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Indigenous Identity, Cultural Harm, and the Politics of Cultural Production: A Commentary on Riley and Carpenter's "Owning Red"

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I. Introduction

In *Owning Red: A Theory of Indian (Cultural) Appropriation*, Professors Angela Riley and Kristen Carpenter explore the contested nature of cultural appropriation in the context of recent controversies involving American Indian claims to ownership or control of tangible and intangible resources.[1] Drawing on Federal Indian law and its history and context, the authors claim that cultural appropriation is merely one facet of "Indian appropriation," a much larger process of involuntary dispossession which resulted in the wholesale transfer of Native resources to non-Native owners. While Native land claims are often associated with historic wrongs, this article focuses on the continuing nature of the dispossession, which is particularly complex in the area of intangible resources.

Venturing beyond descriptive claims about ownership, the authors engage the normative claim: what is wrong with cultural appropriation and

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1. Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 93 TEXAS L. REV. 101 (2016).

why should the law care?[2] These are important questions in an era where cultural production is seen as implicating the liberty interests of citizens, particularly expressive freedoms. Within contemporary politics, freedom of speech is propounded in nearly absolutist terms and corporations have been imagined as "persons" eligible to exercise first amendment rights.[3] Today, even hateful speech merits protection, as demonstrated by the Supreme Court's ruling protecting members of the Westboro Baptist Church who picketed the funeral of a deceased soldier, shouting hateful messages toward his family, the U.S. military, and other targeted groups, such as the LGBT community.[4] Within this vitriolic social environment, is there any hope for a legal response to the harm of cultural appropriation? Alternatively, what non-legal forms of advocacy might be effective in refuting misappropriations of Indigenous identity?

Riley and Carpenter correctly point out that, for American Indian people, the historic wrongs and continuing harms of dispossession relate to both racial justice and self-determination.[5] Unlike any other group, the dynamic of Indian appropriation jeopardizes the individual rights of Native people to equality, and it also threatens the ability of Native Nations to exercise their human right to self-determination as separate peoples. Identity harms are poorly understood within our multicultural democracy, which places civic identity ("citizenship") in the paramount position over any particular ethnic or religious identity. In this realm, the government's duty is merely to "tolerate" the differences of constituent members to the extent possible. Self-determination, however, includes the right of a people to sustain its cultural and political identity. Within international human rights law, nation-states have a duty to respect and even protect the distinctive social, cultural, and political identities of Indigenous peoples within the borders of the nation.

Riley and Carpenter's theory of Indian appropriation is amply supported by history and contemporary policy. This commentary focuses on the issue of Indian mascots, one of the most contentious topics within the realm of cultural appropriation.[6] The authors view the issue as one of the "easy" cases, given that the "doctrinal lever . . . to prevent against the harmful cul-

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2. *Id.* at 108.

3. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) (holding that the government's purported need to regulate campaign contributions by corporations may not suppress political speech on the basis of the speaker's corporate identity).

4. *See* Snyder v. Phelps, 562 U.S. 443, 457 (2011) (holding that the First Amendment shields church members from tort liability for intentional infliction of emotional distress, where they picketed a military funeral and where their hateful messages were directed toward matters of public concern, such as the policies of the U.S. military).

5. Riley & Carpenter, *supra* note 1 at 109.

6. *See id.* at 147–55.

tural appropriation is available, applicable, and straightforward."[7] The mascot issue is currently under active deliberation by courts and policy-makers under the rubrics of civil rights law as well as trademark or property law. As this commentary will discuss, the central premise of *Owning Red* is timely and relevant, and the current cases will test out the limits of American tolerance for Native claims of "ownership" and "appropriation."

II. Civil Rights or Property Rights? The Contemporary Debate

On January 1, 2017, California's Racial Mascots Act will go into effect, making this state the first in the country to impose a law prohibiting any public school from using the term "Redskins" for "school or athletic team names, mascots, or nicknames."[8] California's law represents 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.[9]

The Oregon State Board of Education has also moved in this direction, adopting a resolution and final rule prohibiting the use of any Native American mascot by a public school on or after July 1, 2017.[10] The Oregon rule contains an exception for public schools that enter into written agreements with an Oregon federally recognized Native American Tribe, so long as the mascot in question is "associated with or is significant to the tribe" and the agreement is approved by the state board of Education.[11]

The approach used by California and Oregon, however, does not reflect a national consensus. In Colorado, legislators failed to pass similar legislation, although the Governor subsequently signed an Executive Order

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7. *Id.* at 155.

8. CAL. EDUC. CODE § 221.2–221.3 (West 2010). The California Racial Mascots Act amends the state Education Code and appears as Article 3.5 of Chapter 2. Section 221.2 contains the legislative finding that the "use of racially derogatory or discriminatory school or athletic team names, mascots or nicknames in California public schools is antithetical to the California school mission of providing an equal education to all." Section 221.3 bans all public schools from using the term "Redskin" for "school or athletic team names, mascots, or nicknames" and offers a process for phasing out the term in schools that have made a significant investment in uniforms bearing that term.

9. *See* Wenona T. Singel, *Look at the New California Law Banning Public Schools from Using the Term Redskins*, TURTLE TALK, INDIGENOUS LAW AND POLICY CENTER BLOG, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW (October 14, 2015, 1:05 PM), https://turtletalk.wordpress.com/2015/10/14/a-look-at-the-new-california-law-banning-public-schools-from-using-the-term-redskins/ [https://perma.cc/F7HS-5UCS] (discussing California law and analogous efforts by the Michigan Department of Civil Rights to halt the use of American Indian mascots in 35 schools in Michigan, which failed when the civil rights office of the U.S. Department of Education dismissed the complaint for lack of specific, identifiable harm to individual students).

10. OR. ADMIN. R. 581-021-0047 (2015).

11. *Id.*

creating a "task force on American Indian mascots," which is charged with studying the issue and engaging with tribes, local communities, and state agencies to find "common ground."[12] Colorado's history includes the infamous Sand Creek Massacre, where 19th century militia leader Colonel Chivington and his troops murdered a peaceful encampment of Cheyenne Indians, largely comprised of women and children. The Governor of Colorado formally apologized for the Sand Creek Massacre in 2014. Two years later, the Governor has appointed a mediator to help resolve a conflict between state officials and a school district near the site of Sand Creek where the local high school insists upon retaining its mascot: "The Savage." Local residents claim that they have a "right" to this mascot, indicating that Colorado's genocidal past has not yet been fully reconciled, after all.

As of 2016, the term R*skins is in use in 21 states representing 58 high schools in the United States. This is true even though psychologists such as Dr. Stephanie Fryberg have documented the harmful effects of such mascots on Native American students.[13] The psychological literature demonstrates that exposure to Indian mascots results in "lower self-esteem, sense of community worth, and views of student's own potential."[14] Given existing disparities in educational achievement and health outcomes for American Indian youth, this data cannot be ignored. In particular, researchers have documented the link between low self-esteem and poor health and educational attainment. As a group, American Indian youth tend to dropout of public school systems at much higher rates than the general population.[15] They also suffer from a suicide rate over two and a half times higher than the national population, and suicide is the leading cause of death for American Indians between the ages of 15 and 24.[16] The use of Indian mascots in state schools perpetuates stereotypes that are linked to historical injustice and also embedded in the national psyche, but often repressed until an event

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12. Creating the Commission to Study American Indian Representation in Schools, Colo. Exec. Order No. B 2015 006 (October 6, 2015).

13. ERIK STEGMAN & VICTORIA PHILLIPS, THE CENTER FOR AMERICAN PROGRESS, MISSING THE POINT: THE REAL IMPACT OF NATIVE MASCOTS AND TEAM NAMES ON AMERICAN INDIAN AND ALASKA NATIVE YOUTH 5 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/07/StegmanAIANmascots-reportv2.pdf [https://perma.cc/3V6B-5MHB] (citing resolution of American Psychological Association calling for immediate retirement of Indian mascots and citing Dr. Fryberg's research).

14. *Id.*

15. OR. ADMIN. R. 581-021-0047 (2015) (discussing the dropout rate for American Indian youth in the state of Oregon). This has also been documented for the state of Arizona in the latest Arizona Minority Student Progress Report, generated by the Arizona Minority Education Policy Analysis Center (AMEPAC) within the Arizona Commission for Postsecondary Education. JEFFREY F. MILEM ET AL., ARIZONA MINORITY EDUCATION POLICY ANALYSIS CENTER, ARIZONA MINORITY STUDENT PROGRESS REPORT 20 (6th ed. 2016) (graph showing a dropout rate among American Indian students of 7% in a state where white students have a drop out rate of approximately 2% and Hispanic students of approximately 4%).

16. *Id.* at 7.

triggers the imagery. As one Native American student described, it is common at games for team members to shout "Kill the R*skins!" and "Send them on the Trail of Tears," without regard for the effect of this language upon the American Indian students.[17]

The effect of Indian mascots upon equal educational opportunity for Native students in state school districts is an important, but unresolved issue. The states have taken three approaches. California and Oregon represent the states that frame the issue as a civil rights problem requiring state action. Colorado's approach frames the issue as a potential problem that requires study, dialogue, and a facilitated process of consensus among citizens in shaping the "right" result. Other states disregard the idea that there is any problem at all, and this is the position of Dan Snyder, owner of the Washington Football Team, who has asserted that he will never change the team's name, despite the federal order that recently issued, cancelling its trademark registration.[18]

The Washington Team's case is on appeal to a federal circuit court following the district court's ruling[19] that the Board acted appropriately in cancelling the registration based on section 2(a) of the Lanham Act, which precludes registration for marks that comprise "immoral, deceptive or scandalous matter," or which "disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs or national symbols, or bring them into contempt or disrepute."[20] Although this provision has been part of the federal law since 1946, another federal circuit court has recently ruled that the Patent and Trademark Board may not refuse to register disparaging marks merely because it disapproves of the expressive messages (including racial hatred) conveyed by the marks.

Sitting en banc, the Federal Circuit Court ruled in *In re Tam* that the Board's refusal to issue a trademark protecting the use of the name "THE SLANTS" by an Asian-owned band amounted to unconstitutional viewpoint discrimination.[21] In this case, the band's owner, Mr. Tam, sought to reappropriate the disparaging term as a means to make a statement about cultural and racial issues affecting Asian people. The Patent and Trademark Board found, however, that the name would be seen as disparaging by other Asian people and refused to register it. The Court evaluated the claim in the context of other marks that had been rejected and found that many of those marks "convey hurtful speech that harms members of oft-stigmatized communities," but reasoned that "the First Amendment protects even hurt-

17. *Id.* at 5.

18. Blackhorse v. Pro-Football Inc., 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014), *aff'd* 112 F. Supp. 3d 439 (E.D. Va. 2015).

19. Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015).

20. 15 U.S.C. § 1052(a).

21. In Re Simon Shiao Tam, 808 F.3d. 1321 (Fed. Cir. 2015).

ful speech."[22]

The *Blackhorse v. Pro-Football Inc*. case is founded upon the theory that Riley and Carpenter advance, which is that Indian mascots harm the civil rights of Native people and undermine tribal rights to self-determination. The court's holding in *Blackhorse*, however, was premised upon the assumption that the Trademark provision regarding disparaging terms is constitutional. The *In re Tam* case will likely require the federal circuit court in *Blackhorse* to determine whether "freedom of speech" can be used as a tool to craft a property right out of hate speech toward a vulnerable group. Should non-Indians actually have a right to profit from the use of terms that demean and disparage Native peoples? The doctrinal framework is complex. The court must first determine whether trademarks are "government speech," and therefore outside the realm of First Amendment protection, or whether they are "commercial speech," a category that allows the government to serve important interests related to commerce, even though there might be an incidental burden on speech. If the court agrees with the logic of *In re Tam*, it will apply strict scrutiny and will be forced to decide whether there is some reason to treat Indian mascots differently from other forms of "disparaging speech."

Is there any reason to find that the issue of Indian mascots is unique and exceptional under the law? Riley and Carpenter's theory of Indian appropriation requires the court to situate the issue within its relevant historical and contemporary context. 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.[23] 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.

The connection between human rights and civil rights is important, but often misunderstood by legal professionals who believe that the use of Native cultural imagery is protected as a constitutional right of freedom of expression. The next section of this commentary will demonstrate why the First Amendment is not the relevant focus of this inquiry, and why the issue of Indian mascots should matter to attorneys and political leaders.

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22. *Id.* at 1328.

23. 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 INTELL. PROP. L. REV. 61 (2015).

III. Cultural Imagery in Historical Context: Understanding the Harms

Riley and Carpenter's theory of Indian appropriation correctly situates the issue of cultural appropriation within its historical context. As Professor Robert Williams, Jr., notes in his brilliant critique of Western civilization, *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. The cultural imagery of the savage was used to appropriate Indigenous lands through the fiction of "Discovery," which Chief Justice John Marshall adopted in *Johnson v. McIntosh* as a way to determine that the "civilized" European nations could claim title to Native lands.[24] 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.[25] As wards, Native peoples lacked Constitutional standing to resist forcible assimilation policies enforced by federal officials. Instead, throughout 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.[26] Under the guise of "beneficence," federal policy effectuated the loss of two-thirds of tribal landholdings, as well as thousands of sacred objects and objects of tribal cultural patrimony.[27]

At the same time that Western policymakers were constructing the image of the uncivilized "savage" as a means to appropriate material wealth from tribal governments, they constructed the image of the "Noble Savage" as a friendly Indian who helped white people (Squanto, Pocahontas, Sacajawea) and lived in harmony with nature.[28] Unfortunately, the Noble Savage was destined to vanish in the wake of civilization. This turned out to be quite convenient for the United States, however, 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.

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24. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

25. *See* CAROLE GOLDBERG, REBECCA TSOSIE, KEVIN WASHBURN & ELIZABETH RODKE WASHBURN, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS, 22–30 (6th ed. 2010) (describing the impacts of the allotment policy and other forms of 19th century civilization policies).

26. 25 U.S.C. § 331 et. seq.

27. GOLDBERG, TSOSIE, WASHBURN, AND WASHBURN, *supra* note 25 at 24–30.

28. *See* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 317–25 (2002) (discussing the relationship between culture, art, and law in the context of cultural appropriation).

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, in their effort to create a new, "bicultural" nation-state.[29]

The central problem with 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 fall 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 the term R*skins.[30]

Many Americans purport to be confused about whether such imagery causes any harm to contemporary Native peoples, who are now considered "equal citizens" within the United States. In fact, Dan Snyder continues to proclaim that the Washington Team's logo and name actually "honors" Indians, ignoring the protests of tribal leaders and individual Indians, who assert that the use of the logo disparages and degrades them.[31] 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.[32] 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." In that way, tribal claims can be dismissed as contemporary instances of "political correctness," which irritate many Americans and undercut profits to the extent that companies cave in to social protests.

As Riley and Carpenter assert in *Owning Red*, the operative inquiry is who owns the image of the "Indian" and for what purpose? 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 ap-

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29. *See* Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 TULSA L. REV. 3, 6 (2009) (discussing the role of the national museum in settler nations).

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

31. Tsosie, *Just Governance or Just War*, *supra* note 23 at 65.

32. Tsosie, *Just Governance or Just War*, *supra* note 23 at 65 & nn.10–11.

propriating Native land as well as images from tribal cultures. Consequently, many Americans 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 hockey game.[33] 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.[34]

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 source of prejudice, which is a biased attitude that can manifest in legally prohibited behavior, such as discrimination, but otherwise is not legally actionable.[35] Stereotypes embody a set of widely held associations between a social group and attributes that they are believed to possess. Although stereotyping can be humorous when invoked between equals, such as Northerners and Southerners, it is harmful when used by those in a power position to subordinate vulnerable groups who have experienced the historical denial of equal rights. In such cases, stereotyping can reproduce contemporary inequities by privileging certain groups and justifying the exclusion of others from equal access to employment, housing, educational opportunity, and a host of other benefits. These forms of subtle domination continue to operate within a contemporary society popularly described as "post-racial" and "color-blind" 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 multi-million-dollar sports franchises in the hands of the owners of the Washington Team, the Kansas City Chiefs, the Cleveland Indians, the Atlanta Braves, and the Chicago Black Hawks. The use of Indian images in the sports and entertainment industries is not only tolerable to most Ameri-

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33. Levi Rickert, *57 Charges of Child Abuse and Assault to be Leveled Against Drunken Hockey Fans Who Sprayed Native Youth with Beer*, NATIVE NEWS ONLINE.NET (January 28, 2015), http://nativenewsonline.net/currents/57-charges-child-abuse-assault-leveled-drunken-hockey-fans-sparyed-native-youth-beer/ [https://perma.cc/XR5Z-JRYE] (discussing the incident which occurred when a group of 57 American Indian K–8 grade students from the American Horse School on Pine Ridge Reservation attended a hockey game in Rapid City, South Dakota, accompanied by parents and chaperones, and were assaulted by a group of drunken sports fans, who sprayed the students with beer and shouted racial slurs).

34. *See, e.g.*, NAT'L NATIVE AM. BAR ASS'N, THE PURSUIT OF INCLUSION: AN IN-DEPTH EXPLORATION OF THE EXPERIENCES AND PERSPECTIVES OF NATIVE AMERICAN ATTORNEYS IN THE LEGAL PROFESSION (2015), http://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf [https://perma.cc/Z784-DD39] (documenting lack of inclusion of Native American attorneys in most sectors of legal profession).

35. *See generally* Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655 (2013).

cans, it is actually depicted as "desirable" and "honorific" to Native peoples. Why? First, it is profitable. Dan 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" imagery that the country used to create itself. And 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 Native activists who are accused of trying to mess things up for the rest of American society as it claims its own "Native" history.

IV. Conclusion: The Battleground of Cultural Production

The controversy over the use of Native images in American cultural production is the final battleground in the centuries long conflict between Native peoples and the European colonizers. Indigenous peoples possess cultural identities that are separate from that of the United States. Because of this, cultural identity is pivotal to Indigenous self-determination, and therefore, to the survival of Indigenous peoples. 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.[36] The same mentality 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 "R*skin" contains at least one entry noting that the term is considered "offensive and derogatory" because of its historical associations.

Linking the harm of Indian mascots to the liberties of the First Amendment is a way to divert attention from the real issue, which involves reparative justice for past wrongs, as well as an obligation to effectuate self-determination for contemporary tribal governments. It is also an example of what Frederick Schauer termed "First Amendment opportunism," or the

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36. *Ending the Legacy of Racism in Sports and the Era of Harmful 'Indian' Sports Mascots*, NAT. CONGRESS AM. INDIANS (October 2013), http://www.ncai.org/resources/ncai-publications/Ending_the_Legacy_of_Racism.pdf [https://perma.cc/RE4A-KE32].

use of free speech arguments "as a second-best justificatory device when the primary justification for a questioned course of conduct is legally unavailable."[37] We are in an era where "freedom of speech" is often used rhetorically to shift accountability for racial and sexual harassment to the victims, deflecting the conversation about human dignity to one about the virtue of liberty.[38] In this world, it is easy to fall back upon simplistic arguments to justify behavior that degrades the foundational principles of a pluralistic democracy, committed to "equal justice" for all.

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. 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.

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37. Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025, 1033 & n.38 (2008) (citing Frederick Schauer's work).

38. *See generally* Kerri Lynn Stone, *Decoding Civility*, BERKELEY J. GENDER, L. & JUST. 185 (2013) (discussing abusive speech in the workplace in the context of Title VII claims); JEREMY WALDRON, THE HARM IN HATE SPEECH (2012) (arguing for the value of human dignity and the public good of inclusiveness).