Panel 1
Considering Mascots from Native Perspective

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20th Annual Tribal Law and Government Conference
"Examining and Reconsidering Indian Mascots in the 21st Century"
University of Kansas School of Law
Friday, March 11, 2016

Note for designers: Please change footnotes to endnotes, remove space between number and word, and change all to Times New Roman, 12 pt.

The Federal Lawyer

March 2016

[hed] Indigenous Identity and Sports Mascots: The Battlefield of Cultural Production

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On Jan. 1, 2017, California's Racial Mascots Act will go into effect, making the state the first in the country to impose a law precluding any public school from using the term "Redskins" for "school or athletic team names, mascots, or nicknames."[1] California's law is a historic milestone because it classifies the term as "racially derogatory" and bars its use in public education as a means to prevent racial discrimination, rather than forcing individual claimants to "prove" discrimination by identifying specific instances of racially targeted bias.[2] In 2012, the Oregon State Board of Education also moved in this

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[1]Wenona T. Singel, "A Look at the New California Law Banning Public Schools from using the term Redskins," posted on Turtle Talk, The Indigenous Law and Policy Center Blog, Michigan State University College of Law, Oct. 14, 2015.
[2]*Id.* (discussing an analogous effort by the Michigan Department of Civil Rights to halt the use of American Indian mascots in 35 schools in Michigan, which failed

direction by adopting a resolution and final rule prohibiting the use of any Native American mascot by a public school on or after July 1, 2017.[3] However, the approach used by California and Oregon does not reflect a national consensus. The term is in use in 21 other states representing 58 high schools in the United States, and Dan Snyder, owner of the Washington Redskins National Football League team, has asserted that he will never change the team's name, despite the federal order that recently canceled its trademark registration.[4]

The use of Native images as sports mascots perpetuates a form of identity harm for Native peoples that is pernicious and enduring. This form of "cultural production" reinforces a marginalized status for American Indian and Alaska Native governments, and, in that sense, it is antithetical to the norm of self-determination that is guaranteed to indigenous peoples under international human rights law.[5] The use of Native images as sports mascots also represents a contemporary form of "racism" because it reinforces negative stereotypes about Native peoples, undermining their essential moral rights to dignity and equal respect, as well as their constitutional right to equality under U.S. law.

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when the civil rights office of the U.S. Department of Education dismissed the complaint for lack of specific, identifiable harm to individual students).

[3] *Id.*

[4] *Blackhorse v. Pro-Football Inc.*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). This ruling is being challenged in federal court. *See* Zoe Tillman, "Judge Rules Redskins Trademark Case Can Move Forward," LEGAL TIMES (Nov. 25, 2014).

[5] For a full account of this argument, *see* Rebecca Tsosie, "Just Governance or Just War?: Native Artists, Cultural Production, and the Challenge of 'Super-Diversity'," 6 CYBARIS: AN INTELLECTUAL PROPERTY LAW REVIEW 61 (2015). Portions of this article have been incorporated into this essay.

The connection between human rights and civil rights is important, but it's often misunderstood by legal professionals who believe that the use of Native cultural imagery is protected as a constitutional right of freedom of expression. This article discusses the harm of using Native images as sports mascots and explains why this issue should matter to attorneys and political leaders.

[subhed] Cultural Imagery in Historical Context

As Professor Robert Williams Jr. notes in *Savage Anxieties*, Western European peoples have, for centuries, employed negative cultural imagery to construct other peoples as the "savage" as a means to divest them of equal rights and status and to "reinvent" their own governments and societies in the process.[6] In particular, Western philosophers and jurists relied on the notion of an "irreconcilable difference" between "civilization and savagery" to shape and direct the nature of the policies that would govern their interaction with Native peoples in the Americas. At the point of contact, the cultural imagery of the savage was used to appropriate indigenous lands through the fiction of "discovery," which U.S. Supreme Court Chief Justice John Marshall adopted in *Johnson v. McIntosh* as a way to sanction the claims of "civilized" European nations to Native lands, while the indigenous peoples retained only a "right of occupancy," which could be extinguished at the will of the European sovereign or its grantee through "purchase or conquest."[7]

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[6]Robert A. Williams Jr., SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 1 (2012).
[7]*Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

During the late 19th century, negative cultural imagery was again employed to construct indigenous peoples as "wards" who were in a state of "pupilage" in relation to their "guardian," the United States. As "wards," Native peoples lacked any legal right to resist the federal government's forcible assimilation policies. As "wards," they could be forced to attend federal boarding schools, speak English rather than their Native languages, be "Christianized," and become "farmers" rather than "hunters." Through the 19th century, federal laws and policies barred the practice of indigenous religions, healing ceremonies, tribal economic systems, and customary social practices regarding marriage and distribution of property upon death. The Dawes Allotment Act of 1887 also appropriated tribal lands in exchange for smaller "allotments" that were secured to individual Indians, supposedly as a means to "civilize" them. These policies (which were portrayed as "beneficent") resulted in the loss of two-thirds of tribal landholdings, as well as thousands of sacred objects and objects of cultural patrimony.[8] These policies also damaged the ability of Native peoples to "self-define," because the construction of Indian identity was treated as a federal project rather than an essential right of Native peoples.

At the same time that Western policymakers were constructing the image of the uncivilized and warlike "savage" as a means to appropriate material wealth from tribal governments, they constructed the image of the "Noble Savage" as a friendly Indian who

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[8] *See* CAROLE GOLDBERG, REBECCA TSOSIE, KEVIN WASHBURN AND ELIZABETH RODKE WASHBURN, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS, 24-30 (6th edition, 2010) (describing the impacts of the allotment policy and other forms of 19th-century civilization policies).

helped white people (Squanto, Pocahontas, Sacajawea) and lived in harmony with nature. Unfortunately, the Noble Savage was destined to "vanish" in the wake of civilization. This was quite convenient for the United States because it gave the new country a bicultural and hybrid European/indigenous identity as part of its national creation story. Proud and noble Native images appeared on U.S. coins and currency and were used within U.S. military operations, setting the United States apart from its British heritage. The same dynamic appears in other settler countries, such as New Zealand.

The central problem of this use of cultural imagery is that both "good" and "negative" Indian images are employed selectively to benefit the interests of the dominant society. The collective harms, however, were concentrated upon Native people, divesting them of their rights to self-determination and cultural autonomy. Today no one really knows anything at all about the indigenous nations that Squanto, Pocahontas, or Sacajawea came from. And no one really cares. For the vast majority of Americans, Indians are part of America's past and not part of its present. It is not a coincidence that states like Indiana, Ohio, and Pennsylvania, which removed Indians from their boundaries in the 19th century, continue to have the highest concentration of public high schools using "Redskins" as a mascot.[9]

In 2015, the use of Native American cultural imagery is alive and well and so are Native stereotypes. Many Americans purport to be "confused" about whether there is any harm

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[9] *See* Singel, supra note ___ (providing a map of states showing highest concentration of schools using the term).

to contemporary Native peoples, who are now considered "equal citizens" within the United States. In fact, Snyder continues to proclaim that the Washington football team's logo and name actually "honor" Indians, ignoring the protests of tribal leaders and individual Indians who assert that the use of the logo disparages and degrades them.

The use of Indian images as a form of cultural production also permeates the billion-dollar entertainment industry in the United States, as pop culture heroes such as Pharrell Williams and Gwen Stefani appropriate Native imagery in the form of Indian headdresses or sexy Indian princess attire to manufacture a commercial persona.[10] Native peoples see this as a desecration of specific tribal traditions that authorize the use of ceremonial headdresses for certain esteemed leaders and, in the case of the "sexy Indian princess" image, as a perpetuation of racist stereotypes about Native women that sexualize and degrade them. The mass marketers claim that the use of Indian imagery is a permissible act of "artistic appropriation." If there is no legal right to stop appropriation, then tribal protests become fodder for the "culture wars," allowing tribal claims to be dismissed as contemporary instances of "political correctness," which irritate many Americans and undercut profits.

This unhappy state of affairs will continue so long as non-Indians fail to understand the significance of cultural identity to indigenous peoples and so long as U.S. law fails to recognize that cultural harm to Native peoples is a form of racial discrimination. The

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[10]Tsosie, Just Governance or Just War, at 65 and notes 10-11.

truth of the matter is that Native peoples are not like other "Americans." The use of Native American cultural imagery has been normalized within the United States, and generations of Americans have been trained to think that it is perfectly acceptable to use Native images in ways that would be unacceptable for any other group. Stereotypes about "black mammies" or "Chinese coolies" or "Mexican banditos" have disappeared from the commercial marketplace. Stereotypes about Indians persist. Why? Could it be that Americans claim Native images as *their* "property"?

II. **[subhed]** Cultural Imagery as Property

Who owns the image of the "Indian" and for what purpose? That's the operative legal inquiry. Throughout history, Native people have been formally excluded from the ability to participate in the dominant society's mode of cultural production, which alternately divested Native people of their rights and built a new society by appropriating Native land as well as images from tribal cultures. Today, Native people are saddled with the harms of this legacy, because many Americans have incorporated these images as "theirs," often unconsciously, and they harbor implicit biases about who Native peoples are and where they belong. This can manifest in overt hostility and racial bias, as demonstrated last year at a sports event in South Dakota, where Native American children were openly abused and taunted by spectators at a game. Or it can manifest more covertly, in the denial of full inclusion of Native people in corporations, law firms, and the political institutions that drive federal and state decision-making.

The common thread is the use of stereotyping to maintain the status quo, which benefits non-Indians and harms tribal governments and their members. Stereotyping is a primary form of prejudice, which is a biased attitude that can manifest in legally prohibited behavior, such as discrimination, but otherwise is not legally actionable.[11] Stereotypes embody a set of widely held associations between a social group and attributes that they are believed to possess. Commentators often assert that stereotyping is widespread throughout the world and it is frequently used in comedy routines (e.g., "redneck" humor) and satire, both of which are protected forms of expression. This is true. However, when stereotyping is linked to a history of oppression and exclusion that operated to deny groups equal rights, it can reproduce contemporary inequities by conferring privileges on certain groups and justifying the exclusion of others from equality in employment, housing, educational opportunities, and a host of other benefits. These forms of subtle domination continue to operate within a contemporary society popularly described as "post-racial" and "colorblind" in its adherence to "formal" equality.

The use of Indian images as sports mascots originated at a time when overt racism and bigotry was the norm in society, but it is now used to sustain multimillion-dollar sports franchises in the hands of the owners of the Washington Redskins, the Kansas City Chiefs, the Cleveland Indians, the Atlanta Braves, and the Chicago Blackhawks. The use of Indian images in the sports and entertainment industries is not only tolerable to most

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[11] *See* Anita Bernstein, "What's Wrong with Stereotyping?," 55 ARIZ. L. REV. 655 (2013).

Americans, it is actually depicted as "desirable" and "honorific" to Native peoples. Why? First, it is profitable. Snyder and his cohort of team owners assert that they have a property interest in the team name and logo worth millions of dollars. Second, it seems to align with the intuition of Americans that this is a constitutionally protected form of expression (commercial speech), and thus, the argument is that the Constitution supports the liberty and property interests of the team owners and their fans rather than the right of Native peoples to equal respect. And finally, the team owners continue to assert that, unlike the caricatures of other racial groups, Native American cultural imagery actually honors Indians. This assertion resurrects the Noble Savage concept that the country used to create itself. If the team owners can find a "good" contemporary Indian to validate this, the assertion becomes a "fact" and is used to block the protests of Native activists who are accused of trying to mess things up for the rest of American society as it claims its own "Native" history.

[subhed] The Path Forward

The California law represents the emerging view among human rights attorneys and civil rights advocates that the use of Indian images as sports mascots constitutes a denial of "equal educational opportunity" to Native students within public school systems. At the national level, the continued litigation over the fate of the Washington team's logo demonstrates the entrenched attitude that use of Indian images is an economic right of "Americans."

The controversy over the use of Native images in American cultural production is the final battleground in the centurieslong conflict between Native peoples and the European colonists. For Native peoples and Native individuals, the stakes are about protecting the essence of indigenous identity as separate from that of the United States and as a core element of tribal cultural survival. Because of this, cultural identity should be framed as the core issue of indigenous self-determination. As the National Congress of American Indians (NCAI) has documented, the term "redskins" originated from the genocidal past, as Native people were actively hunted and killed for bounties.[12] Native bodies had a commercial value in the 19th century, but only after they were dead. This is the same mentality that was invoked to justify the widespread historical practice of looting Native graves and battlegrounds and appropriating Native bodies and body parts, regalia, sacred objects, and just about anything else that could be confiscated by a "victor" over a "victim." There is a long tradition of symbolic "taking" of objects from the enemy on a battleground as a means to humiliate and degrade the victims. The link between language and historical practice is not speculative. Every dictionary definition of the term "redskin" contains at least one entry noting that the term is considered "offensive and derogatory" because of its historical associations.

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[12] National Congress of American Indians, "Ending the Legacy of Racism in Sports and the Era of Harmful 'Indian' Sports Mascots" (October 2013), *available at* www.ncai.org/resources/ncaipublications/Ending_the_Legacy_of_Racism.pdf.

The fundamental challenge for the future is to develop equitable governance structures that facilitate respect and responsibility for the important values and interests at stake. Native peoples must secure the legal right to protect themselves against cultural appropriation, which is the unauthorized and exploitive use of Native cultural symbols and expression. If a tribal government chooses to license the use of its tribal name for commercial purposes, this is an act of sovereignty. However, there is no "right" to use a racially derogatory term that has been used to justify genocide. No one should profit from the term, nor should it be used to foster a "team" identity. Rather, the commodification of racial oppression should be unacceptable within contemporary U.S. society.

The cultural heritage of indigenous peoples belongs to the communities of origin, and tribal governments should have the right to protect their cultural identities,[13] which do not belong to the United States. Rather, the appropriation of indigenous cultural identity by outsiders is the final act of colonialism in a centurieslong struggle to claim victory over the indigenous nations of this land. I honor Suzan Harjo, Walter Echo-Hawk, Amanda Blackhorse, and all of the other Native leaders who have litigated the right of indigenous peoples to protect their cultural and political identities from misappropriation and exploitation. Thanks to their courageous advocacy, states such as California have been inspired to take action to protect the civil rights of Native children in public school systems. The federal Patent and Trademark Board's decision to deny trademark

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[13] For an excellent account of this argument, *see* Angela Riley, "Straight-Stealing: Towards an Indigenous System of Cultural Property Protection," 80 WASH. L. REV. 69 (2005).

protection to the Washington football team and the actions of California and Oregon to ban the use of racially derogatory terms in public schools are positive developments. However, so long as individuals and corporations are allowed to exploit aspects of Native cultural identity as "property," the battle will continue.

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