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The Mascot Name Change Controversy: A Lesson in Hypersensitivity

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COMMENT

THE MASCOT NAME CHANGE CONTROVERSY: A LESSON IN HYPERSENSITIVITY

INTRODUCTION

Of all the things in the world to worry about—all the war, the famine, the violent crime, the uncured disease—it is remarkable that athletic team mascots[1] receive as much attention as they do. While a few mascots today truly do offend a significant number of people, the current trend of scrutinizing potentially offensive mascots has been blown completely out of proportion. For example, in an apparent attempt to appease his "politically correct" constituency, President Bill Clinton donned the old style Cleveland Indians baseball cap with the letter "C" for Cleveland on it when he threw out the first pitch on April 4, 1994, opening day at Cleveland's brand new Jacobs Field.[2] Obviously, Clinton was afraid of the potential fall-out that might have followed if he wore the Indians' modern cap with the currently controversial, grinning Indian "Chief Wahoo" mascot on it.

Other examples of this sudden fear of offending are numerous. The University of Alabama-Birmingham Blazers recently abandoned their mascot—a viking like character named Blaze—for being too male and too Caucasian, and because he was intimidating to children.[3] One commentator suggested that if these factors are truly overriding concerns in today's society, then perhaps Santa Claus should be dumped as well.[4] However, being too male is not always the problem. Sometimes the role is reversed. For example, the Pomona-Pitzer (California) College "Sagehen" is clearly sexist and offensive to all males—just as "Sagecock" would be offensive to females.[5] On a further gender-sensi-

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1. Nickname, logo, symbol, and mascot are all generally interchangeable terms. For consistency purposes, this Comment will mainly use the term: mascot.

2. *Channel 6 Sports with Jon Anderson* (CBS local television broadcast, 10 o'clock news, Channel 6, WITI, Milwaukee, WI, Apr. 4, 1994).

3. Angus Lind, *Colleges Need Some Name—Dropping*, TIMES-PICAYUNE, Oct. 20, 1993, at E1.

4. *Id.*

5. *Id.*

tive note, "Hooter" the Owl, mascot of Kennesaw State (Georgia) College recently underwent a name change because "hooters" is a "vulgar term for breasts."[6]

According to some standards, the Notre Dame Fighting Irish is also an insensitive mascot. First of all, it is inconsiderate of all the world's Irish people who do not want to be associated with the mascot of some university located in Indiana. Second, it suggests that Notre Dame and Irish people condone fighting, a senseless and despicable practice. And finally, as one newspaper writer put it, "[W]hat about that sawed-off little Leprechaun mascot of theirs. Doesn't he offend midgets and short people in general?"[7]

Furthermore, do names like the California Angels and the New Orleans Saints offend non-Christians? What about the Arizona State Sun Devils and the Duke Blue Devils[8]—do they offend Christians? How about the feelings of those Southerners whose ancestors were victimized and killed by the Union Army during the Civil War—should they have to endure the constant painful reminder provided by the New York Yankees?

Hopefully my sarcasm in exposing many of the seemingly harmless examples above is obvious. However, offensive mascots are no laughing matter. On the contrary, many people take them very seriously. The controversy surrounding many mascots has led to boycotts, protests, demonstrations, classroom disruption and absence, and even legislation and court orders restricting the use of certain mascots. The two biggest offenders in the offensive mascot game are Native American and Confederate Rebel mascots.

The debate has permeated all levels of athletics—from high schools to professional franchises. However, there is one big issue that differentiates high school and college sports from the pros. Professional franchises are almost invariably privately owned by one person or a small group of people. Hence, under the principles of free speech, owners may name their teams whatever they like, and not have to fear reprisal from the government in the form of elimination of state and federal funding.

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6. John Leo, *Looking Back at the PC Extravaganza*, U.S. NEWS & WORLD REPORT, Jan. 31, 1994, at 19.

7. Lind, *supra* note 3, at E1.

8. Actually Duke University's Blue Devil mascot is derived from a famous French alpine fighting unit that served during World War I. *Id.*

Rather than delve into free speech principles and the other intricate issues posed by the debate over professional team mascots, this Comment will focus on high school and college mascots. Furthermore, although each state has grappled with the mascot issue to some extent, this Comment will focus on relevant Wisconsin law and policy wherever possible. Interestingly, high school mascots have been the object of most of the litigation that has risen from this controversy. Therefore, Part I of this Comment will discuss offensive mascots at the high school level. Part II will review college and university mascots. And finally, Part III will analyze the controversy and suggest that the entire debate is truly a foolish waste of time and we ought to move on to more important issues.

I. HIGH SCHOOLS

The Civil Rights Movement of the 1960s appears to have been the genesis of efforts to eradicate many high school mascots. However, this movement was led largely by black Americans, and therefore has generally only caused the removal of mascots considered offensive by black Americans. Mascots considered offensive by other ethnic groups, such as Hispanics and Native Americans, have only more recently become the source of controversy. It would be interesting to know how many mascots such as the "Indians" or the "Gauchos" would still be around today had Hispanics or Native Americans played a more prominent role in the Civil Rights Movement. Nevertheless, despite the severity of the controversy that often surrounds team mascots, relatively few disputes have gone to litigation, and essentially all of those that have, involve high schools that used relics of the Civil War Confederacy as mascots.

A. Banks v. Muncie Community Schools[9]

When the growing city of Muncie, Indiana, realized that it needed another high school in the early 1960s, Muncie Southside High was constructed.[10] In keeping with its "southern" name, the school board chose to pursue a theme based on the old South when deciding on an athletic team mascot in 1962.[11] Accordingly, the Confederate Rebel was selected.[12]

Subsequently, a group of black students at the school filed a class action against the school board alleging racial discrimination and seeking

9. 433 F.2d 292 (7th Cir. 1970).
10. *Id.* at 293.
11. *Id.* at 297.
12. *Id.*

a declaratory judgment and injunction to prohibit the board from, among other things, permitting the use of the Rebel mascot at Southside High.[13] Plaintiffs alleged that the mascot: 1) was offensive to black students at the school (who made up thirteen percent of the enrollment), 2) was inflammatory, and 3) discouraged blacks from participating in extracurricular activities.[14]

While there was some evidence that tended to support the plaintiff's allegations,[15] the court ruled that "no evidence was presented which demonstrated that the Black [sic] students . . . were being denied access to any of the school's facilities because of the use of the [Rebel mascot]."[16] Therefore, no "nexus" had been drawn between the use of the Rebel mascot and the alleged discrimination practiced against the black students, so nothing could be done to restrict the use of the Rebel without abridging the First Amendment rights of the majority of students who favored the Rebel mascot.[17]

However, despite plaintiffs' failure to present evidence of any constitutional violation, the court did conclude that the mascot was offensive and that good policy would dictate its removal.[18] The court's final words also hinted that if it were presented with more evidence in the future, it may be persuaded to side with the plaintiffs and abolish the Rebel mascot.[19] Hence, in an attempt to prevent further controversy, the school reached a compromise. Rather than entirely abolishing the Rebel, the school decided to continue using the name "Rebels," but discontinue its mascot's portrayal as a Confederate Rebel. The current symbol used to represent the Muncie Southside Rebels is a cannon.

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13. *Id.* at 293.

14. *Id.* at 297.

15. *Id.* Plaintiffs presented a 1968 report by the Indiana State Advisory Committee to the United States Commission on Civil Rights [Report] entitled *Student Friction and Racial Unrest at Southside High School, Muncie, Indiana.* The Report stated that racial discrimination existed at the school and that "the use of [the Rebel mascot] . . . is distasteful to many Negro students and their parents." Furthermore, the Report recommended that "[t]he school administration should take immediate steps to eliminate the [Rebel mascot] . . . at Southside High School. It is impossible for Negro students to feel loyal to a school whose official symbols represent a system that enslaved their ancestors." *Id.* (quoting the Report). Expert witnesses offered similar conclusions at the trial. *Id.* at 297 n.14.

16. *Id.* at 298.

17. *Id.*

18. *Id.* at 299.

19. *Id.* The court's exact words were: "Should such evidence become available in the future, we see nothing which bars an appropriate action at that time." *Id.*

B. Augustus v. School Board of Escambia County, Fla.[20]

In the early 1970s, Escambia High School, located in the extreme western end of the Florida panhandle, faced a similar, yet much more volatile, situation as Muncie's Southside High. Escambia High had also chosen the "Rebel" as its mascot by a vote of the all-white student body when the school opened in 1958.[21]

The school was racially integrated during the 1960s, resulting in racial tension between black and white students.[22] During the 1972-73 school year, four large scale confrontations involving major interracial fighting broke out, each requiring law enforcement officers to be called in to restore order, and twice forcing the school to be closed.[23] The black students' demands to abolish the "Rebel" mascot were one source of the racial tension.[24] Another was the practice by some white students of using the mascot and other symbols to deliberately irritate and provoke black students.[25] Despite the controversy, an overwhelming majority of the students voted to retain the Rebel as their mascot in January of 1973.[26]

Like in *Banks*, a class action was filed by a group of black Escambia students seeking a permanent injunction against the use of the Rebel mascot at the school.[27] The district court granted the injunction.[28] However, a group of student intervenors and the school board appealed to the circuit court, arguing that their rights under the First and Fourteenth Amendments had been violated, and also that the permanent injunction was overbroad.[29]

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20. 507 F.2d 152 (5th Cir. 1975). For a good summary of the issues and holding of this case see HERB APPENZELLER & THOMAS APPENZELLER, SPORTS AND THE COURTS 127-32 (1980).

21. 507 F.2d at 155.

22. *Id.*

23. *Id.*

24. *Id.*

25. Augustus v. Sch. Bd. of Escambia County, 361 F. Supp. 383, 385 (N.D. Fla. 1973).

26. 507 F.2d at 155. No breakdown was recorded of how either the black or white students voted. However, the vote to retain the Rebel should come as no surprise considering the large majority of white students at the school.

27. *Id.* at 154.

28. 361 F. Supp. at 389. The district court considered two issues in granting the permanent injunction. First, it was ruled that the use of the name "Rebels" seriously interfered with the effective operation of a unitary school system. *Id.* at 388. Second, the court determined that there was a valid state interest which, under the 14th Amendment, justified banning individual students from using the "Rebel" symbol. *Id.* at 388-89.

29. 507 F.2d at 156-57. *See also* APPENZELLER & APPENZELLER, *supra* note 20, at 129.

The circuit court modified the injunction from permanent to temporary and remanded the case for reconsideration, giving several reasons and citing many precedents. First, the court questioned whether a case involving the name of a high school athletic team was sufficient to "independently gain the attention of a federal court."[30] However, due to the violence and disruption of the educational process that had resulted in Escambia, at least partially because of the Rebel mascot, the court's attention was granted. Despite this concession, the court warned that it would be unacceptable in the future for a group to create a violent disturbance as a means to compel a court's involvement in a mascot name change dispute.[31]

The court's main cause for modifying the permanent injunction was that it was overbroad and went further than necessary to bring about the ultimate purpose of establishing a unitary system of education.[32] The circuit court felt that the school board should have been given the opportunity to reach a solution to the problems created by the misuse of the Rebel mascot that might be less drastic than the district court's permanent injunction.[33] The circuit court pointed out that the lower court, before it granted the permanent injunction, had failed to evaluate the solutions that the school board had proposed to end the use of the Rebel mascot and other symbols as racial irritants.[34]

The circuit court was also troubled by the lower court's interference with the day-to-day operations of the school.[35] The court proclaimed:

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30. 507 F.2d at 155 (citing Banks v. Muncie Community Sch., 433 F.2d 292 (7th Cir. 1970); Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc) *cert. denied*, 409 U.S. 989 (1972)).

31. 507 F.2d at 156.

32. *Id.* at 154-55.

33. *Id.* at 157.

34. *Id.*

On January 15, 1973, the school board reaffirmed its policy that symbols could be used as "rallying points for athletics and other events," and not to harass or intimidate teachers or students. At that same meeting the board resolved to "take those steps necessary to see that a proper educational environment exists," stating that "[i]t is essential that school board policies and regulations may be followed." The school board sought to follow the guidelines laid down in Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) and Tinker v. Des Moines Community Sch. Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). 507 F.2d at 157.

The school board had also adopted a policy that "prohibit[ed] the use of the involved symbols to harass or intimidate teachers or other students, directing their use and display only in good taste, and directing the policy's enforcement and providing sufficient lawmen to protect all students . . . ." *Id.* at 156.

35. 507 F.2d at 155 (citing Wright v. Houston Indep. Sch. Dist., 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972)).

"Only as a last resort should the court arrogate to itself the position of administering any part of the day-to-day operation of the school system."[36] Essentially, the court believed that it only had an obligation to intervene when a school board abrogates its responsibility to run a constitutionally acceptable school system.[37] Intervention in any situation other than clear cases of constitutional infringement can "only serve to fan the embers of unrest."[38]

The court felt that it is best to let students of public high schools determine their own athletic team names through a democratic process.[39] However, the court did recognize that the power of a democratic system could also be abused. "Tyranny by the majority is as onerous as tyranny by a select minority."[40] In other words, it would be wrong for a majority group of students to select a mascot that they know will offend a powerless minority.[41]

C. Crosby v. Holsinger[42]

Most recently, the "Rebel" found its way into the courts in the form of Fairfax (Virginia) High School's "Johnny Reb" mascot. Although Fairfax's use of Johnny Reb had been toned down since its inception in the 1930s by changing the design of the logo to a presumably less offensive figure in 1978,[43] Fairfax principal Harry F. Holsinger announced his

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36. 507 F.2d at 158.

37. *Id.*

38. *Id.* (citing Tate v. Bd. of Educ. of Jonesboro, Ark., Special Sch. Dist., 453 F.2d 975, 982 (8th Cir. 1972)).

39. 507 F.2d at 155-56. *Compare with id.* at 159 (Moore, J., dissenting) (Judge Moore is particularly scathing in his rejection of any other method of resolving this controversy besides letting the students vote on the nickname).

> When the federal courts undertake to regulate the conduct of students and spectators at football games . . . they have, indeed, strayed far beyond their constitutional functions and have created a new kind of tyranny, i.e. "tyranny of the courts." . . . If the will of the vast majority (concededly a "landslide student vote") is to be overridden at the behest of a small minority (here less than eight percent of the students were black), then that concept of our so-called democratic system might as well be scrapped.

Id. (citation omitted).

40. *Id.* at 158 (quoting Banks v. Muncie Community Sch., 433 F.2d 292, 297 (1970)).

41. Subsequent to this controversy and the circuit court decision, Escambia High changed its mascot from the "Rebel" to the "Gator."

42. 852 F.2d 801 (4th Cir. 1988).

43. Crosby v. Holsinger, 816 F.2d 162, 163 (4th Cir. 1987). This case originally made its way to the federal circuit court appealing the district court's dismissal of the case for being frivolous.

decision to ban the mascot in February of 1986, after receiving complaints from black students and parents.[44]

Initially, some students protested the ban by holding rallies, mounting a petition drive, attending a school board meeting, and displaying blue ribbons.[45] However, eventually a suit was filed to challenge Holsinger's decision.

The court ultimately upheld the principal's right to ban the mascot for several reasons. The court noted that "[a] school mascot bears the stamp of approval of the school itself."[46] School officials do not have to promote all student speech,[47] and especially not that which "the public 'might reasonably perceive to bear the imprimatur of the school.' "[48] Therefore, Holsinger was free to disassociate the school from the mascot because, by continuing its use, the public might perceive that the school approved of it.

Furthermore, the court ruled that the mascot's offensiveness to blacks, which possibly limited their participation in school activities, was a valid educational concern legitimizing the elimination of "Johnny Reb."[49] The court based its opinion on the recent Supreme Court decisions[50] that gave school officials the authority to disaffiliate a school from controversial speech even when it limits student expression.[51]

The *Crosby* decision is a big departure from the precedent set forth in *Augustus v. School Board of Escambia County*. In fact, *Crosby* does not even cite *Augustus*. This may be due to the fact that *Crosby* came out of the Fourth Circuit, while *Augustus* came out of the Fifth Circuit. Furthermore, the *Crosby* decision was released thirteen years after *Augustus*, demonstrating that attitudes may have changed and courts have become more willing to provide relief in cases involving racial issues. Nevertheless, a compromise was reached at Fairfax High, similar to the one achieved by Muncie Southside. Fairfax has ended its use of "Johnny Reb" and now goes simply by the name "Rebels" without any mascot to portray its name.

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44. *Id.*
45. *Crosby*, 852 F.2d at 802.
46. *Id.*
47. *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 569, 98 L. Ed. 2d 592, 605 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 106 S. Ct. 3159, 3164, 92 L. Ed. 2d 549, 558 (1986)).
48. 852 F.2d at 802 (quoting *Kuhlmeier*, 484 U.S. 260, 108 S. Ct. at 569, 98 L. Ed. 2d at 605).
49. 852 F.2d at 802.
50. *Kuhlmeier*, 484 U.S. 260; *Fraser*, 478 U.S. 675.
51. *Crosby*, 852 F.2d at 803.

D. Wisconsin High Schools

As of April 1993, seventy-four Wisconsin high schools used Native American mascots.[52] However, that number is slowly decreasing, as at least six schools have decided to stop using Native American mascots in recent years, and many more are considering it.[53] However, many schools are resisting change.[54] The name change movement has three powerful allies in Wisconsin government: 1) State Attorney General, James E. Doyle, 2) the Wisconsin State Assembly, and 3) State Superintendent of Public Instruction, John T. Benson.

1. The Attorney General's Opinion

State Attorney General, James E. Doyle, was the first government official to get involved in the name change movement. On September 17, 1992, Attorney General Doyle responded to a request from former State Superintendent of Public Instruction, Herbert J. Grover, Ph.D., for an opinion on the use by public schools of American Indian mascots.[55] Specifically, Dr. Grover asked: "1) Does the use by public schools of American Indian logos, mascots or nicknames, singly or in combination, come within the purview of section 118.13 of the Wisconsin statutes?" and "2) Is Wisconsin Administrative Code chapter PI 9 consistent with legislative intent?"[56] Doyle opined that the answer to both questions is yes.[57]

Section 118.13 provides:

> Pupil discrimination prohibited. (1) No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin,

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52. Valerie Lynn Dorsey, *State Legislators Look at Issue*, USA TODAY, Apr. 29, 1993, at 12C.

53. Valerie Lynn Dorsey, *Official: Easier to Switch than Fight*, USA TODAY, Apr. 29, 1993, at 12C; Jo Sandin, *All in a Name: Pain, Pride and Power*, MILWAUKEE J., Dec. 20, 1992, at B5. Examples of schools that have changed their mascots include the Seymour High Thunder and the Shawano High Hawks (both formerly called the Indians).

54. *See, e.g.*, Cindy Simmons, *Committee Questions Use of Indians for School Mascots*, UPI Release, Nov. 12, 1992. Wesley White, a pastor in the town of Milton, Wisconsin, and member of an advisory board considering whether to change Milton High Schools "Redmen" mascot said, "the power of anger and the power of tradition" are preventing Milton from choosing another mascot. *Id.*

55. *See* 25-92 Op. Att'y. Gen. (1992).

56. *Id.*

57. *Id.*

> ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.[58]

Doyle believed that, on its face, this statute is ambiguous because reasonably well-informed persons can differ over the application of the definition of discrimination to "any curricular, extracurricular, pupil services, recreational or other program or activity."[59]

However, Doyle also noted that the legislature gave the Superintendent of Public Instruction the power to create rules to administer section 118.13.[60] Pursuant to this authority, the Department of Public Instruction established Wisconsin Administrative Code chapter PI 9, which provides:

> "Discrimination" means any action, policy or practice, including bias, stereotyping and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability, or which perpetuates the effects of past discrimination.[61]

The legislature approved this rule and, therefore, Doyle reasoned it "must have intended the statute [section 118.13] to be at least as broad as the rule [section PI 9] provides."[62]

Furthermore, when the legislature charges an administrative agency to carry out a particular statute, the agency's interpretation of the statute is given great weight.[63] This, when combined with the fact that the Department of Public Instruction's interpretation here has gone unchal-

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58. WIS. STAT. § 118.13 (1991-92).

59. 25-92 Op. Att'y. Gen. (1992).

60. *Id.* (citing WIS. STAT. § 118.13(3)(a)(2) (1991-92)).

61. WIS. ADMIN. CODE § PI 9.02(5) (October 1986).

" 'Stereotyping' means attributing behaviors, abilities, interests, values and roles to a person or group of persons on the basis, in whole or in part, of their sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability." WIS. ADMIN. CODE § PI 9.02(14) (October 1986). "Pupil harassment" means behavior towards pupils based, in whole or in part, on sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which *substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment.* WIS. ADMIN. CODE § PI 9.02(9) (October 1986) (emphasis added).

62. 25-92 Op. Att'y Gen. (1992).

63. *Id.* (citing William Wrigley, Jr. Co. v. Dept. of Revenue, 160 Wis. 2d 53, 69-70, 465 N.W.2d 800, 806 (1991)).

lenged by the legislature, led Doyle to conclude that the rule set forth in Wisconsin Administrative Code chapter PI 9 is not ambiguous.[64]

Applying all of this to the American Indian mascot problem, Doyle concluded that, although such mascots are not *per se* violations of section 118.13, an individual mascot could be found to be a form of discrimination under the statute, regardless of intent, if a hostile environment is created.[65] However, Doyle recognized that not all Native American mascots are intrinsically negative or offensive.[66] Whether an individual mascot violates the statute must be determined on a case-by-case basis, and only after a hearing before the superintendent with findings of fact, a record of evidence, and conclusions of law.[67]

2. The Wisconsin Assembly

The Wisconsin Assembly, without the Senate's concurrence, has also come down on the side of those who oppose Native American mascots. On June 15, 1993, the Assembly adopted a resolution calling upon school boards throughout the state to review stereotypical depictions of American Indians in school mascots.[68]

The resolution called upon each school board to bring any currently employed American Indian mascot before the Wisconsin Indian Education Association, the American Indian Language and Culture Education Board of the Wisconsin Department of Public Instruction, and other statewide Indian organizations for review. These groups are supposed to determine whether the mascot reinforces any stereotypes, creates an intimidating or offensive environment, or perpetuates past discrimination.[69] The Assembly urged that such review be completed by July 1994, and that all findings subsequently be reported to the State Superintendent of Public Instruction and the legislative council's American Indian study committee.[70]

The Assembly listed numerous reasons for adopting this resolution. First and foremost, they cited a concern for the feelings and self-esteem of American Indians. Prevention of discrimination and potential interference with required curriculum and instruction on the history and culture of American Indians was also cited. Finally, the Assembly also

64. 25-92 Op. Att'y. Gen. (1992).
65. *Id.*
66. *Id.* Doyle pointed to the "Seminole" as an example.
67. *Id.*
68. 1993 WI A.J.R. 27.
69. *Id.*
70. *Id.*

noted the Wisconsin Interscholastic Athletic Association's (WIAA) separate request for schools to proactively review their mascots, rather than waiting for a complaint to be filed.[71]

The resolution was messaged to the State Senate on June 15, 1993 where it became entrenched in committee debate. Finally, on January 12, 1994, the Senate Committee on Education recommended passage of the resolution.[72] However, the measure never came to a vote before the full Senate, and therefore died in the legislature.

3. The State Superintendent of Public Instruction

In April 1994, newly elected State Superintendent of Public Instruction, John T. Benson, initiated his own action on the issue. Benson sent letters to the more than sixty school districts in Wisconsin containing schools that still use American Indian mascots, urging them to stop.[73] Benson said his action came in response to the fact that many American Indians consider the use of such names as racist and demeaning.[74]

Lawmaker response to Benson's letter was mixed. Representative Frank Doyle (D-Superior), who sponsored the Assembly Joint Resolution discussed above, praised Benson as "courageous" for taking action.[75] However, Representative Robert K. Zukowski (R-Thorp) criticized Benson for wasting time and money on "sensitivity issues" rather than "making sure students are prepared for the next century."[76] Meanwhile, the mascot controversy continues to fester in many of the state's school districts.

II. COLLEGES AND UNIVERSITIES

Colleges and universities have also been forced to grapple with the persistent controversy over Native American mascots. Dartmouth College and Stanford University were among the first to abandon the "Indian" as a mascot in the early 1970s.[77] The 1980s were a period of

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71. *Id.*

72. Wisconsin Bill Tracking Statement, 91st Legislative Session — 1993-94 Regular Session, 1993 WI A.J.R. 27.

73. *Benson Frowns on Indian Mascots*, MILWAUKEE J., Apr. 12, 1994, at B1.

74. *Id.*

75. Daniel Bice, *Lawmakers Split on Benson's Letter About School Mascots*, MILWAUKEE SENTINEL, Apr. 13, 1994, at 13A.

76. *Id.*

77. Leonard Shapiro, *Offensive Penalty is Called on "Redskins"; Native Americans Protest the Name*, WASH. POST, Nov. 3, 1991, at D1. Stanford has changed its nickname to its school color, the "Cardinal," and its mascot is a pine tree. Dartmouth's athletic teams are now called the "Big Green."

general dormancy for the mascot debate, but the 1990s have seen renewed interest in the subject as offensiveness is being attributed to more and more mascots that were not considered even remotely offensive twenty or twenty-five years ago.

A. College Mascots in the State of Wisconsin

Two of Wisconsin's premiere universities, Marquette and the University of Wisconsin-Madison, currently find themselves engulfed in the mascot controversy and plagued by the problems and debate it has caused.

1. The Marquette Warrior

Marquette University, named after the French explorer and missionary Father Père Jacques Marquette, was founded as a Jesuit University in 1881. Athletics have played an important role at the university since Marquette football began in 1892.[78] Marquette's athletic teams played under a variety of names including: the "Blue and Gold,"[79] the "Hilltoppers,"[80] the "Singing Hilltoppers,"[81] and the "Golden Avalanche,"[82] before the "Warrior" was adopted as the official mascot by the Student Senate on May 13, 1954.[83]

The original reasons for selection of the Warrior were listed by the Student Senate as follows:

> Marquette has a history that goes hand in hand with Indian lore. First, Pere Marquette used Indians extensively as guides, teachers, counselors and pupils; second, the appearance of an Indian on the official seal of the University tended to give the motif the

78. Memorandum prepared by Kriss Schulz, Marquette University Public Relations Office (1993) (on file with the *Marquette Sports Law Journal*) [hereinafter Public Relations Memo].

79. *Id.* The "Blue and Gold" was a commonly used unofficial nickname for the Marquette football team from 1892 until the 1960s. *Id.*

80. *Id.* The "Hilltoppers" first began appearing as a nickname in 1917. The first Marquette building was located on a hill in downtown Milwaukee. However, this name was never very accurate, as Marquette subsequently moved to its present location on flatter ground in the early 1900s. *Id.*

81. *Id.* "Singing" was added to the name "Hilltoppers" in 1928 when football coach Frank Murray joined the team. *Id.*

82. *Id.* The name "Golden Avalanche" first began appearing in the school yearbook and the newspaper, the *Marquette Tribune*, in 1924. The name was supposedly coined by Milwaukee sports writers, but its exact origin is unknown and its use eventually faded. *Id.* However, a popular tavern named the Avalanche remains on campus and serves as a reminder of the past.

83. Public Relations Memo, *supra* note 78.

> authorization it needed; third the Indian name fits in well with the symmetry of names of Milwaukee sporting teams, Hawks, Braves, Chiefs, and now Warriors.[84]

Furthermore, the American Indian warrior was chosen over other types of warriors, such as the Spartan or the Amazon, in order to honor the first inhabitants of the United States and also the memory of Father Marquette.[85] The generic term "warrior," however, has nothing to do with Indians.[86] The Random House Dictionary defines "warrior" as: "1. a person engaged or experienced in warfare; soldier. 2. a person who shows or has shown great vigor, courage, or aggressiveness, as in politics or athletics."[87]

The image of the Marquette Warrior has changed considerably since its inception. During the 1960s, "Willie Wampum" was born as a result of a "name the warrior" contest. Willie was a grinning, tomahawk-swinging Indian caricature who appeared at sporting events in the form of a student donning a big fiber glass or paper-mâché head. The mascot would yell, jump, and chase other opponents' mascots with his tomahawk.[88] However, the Willie Wampum mascot was abolished in 1971 because it was considered demeaning to Indians.[89]

In the 1980s, the "First Warrior" symbol and mascot were conceived by American Indian students at Marquette in order to continue the Warrior theme, but in a manner less offensive than Willie Wampum.[90] At games, an American Indian student would dress up in a warrior costume and entertain the audience with dances and leaps.[91] Due to lack of interest on the part of American Indian students to be the "First Warrior,"

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84. *Id.* Interestingly, none of the professional sports teams mentioned in the Student Senate's third reason for choosing the Warrior are associated with Milwaukee any longer. The Milwaukee Hawks basketball team was moved to St. Louis after the 1954-55 season, the Milwaukee Chiefs hockey team was only in Milwaukee from 1952 to 1955, and the Major League Baseball Milwaukee Braves left Milwaukee for Atlanta after the 1965 season. For a detailed history of the Milwaukee Braves and their move to Atlanta see BOB BUEGE, THE MILWAUKEE BRAVES: A BASEBALL EULOGY (1988). There had also been a professional football team in Milwaukee named the Chiefs, however, they were only in Milwaukee for a little over two months in 1940.

85. *Id.*

86. *See* Lind, *supra* note 3, at E1.

87. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2144 (2d ed. 1987).

88. Public Relations Memo, *supra* note 78.

89. *Id.*

90. *Id.*

91. *Id.*

the mascot was discontinued,[92] but a silhouette of the "First Warrior," a profile of a noble Indian warrior, continued to adorn t-shirts, notebooks, and other Marquette paraphernalia through the 1993-94 school year.

Similar to the early 1970s, recent years have seen increased attention and focus on athletic mascots throughout the nation. Until as recently as April 1993, Marquette officials stood by and defended the university's use of the Warrior. Marquette spokeswoman, Kathleen Hohl said, "The [Warrior] nickname has been to honor the spirit and the strength and the athleticism of Native Americans. We're different from a lot of other schools. The history behind [the Warrior] was never to ridicule Native Americans or show contempt."[93]

Nevertheless, despite receiving no publicized complaints about its current mascot, Marquette officials had a change of heart and announced suddenly in the fall of 1993 that after eighteen months of committee introspection the university had decided that the Warrior would be scrapped completely for being specifically disrespectful to American Indians.[94] Marquette then mounted a write-in campaign inviting students, faculty, alumni, and the general public to help pick a new mascot "that reflect[ed] respect for ethnic heritage and [was] inclusive in terms of both men's and women's varsity programs and [the university's] extensive recreational team sports."[95]

In April 1994, the university announced that it had narrowed its search for a new mascot down to two finalists: the "Lightning" and the "Golden Eagles." A university-wide vote was conducted to choose the winner and, on May 2, 1994, Marquette officially adopted the Golden Eagle as its new mascot.[96]

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92. *Id.* The lack of interest may have been partially due to the small number of American Indian students at Marquette. During the 1992-93 school year, only 29 American Indians (less than 0.2% of the total enrollment) were enrolled at Marquette. *Id.*

93. Dennis Chaptman, *Wisconsin Scrutinizes Nicknames*, ARIZONA REPUBLIC, April 9, 1993, at E6.

94. *Will the "Fighting Irish" Be Next?*, CHI. TRIB., Nov. 7, 1993, at C2.

95. *E.g., id.* A large contingency of students at Marquette felt that rather than completely dropping the Warrior name, only the Indian reference within the mascot should be changed, but the name "Warriors" should be retained. After all, as noted previously, the term "warrior" has no inherent connection to Indians, nor does it specifically refer to gender. *See supra* notes 86-87 and accompanying text. Therefore, many students believed that the Warrior could be retained even under the university's new requirement guidelines for a mascot.

96. Phil Nero, *Golden Eagles MU Chooses New Nickname*, MILWAUKEE J., May 2, 1994 at A1. The announcement was made by Marquette President Father Albert J. DiUlio outside the school union where it was greeted by "groaning, booing and very little applause" among the several hundred students who gathered to hear it. *Id.* "Golden Eagles" garnered 54% of the vote with 46% for the "Lightning." *Id.* Perhaps, the "Lightning" lost for fear that such a

2. The University of Wisconsin-Madison Takes a Stand

When the University of Wisconsin (UW) squared off in a non-conference basketball game on December 29, 1992, against Alcorn State (Mississippi) University (ASU), no one expected the game to be of much significance.[97] However, the contest between the UW-Badgers and the ASU-Scalping Braves sparked a controversy that has engulfed the entire State of Wisconsin.

The game caught the attention of Native American groups, such as the Great Lakes Intertribal Council,[98] prompting complaints to the University of Wisconsin for scheduling a game against a team with such an offensive mascot.[99] Hugh Danforth, an Oneida Indian, of the UW Physics Department, led the call for a change in policy.[100] James Hoyt, chairman of UW's athletic board and NCAA faculty representative said, "We got reactions on both sides. It's one of those types of issues where you never win."[101] Nevertheless, UW gave in to pressure from the "politically correct" crowd and, in July 1993, adopted a policy barring the scheduling of regular season games against teams with "inappropriate" mascots.[102] The policy even goes so far as to discourage teams with Native American mascots from sending their mascots to the city of Madison and from selling their teams' souvenirs on campus.[103]

However, the UW policy does not apply to traditional Wisconsin foes including: the North Dakota Fighting Sioux, the Marquette Warriors (now named the Golden Eagles, which is no longer "inappropriate"), and Big Ten Conference rival the Illinois Fighting Illini.[104] Furthermore, the policy does not prevent Wisconsin from competing against teams with "offensive" mascots in postseason games, such as the NCAA bas-

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name might be insensitive to those who have lost loved ones to being struck by lightning or other forms of electrocution.

97. ASU came into the game with a record of 1-7, while UW was off to a 4-2 start. Wisconsin won the game by a score of 110-81.

98. The Great Lakes Intertribal Council represents eleven Native American tribes and nations in the Wisconsin area.

99. *See, e.g.*, Alan Schmadtke, *Mascots Make Badgers Upset; FSU's Nickname is Among Non-Acceptables by University of Wisconsin*, ORLANDO SENTINEL, July 15, 1993, at D2; *Wisconsin Targets Indian Mascots*, SAN DIEGO UNION-TRIB., Apr. 9, 1993, at D2.

100. *Wisconsin Targets Indian Mascots*, *supra* note 99, at D2.

101. Amy Rosewater, *Two Big Ten Schools Take on Mascot Debate*, PLAIN DEALER, July 16, 1993, at 2D.

102. Schmadtke, *supra* note 99, at D2.

103. Rosewater, *supra* note 101, at 2D.

104. *Id.* Hoyt said, however, that UW may try to pressure the University of Illinois to drop its nickname and mascot, Chief Illiniwek. *Wisconsin Targets Indian Mascots*, *supra* note 99, at D2.

ketball tournament or a football bowl game.[105] In other words, UW is willing to appease those who are sensitive to the mascot issue when it comes to non-conference, lower revenue generating games, but when it comes to big money-makers like a bowl game, the policy is thrown out the window.

Wisconsin was actually the second Big Ten Conference university to adopt a policy against "offensive" mascots. The University of Minnesota approved a similar policy in 1991, after a demonstration and brawl that occurred over the University of Illinois Chief Illiniwek mascot before a Minnesota-Illinois basketball game in Minneapolis.[106] Minnesota no longer plays non-conference home games against schools with Native American mascots.[107] Apparently, a third Big Ten member, the University of Iowa, has now asked Illinois not to bring Chief Illiniwek to its campus either.[108]

B. Defending College and University Mascots

There is a major problem with trying to label certain mascots as "offensive" because many mascots that are offensive to some, are actually admirable to many others. For example, Lytreshia Green-Bell, an African American student at Alcorn State University stated, "I'm proud to be a [Scalping] Brave . . . ."[109] Green-Bell went on to say that her pride did not "stem from racism or spiritual cruelty, but rather from admiration for the Native American."[110] When asked how she would feel if a team were named the "Darkies" or the "Negroes" and their mascot paraded around in ragged clothes and nappy hair, she said of course she would be offended. However, if a team took on the name of an African American hero and its mascot were dressed nobly, she would not be offended at all. In fact, Green-Bell writes that she would be honored that someone saw such strength in her people.[111] Many Native Americans also believe it is a great compliment when a university adopts an Indian nickname.[112]

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105. *E.g.*, Rosewater, *supra* note 101, at 2D.
106. *Id.*
107. Schmadtke, *supra* note 99, at D2.
108. Pete Wickham, *Nicknames Come Under Fire Indians Seek Alternatives*, COMMERCIAL APPEAL, July 3, 1994, at 1D.
109. Lytreshia Green-Bell, *Nicknames Can Be Used to Show Admiration for Native Americans*, USA TODAY, Apr. 29, 1993, at 12C.
110. *Id.*
111. *Id.*
112. *See, e.g.*, Letter from Jack Allen to Mike Downey, *Indian Nicknames Said to be an Honor*, LOS ANGELES TIMES, May 7, 1994, at C3, col. 1.

There is also the story of the late Tim Williams, a Yurok Indian who played the role of Stanford's Prince Lightfoot Indian during the 1950s and 1960s. During Stanford games, Williams wore a full headdress, led his team's marching band onto the field, and placed hexes on opposing teams.[113] Williams died tragically in a car crash in 1988.[114] An acquaintance said after his death that it had been William's dream that one day Stanford would reinstate him as its mascot.[115]

Stories like Green-Bell's and Williams' demonstrate that some people can feel just as strongly about maintaining Native American mascots as those who want to abolish them. There is no easy answer. No matter what decision is made, it is going to upset someone.

III. Analysis of the Controversy

The whole mascot controversy ultimately boils down to whether there should be an unequivocal ban of all mascots that could be deemed offensive by someone. The answer is clearly no. First of all, just about any mascot could be deemed offensive by someone. Furthermore, even if it is not found offensive today, someone might find it offensive tomorrow because attitudes are always changing and some people will always need to complain about something. The only solution that would absolutely end this controversy would be to simply stop using mascots altogether. In other words, just start referring to a team by its school or city name. However, this is much too drastic a remedy, and it probably would not work anyway. People are not going to just forget that mascots ever existed. Even if the official use of mascots were banned, unofficial use would continue in taverns, classrooms, offices, and anywhere else across the country where people talk about sports.

There are those who claim to be the "victims" of negative stereotyping caused by mascots. They say that only they know what it feels like to be portrayed as a mascot and no one else can understand what they are forced to endure. They say that being portrayed as a mascot lowers their people's self esteem and makes them feel like they do not or should not

113. *Crash Kills Indian Who Once Was Stanford Mascot*, UPI Press Release, Mar. 8, 1988.

114. *Id.*

115. *Id.* However, Williams dream for the Indian to return to Stanford may not be lost forever. Apparently, a group of 1,600 Stanford alumni is attempting to persuade the university to bring back the original Indian mascot that was designed in 1938 by Jack Dixon. Barbara Koh, *Stanford Alumni Group Trying to Bring Back Indian Mascot*, Miami Herald, June 24, 1994 at A8, col. 1.

exist anymore.[116] Come on people, let's stop making far-fetched excuses for our troubles. People must quit making excuses and simply learn to see human beings as human beings. It does not matter what color a person is or whether someone has portrayed them as something that they are not. We are all just people, nothing more and nothing less. If we are not able to make a distinction between a mascot and a human being, then our problems run much deeper than offensive mascots. I am bombarded every day by cartoon images, symbols, and caricatures that portray my race. Elmer Fudd, Beetle Bailey, Dagwood, Mr. Clean, the Quaker Oats man, the New England Patriots and the Dallas Cowboys do not make me feel like I do not or should not exist. Ending the use of these images and mascots will not solve anyone's personal problems. Rather, the key to success in our society is hard work, honesty, and education.

There are many other reasons why we should not end the use of mascots. Mascots are never chosen as a means to humiliate or degrade anyone. Rather, they are chosen to gloriously represent an athletic team and often to honor a historical person or people. Such noble intentions ought to be encouraged, not dismissed as pejorative.

An alarming element of the recent rush to abolish "offensive" mascots has been the decision makers' hasty knee-jerk reactions. How many schools and universities have taken the time to poll their students, teachers, and alumni, or even poll their supposed victims, such as Native Americans, to determine whether a majority of these people even felt that the controversial mascot was offensive before it was changed? The answer is: not many, and those that did often discovered that most people did not find their mascot offensive.[117] It is frightening in this age of political correctness that a boisterous radical minority can impose its

116. Susan Shown Harjo, a Native American and President and Executive Director of the Morning Star Foundation has stated that she believes that the high suicide rate for Native American teenagers is being caused by low self esteem that comes from the "constant bombardment of negative imaging . . . that gives [Native American teens] an impression that they no longer exist and lead some to the conclusion that they shouldn't." Wickham, *supra* note 108, at 1D.

117. *See, e.g.*, Keith Ervin, *Enumclaw Junior High to Drop Chieftain Mascot*, SEATTLE TIMES, May 26, 1994, at B2 (describing how a majority of students at Enumclaw Junior High in Washington were ordered by the school board to stop using their Chieftain mascot despite a survey showing that a majority of students, including the president of the school's Native American club, wished to continue the use of the mascot); Taylor Bell, *Changing Nicknames Case of Overreaction*, CHICAGO SUN-TIMES, April 15, 1994, at 113 (describing how the Naperville (Illinois) school board forced Central High to change their Redskin mascot to the Redhawk despite an overwhelming student vote not to make the change).

thoughts and beliefs on a more quiet, but well-intentioned and generally decent group of students, faculty, alumni, and other sports fans.

Furthermore, many Native Americans feel that there are more important issues facing their people that should be focused upon before mascot portrayals. For example, Jolyn Carey, a Cherokee Indian, believes that if a poll were taken by Indian people, it would show that the mascot activists are in the minority and that more important issues, such as high teen pregnancy rates, better education, and ending drug and alcohol abuse for Native Americans, need to be tackled before attacking mascots.[118] Imagine the progress that could be made if mascot activists decided to focus all their energy and attention on these issues.

CONCLUSION

It has been suggested that perhaps we are taking this whole mascot business too seriously. One commentator has stated:

> I have a feeling all this madness will eventually pass and the people and students who have nothing better to do than worry about mascots . . . will eventually get a life and move on to something more typically productive of college years, such as stuffing their faces with pizza, swilling beer and worrying about dates on Saturday nights.[119]

It is true that many athletic mascots still exist today that offend considerable segments of our society either in their names or in the portrayal of their names. When a majority of all decent people affected by a mascot agree that these offensive elements exist, then they should be changed. This is the beauty of democracy. However, "there should not be a meat-ax overreaction."[120] Not all mascots that only a few people find offensive need to be abolished. Furthermore, teams with acceptable names, but mascots that offensively portray the names, need only change the portrayal. Many mascots are truly intended to honor, and in the eyes of many, they do honor. A name that honors need not and ought not be changed.

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118. Karen Goldberg, *Ethnic Team Names Draw New Attacks*, WASH. TIMES, July 10, 1993, at D1.

119. Lind, *supra* note 3, at E1.

120. *Be Sensitive, But Don't Drop All Indian Names*, SEATTLE TIMES, Sept. 28, 1993, at B4.