, the people we’ve met, the lessons we’ve learned, the books we’ve read, the movies we’ve seen, and so on, and it forms an opinion The disturbing thing . . . is that . . . our unconscious attitudes may be utterly incompatible with our stated conscious values.¹³⁵

Thus, even if some people believe that they are not negatively influenced by Native American mascots, these mascots may influence a person’s unconscious beliefs about Native Americans. The images of Native American mascots being portrayed at sporting events contribute to the information a person’s brain uses to create unconscious opinions about Native Americans. This may impact a person’s split-second reaction to a situation involving a Native American and may influence the way a person is prone to act towards Native Americans without that person even knowing it.

F. Furthering Existing Problems Rather Than Combating Them

Currently, Native Americans experience significant challenges including problems with poverty, drugs, alcohol abuse, poor health, inadequate education, and high suicide rates.¹³⁶ Native American children have “the highest dropout rates, the highest suicide rates, and the lowest academic achievement levels of any minority group.”¹³⁷ Furthermore, the average life expectancy of a Native American male is 45 years old. Native Americans have a substantially lower life

¹³⁵ *Id.*

¹³⁶ Davis, *supra* note 85, at 24 (“[S]ince Native Americans have extremely high rates of suicide, health problems, and poverty, asserting that this racial group has more pride than other groups is shallow.”).

¹³⁷ Ellen J. Staurowsky, *American Indian Imagery and the Miseducation of America*, in *THE NATIVE AMERICAN MASCOT CONTROVERSY: A HANDBOOK* 70 (C. Richard King ed., 2010) (“Indian children have been left with ‘deep emotional scars’ . . . as evidenced in Native American children having the highest dropout rates, the highest suicide rates, and the lowest academic achievement levels of any minority group.”) (citation omitted).

expectancy than other Americans.¹³⁸

By using Indian mascots, schools are arguably erecting additional social barriers for Native Americans and are therefore “constrain[ing] native American efforts to effectively address such problems,”¹³⁹ rather than helping Native Americans overcome challenges they currently face. The use of Indian mascots arguably does not empower Native Americans, but rather is likely to lead to discrimination, lower levels of self-esteem among Native Americans, and violence towards Native Americans. The use of Indian mascots not only may create additional challenges for Native Americans, but it may also have aided in the creation of existing challenges.¹⁴⁰ Although it may be hard to find evidence supporting such a contention, it is plausible that the Indian mascots have actually instigated some of the discrimination towards Native Americans.

This section has shown how the use of Indian mascots (A) mocks ancient and sacred Indian culture; (B) makes the impression that Native Americans are an inferior people; (C) leads society to have a greater tolerance for discrimination against Native Americans, which may lead to increased violence towards Native Americans; (D) could foreseeably create a hostile learning environment in schools using Native American mascots; (E) influences how people unconsciously view Native Americans; and (F) increases barriers faced by Native Americans trying to overcome current challenges.

Native Americans are not immune from the harmful effects of stereotypes. Cultural pride is not an immunization.¹⁴¹ The use of stereotypes in a positive manner is not an immunization. Even though no harm may be intended by the use of Native American mascots, the use of these Indian mascots nevertheless furthers Indian stereotypes.¹⁴² These

¹³⁸ See Munson, *supra* note 84, at 17; *Life Expectancy*, CENTER FOR DISEASE CONTROL AND PREVENTION (April 29, 2015) <http://www.cdc.gov/nchs/fastats/life-expectancy.htm> (listing the life expectancy in the United States as 78.8 years).

¹³⁹ Davis, *supra* note 85, at 27 (“Mascot stereotypes affect more than mental health and comfort within a school/community. Other problems Native Americans commonly face, such as poverty, cultural destruction, poor health, and inadequate education, are intertwined with public images of Native Americans. These images played a role in creating such problems, and now these images constrain Native American efforts to effectively address such problems.”).

¹⁴⁰ *Id.*

¹⁴¹ See Davis, *supra* note 85, at 28.

¹⁴² *Id.* (“It is also crucial to note that intent is not the most important issue here.

stereotypes—whether negative or positive—lead to harmful consequences felt not only by Native Americans, but also by society as a whole.¹⁴³

The negative consequences of furthering Indian stereotypes are but a few among many reasons why tribal mascot-use agreements should not be enforced. These agreements should also be unenforceable because there is a strong possibility that the agreements were not entered into voluntarily by the Indian tribes.¹⁴⁴

VI. VOLUNTARINESS

There is reason to believe that some of the agreements made between the Indian tribes and the universities that support the continued use of Indian mascots were not entered into voluntarily by the Indian tribes. This is especially possible due to the dire financial situation faced by many Indian tribes today. A reviewing court would likely look at the overall situation that parties were in at the time of making their agreements to determine whether an agreement was made voluntarily. Although it is unlikely that all agreements between Indian tribes and universities were made involuntarily, it is likely that courts may find some of the agreements made by the Indian tribes to have been entered into involuntarily.

A. *Possibly Not Voluntary*

It is possible that some tribal mascot-use agreements were not entered into voluntarily by the Indian tribes. Native Americans are currently experiencing major challenges including poverty and inadequate education.¹⁴⁵ Some schools might be offering financial or educational incentives to Native American tribes in exchange for approval to use Indian mascots. With Native Americans negotiating from a potentially vulnerable position, it could be inferred that some Native Americans may feel they have no other real options other than

If a belief or action has problematic consequences . . . , then we should eliminate it, regardless of intents.”).

¹⁴³ *Id.*

¹⁴⁴ *See infra* Part VI.

¹⁴⁵ *See supra* Part V, section F.

to give schools approval for the use of Indian mascots. Some Native Americans are not experiencing as much financial hardship and are more likely to have made voluntary choices to support continued mascot use. However, it is possible that the current pressures faced by some Native Americans have led to some involuntary agreements concerning Indian mascot use. If a court finds that an agreement was entered into involuntarily, that will play a role when courts determine whether the agreement should be enforced.

B. The Effect of Involuntariness

The voluntariness of the agreements between Indian tribes and schools lending support of Indian mascots is questionable. This is important because courts look at voluntariness as a factor in deciding whether to hold a contract unenforceable on the basis that it contravenes public policy. Even though the courts have not addressed this exact mascot issue, courts have considered the voluntariness of other agreements that may be against public policy. When courts decide if agreements were entered into involuntarily, they will look at the overall situation of the parties at the time of making the agreement.¹⁴⁶

What was the situation of the Indian tribes when they entered into their agreements with the universities? As a poverty-stricken people searching for higher education and advancement in society, Indians facing the financial incentives offered by a university in exchange for approval to use Indian mascots may be unable to resist such an offer. If a reviewing court does find that an Indian tribe was facing a difficult financial situation at the time of entering into an agreement with a university, then a court may find that the offer of financial incentives would make the agreement seem more involuntary on the part of the Indian tribe.

At the same time, would removing the rights of Indian tribes to enter into binding agreements because of their financial situation take away the rights of Indian tribes to enter into agreements? Should Indian tribes, as sovereign nations, be able to decide for themselves what agreements they

¹⁴⁶ *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 465 (Tenn. Ct. App. 2009) (“To determine whether a contract is void as violative of public policy, we consider the situation of the parties at the time the contract was made and the purpose of the contract.”) (internal quotation marks omitted).

deem appropriate? These are difficult questions a reviewing court would need to consider. Thinking about these questions, a court may find that the potential for abuse and involuntariness trumps the ability to contract freely. Thus a court may find that agreements entered into mainly based on financial incentives were involuntary and should be unenforceable.

VII. THE BALANCING TEST

Courts may find contracts to be unenforceable if they are against public policy. *Corbin on Contracts* explains this as follows: “The law has a long history of recognizing the general rule that certain contracts, though properly entered into in all other respects, will not be enforced, or at least will not be enforced fully, if found to be contrary to public policy.”¹⁴⁷

The courts do not create public policy. Rather, they determine if an agreement violates a current public policy in society as seen through the generally accepted practices of society. Given that Native American mascots are arguably stereotypical and that using them arguably furthers the negative consequences of stereotypes, courts should find that the agreements between the schools and the Native American tribes should not be enforced since they contradict the public policy of treating all races and cultures equally and respectfully.

Courts engage in a balancing test to determine whether the harm to society of enforcing the agreement outweighs the benefits to society of enforcing the agreement.¹⁴⁸ This balancing test takes into account the totality of the circumstances surrounding the agreement. It is discussed in the Restatement (Second) of Contracts as well as in a variety of cases.¹⁴⁹ Section 178 of the Restatement describes this balancing test as follows:

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation

¹⁴⁷ 15-79 *Corbin on Contracts* § 79.1.

¹⁴⁸ See *Cain v. Darby Borough*, 7 F.3d 377, 382 (3d Cir. 1993) (“The public policy implications must be examined on a case-by-case basis to determine whether the public interest in enforcing the agreement outweighs any harm.”); *Malden Mills Indus., Inc. v. ILGWU Nat. Ret. Fund*, 766 F. Supp. 1202, 1210 (D. Mass. 1991).

¹⁴⁹ Although with federal Indian law only federal cases would be binding, state cases are also useful in this analysis to see patterns for how courts make this determination.

provides that it is unenforceable *or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.*

(2) In weighing the interest in the enforcement of a term, account is taken of

- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied, and
- (c) any special public interest in the enforcement of the particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.¹⁵⁰

The first part of Restatement § 178 indicates that legislation will be looked at first.¹⁵¹ Because there are no current statutes about tribal mascots, a court reviewing this issue will use a balancing test to determine if public policy considerations that favor enforcing the agreements between the schools and the tribes are “clearly outweighed” by public policy considerations against enforcing the agreements.¹⁵²

There are two parts of this balancing test: Restatement § 178(2) looks at three factors a court would weigh in favor of enforcement, and Restatement § 178(3) looks at four factors against enforcement. The following will discuss these two parts of this test to demonstrate how a reviewing court could decide the enforceability of these agreements.

¹⁵⁰ Restatement (Second) of Contracts § 178 (1981) (emphasis added).

¹⁵¹ *Id.*

¹⁵² *Id.*

A. *Factors in Favor of Enforcement*

1. *Expectations of the parties*

A court will consider the first Restatement factor, which is the “justified expectations” of the parties.¹⁵³ In a situation where there is an actual agreement between a tribe and a school, the expectations of the parties may be clearly set forth in the agreement. For instance, an agreement might show that a tribe expects benefits, such as financial aid for tribal students, in exchange for supporting a school’s continued use of an Indian name for a mascot.

2. *Forfeiture*

The second Restatement factor to determine the benefit of enforcement is “any forfeiture that would result if enforcement were denied.”¹⁵⁴ Courts give this factor significant weight in making their determination about enforceability.¹⁵⁵ The invalidation of a school’s mascot-use agreement could have significant and far-reaching consequences. A school would forfeit the permission it received from an Indian tribe. This may be detrimental to a school’s ability to retain its mascot, especially because a primary factor in the NCAA’s analysis of Native American mascot exemptions is permission from the namesake Indian tribe. If a school is required to change its mascot to compete in NCAA championship games, this could cost the school a substantial amount of money. It could cost hundreds of thousands of dollars for a university to change its mascot,¹⁵⁶ and unhappy current donors of a school may decide to withhold donations if a school changes its mascot. However, some people may be willing to donate money to a school to help the school change its mascot. But not only could a university potentially suffer financially, but the morale of the students, faculty, staff, and alumni of a university may also suffer if a university is unable to continue with its cherished athletic

¹⁵³ *Id.*

¹⁵⁴ Restatement (Second) of Contracts § 178 (1981).

¹⁵⁵ See *Town of Newton v. Rumery*, 480 U.S. 386, 392, 395, 398 (1987) (holding that a release-agreement did not violate public policy because of the benefits of enforcing the agreement)

¹⁵⁶ Mark Friedman, *ASU Still Mulling Mascot Change*, 24 ARK. BUS. 11, 11 (2007) (“Arkansas State University’s Mascot Review Committee said it could cost around \$500,000 to change the school’s mascot from the Indian.”).

traditions stemming from the use of its mascot.

The Native American tribes would also forfeit benefits that may be discussed in their agreement. These lost benefits could be very costly to a tribe. For example, if a benefit is financial aid for Native American students who attend the school, then withholding this benefit could be detrimental for a tribe already struggling with educational or financial issues. Also, some Native Americans may feel a sense of pride at having their tribe represented by a university. Other Native Americans might not want to fight the mascot issue out of fear of being labeled as overly sensitive or because they do not want to be accused of focusing too much on political correctness or on issues of no importance—especially in light of other more critical issues currently facing Native Americans such as high poverty, unemployment, alcoholism, and high suicide rates. By enforcing contracts that allow for schools to use Native American mascots, the Native Americans would not have to worry about such possible persecution.

3. Special public policies in favor of enforcement

The third Restatement factor courts would use to determine the benefit of enforcement is “any special public interest in the enforcement of the particular term.”¹⁵⁷ A school may value the tradition of using its Native American mascot very highly, and a court may consider a school’s long athletic tradition in this analysis. Also, a court may consider whether tribes view the use of their name as a token of honor and respect. An Indian tribe who appreciates and cherishes a school’s use of its own name may influence the court as it has the NCAA thus far.

B. Factors Against Enforcement

1. Statutes and common law to determine strength of public policy

Restatement § 178(3) looks at four factors courts may consider in weighing whether an agreement should not be enforced because it violates public policy.¹⁵⁸ The first Restatement factor against enforcement is “the strength of that

¹⁵⁷ Restatement (Second) of Contracts § 178 (1981).

¹⁵⁸ Restatement (Second) of Contracts § 178 (1981).

policy as manifested by legislation or judicial decisions.”¹⁵⁹ Hence, courts look to the common law and to statutes to see the strength of the public policy against enforcing the agreement.¹⁶⁰ This factor does not play a large role in this analysis because of a lack of statutes regarding Native American mascots for universities and because this issue has not yet been decided by the courts.

2. *Refusal to enforce furthers public policy*

The second Restatement factor against enforcement is “the likelihood that a refusal to enforce the term will further that policy.”¹⁶¹ In this case, the existence of an important public policy that requires the equal treatment of all races and cultures is well-established. If a court considers the harmful effects that the use of Native American mascots has on public policy, it is likely to find that refusing to enforce mascot-use agreements would discourage schools’ use of such a mascot and that the harmful effects would be mitigated. Although finding the agreements unenforceable does not guarantee that a school will change its mascot, it could make it more likely that a school would do so.

3. *Deliberativeness and seriousness of misconduct*

The third Restatement factor against enforcement is “the extent to which [the misconduct] was deliberate” as well as “the seriousness of any misconduct involved”¹⁶² Although schools are not deliberately trying to cause harm to Native Americans, the schools are deliberately using Native American mascots which in turn arguably leads to harm. The undeniable fact that schools are deliberately using Native American mascots would weigh heavily in a court’s analysis of this factor.

A reviewing court would also look to see the “seriousness” of the “misconduct”¹⁶³ in order to protect the public welfare.¹⁶⁴ In

¹⁵⁹ *Id.*

¹⁶⁰ Along with Restatement § 178, Restatement § 179 discusses how a “public policy against the enforcement of promises or other terms may be derived by the court from . . . legislation relevant to such a policy” or from “the need to protect some aspect of the public welfare” Restatement (Second) of Contracts § 179 (1981).

¹⁶¹ Restatement (Second) of Contracts § 178 (1981).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Restatement § 178, *supra* note 160.

this instance, the harm furthered by allowing schools to use Native American mascots is substantial. The harmful effects of furthering Native American stereotypes through the use of tribal mascots were described in detail in Part V of this Comment. The use of tribal mascots arguably (A) mocks sacred Native American culture and religion; (B) dehumanizes Native Americans and makes Native American people appear inferior to people of other races and nationalities; (C) increases society's tolerance for discrimination against Native Americans and possibly leads to increased violence towards Native Americans; (D) creates a hostile learning atmosphere in schools that use Native American mascots; (E) influences people's automatic reactions in situations involving Native Americans; and (F) furthers existing challenges that Native Americans face.¹⁶⁵

It may be easier for a court to find an agreement to be unenforceable if it is between a public institution and a Native American tribe as compared to an agreement between a private institution and a Native American tribe. This is because the United States government has a fiduciary responsibility towards Native American people.¹⁶⁶ Therefore, the analysis could change depending on whether the school is a private institution or a public school receiving federal funding. Out of the current five schools that have received exceptions from the NCAA's mascot ban, three of them are public schools. Both Catawba College¹⁶⁷ and Mississippi College¹⁶⁸ are private institutions, thus not automatically triggering the fiduciary duty of the United States; however, Central Michigan University,¹⁶⁹ Florida State University,¹⁷⁰ and the University of Utah¹⁷¹ are all public institutions, and so the United States

¹⁶⁵ See *supra* Part V.

¹⁶⁶ *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.")

¹⁶⁷ *Quick Facts*, CATAWBA, <http://catawba.edu/about/more/overview> (last visited Oct. 22, 2015).

¹⁶⁸ *About MC*, MISSISSIPPI COLLEGE, <http://www.mc.edu/about/history> (last visited Oct. 22, 2015).

¹⁶⁹ *About CMU*, CENTRAL MICHIGAN UNIVERSITY, <https://www.cmich.edu/about/Pages/default.aspx> (last visited Oct. 22, 2015).

¹⁷⁰ *Academics*, FLORIDA STATE UNIVERSITY, <https://www.fsu.edu/academics/> (last visited Oct. 22, 2015).

¹⁷¹ *University of Utah*, U.S. NEWS, <http://colleges.usnews.rankingsandreviews.com/best-colleges/university-of-utah-3675> (last visited Oct. 22, 2015).

would have a fiduciary responsibility in those instances. Since Native American stereotypes arguably further racial discrimination, these public schools are held to a higher standard than private schools. Public institutions that use Native American mascots may actually be breaching their fiduciary duties to the tribes by doing so. Because of this, it may be easier for a court to find an agreement to be unenforceable if it is between a public institution and a Native American tribe (where there could be a breach of a fiduciary duty) as compared to an agreement between a private institution and a Native American tribe (where there arguably would not be a breach of a fiduciary duty). Although the United States federal government has not always lived up to its fiduciary responsibilities towards Native American tribes, these fiduciary duties do exist and should be acknowledged by a reviewing court.

Certainly, just because an institution is a private institution does not mean that their use of a Native American mascot is acceptable. Any school—whether it receives federal funding or not—that uses Native American mascots is furthering stereotypes of Native Americans. These stereotypes, in turn, create great harm for society. Courts that are performing this balancing test should weigh this harm. However, when a public institution is involved, the analysis of the harm caused by using Native American mascots needs to be undertaken in the context of the fiduciary duty that the United States federal government owes to Indian tribes.

4. Directness of connection between misconduct and agreement

The fourth Restatement factor against enforcement is “the directness of the connection between [the] misconduct and the term.”¹⁷² This would not be a difficult issue for a reviewing court to decide because the social harm is arguably caused directly by using Native American mascots, and the use of Native American mascots is the direct objective and result of the agreements.

The use of Native American mascots also furthers the challenges currently faced by Native American tribes and may have even aided in creating some of those challenges. Native Americans face financial hardships and could be at a

¹⁷² Restatement (Second) of Contracts § 178 (1981).

disadvantage when bargaining with schools that are willing to offer financial incentives. If the use of the Indian mascots furthers the hardships faced by Native Americans, then the use of mascots itself plays a direct role in furthering the current issues faced by Native Americans. The harsh situations in which Native American tribes find themselves in play a direct role in generating permission for the use of tribal mascots by universities. This permission then promotes the use of tribal mascots which, in turn, is harmful for Native Americans. Thus this harmful cycle of challenges for Native Americans continues. Rather than aid Native Americans in overcoming current challenges, the use of Native American mascots arguably perpetuates this cycle of challenges.

VIII. CONCLUSION

Although the NCAA has allowed universities to appeal the ban on Native American mascots at NCAA championship games, these appeals were based primarily on the permission that schools received from the namesake Indian tribes. Some of these Native American tribes have shown their support by making agreements with the schools to support the continued use of Indian mascots in exchange for the school's continued respectful use of the Native American images and, in some cases, for financial benefits as well.

However, the use of Indian mascots by schools furthers stereotypes of Native Americans. These stereotypes are harmful because they perpetuate an incorrect belief about Native Americans and negatively influence not only the way that others view Native Americans but also the way Native Americans view themselves. Agreements reinforcing these stereotypes, including the agreements between universities and tribes that permit the use of Native American mascots, should not be enforced by the courts because they contravene public policy.

Not only do these agreements allow for the continued use of stereotypical Native American mascots, but some of these agreements may have been entered into involuntarily by Native American tribes who were in need of the financial and educational benefits offered by the schools in exchange for permission to use the tribal mascots. If a court were to review such an agreement based on the totality of the circumstances, a

court would most likely conclude that such agreements are unenforceable because they conflict with public policy. This is especially true for those agreements entered into between Native American tribes and public schools given the fiduciary relationship of the United States to Native American tribes.

Thus, a reviewing court should find that agreements between Native American tribes and Universities granting approval for the use of Indian names as mascots should be void as against public policy. If the approval is found to be void, the NCAA would have a harder time basing approval as the primary factor for exemptions from its own mascot policy at championship games. Without the mascot exemption, more universities may decide to eliminate their use of Indian mascots and, in doing so, discontinue the harmful effects from their use of Indian mascots.

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