

## The Paradox of Cultural Property

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### Introduction

For over 80 years, Chief Illiniwek would take to the field at halftime at the University of Illinois to perform a dance whose moves were half pow wow and half cheerleading. Over the years thousands of fans found his performance to be dignified and moving and they considered him to be a central symbol not just of a team or a school, but of a community. Many Indians and many whites, on the other hand, saw in the Chief a performance of racial mockery and a misappropriation of Native American culture. One of the few things both supporters and denouncers of Chief Illiniwek share is a belief that the halftime ritual partakes in some important way of Indian cultural practice. It is this belief in fact that gives the performance both its uplifting and its offensive meaning. Meanwhile, plenty of cultural historians and anthropologists would argue that Chief Illiniwek is more a product of mainstream white American culture than Native American culture, that he and many other sports mascots are simply the most recent manifestation of a long tradition of whites playing Indian, a form of play that tells us much more about whites than Indians. Indian mascots are generally invented by whites. They borrow from the iconography of various tribal cultures—the regalia, the pipe, sometimes the name and the dance steps—and are set within a distinctly white cultural ritual of the halftime show and invested with meaning by sports fans. To whose culture do these icons belong? To ask the question using the language of cultural property is both to reinforce rigid ideas about culture and to miss the point. These mascots are products of cultural fusion; they are cultural hybrids. They cannot be owned in any way that cultural property law can resolve.

Many current cultural disputes sound in the legal language and logic of discrimination or hate speech. The focus of this paper is on the many claims made explicitly or implicitly on the basis of cultural property. The problem with using ideas of cultural property to resolve cultural disputes is that cultural property uses and encourages an anemic theory of culture so that it can make sense as a form of property. Cultural property is a paradox because it places special value and legal protection on cultural products and artifacts, but it does so based on a sanitized and domesticated view of cultural production. Cultural property is paradoxical in two distinct ways. First in the very pairing of its core concepts. Property is fixed, possessed and controlled by its owner, and alienable.

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Culture is none of these things. Thus, cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable. They also tend to sanitize culture, which if it is anything is human and messy, and therefore as ugly as it is beautiful, as destructive as it is creative, as offensive as it is inspiring.

Second, and more importantly, cultural property is paradoxical in the sense that it has contributed to its own ineffectuality and conceptual poverty. Within cultural property discourse, the idea of property has so colonized the idea of culture that there isn't much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture. Aided and abetted by multiculturalism and the recognition of difference, cultural property has popularized a logic that tends to forcefully align "cultures" with particular groups. Within the logic of cultural property, each group possesses and controls (or ought to control) its own culture, and to respect difference is to respect the culture that is the lifeblood of each group. This view of cultural property suggests a preservationist stance toward culture and sees culture as both static and good. I want to argue against both of these assumptions, and for a view of culture as both dynamic and at least potentially bad, in the sense that part of the dynamism of culture is its appropriations, hybridizations and contaminations.

To rethink culture in this way complicates the prevailing idea that cultural property law can afford groups collective property rights in their cultural heritage. To think of culture more dynamically requires asking about the power, appropriation, and negotiation between groups. It moves away from fixing and preserving cultures and peoples and toward an interesting set of questions that flow from cultural change and contact. For example, what happens when property rights are recognized or redistributed in the name of a culture that no longer exists or when cultural appropriation has transformed the contested property into something belonging to more than one culture? These questions come up concretely in the Indian mascot dispute, an implicit cultural property decision by the NCAA to prohibit the use of Native American names and mascots by teams under their jurisdiction.

The NCAA policy did not invoke the law of cultural property, but what I am calling the popular logic of cultural property, a social common sense that cultural property law has helped to create. It allows for college teams to use tribal names only with consent of the appropriate tribe. Without the undisputed authorization of the relevant tribe, the policy makes clear that it is hostile and offensive for universities to appropriate Native American names and images. In other words, NCAA policy suggests that images of Indians belong to Indians and cannot be used by non-Indians without Indian permission. A policy that meant to respect the property rights of tribes in their own names and representations has become ensnared in the popular but flawed logic of cultural property. It seeks to give tribes the right to allow or disallow use of their names, images or icons, but fails to make sense of the fact that many of the offending mascots are white inventions: cultural property without a culture, or cultural property that through

cultural fusion now belongs to more than one culture, or perhaps belongs properly to the offending culture. In order to explicate the paradoxes of cultural property and offer a counter narrative, I chart one case of cultural fusion in Chief Illiniwek. The University of Illinois' recently retired Chief Illiniwek is a cultural hybrid extraordinaire—a mix of plains tribal regalia, woodland tribal history, myth and legend, imperial imagination and sports boosterism.<sup>1</sup>

This is not to say that we should never recognize cultural property, but that we should do so with great caution and if and when we do, we should recognize as well the contingency and complexity of the group to which we assign the property right. Nor is it to say that we should not regulate or prohibit the use of Indian names and mascots in sports. Rather, given the conflicted and sometimes brutal appropriation of Native American imagery at the very heart of mainstream American culture, and given that it is not clear to which culture these images properly belong, it makes more sense and does less harm to both marginalized groups and the notion of culture itself for the law to act, not because tribal cultures have a better claim to white performances of Indian images, but for any number of other legal and moral reasons: because it gives offense for the purposes of entertainment, because it is hate speech, because you cannot trademark a racial slur. Sometimes it may make more sense for people to act not because the law forces them to, but because it comes to make sense for them to change their behavior.<sup>2</sup>

In Part I of this paper I explore both cultural property law and the NCAA policy. I briefly summarize cultural property law and argue that it has led to the popularization of a particular way of thinking about culture, that it has moved beyond law to a popular logic that understands cultures and groups as being in clear correspondence. I then detail the NCAA mascot policy as a prime example of cultural property logic.

In Part II I offer a cultural counter narrative that highlights the problems and paradoxes of cultural property. The counter narrative is an account of how cultural fusion occurs and an extended argument for why Indian mascots are cultural hybrids that should not belong to either the tribes to which they refer or the sports teams that invented them. I chart the history of whites playing Indian to show how profoundly this cultural appropriation has become part of a white national identity. I recount the invention of Chief Illiniwek specifically and finally discuss the theory of cultural hybridity, which may lead to a different, more dynamic way of mediating competing claims to cultural meaning.

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<sup>1</sup> Chief Illiniwek was officially retired as the University of Illinois mascot following his last half-time dance on February 21, 2007.

<sup>2</sup> I recognize that law is an intricate part of the larger cultural picture and that it contributes to changes in common sense. See e.g., Naomi Mezey, "Law as Culture," 13 Yale J. L. & Hum. 35 (2001).

While not a panacea, cultural hybridity is an important corrective for the paradoxes of cultural property. Cultural property law has been well-intentioned; it has been an attempt at forging new common sense about respect for cultural difference. But grounding this common sense respect in the logic of cultural property does too much damage, not just to the abstraction that is culture, but ultimately to tribes, Indians and everyone else for whom cultural survival depends on change. This paper is an attempt to help create a new common sense about culture that allows cultures to change and stay meaningful rather than allow white stereotypes and nostalgia to create museum pieces out of indigenous cultures, to restrict and asphyxiate culture in the name of cultural property and collective identity.

## **I. Cultural Property and the NCAA**

### **A. Cultural Property**

The evolution of cultural property law is fascinating and complex.<sup>3</sup> My account emphasizes its origins and very selectively traces its trajectory in order to show how the popular logic of cultural property—the pervasive idea that cultural objects and practices belong in some fundamental way to a particular culture or state—has developed out of this legal evolution.

Cultural property's founding document is the 1954 Hague Convention on the Protection of Cultural Property.<sup>4</sup> This convention is a descendent of older laws of war but developed after World War II in response to a new style of war in which cultural property was intentionally targeted by the Nazis.<sup>5</sup> The 1954 Hague Convention coined the term “cultural property,”<sup>6</sup> and was the first international convention to deal exclusively with the protection of cultural property.<sup>7</sup> The Hague Convention and its two protocols obligate parties to safeguard cultural property within their territory in times of peace, and to prevent the targeting, theft, misappropriation or destruction of cultural property during wartime.<sup>8</sup> The Hague Convention defines cultural property as “moveable or immovable property of great importance to the cultural heritage of every people” and includes buildings or areas that contain cultural property.<sup>9</sup> Particularly interesting is the convention’s preamble, which states that “damage to cultural property belonging

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<sup>3</sup> A particularly astute and accessible account is Susan Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (2005).

<sup>4</sup> Hague Convention on the protection of Cultural Property in the Event of Armed Conflict (1954) [hereinafter 1954 Hague Convention].

<sup>5</sup> John Henry Merryman, “Two Ways of Thinking About Cultural Property,” 80 Amer. J. Internat. L. 831, 835-36 (1986).

<sup>6</sup> Lyndel V. Prott & Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural property’?” 1 Internat. J. Cultural Property 307, 312 (1992).

<sup>7</sup> Merryman, *supra* note \_\_\_, at 836.

<sup>8</sup> 1954 Hague Convention, Art. 3 & 4. The U.S. has not ratified the convention.

<sup>9</sup> 1954 Hague Convention, Art. 1.

to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".<sup>10</sup>

In 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>11</sup> As its title makes clear, the UNESCO Convention was concerned less with war and more with the growing black market in cultural property. It seeks to prevent states from acquiring stolen or illegally exported cultural products.<sup>12</sup> It defines cultural property in much more detail than the 1954 Hague Convention, as property which is designated by a state "as being of importance for archaeology, prehistory, history, literature, art or science" and which can include flora, fauna, minerals; objects relating to historical, archaeological, ethnological, or artistic interest; rare manuscripts, statuary and stamps; photographic and cinematographic archives; antiquities and furniture over 100 years old, and much else.<sup>13</sup> Again, what is most interesting here is the part of the text which purports to do the least legal work. The preamble states that "cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting." It further expresses an urgent sense that "it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations".<sup>14</sup> In almost flamboyant language, it is a call to each nation to awaken to its own cultural identity.

John Merryman famously and accurately characterized the Hague and UNESCO conventions as representing two very different sets of values and perspectives on cultural property. Merryman reads the 1954 Hague Convention as a "charter for cultural internationalism,"<sup>15</sup> a cosmopolitan take on cultural property that understands it as primarily important in the contribution it makes to "the cultural heritage of all mankind." For Merryman, it represents a kind of endangered species approach: we should save species not because each species has an interest in its own survival but for the sake of a species' contribution to a diversified global ecosystem. In contrast, Merryman argued that the 1970 UNESCO Convention was a document of "cultural nationalism" in both its text and its subsequent interpretation.<sup>16</sup> Consistent with a more nationalist approach, the UNESCO Convention has been read not only to require care for cultural property, but to justify retention of such property by source nations. On this reading, cultural property is primarily important to individual states because it expresses the "cultural genius of nationals of the State concerned."<sup>17</sup>

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<sup>10</sup> 1954 Hague Convention, Preamble.

<sup>11</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) [hereinafter 1970 UNESCO Convention].

<sup>12</sup> 1970 UNESCO Convention, Art. 7.

<sup>13</sup> 1970 UNESCO Convention, Art. 1.

<sup>14</sup> 1970 UNESCO Convention, Preamble.

<sup>15</sup> Merryman, *supra* note \_\_\_, at 837.

<sup>16</sup> Merryman, *supra* note \_\_\_, at 846.

<sup>17</sup> 1970 UNESCO Convention, Art. 4(a).

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On close inspection, however, both of these conventions imply that cultures belong in some way to particular groups. Even in the cosmopolitan Hague Convention there are seeds of cultural nationalism. It asserts that “*each people makes its contribution to the culture of the world*”.<sup>18</sup> While we may value those contributions for what they bring to the collective table, the implication is that a distinct culture emerges from a distinct people. This correspondence between bounded collectivities and the cultures they produce was not enough in 1954 to stake an ownership claim, but it is there nonetheless and it is this assumption that lies at the heart of the popular logic of cultural property. This logic was more explicitly present in the UNESCO Convention and has become only more pronounced over time. A cosmopolitan himself, Merryman bemoaned the fact that during the 1970s and 1980s, “the dialogue about cultural property has become one-sided. Retentive nationalism is strongly and confidently represented and supportively received wherever international cultural property policy is made.”<sup>19</sup> Twenty years later, cultural nationalism is still in its ascendancy, in part because of the paradox of cultural property.

What, then, does this concern with the wartime destruction of great architecture and the illegal trade in antiquities have to do with college halftime shows? As it turns out, expansive notions of property have outpaced dynamic notions of culture. Intangibles have been brought into the cultural property fold. In 2003, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage.<sup>20</sup> Although it changes the term of art, the most recent convention turns the logic of cultural property into an artform. The 2003 UNESCO Convention established a committee within UNESCO to promote and help implement the convention and requires parties to the convention to inventory and safeguard intangible cultural heritage. The convention expands the notion of property and calls it heritage. According to the convention, intangible cultural heritage includes a huge range of practices, rituals and traditions that are *defined as integral to the identity and continuity of the groups to which they implicitly belong*.

The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artifacts and cultural spaces associated therewith—that communities, groups, and, in some cases, individuals recognize as part of their cultural heritage. The intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and

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<sup>18</sup> 1970 UNESCO Convention, Preamble (emphasis mine).

<sup>19</sup> Merryman, *supra* note \_\_\_, at 850.

<sup>20</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) [hereinafter 2003 UNESCO Convention].

provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.<sup>21</sup>

In its definition of cultural heritage, the 2003 UNESCO Convention is the legal fruition of the popular logic of cultural property: cultural heritage is always specific to a particular group and the culture emerges as a response to environment, nature and history, but not in response to contact, interaction and conflict with others. Culture is not shared. If the reference to history is meant to imply such contact, it is a history that is at once repatriated: it is “their history,” the history that belongs to the group alone. Admittedly culture is not static in this definition; it is “constantly recreated,” but it is oddly isolated from others, from power, from contestation and contamination. Moreover, the cultural heritage that is transmitted from generation to generation is what provides a group with identity and it is what gives the group continuity; in other words, survival depends on this intangible cultural heritage which is the group’s alone. Finally, the 2003 UNESCO Convention moves away from the old-fashioned idea, embedded in the previous conventions, that states are the primary holders of culture. In a world in which states are not homogeneous nations that share one culture (if they ever were), it formally recognizes groups and communities as the entities to which coherent cultures attach.

Some have argued that the increasing use of the term “cultural heritage” is an important corrective to many of the limitations of applying the concept and law of property to culture,<sup>22</sup> including some of the limitations that I sketch above. Those who favor using cultural heritage tend to favor it because “it creates a perception of something handed down; something to be cared for and cherished.”<sup>23</sup> That preservationist rhetoric of cultural heritage, however, replicates much of the popular logic of cultural property. It gives us a more complex picture of culture, one that includes intangible practices and traditions,<sup>24</sup> but it does not escape the suggestion that cultures *belong* in some important way to groups, even if that belonging is not recognized by law. It is precisely this

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<sup>21</sup> 2003 UNESCO Convention, Art. 2(1).

<sup>22</sup> See e.g., Prott & O’Keefe, *supre note* \_\_\_\_.

<sup>23</sup> *Id.* at 311.

<sup>24</sup> Intangible products and property raises the issue of applicability of the intellectual property regime. While it is not my purpose here to explore the differences between intellectual property and cultural property, they intersect in interesting ways. Susan Scafidi deftly summarizes one way of distinguishing them: “intellectual property protects the new and innovative; cultural property protects the old and venerated.” Susan Scafidi, *Who Owns Culture?*, *supra note* \_\_\_, at 51. In fact, the central tension I address in this paper between the restrictions of property and the mobility and creativity of culture parallels the tension in intellectual property between property protections and the public domain. *Id.* at 17. There is also a growing body of culturally attuned intellectual property scholarship. See e.g., Rosemary J. Coobe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (1998); Madhavi Sunder, *IP3*, 59 Stan. L. Rev. 257 (2006); Julie Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *The Future of the Public Domain* 121 (P. Bernt Hugenholtz & Lucie Guibault eds. 2006); Rebecca Tushnet, “Legal Fictions: Copyright, Fan Fiction, and a New Common Law,” 17 Loy. L.A. Ent. L.J. 651 (1997).

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sense of belonging that does harm, even as it provides an important source of identity and community. Preservationism, for all its importance, values stasis, and therefore is much better suited to dead cultures than to living ones.<sup>25</sup> The fact of the matter is that moving to the term cultural heritage does not move us very far along.

Finally, the most extensive domestic law dealing specifically with Native American cultural property is the Native American Graves Protection and repatriation Act (NAGPRA) passed in 1990.<sup>26</sup>

This is a highly selective and skeptical summary of cultural property law. My skepticism is quite different than that of Eric Posner.<sup>27</sup> While we both agree that the conventions on cultural property have perverse effects,<sup>28</sup> Posner thinks that this can be solved by deregulating, by making the market in cultural products more efficient and above-board.<sup>29</sup> In other words, he thinks most cultural property ought to be treated just like regular property, and I think that most cultural property ought to be treated more like regular culture and given more air. It is the circulation of cultural products and practices that keep them meaningful, and allow them to acquire new meaning, even when that circulation is the result of inequalities in money and power. My sympathetic skepticism is closer to Michael Brown's, who worries that when ethnic groups "define their cultural practices as property" it reifies culture and implies that those practices cannot be "studied, imitated, or modified by others without permission."<sup>30</sup> Unlike claims for reparations or the return of indigenous lands, disputes over intangible resources lead in Brown's view, "to vexing questions of origins and boundaries that are commonly swept under the rug in public discussions, which tend to treat art, stories, music, and botanical knowledge as self-evidently the property of identifiable groups."<sup>31</sup> I would go farther still: as groups become strategically and emotionally committed to their "cultural identity," cultural property tends to increase intra-group conformity and inter-group intransigence in the face of cultural conflict.

## B. The Popular Logic of Cultural Property

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<sup>25</sup> Paul Gilroy asks: "Is this impulse towards cultural protectionism the most cruel trick which the west can play upon its dissident affiliates?" Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* 33 (1993).

<sup>26</sup> 25 U.S.C. 3001 (1990).

<sup>27</sup> Eric A. Posner, "The International Protection of Cultural Property: Some Skeptical Observations," Chicago Public Law & Legal Theory Working Paper No. 141 (2006).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.* at 11 (Posner believes some forms of cultural property might merit light regulation).

<sup>30</sup> Michael F. Brown, *Who Owns Native American Culture* 7 (2003).

<sup>31</sup> *Id.*

The popular logic of cultural property is not the law of cultural property, but the social attitudes that law helps to engender.<sup>32</sup> Many of the ways in which people make sense of the world derive imperceptibly from legal values and practices. The salience and use of particular legal categories influence our way of thinking about other aspects of our lives. The law of cultural property is fairly circumscribed, but its influence on our ways of thinking about culture and difference goes far beyond the reach of its actionable claims. In this instance cultural property and cultural heritage law has dovetailed with multiculturalism, and what Richard Ford calls “difference discourse” to produce a common sense understanding of culture as belonging to particular groups.<sup>33</sup> Seyla Benhabib, for one, attributes this reductionist thinking about culture to both “strong multiculturalism” and to the tendency among both conservatives and progressives to adopt the German Romantic understanding of culture as the unique expression of a people’s identity as well as the modern anthropological view that all cultures are equal.<sup>34</sup> Taken together, these accepted ideas account for the widespread belief that every human group has its own culture.<sup>35</sup> Moreover, this belief rests on three faulty epistemic premises:

- (1) that cultures are clearly delineable wholes; (2) that cultures are congruent with population groups and that a noncontroversial description of the culture of a human group is possible; and (3) that even if cultures and groups do not stand in one-to-one correspondence, even if there is more than one culture within a human group and more than one group that may possess the same cultural traits, this poses no problems for politics or policy.<sup>36</sup>

A social constructivist view of culture rejects these premises because they essentialize, homogenize and fetishize culture.<sup>37</sup> They should also be rejected because in the cultural conflicts in which law and politics increasingly engage, they take too much off the table.

The “logic” of cultural property works much like Ford’s “difference discourse”: it describes social and ethnic groups as tied to an identifiable culture at the same time that it helps generate that very relationship.<sup>38</sup> Cultural property claims help produce the logic of clear group difference and cultural ownership. One effect is a notion of culture that can feel oppressive to those whose identity it purports to describe. These ideas of culture and difference come with unspoken

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<sup>32</sup> Some call this legal consciousness. See Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (1998).

<sup>33</sup> Richard Thomson Ford, *Racial Culture* (2005).

<sup>34</sup> Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* 7-8 (2002).

<sup>35</sup> *Id.* at 3-4.

<sup>36</sup> *Id.* 4.

<sup>37</sup> *Id.* at 4 (quoting Terence Turner, “Anthropology and Multiculturalism: What is Anthropology that Multiculturalists Should be Mindful of It?” 8 *Cultural Anthropology* 411, 429 (1993)).

<sup>38</sup> Ford is primarily concerned with the way difference discourse links race with culture, but the generative effects of discourse are the same. Ford, *supra* note \_\_\_, at 28.

presumptions about group membership, about who belongs and how one should act out one's cultural identity.<sup>39</sup> These understandings of group difference are, as Ford points out, "exercises of power—attempts to legitimate a particular and controversial account of group culture over the objection of those who would reject or challenge that account."<sup>40</sup> The move from cultural property as a legal claim to a popular logic about groups effects how we continue to understand culture and the rights that flow from collective life. It also encourages a turn to law to solve cultural disputes. By placing a cultural property right in a particular embodiment of a group or community, the law tends to empower the version of the group to which it gives the right at the same time that it reifies a specific understanding of culture.<sup>41</sup>

### C. NCAA Policy on Native American Nicknames & Mascots

On August 5, 2005, the NCAA issued a press release announcing a new policy implemented by the NCAA Executive Committee (which is comprised of university presidents and chancellors) to "prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships."<sup>42</sup> The policy eventually encompassed 19 schools, all of whom used Native American names and mascots.<sup>43</sup> As a private, member-based organization, the NCAA is without authority to force schools to change their mascots and imagery. However, the NCAA's coercive power is considerable because schools wishing to compete in intercollegiate sports do not have many alternatives and no alternative that is so profitable.

Since the policy was adopted, 11 schools have agreed to change their name or mascot and are no longer subject to the policy. Five schools have received permission from namesake tribes and have been exempted from the policy. One school is on a "watch list" and three schools are subject to the policy, which prohibits them from hosting any post-season NCAA sporting events or displaying hostile and abusive images at any championship competitions.

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<sup>39</sup> See Ford, *supra* note \_\_\_, at 39.

<sup>40</sup> Ford, *supra* note \_\_\_, at 41.

<sup>41</sup> Madhavi Sunder, "Cultural Dissent," 54 Stan. L. Rev. 473 (2001).

<sup>42</sup> [http://www.ncaa.org/media\\_and\\_events/press\\_room2005/august/20050805\\_exec\\_comm\\_rls.htm](http://www.ncaa.org/media_and_events/press_room2005/august/20050805_exec_comm_rls.htm)

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<sup>43</sup> Alcorn State University (Braves), Central Michigan University (Chippewas), Catawba College (Indians), Florida State University (Seminoles), Midwestern State University (Indians), University of Utah (Utes), Indiana University-Pennsylvania (Indians), Carthage College (Redmen), Bradley University (Braves), Arkansas State University (Indians), Chowan College (Braves), University of Illinois-Champaign (Illini), University of Louisiana-Monroe (Indians), McMurry University (Indians), Mississippi College (Choctaws), Newberry College (Indians), University of North Dakota (Fighting Sioux), Southeastern Oklahoma State University (Savages). The College of William and Mary (Tribe) was granted an extension to complete a self-evaluation of their mascot. The Central Michigan University (Chippewas), Florida State University (Seminoles), Midwestern State University (Indians), University of Utah (Utes), and the Carthage College (Redmen) have since been removed from the list.

The NCAA policy outlined three different deadlines for compliance. First, effective February 1, 2006, the NCAA prohibited colleges and universities with hostile or abusive mascots, nicknames or imagery from hosting any NCAA championship. Also as of February 1, 2006, schools with hostile or abusive references had to take “reasonable steps to cover up” such references at predetermined NCAA championship sites. As of August 1, 2008, any college or university promoting hostile or abusive references on their mascots, cheerleaders, dance teams, and band uniforms or paraphernalia are banned from displaying it at NCAA championships. Finally, student-athletes with uniforms or paraphernalia having hostile or abusive references were prohibited from wearing those uniforms at championship events as of the date of the announcement.

On August 23, 2005, Bernard Franklin, NCAA Senior Vice-President for Governance and Membership, announced that Florida State University had been removed from the list, citing the “unique relationship between the university and the Seminole Tribe of Florida as a significant factor.” The statement made no mention of the Seminole Tribe of Oklahoma, which has not taken an official position on the Florida State mascot but whose members have been less than supportive.<sup>44</sup> Within two weeks Central Michigan University (CMU) and the University of Utah were also removed from the list for the same reason, the approval of the namesake tribes: the Saginaw Chippewa Indian Tribe of Michigan and the Northern Ute Indian Tribe. Franklin went on to state, “The decision of a namesake sovereign tribe, regarding when and how its name and imagery can be used, must be respected even when others may not agree.”<sup>45</sup> The NCAA has encouraged CMU to change its nickname to the “Saginaw Chippewas” because that was the Chippewa tribe which permitted Central Michigan to retain its name. The Catawba College “Catawba Indians” and the Mississippi College “Choctaws” have also been allowed to use their names with support from the relevant tribes.<sup>46</sup>

Several appeals by universities were denied by the NCAA. In rejecting the University of North Dakota’s appeal to use the “Fighting Sioux” nickname, Franklin noted that at least two Sioux tribes opposed the nickname and none clearly supported it. Bradley University’s appeal for its use of the name “Braves” was rejected because, as Franklin noted, “no Native American tribe ‘owns’ the word Braves in the same way it owns the name of a tribe, and therefore cannot overcome the position that the use of such a name leads to a hostile or abusive

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<sup>44</sup> “NCAA allowing Florida State to use its Seminole mascot,” USA Today, Aug. 23, 2005. [http://www.usatoday.com/sports/college/2005-08-23-fsu-mascot-approved\\_x.htm](http://www.usatoday.com/sports/college/2005-08-23-fsu-mascot-approved_x.htm). One member of the general council for the Seminole Tribe of Oklahoma said that he was “nauseated that the NCAA is allowing this ‘minstrel show’ to carry on this form of racism in the 21st century.” Id.

<sup>45</sup> Supplement No. 3 Executive Comm 10/05.

<sup>46</sup> Cite [check these for statements from tribes]

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environment.”<sup>47</sup> Both of these schools’ final appeals were denied by the NCAA in April of 2006.<sup>48</sup>

In November of 2005 Franklin announced the removal of Midwestern State University and Carthage College from the list. Midwestern State has changed its nickname from the “Indians” to the “Mustangs” and was granted an extension of time in which to remove the name “Indians” from its basketball court. Carthage removed the two feathers from its logo and changed its name from the “Redmen” to the “Red Men.” With respect to Carthage, Franklin stated that the committee supported “the development of a new policy statement that will communicate the school’s historical meaning of the ‘Red Men’ nickname and emphasize that there is no association with Native Americans.”<sup>49</sup> Carthage is either in the process of developing a new policy statement or has abandoned their policy statement altogether.<sup>50</sup> Given the early fraternal societies of the same name,<sup>51</sup> it seems unlikely that the name has “no association” with Native Americans.

The University of Illinois’ appeal for the right to use the “Illini” name and their mascot was denied, in part, in November of 2005. The NCAA accepted the continued use of the name “Illini” as being emblematic of the state, but stressed that the University had to engage in a public educational effort to disassociate the school from Native American imagery owing to its continued use of Chief Illiniwek, the school mascot or symbol. The University of Illinois’ final appeal was denied in April of 2006. The University of Illinois announced on February 16, 2007 that Chief Illiniwek would no longer perform at sporting events at the

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<sup>47</sup> “Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Bradley University Review,” <http://www.ncaasports.com/story/8987213>.

<sup>48</sup> Bradley has been “placed on a five year ‘watch-list’ during which time the NCAA will work with the institution to assure that it continues to maintain an environment that is not hostile or abusive and one that is consistent with the NCAA constitution and commitment to diversity. Bradley is allowed to fully participate in and host NCAA championships without restrictions.” “Native American Mascot Policy Status List,” (as of February 16, 2007)

[http://www.ncaa.org/wps/portal/!ut/p/kcxml/04\\_Sj9SPykssy0xPLMnMz0vM0Y\\_QjzKLN4j3NQDJgFjGpvqRqCKO6AI-YXARX4\\_83FR9b\\_0A\\_YLc0NCIckdFAEuT364!/delta/base64xml/L3dJdyEvUUd3QndNQSEvNEIVRS82XzBftFU!CONTENT\\_URL=http://www2.ncaa.org/portal/media\\_and\\_events/press\\_room/2007/february/20070220\\_mascot\\_status\\_report.html](http://www.ncaa.org/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4j3NQDJgFjGpvqRqCKO6AI-YXARX4_83FR9b_0A_YLc0NCIckdFAEuT364!/delta/base64xml/L3dJdyEvUUd3QndNQSEvNEIVRS82XzBftFU!CONTENT_URL=http://www2.ncaa.org/portal/media_and_events/press_room/2007/february/20070220_mascot_status_report.html)

<sup>49</sup> “Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Carthage College and Midwestern State University,” [http://www2.ncaa.org/portal/media\\_and\\_events/press\\_room/2005/november/20051109\\_carthage\\_midwestern\\_stmt.html](http://www2.ncaa.org/portal/media_and_events/press_room/2005/november/20051109_carthage_midwestern_stmt.html).

<sup>50</sup> The Carthage website currently does not provide a policy statement on the issue. As of last year, their old policy statement from 1994 was still available. That policy statement stressed that the only place Native American imagery was used was in the Carthage logo, featuring a red “C” inside a black circle with two feathers coming out. That policy statement nowhere mentioned that Red Men meant anything other than Native Americans, only that Carthage treated them with respect.

<sup>51</sup> See section III.A infra.

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University after the last home basketball game of the season.<sup>52</sup> The Chief was officially retired on February 21, 2007 after his halftime performance in a game against Michigan.<sup>53</sup> As a result, Illinois became immediately eligible to host post-season NCAA events.

The NCAA mascot policy, while not based in cultural property law, is a perfect example of an application of the popular logic of cultural property. It is emblematic of the way that the paradoxical logic of cultural property has been popularized and become itself a basis for action. The NCAA policy developed out of a recommendation by its Minority Opportunities and Interests Committee, which in its report on the subject listed a number of arguments against the use of Native American mascots, symbols and images in college sports. Many of those arguments were based on the discrimination, racism and hostile environment that the committee felt such images perpetuated.<sup>54</sup> Other arguments sounded in cultural property, such as claims that Indian mascots are sacrilegious in that the feathers, paint and costumes are misappropriations on Native American religious practices.<sup>55</sup> Most telling, however, is simply that the NCAA policy, once adopted, exempted those schools which could show that their names or mascots were approved by the namesake tribe.

The idea behind key aspect of the NCAA policy is pure cultural property, that images and rituals of Indians belong to Indians. There are cases in which this is a fairly uncontroversial statement or at least a plausible argument under cultural property law.<sup>56</sup> I am concerned with a subset of this claim: can images of Indians that white Americans have invented, appropriated and refashioned to serve the often hostile purposes of mainstream American culture be claimed as cultural property by Indians? While there may be plenty of reasons we might want the law to answer this question in the affirmative, there are at least two reasons why cultural property law or logic should not be the basis of such a response. First, a cultural property rationale would require that such images belong to tribal cultures. This would be akin to saying that Little Black Sambo and Aunt Jemima are products of African American culture. Yet they are quite clearly products of white American culture, products whose significance can only be mined by looking at a white cultural project of racial subjugation and appropriation.

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<sup>52</sup> University of Illinois News Release: <http://www.uillinois.edu/chief/ChiefRelease2-16-07.pdf>

<sup>53</sup> Vincent M. Mallozzi, "Mascots in court, Not on the Court," New York Times, Mar. 4, 2007 at Sec. 8, p. 8. For a video of the last dance of Chief Illiniwek, see [www.uillinois.edu/chief](http://www.uillinois.edu/chief).

<sup>54</sup> "NCAA Minority Opportunities And Interests Committee Report on the Use of American Indian Mascots in Intercollegiate Athletics to the NCAA Executive Committee Subcommittee on Gender and Diversity Issues," October 2002 [hereinafter MOIC Report].

[http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/moic/2003/mascot\\_report/mascotreport.htm](http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/moic/2003/mascot_report/mascotreport.htm).

<sup>55</sup> MOIC Report at 10.

<sup>56</sup> The photographs taken of Hopi Indian rituals by Rev. H.R. Voth at the turn of the century might be a less problematic case, although there as well, to the extent that it uses cultural property logic, it tends to create the same problems I describe in this essay. For an excellent discussion of the Voth photographs and the Hopi claims, see Michael Brown, *supra* note \_\_\_, at 11-42. Brown characterizes the Hopi claims in this instance as invoking a right to cultural privacy. *Id.* at 27-28.

Similarly, “invented mascots indicate moments of writing and rewriting a Euro-American identity in terms of conquest, hierarchy, and domination.”<sup>57</sup> We miss the meaning of mascots if we misidentify their cultural influences. Second, and more insidiously, a cultural property rationale tends to reinforce the idea that cultures are the property of groups, and that particular groups correspond in some unproblematic way to particular cultures. Moreover, this concern applies with equal force to even more standard cultural property claims.<sup>58</sup>

## II. The Making of a Cultural Hybrid

The paradox of cultural property is that it deals in culture and yet distorts and mummifies culture in its dealings with it. Cultural property not only misses the point, but perpetuates potentially harmful notions about cultures and groups in the name of trying to protect and preserve them. I offer below one potential corrective to the popular logic of cultural property, a cultural counter narrative about Indian mascots that emphasizes hybridity and change over coherence and stasis.

### A. Playing Indian<sup>59</sup>

Definitions of property and property distributions have always followed political and social power. Thus, groups with power have been able to define and protect their property and have been masters of their own identities. They have been able to appropriate and control meaning. But power of course is always fluid and relative. White Americans have been making use of Indian images and practices in their own national self creation since before they were Americans, indeed as part of becoming Americans. The trope of the noble savage served the colonists well, allowing them to use their identification with the noble and free Indian to distance themselves from the British at the same time that they used the savageness of the Indian to justify their dispossession and extermination. Literally donning tribal costumes and mimicking tribal dance and language, “playing Indian” was useful for white Americans in their power struggles with England as well as in their consolidation of power over the Indians they mimicked. A long tradition of Indian disguise and performance by white Americans has both defined a national identity distinct from England and legitimated the displacement of real Indians from the national landscape.<sup>60</sup>

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<sup>57</sup> C. Richard King & Charles Fruehling Springwood, “Introduction: Imagined Indians, Social Identities, and Activism,” *Team Spirits: The Mascot Controversy* 8 (2001).

<sup>58</sup> An antiquity looted from the Iraqi National Museum in Baghdad is not obviously the cultural property of Iraq. We would want to ask where it came from, how it was procured, what cultural connections modern Iraqis have to ancient Mesopotamians, what connections and claims other human groups have to the region or to this artifact, etc.

<sup>59</sup> The phrase is borrowed from Philip Deloria. Philip J. Deloria, *Playing Indian* 1998.

<sup>60</sup> *Id.*

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Phillip Deloria notes however, the extraordinary extent to which the idea of Indianness was made part of, and interior to, the new notion of American national identity.

In the late eighteenth century . . . rebellious American colonists in New England and Pennsylvania did something unique. Increasingly inclined to see themselves in opposition to England rather than to Indians, they inverted interior and exterior to imagine a new social boundary line of national identity. They began to transform exterior, noble savage Others into symbolic figures that could be rhetorically interior to the society they sought to inaugurate. In short, the ground of the oppositions shifted and, with them, national self-definition. As England became a them for colonists, Indians became an us. This inversion carried extraordinary consequences for subsequent American politics and identity.<sup>61</sup>

This claim is consistent with accounts of other cultural historians, such as Richard Slotkin, who describe the mythic American hero as one who has fundamentally internalized the Indian in order to be made anew, to be made into an authentic American.

The American must cross the border into “Indian country” and experience a “regression” to a more primitive and natural condition of life so that the false values of the “metropolis” can be purged and a new, purified social contract enacted. Although the Indian and the Wilderness are the settler’s enemy, they also provide him with the new consciousness through which he will transform the world.<sup>62</sup>

Every new national identity must, in Hobsbaum’s famous phrasing, invent the traditions in which it grounds that identity and lays claim to a shared past.<sup>63</sup> For the colonists in North America, reference to Indians helped to connect them to the land and to customs which existed long before they arrived.<sup>64</sup> Symbolic Indianness helped them reject and exorcise the past they shared with England. In this way, “playing Indian suggested that a powerful landscape had somehow transformed immigrants, giving them the same status as Indians and obligating them to defend the same customary liberty.”<sup>65</sup> The rhetoric, images and performances of Indianness were at the heart of American identity, and they

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<sup>61</sup> Deloria, *Playing Indian*, at 21-22.

<sup>62</sup> Richard Slotkin, *Gunfighter Nation: The Myth of the Frontier in Twentieth-Century America* 14 (1992). See generally, Richard Slotkin, *Regeneration Through Violence: The Mythology of the American Frontier 1600-1860* (1973).

<sup>63</sup> Hobsbaum, *Invention of Tradition*.

<sup>64</sup> Deloria, *Playing Indian*, at 25. The important point was not that they shared these customs or even knew what they were, but that they existed at all as part of the heritage of the continent they laid claim to.

<sup>65</sup> Deloria, *Playing Indian*, at 26. Deloria makes the nice point that by disguising themselves as native savages, colonists could actually perform the conflicting identities of rebels and citizens. *Id.*

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always had a duality to them. If Indian disguise allowed them to act out rebellion and dump tea into Boston harbor, it also allowed them to claim an anti-European, aboriginal citizenship.

It must be remembered, of course, that rhetorical, symbolic and mythic Indians are ideas, narratives or gestures, but not real humans, and it was the idea of the Indian rather than Indian people that proved so powerful and enduring for white Americans. Robert Berkhofer has famously studied the way Europeans and later Americans themselves created “Indians” as a category, and filled it with ideas and images that were often as mistaken as the name itself.<sup>66</sup> What is most amazing is not the power of verbal and visual rhetoric, but how consistent and enduring some of that rhetoric and imagery has been. Centuries after Columbus briefly described Indians in his 1493 letter, after much contact and better knowledge of many different Native American tribes, and in the face of dramatic changes in the way Indian tribes actually live, white Americans continue to deploy and respond to images of Indians that are strikingly similar to the images and rhetoric that Columbus and Amerigo Vespucci conjured in the fifteenth century.<sup>67</sup> One obvious explanation for the endurance of these images and stereotypes is that they have become part of mainstream American culture, not just as a story we tell about “them,” but sometimes a story we tell about “us.”

Traditions of playing Indian have been bound up with American national identity-making long before and long after the Revolution. And precisely because Indian play and imagery was used at different times for different purposes, it sometimes evoked quite contradictory themes.<sup>68</sup> What is common, however, to almost all of the Indian mythologizing is its link to national identity, to defending and defining a new nation while deflecting all the cultural and political anxieties of being a new nation. Sometimes the Indian play invoked anti-British rebellion, courageous transgression, and innate liberty, as was the case when participants in the Boston Tea Party dressed up as Mohawk warriors. After Independence, as the need for rebellion was replaced by the need for stability and legitimacy and real Indians posed real problems for national expansion, the iconography of Indian play changed, but it still accommodated potent themes of American national identity. Alan Trachtenberg has argued that a “perceived crisis in national identity” inspired by the waves of new immigration at the end of the 19<sup>th</sup> century contributed to a “fundamental shift in representations of Indians, from ‘savage’ foe to ‘first American’ and ancestor to the nation.”<sup>69</sup> It was precisely at this time

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<sup>66</sup> Robert F. Berkhofer, Jr., *The White Man’s Indian: Images of the American Indian from Columbus to the Present* 1978.

<sup>67</sup> Berkhofer, *The White Man’s Indian*, at 29.

<sup>68</sup> Deloria, *Playing Indian* at 58 (“These contradictory figurings of Indianness should come as no surprise, for, as we have seen, different social groups used Indian play to advance different agendas and materialize a complex range of identities.”).

<sup>69</sup> Alan Trachtenberg, *Shades of Hiawatha: Staging Indians, Making Americans 1880-1930* xxii (2004). One of Trachtenberg’s animating questions in this book is “How did it happen that dreaming Indian—playing Indian in fantasy and imagination—became a way of dreaming

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that fraternal societies such as the Tammany Society and the Society of Red Men used Indian play to invoke a long and uninterrupted history of self-government. These societies, with their secrecy, elaborate governance rituals, and ornate Indian imagery, “remade interior Indianness. Indian costume now signified an American identity based upon republican order rather than revolutionary potential.”<sup>70</sup>

At the same time that these societies flourished, genocidal federal policies physically removed Indians from the Eastern United States,<sup>71</sup> thereby allowing the mythic Indian to signify the past more effectively. U.S. Indian policy helped cultivate an ideology of the vanishing Indian, an ideology which simultaneously supported social Darwinist ideas about white American destiny and made room for white Americans to become the “custodial historians” of a quintessential piece of America’s native past.<sup>72</sup> But the ideology of the vanishing Indian was part of the justification for the actual and often brutal attempts by the federal government to make the Indian vanish, first in removing them to isolated reservations and then in allotting their land in an effort to make them disappear through assimilation.<sup>73</sup> The end of the 19<sup>th</sup> century saw the passage of the General Allotment Act of 1887,<sup>74</sup> which sought to civilize Indians and gain more land for white settlers by parceling out communal Indian land.<sup>75</sup> And 1890 marked the slaughter of Lakota Sioux by U.S. Calvary at Wounded Knee. Shari Huhndorf specifically links the proliferation of white Americans “going native” at the end of the 19<sup>th</sup> century with the final military conquest of Native Americans, characterizing the Indian play as “cultural rituals that express and symbolically resolve this anxiety about the nation’s violent origins.”<sup>76</sup>

Deloria’s account of white Indian play is so persuasive partly because he shows how Indian play changed to accommodate changes and crises in national identity. For example, during the early twentieth century, when industrialization and modernization had brought rapid change to economic and social patterns, Americans began to imagine a lost authentic self in a past authentic space.<sup>77</sup> And perhaps not surprisingly, the “authenticity,” naturalness and self-reliance that Americans had lost to modernity was potently symbolized and available to be

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American, imagining oneself a member of the nation?” Id. at 13. The answer is too complex and insightful to do justice to in this essay.

<sup>70</sup> Deloria, *Playing Indian*, at 56.

<sup>71</sup> Describe Trail of Tears and other mass removals. See e.g., Brian Dippie, *The Vanishing American: White Attitudes and U.S. Indian Policy* (1982).

<sup>72</sup> Deloria, *Playing Indian*, at 63-65.

<sup>73</sup> Brian W. Dippie, *The Vanishing American: White Attitudes and U.S. Indian Policy* 70-71, 171-176 (1982). As Dippie points out, there were always “noble motives” articulated to serve the “opportunistic ends” of federal Indian Policy. Id. at 70.

<sup>74</sup> Cite for General Allotment Act.

<sup>75</sup> Trachtenberg reads the General Allotment Act and the putative speech by Chief Seattle together as fulfilling two white wishes at once: that Indians “will vanish from the land and yet continue to inhabit it as spirits of the place” in order to authenticate the nation without interrupting its progress.

<sup>76</sup> Shari M. Huhndorf, *Going Native: Indians in the American Cultural Imagination* 14 (2001).

<sup>77</sup> Deloria, *Playing Indian*, at 100-01.

reclaimed by playing Indian. In the early twentieth century, this remaking of a robust American identity in opposition to the effeminacy and emptiness of modernity was directed at children. Youth movements and summer camps that took children “back to nature” were abundant. Ernest Thompson Seton’s Woodcraft Indian movement offered therapeutic naturalism; Daniel Carter Beard’s Sons of Daniel Boone provided nostalgic, frontier patriotism, and a multitude of wilderness summer camps allowed children of the upper and middle classes to play at primitive authenticity as a way of preparing them to be better modern citizens.<sup>78</sup>

When the English boy scouting movement crossed the Atlantic, Seton and Beard were there at its founding and American Boy Scouts incorporated both of their influences; to Lord Baden-Powell’s military uniforms and hierarchy were added Seton’s nativism and Beard’s patriotism.<sup>79</sup> If playing Indian was important to Boy Scouting, it was even more central to Campfire Girls, which used Indian play explicitly to teach girls an American gender identity based on domesticity.<sup>80</sup>

I recount Deloria’s argument extensively for two reasons. First, Deloria’s work is itself a brilliant study in cultural fusion; it shows how appropriation and misappropriation of Indian imagery and practices has been central to “the creative assembling of an ultimately unassimilable American identity.”<sup>81</sup> Second, this narrative links up in meaningful ways with the story of Indian play in college sports. Mascots function in much the same way as fraternal societies and boy scouts did in building collective American identities, and they share the same genealogy of making and remaking a collective self by playing Indian. “In essence, Native American mascots are masks, which when worn enable Euro-Americans to do and say things they cannot in everyday life, as though by playing Indian they enter a transformative space of inversion wherein new possibilities of experience reside.”<sup>82</sup>

## B. The Illini and Chief Illiniwek

Chief Illiniwek is a telling footnote in the larger narrative of Indian play: invented by a boy scout, adopted by a team and embraced by a state university as a symbol of their connection and custodian relationship to the land they occupied. The story of this invented Chief disrupts the logic of cultural property.<sup>83</sup> It brings

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<sup>78</sup> Deloria, Playing Indian, at 102 (“Antimodern campers played the primitive authentic against modernity’s inauthenticity in order to devise a better modern. . . . The two positions—modernism and antimodernism—were, in effect, two sides of the same coin.”).

<sup>79</sup> Deloria, Playing Indian, at 109-111. See also, [books on history of Boy Scouts].

<sup>80</sup> Deloria, Playing Indian, at 111-14.

<sup>81</sup> Deloria, Playing Indian, at 5.

<sup>82</sup> C. Richard King & Charles Fruehling Springwood, “Introduction: Imagined Indians, Social Identities, and Activism,” in Team Spirits: The Mascot Controversy 9 (italics omitted).

<sup>83</sup> I mainly rely on Carol Spindel’s definitive book on the subject: Carol Spindel, *Dancing at Halftime: Sports and the Controversy over American Indian Mascots* (2000).

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questions of power, appropriation and hybridity to the forefront. It makes ownership beside the point.

The Illiniwek Tribe, from which the French word Illinois derives, were a collection of village groups—including the Peoria, Kaskaskia, Cahokia, Tamaroa and Michigamea—which were displaced and destroyed by European colonial warfare, although principally at the hands of the Iroquois. The Illinois allied themselves with the French explorers and traders in the 17<sup>th</sup> century and as the competition with the British over the fur trade increased, so did the conflicts with British-backed tribes such as the Iroquois.<sup>84</sup> At the end of the 17<sup>th</sup> century there were some 10,000 Illinois. After half a century of disease, splintering, and Iroquois attacks, there were 2,500. Increased settlement, Illinois statehood and disastrous treaties in the 19<sup>th</sup> century did the rest. The 132 remaining Illinois Indians were removed to Kansas in 1832. Little more than twenty years later a number of small Illinois groups came together as the Confederated Peoria and were displaced again to Oklahoma.<sup>85</sup> Some Illinois Indians never left Illinois and others stayed behind in Kansas, but apart from these scattered individuals and the descendants of the Peoria in Oklahoma, the Illiniwek tribe no longer exists. A number of sources report that in 1916 the Illinois Centennial Commission sent an anthropologist to study the Confederate Peoria, and he concluded that there were no pure blooded Peoria left and those that remained had forgotten so much of their rituals and their language that the Illinois Indians were effectively extinct.<sup>86</sup>

As tragic as the story of the Illinois is, it worked out well for whites, in that it allowed them not only to take over the former territory of the Illinois but to also better appropriate their history and culture for their own purposes. Here is another instance of the myth of the idea of the vanishing Indian allowing white Americans to become “custodial historians” of a mythic Indian past.<sup>87</sup> The story these custodial historians tell of how the Illinois Indians vanished is at once mythic and sanitized. In the legend of Starved Rock, the last Illinois were not the collateral damage of colonialism, but were stranded on Starved Rock by enemy tribes and either died fighting or starved stoically.<sup>88</sup> The tribe ended there in noble self-sacrifice.

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<sup>84</sup> Spindel, *Dancing at Halftime*, at 40-41 (citing Reuben Gold Thwaites, ed., *The Jesuit Relations and Allied Documents: Travel and Explorations of the Jesuit Missionaries in New France* (1959)).

<sup>85</sup> Spindel, *Dancing at Halftime*, at 42-45.

<sup>86</sup> Spindel, *Dancing at Halftime*, at 45-46; David Prochaska, “At Home in Illinois: Presence of Chief Illiniwek, Absence of Native Americans,” in *Team Spirits: The Native American Mascots Controversy* 157, 160. The assessment of tribal extinction, of course, depends almost entirely on the standard by which we judge who is Indian and what constitutes a tribe. For a brilliant discussion of this issue in the context of the Mashpee’s fight for federal recognition, see James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* 235 (1988).

<sup>87</sup> See note \_\_\_ *supra*, and accompanying text.

<sup>88</sup> Spindel, *Dancing at Halftime*, at 61.

In so many ways the story of the University of Illinois perfectly parallels the nation's obsession with playing Indian. The idea of the Indian became part of the University's identity much like it was foundational in the national imagination. Founded in 1867 with money from the sale of former Indian land granted to the state of Illinois by the federal government, the University of Illinois referred to itself the Tribe of the Illini.<sup>89</sup> Much like the fraternal societies of the time that used mock Indian rituals to grant their members identity and distribute honors, the University of Illinois named their honor societies the Sachem and the Ma-wan-da, and initiated new members by wearing Indian blankets and smoking peace pipes.<sup>90</sup> When football was first introduced at the University at the end of the 19<sup>th</sup> century, the "roughneck Indian game" was meant to do what the summer camps and woodcraft Indians were doing with younger kids: to toughen the soft, untested children of modernism and prepare them to be leaders.<sup>91</sup> In the 1920s, under the leadership of the legendary Robert Zuppke, the Illinois football team had a number of remarkable seasons and henceforth became known as the Fighting Illini.<sup>92</sup>

Perhaps nowhere is the mythologizing of the Illinois Indian past more vividly suited to the white present than in a book written in the 1920s by the University in order to raise funds for its first football stadium. "Listen to the historian," it begins:

The Illini Indian, he was called, and he was a hunter, and a fighter, and more generous in war and in peace than his neighbors . . .

He was an individualist, and his children, whom he loved, were given freedom to grow as they willed, only they had to be brave and self-denying, and each had to find his own god—his Manitou—to protect and inspire him; for this was the law of the tribe.

Never were a people better made than the Illini, said a traveler who observed them. "They are neither large nor small. . . . They have tapering legs which carry their bodies well, with a very haughty step, and as graceful as the best dancer. The visage is fairer than white milk so far as savages of this country can have such. The teeth are the best arranged and the whitest in the world. . . ."

No temples have these ancient Indians left us, and no books. But we have a heritage from them, direct through the pioneers who fought them and learned to know them. It is the Great Heart, the fighting spirit,

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<sup>89</sup> Spindel, *Dancing at Halftime*, 48-49. As Spindel notes, while other Midwestern universities chose the nicknames of their early white settlers, such as the Hawkeyes or the Wolverines, it "is understandable that the Illinois students looked elsewhere for inspiration, for the earliest white settlers in the Illinois Territory were called Suckers." *Id.* at 49.

<sup>90</sup> Spindel, *Dancing at Halftime*, at 49.

<sup>91</sup> Spindel, *Dancing at Halftime*, at 69-71.

<sup>92</sup> Spindel, *Dancing at Halftime*, at 72.

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the spirit of individualism, of teaching our children to be free but brave and to have a God—for these are the laws of our tribe.<sup>93</sup>

Under the authority of the historian and the present-tense accuracy of an early observer, the Illinois Indian is transformed in this account into a noble, free, and very white ancestor who passes on native claim to the land, and serves also as a physical and spiritual role model for the modern white American. These performances of mythic Indian identity, whether at Boston Harbor or on the U of I campus, serve a larger claim of aboriginal citizenship and national identity.<sup>94</sup> The narrative also claims a direct Indian inheritance through the “pioneers,” who used both killing and kindness to secure their legacy, actions ostensibly suited to the character passed on by the Indians themselves.

Chief Illiniwek, the University of Illinois’ revered Indian mascot, came into existence in 1926 when the University of Pennsylvania came to play football and brought a William Penn costume for a halftime performance. Before arriving, Penn had suggested that Illinois join them in costume for a halftime skit. Lester Leutwiler was an Illinois student interested in Indian crafts who had made an Indian costume as a scouting project, and he was recruited by the assistant band director to lead the band onto the field and smoke a peace pipe with William Penn.<sup>95</sup> The Chief was an immediate and huge success and has appeared at halftime ever since. Leutwiler, his successor Webber Borchers, as well as many of the students who followed them into the role of Chief Illiniwek, were avid boy scouts and protégés of Ralph Hubbard, the man who inherited Seton’s role as the white expert on Indian crafts and dance within the Boy Scout movement.<sup>96</sup> Borchers raised money to replace his homemade costume with “authentic” Sioux regalia which he had made at the Pine Ridge reservation in South Dakota.<sup>97</sup> Like Hubbard, these students took their jobs as custodial historians seriously. The history they perform is not Indian history, but it is sacred; it is the white American history of playing Indian:

On the prairies of Central Illinois, with the state’s largest educational institution asserting that Chief Illiniwek is a sacred invocation of the

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<sup>93</sup> Spindel, *Dancing at Halftime*, at 73-74. Prochaska notes the same use of the Chief as a direct link between the university and a mythic, native past in a 1950s history of Illinois bands: “In the name of his tribe and in memory of his forefathers and of the warriors who had struggled and died both in prehistoric and historic Illinois, it was proper and pleasing that the Chief should strut his stuff and perform his ancient ritualistic dances . . . before the packed Stadium of contemporary Palefaces.” Prochaska, “At Home in Illinois,” at 167 (quoting Cary Clive Burford, “We’re Loyal to You, Illinois”: The Story of the University of Illinois Bands 407 (1952)).

<sup>94</sup> See note \_\_\_ *supra*, and accompanying text.

<sup>95</sup> Spindel, *Dancing at Halftime*, at 80-81; see also, Prochaska, “At Home in Illinois,” at 162-63.

<sup>96</sup> Spindel, *Dancing at Halftime*, at 94-95.

<sup>97</sup> University of Illinois Athletics Homepage: <http://fightingillini.cstv.com/trads/ill-trads-thechief.html> (visited Sept. 13, 2006). According to the University, since Borchers’ regalia was made, “five different authentic outfits have been used by Chief Illiniwek. The one used in performances now was purchased in 1983 from Sioux Chief Frank Fools Crow, and is topped by a headdress of turkey feathers.” Id.

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vanished Illinois, and in Tallahassee, where the rider who carries the flaming lance is supposed to represent the Seminole war leader Osceola, it is forgotten or ignored that these performances trace their genealogy not to the Illinois or the Seminole tribes but to midway exhibits, Wild West performers, Indian hobbyists, and Boy Scouts.<sup>98</sup>

David Prochaska attributes the success and cultural significance of Chief Illiniwek, and mascots like him, to what Renato Rosaldo calls imperialist nostalgia, when “people mourn the passing of what they themselves have transformed.”<sup>99</sup> It is important to see that there is both imperialism and nostalgia in the Indian mascot, but it is more than that as well. It is the more profound reinvention of the American self through the internalization of the Indian, an internalization that is only made possible by the virtual elimination of “real” Indians from the cultural landscape. It is not by accident that playing Indian “necessarily went hand in hand with the dispossession and conquest of actual Indian people.”<sup>100</sup> Like Worlds Fairs,<sup>101</sup> Wild West shows, and Westerns, Indian mascots are part of a national performance art piece in which the conquest of the Indian is traumatically repeated, celebrated, mourned, and the idea of the Indian is resurrected, fetishized and internalized.

In a sense, cultural property is like mascots themselves—a product of imperialist nostalgia. It is often invoked to salvage a past or a culture that we had a hand in destroying. The paradox of playing Indian is that we kill off the Indian so that we can make better use of the idea of the Indian. The paradox of cultural property is that it kills off culture in order to make the idea useable within a property regime.

### C. Cultural Friction

Given the larger picture and the brutality it depicts, it is perhaps surprising that sports mascots generate as much heat as they do. And yet, it is hard to exaggerate the tensions, hostilities and cultural warfare that Indian mascots have inspired. If the internet is the modern marketplace of ideas, the raging debate on the websites that have been dedicated to Chief Illiniwek, both for and against,<sup>102</sup> are themselves symbolic of the cultural friction occasioned by this one example of

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<sup>98</sup> Spindel, *Dancing at Halftime*, at 95.

<sup>99</sup> Prochaska, “At Home in Illinois,” at 165 (quoting Renato Rosaldo, “Imperialist Nostalgia,” *Culture and Truth: The Remaking of Social Analysis* 69 (1989)).

<sup>100</sup> Deloria, *Playing Indian*, at 182.

<sup>101</sup> The 1893 Worlds Columbian Exposition was in Chicago, Illinois and featured an abundant array of Indian performances. [Fill in with Mike’s memo]

<sup>102</sup> Indicative of the sites that support Chief Illiniwek are <http://www.chieffilliniwek.org/> and <http://www.honorthechief.org/history.html>. Both sites consider their purpose to be educating people about the history and tradition of the Illinois tribe and the Chief Illiniwek tradition. Indicative of the websites that oppose Chief Illiniwek are

<http://www.prairienet.org/prc/prcanti.html> known as the Anti-Chief Homepage, and <http://www.retirethechief.org/>.

playing Indian. Flowing through this debate are various arguments that have their origins in notions of cultural property. Tellingly, Wikipedia's entry on Chief Illiniwek relies on the popular logic of cultural property: "at root of the controversy is the view by many Native Americans and others that the symbol is a misappropriation of indigenous cultural figures and rituals . . ."<sup>103</sup> Similarly, supporters also claim that the Chief is an authentic and meaningful reference to tribal culture, with one website calling Chief Illiniwek "the State of Illinois' most visible representation of its Native heritage."<sup>104</sup>

Mythologizing is an art of language, and in that spirit the University of Illinois has refused to call the Chief a mascot, insisting instead that he is an "honored symbol," and characterizing his halftime performances as "one of the most dramatic and dignified traditions in college athletics."<sup>105</sup> Similarly, one of the main pro-Chief websites notes that Chief Illiniwek has "proudly and majestically represented the University and the State for almost 80 years."<sup>106</sup> But the University has come to this position through cultural friction, political evolution and damage control. In the early 1990s the Chief's image was polished and made more solemn. Fans and cheerleaders were prohibited from wearing war paint, and the Chief was not allowed to appear at pep rallies or ride on parade floats.<sup>107</sup> Nor can one buy Chief Illiniwek toilet paper anymore.<sup>108</sup>

Those that object to the Chief's performance do so on any number of grounds that apply to all Indian mascots. Representative of this position is the contention that mascots transform "Native Americans into totems (for luck and success on the playing field), trophies (of conquest and the privileges associated with it), and targets (directing hostility, animosity, and longing onto indigenous bodies and societies)."<sup>109</sup> But when one listens to the language in which objections to Native American mascots are framed, one sees that the objections are not just to the ways in which mascots perpetuate harmful and discriminatory stereotypes of Indian people, but to their misappropriation of cultural property. As King and Springwood write in their introduction to a book about Indian mascots, "Indeed, Native American mascots misappropriate sacred ideas and objects, such as the headdress war bonnet, relocating them in sacreligious contexts."<sup>110</sup> Or more pointedly still Prochaska asks in his essay on Chief Illiniwek, "to what extent, under what conditions, is it all right to appropriate another's culture?"<sup>111</sup>

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<sup>103</sup> [http://en.wikipedia.org/wiki/Chief\\_Illiniwek](http://en.wikipedia.org/wiki/Chief_Illiniwek) (last visited Sept. 26, 2006).

<sup>104</sup> <http://www.chiefilliniwek.org/> (last visited Sept. 26, 2006).

<sup>105</sup> University of Illinois Athletics Homepage: <http://fightingillini.cstv.com/trads/ill-trads-thechief.html> (visited Sept. 13, 2006).

<sup>106</sup> <http://www.chiefilliniwek.org/> (last visited Sept. 26, 2006).

<sup>107</sup> Prochaska, "At Home in Illinois," at 174-75.

<sup>108</sup> *Id.* at 163.

<sup>109</sup> C. Richard King, "This is Not an Indian," 28 J. Sports & Soc. Issues 3 (2004).

<sup>110</sup> King and Springwood, "Introduction," at 7.

<sup>111</sup> Prochaska, "At Home in Illinois," at 173-74.

These arguments are deeply committed to the logic of cultural property and they perpetuate its paradox—only in from a strange and static view of culture can this claim makes sense. Chief Illiniwek is not a chief of the Illini, and the fact that NCAA policy and Native American advocates alike treat him as if he were is to see precisely what is wrong with the propertization of culture. To see how mascots unmask the larger paradoxes of cultural property logic, it is necessary to explore their role as cultural hybrids in the mainstream American imagination. As Deloria has persuasively argued, playing Indian is deeply ingrained in American culture and white American national identity has been repeatedly forged through the appropriation and performance of Indian images and rituals. Rooted in power, imperialism, and nostalgia, these performances have become cultural fusions. To the extent they were ever based on actual Indian rituals, they have long since become mythic enactments of a particular white vision of the Indian. And sometimes they are wholesale inventions, with no connection to any tribal culture save the invocation of the name “Indians” or “braves.” To invoke cultural property as a argument against the use of Indian mascots is to seriously distort the notion of culture, undermine its use in more applicable cases and even contribute to uses of culture that have the potential to do real harm to other kinds of Native American claims. To turn toward cultural fusion and hybridity and away from cultural property helps recast the mascot debate and points up the poverty of cultural property’s prevailing logic.

#### D. Cultural Fusion

Cultural conflict, change and calls for cultural preservation are not just the result of globalization. For centuries, cultural practices, icons, symbols have passed from one culture to another and have been transformed by their passage. These perpetual passages also transform the cultures themselves over time. Cultures and subcultures overlap, interact and change each other all the time, and the impetus for this influence is as often as not politically unsavory—capitalism, colonialism, and conquest. This is not just a fact, but a necessary facet of culture. As Anthony Appiah has said, “Cultures are made of continuities and changes, and the identity of a society can survive through these changes. Societies without change aren’t authentic; they’re just dead.”<sup>112</sup>

Perhaps nowhere is this fact of cultural destruction and cultural survival more evident than among Native Americans. Indeed, notions of cultural authenticity have continued to harm Indians and hinder the survival of tribal cultures in an echo of the way that violent contact did in the 16<sup>th</sup> century onwards. Many have observed the bitter irony of how Native Americans have been forced to acculturate and assimilate and then have found themselves caught in the bind of being unable to prove their Indian-ness or their tribal continuity because they do

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<sup>112</sup> Kwame Anthony Appiah, “No to Purity. No to Tribalism. No to Cultural Protectionism. Toward a New Cosmopolitanism,” New York Times Magazine, Jan. 1, 2006, at 34.

not look like our mythic images of "authentic" Indians.<sup>113</sup> But it is not just minority cultures that change, adapt and creatively appropriate. Dominant cultures change too. Mainstream American culture reflects the influence of slavery, imperialism, immigration and Native American tribes. One can always tell a mythic, celebratory story of mainstream cultural change, one in which the creation and absorption of bagels, St. Patrick's Day, and hip hop are a testament to the American melting pot. But these versions tend to leave untold the more sordid details of discrimination against and exclusion of minority cultures that are part of the rite of passage into American society and inform their cultural contributions to that society. Not only is cultural change, hybridity and fusion inevitable, it gives us plenty to celebrate and plenty to decry.

Cultural hybridity is not new and not without its critics, but it may be the best alternative we have to the anemic theory that animates cultural property. There is a rich theoretical literature on cultural hybridity by some of the most respected contemporary cultural theorists, much of it intended to highlight the resilience and adaptability of minority cultures while critiquing the forces of assimilation.<sup>114</sup> And like many productive shorthand terms, the notion of hybridity has already generated its own debate and backlash.<sup>115</sup> For our purposes it is enough to explore the ways in which "hybridity evokes all manner of creative engagements with cultural exchange."<sup>116</sup> Paul Gilroy links cultural hybridity with other related concepts of creolization, metissage, and mestizaje, as "unsatisfactory ways of naming the processes of cultural mutation and restless (dis)continuity . . ."<sup>117</sup> Although the concept of hybridity originates in botany and biology to mean the mixture of two species and includes in its genealogy all the anxieties of race mixing from the heyday of social Darwinism,<sup>118</sup> virtually all cultural theorists are quick to distance themselves from any suggestion that cultural mixing involves "a collision between fully formed and mutually exclusive cultural communities . . ."<sup>119</sup> Most theorists agree that what precedes hybridity is only more hybridity. What is mixed in processes of cultural exchange are elements of cultures that are themselves in flux, that are themselves the products of cultural exchange. As Anthony Appiah puts it, "Living cultures do not, in any case, evolve from purity into contamination; change is more a gradual transformation from one mixture to a new mixture, a process that usually takes place at some distance from rules and rulers, in the conversations that occur across cultural boundaries."<sup>120</sup>

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<sup>113</sup> James Clifford's essay on the Mashpee is one of the best accounts of this double-bind. James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* 235 (1988).

<sup>114</sup> John Hutnyk, *Hybridity*, 28 *Ethnic & Racial Studies* 79, 92 (2005).

<sup>115</sup> See e.g., *Debating Cultural Hybridity* (P. Werbner & T. Modood eds.). Without wanting to engage the debate over the value of the term directly, I find both the debate and the term useful for elucidating what I mean by cultural fusion.

<sup>116</sup> John Hutnyk, *Hybridity* at 83.

<sup>117</sup> Paul Gilroy, *The Black Atlantic*, *supra* note \_\_\_, at 2.

<sup>118</sup> Robert J.C. Young, *Colonial Desire: Hybridity in Theory, Culture and Race* 19 (1995).

<sup>119</sup> Gilroy, *The Black Atlantic*, *supra* note \_\_\_, at 7.

<sup>120</sup> Appiah, *Toward a New Cosmopolitanism*, at 37.

What the processes of cultural interaction and conflict do create is anxiety about cultural identity. It is the very instability of culture that motivates a desire for cultures that are whole, pure and stable. As Robert Young has noted, “Fixity of identity is only sought in situations of instability and disruption, of conflict and change.”<sup>121</sup> Paul Gilroy, in his study of the black diaspora, has shown how the evolution of black history and culture in Britain was perceived as “an illegitimate intrusion into a vision of authentic British national life that, prior to their arrival, was as stable and as peaceful as it was ethnically undifferentiated.”<sup>122</sup> Ironically, this mirrors in reverse some of the assumptions of those who are most antagonized by Indian mascots and see them as modern examples of continuous white incursions into the stable cultural lives of Native Americans. It is another version of the trap of claims to authenticity.<sup>123</sup> Likewise, cultural property law is a way of distancing anxiety over identity and cultural change by making culture seem solid again, of realigning it with identity and group membership.

Culture, like people, is now thought of in terms of movement and migration. Thus there is an emphasis in the scholarship on tracing cultural routes rather than roots.<sup>124</sup> Routes are a way of making sense of the journeys of and through postcolonial and diasporic cultures, which are themselves of course hybrids. Indeed, much of the influential work on cultural hybridity has been done in the context of postcolonial theory, which is deeply relevant to thinking about indigenous displacement by settler societies. Indian nations, as “wards” of the state, were America’s first colonial subjects.<sup>125</sup> In the same year that Edward Said inaugurated a new way of thinking about colonialism’s discursive power, Robert Berkhofer offered a similar innovation in reading our images of Indians. Both recognized that it was imperial knowledge that created “the Orient” as well as “the Indian” and that there was often very little in common between that knowledge and its object. Said’s Orientalism is simply “a kind of Western projection onto and will to govern the Orient” in much the way the White Man’s Indian is.<sup>126</sup> It is precisely this way of thinking about white images of the Indian that makes sense of the sign at a University of Illinois football game: “Save the Chief, Kill the Indians.” The suggestion is that we might have to kill all Indian people to protect the rhetoric and image of the Indian that has become central to our national sense of self and to maintain discursive control.<sup>127</sup>

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<sup>121</sup> Young, *Colonial Desire*, at 4.

<sup>122</sup> Gilroy, *The Black Atlantic*, at 7.

<sup>123</sup> Susan Scafidi discusses how “source communities” contribute to the binds of authenticity when they negotiate over their cultural products. Scafidi notes that “authenticity is a label applied only when a cultural product comes into contact with the outside world; just as a fish is the last to recognize water, members of a source community have little need to analyze uncontested everyday objects and activities.” Scafidi, *Who Owns Culture?*, *supra* note \_\_\_, at 63.

<sup>124</sup> James Clifford, *Routes: Travel and Translation in the Late Twentieth Century* (1997).

<sup>125</sup> Alan Trachtenberg, *Shades of Hiawatha*, *supra* note \_\_\_, at xx-xxi.

<sup>126</sup> Edward W. Said, *Orientalism* 95 (1978)

<sup>127</sup> See text *supra* on the vanishing Indian.

Homi Bhabha is probably the most prolific and opaque of the scholars who theorize hybridity in the context of colonialism. For Bhabha, hybridity is not a cultural condition but a “problematic of colonial representation” in which imperial power begins to lose its discursive authority.<sup>128</sup> Thus, rather than taking hybridity to mean the resolution of conflict or tension between two cultures,<sup>129</sup> Bhabha understands cultural hybridity as a product or excess of colonial power itself.<sup>130</sup> Hybridity and the threat of the hybrid subject are the products of power that at the same time displace power by making colonial authority both visible and uncontrollable. “The paranoid threat from the hybrid is finally uncontrollable because it breaks down the symmetry and duality of self/other, inside/outside.”<sup>131</sup> It is both authority and desire in mainstream American culture that have generated the mythic Indians and native images—the cultural hybrids—that we have internalized. But these very ideas and images have also greatly complicated the distinction between us and them, between the nation and the other, or as Deloria puts it, between the interior Indian and the exterior one. The Indian mascot is one such product of colonial authority that at once supports and undoes that authority, but it is a hybrid with a twist. Bhabha’s focus is on the “discursive disturbances” created by the hybrid demands of natives, demands which both mimic and disavow colonial knowledge.<sup>132</sup> The Indian mascot, in contrast, arises from the hybridized colonizer to mimic and disavow native knowledge. If colonial mimicry resists colonial authority, as Bhabha suggests, does native mimicry reinforce it? In a sense yes, the mascot is a kind of performance of colonial power to both destroy and create the Indian. But it is not only that. It also has some of the same disruptive effects of native hybridity in that it exposes colonial authority at the same time that it attests to a lack at the heart of that authority. The lack to which Indian play so often attests is the lack of authenticity. Hybridity also undoes the authoritative logic of cultural property.

One of the most pointed critiques of hybridity theorizing is that it tends to celebrate cultural difference and diffusion while at the same time “providing an alibi for lack of attention to politics” and issues of inequality.<sup>133</sup> What is interesting about Indian mascots is the way in which the inequalities at the heart of these cultural hybrids flow through the gaps of cultural theory. Even within an argument like mine that mascots are not Native American cultural property, it is abundantly clear that neither are they banal and easily celebrated products of multicultural America. They are contested precisely because they are the

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<sup>128</sup> Homi K. Bhabha, *The Location of Culture* 114 (1994).

<sup>129</sup> Bhabha, *Location of Culture* at 113-114.

<sup>130</sup> Bhabha, *Location of Culture* at 112 (characterizing the effect of colonial power as “the *production* of hybridization rather than the noisy command of colonialist authority or the silent repression of native traditions”).

<sup>131</sup> Bhabha, *The Location of Culture* at 116.

<sup>132</sup> Bhabha, *The Location of Culture* at 119. Bhabha’s example is Indians (from India) who take the Bible as God’s word but adapt it to other native understandings by, for example, agreeing to be baptized but refusing to take the sacrament. *Id.* at 104.

<sup>133</sup> John Hutnyk, *Hybridity*, at 92. See also, Rey Chow, *Ethics After Idealism: Theory-Culture-Ethnicity-Reading* (1998).

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products of a process of cultural domination and fusion that continues to both inspire collective identity and inspire shame and ambivalence. They bring us together by ritualizing our past and our national imagination and they shame us for the same reasons, because the past they ritualize and reenact is conditioned on a history of catastrophe, genocide and cultural appropriation.

I have used the term cultural fusion in addition to cultural hybridity not to disavow the thinking on hybridity but to capture the movement, instability, borrowing and contamination at work in the many uses of cultural hybridity. I also think it does a little more to emphasize the generative and creative aspects as hybridity—in Salman Rushdie’s words, “how newness enters the world,”—as well as to highlight the indivisibility of cultural products.<sup>134</sup> For example, cultural products like Chief Illiniwek are hybrids, but they are also fusions whose influences are not so easily disentangled. They certainly borrow images and derive meaning from various tribal cultures: the mythic meanings of Indian dance, the peace pipe, of “authentic” Sioux regalia, and the idea of the Indian itself owe something to real tribal practices. But Chief Illiniwek makes no sense outside white sports culture and even then, makes different sorts of sense when viewed in the light of the American tradition of playing Indian.

Interestingly, the same critique of hybridity applies in spades to cultural property—it tends to celebrate cultural difference and ignore inequality. Although hybridity theorizing may offer a corrective for the popular logic of cultural property by unmasking its impoverished notion of culture, it can also fall into the trap of creating a kind of equivalence between appropriations by the dominant culture and survival strategies of the colonized. Yet because hybridity theory offers a more robust account of culture, in a world of inequality, it may still offer Native Americans the best chance to be authors of their own hybrid imaginations. What is clear is that cultural property doesn’t solve the problem of cultural conflict and inequality, and it likely makes it worse. “Giving mascots back” not only makes no sense from the perspective of culture, but once we escape the logic of cultural property, it also makes no sense from the perspective of law. The harm is not a property harm but a dignitary one.

## Conclusion

The Native American mascot issue is interesting precisely because mascots embody the phenomenon of cultural fusion and hybridity and because their regulation exemplifies the paradoxes of cultural property. For many universities, their team names, mascots and practices were born out of ignorance, romanticism and racism, but these same icons have become part of the dominant culture of sports. Indeed, within the logic of cultural property, white subcultures may have a greater claim than Native Americans when these icons or images become deeply-embedded expressions of team identity. The University of Illinois repeatedly attested to the fact that Chief Illiniwek was not a mascot but a

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<sup>134</sup> Quoted in Bhabha, *The Location of Culture*, at 227.

treasured symbol, one which was treated with honor. But the honor Illinois bestowed was to its own tradition. The Chief was an honored part of the University culture. At the same time he clearly referenced and was inspired by another set of cultures, those of Native Americans generally and the Illini tribes in particular, and the same practices that honored him among many Illinois students and alumni rendered him an object of insult and contempt to many Native Americans. It is precisely the logic and paradox of cultural property that helped create the intransigent debate over who had a better claim to the Chief. It also denies the messiness and brutality of cultural change.

Contact, power and plunder are facts of life, and they have, for better and worse, multiplied the possible overlap of property claims based on culture. They also inspire cultural invention and hybridity as survival tactics and as one way out of the paradox of cultural property. But to rethink culture in all its complexity will not get rid of cultural contestation, it just shows us the dangers of approaching those debates from the perspective of property. It does not mean that other kinds of law might not provide better models, but it certainly suggests that law should not be the only or even the primary answer to the conflicts of culture.<sup>135</sup> Law does not have a good track record for getting at the complexities of culture. As Michael brown puts it,

If we turn culture into property, its uses will be defined and directed by law, the instrument by which states impose order on an untidy world. Culture stands to become the focus of litigation, legislation, and other forms of bureaucratic control. The readiness of some social critics to champion new forms of silencing and surveillance in the name of cultural protection should trouble anyone committed to the free exchange of ideas.<sup>136</sup>

To make a strong case for why Indian mascots are not the cultural property of Native Americans, does not of course mean that we should leave it at that. Part of my aim in showing how, in one instance, cultural practices have been appropriated and how cultural change occurs is to be able to make the more normative argument that sometimes culture should change. The use of Indian mascots is one example where the cultural practice should change regardless of legal right. Sports teams should abandon Indian mascots not because those mascots are the property of tribes but because it is the right thing to do in a culturally pluralist world. This is not an issue that can be resolved without strife or friction, but my intuition is that the accommodation is easier for colleges than it

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<sup>135</sup> With respect to a different set of cultural disputes over national symbols, monuments and flags, Sandy Levinson's assessment is that "whatever the value of courts—and constitutions—in limiting tangible oppression, I think it necessarily limited when what is at stake is the politics of cultural meaning." Sanford Levinson, "They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society," *Chi.-Kent L. Rev.* \_\_, 1106 (1995).

<sup>136</sup> Michael F. Brown, *supra* note \_\_\_, at 8.

is for Native Americans. It asks them to make a sacrifice, but it isn't the sort of sacrifice that would be entailed if we asked them to eliminate the sports themselves or the college loyalty fans feel. To ask those Native Americans who are offended by the practice to continue to accommodate the mascots is to ask more; it is asking them to make light of their sense of self and history, to appreciate that these vestiges of colonial mimicry are all in good fun, to lighten up.