

ESSAY

THE PARADOXES OF CULTURAL PROPERTY

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Many current cultural disputes sound in the legal language and logic of discrimination or hate speech. The focus of this Essay is on the 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 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 does so based on a sanitized and domesticated view of cultural production and identity. Within the logic of cultural property, each group possesses and controls—or ought to control—its own culture. This view of cultural property suggests a preservationist stance toward culture. This Essay argues against both of these assumptions and for a view of culture that takes account of its dynamisms, appropriations, hybridizations, and contaminations. As a corrective to the paradoxes of cultural property, this Essay offers a counternarrative of cultural fusion and hybridity. These themes are illustrated with an extended example of the regulation of Native American mascots generally and the invention of one such mascot—Chief Illiniwek—specifically.

INTRODUCTION

For over eighty years, Chief Illiniwek would take to the field at half-time at the University of Illinois to perform a dance whose moves were half powwow 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 shared was a belief that the halftime ritual partook in some meaningful way of Indian cultural practice. This belief in fact gave the performance both its uplifting and its offensive meaning.

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Despite some consensus on the origins of the Chief, both supporters and detractors tended to claim the Chief as belonging to their culture, a claim which was usually exclusive. The claim that Chief Illiniwek was a vital part of University of Illinois culture is not as far-fetched as it might seem. Plenty of cultural historians and anthropologists would argue that Chief Illiniwek was 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 and answer 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. Cultural property law is currently unequipped to resolve disputes over the rights to these hybrids. Many current cultural disputes sound in the legal language and logic of discrimination or hate speech; the focus of this Essay, however, 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, cultural property is contradictory in the very pairing of its core concepts. Property is fixed, possessed, controlled by its owner, and alienable. 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 is not much culture left in cultural property. What is left are collective property claims on the basis of something we continue to call culture, but which looks increasingly like a collection of things that we identify superficially with a group of people. 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. This Essay will argue against both of these assumptions and will advocate instead a view of culture as dynamic in its appropriations, hybridizations, and contaminations.

To rethink culture in this way complicates the prevailing idea that cultural property law can and should 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? We think of culture as the foundation for a sense of human belonging, but what does that mean for culture's ability to be a thing that can belong?

These questions come up concretely in the Indian mascot dispute; more specifically, they are evident in an implicit cultural property decision by the National Collegiate Athletic Association (NCAA) to prohibit the use of Native American names and mascots by teams under its jurisdiction. The NCAA policy did not invoke the *law* of cultural property, but rather 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 gives tribes the right to allow or disallow use of their names, images, or icons. Yet this logic fails to make sense of the fact that many of the offending mascots are white inventions: cultural property without a culture, 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 counternarrative, this Essay charts one case of cultural hybridity in Chief Illiniwek, an illustration that complicates the assumptions of cultural property logic and demonstrates the need for a more culturally nuanced approach to such claims. The University of Illinois's 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.¹

In this Essay I take an idiosyncratic and skeptical approach to cultural property law. This skepticism is quite different than that offered recently by Eric Posner.² Posner, for example, thinks that the perverse effects of cultural property law can be solved by deregulating, by making the market in cultural products more efficient and above board.³ In other words, he thinks most cultural property ought to be treated just like regular property. I think that most cultural property ought to be treated more like regular culture—open to a certain amount of circulation, creative appropriation, and contestation. It is the circulation of cultural products and practices that keeps them meaningful and allows them to acquire new meaning, even when that circulation is the result of chance and inequality. My sympathetic skepticism is closer to that of Michael Brown, who argues that disputes over intangible resources, unlike claims for reparations or the return of indigenous lands,⁴ lead “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.”⁵ I would go further still: As groups become strategically and emotionally committed to their “cultural identities,” cultural property tends to increase intra-group conformity and intergroup intransigence in the face of cultural conflict.

This is not to say that we should never commodify culture or recognize cultural property; to do neither would be both impossible and undesirable. But this Essay suggests a more cautious approach that recognizes the costs and consequences, as well as the contingency and complexity of the groups to which law assigns the property right. Nor does this Essay argue that we should not regulate or prohibit the use of Indian names and mascots in sports. 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

1. Chief Illiniwek was officially retired as the University of Illinois mascot following his last halftime dance on February 21, 2007. However, the Board of Trustees did not officially act on the matter until March 13, 2007, when it ratified the earlier decision to retire the name, regalia, and image of Chief Illiniwek. David Mercer, *Illinois Sweeps Aside Chief Logo and Name*, San Diego Union-Trib., Mar. 13, 2007, at http://www.signonsandiego.com/sports/college_football/20070313-0951-chiefilliniwek.html (on file with the *Columbia Law Review*).

2. See Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations 2* (Chi. Pub. Law & Legal Theory, Working Paper No. 141, Nov. 2006), available at <http://www.law.uchicago.edu/academics/publiclaw/index.html> (on file with the *Columbia Law Review*) (claiming that cultural property is not sufficiently distinct from ordinary property to justify its international legal regulation).

3. *Id.* at 11.

4. I am not sure that tangible goods are so different, but I do not extend the argument that far here.

5. Michael F. Brown, *Who Owns Native American Culture?* 7 (2003).

images properly belong, it makes sense that the law is called on to act. But 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 property claim to white performances of Indian images, but for any number of other legal and moral reasons: because these performances give offense for the purposes of entertainment, because they are hate speech, or simply because they seem to us historically and economically unjust.⁶ This Essay, however, does not directly engage the debate about the justice of Native American mascots. Instead the focus here is on how particular kinds of legal responses to cultural conflict help generate new kinds of cultural meaning.⁷ More specifically, this Essay suggests that rethinking Indian mascots as cultural hybrids complicates and disrupts the logic of cultural property.

In Part I, I provide a brief genealogy of cultural property law and explore various developments over the past few decades.

Part II discusses how cultural property law has led to the popularization of a particular way of thinking about culture, having moved beyond law to a popular logic that understands cultures and groups as being in clear correspondence with each other. In this Part, I detail the NCAA mascot policy as one example of cultural property logic and consider the many paradoxes of cultural property law and its inadequacy for addressing certain kinds of cultural disputes.

Finally, in Part III, I offer a cultural counternarrative that highlights the problems and paradoxes of cultural property. The counternarrative is one 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 they reference or the sports teams that invented them. As illustration, Part III charts the history of whites playing Indian to show how profoundly this cultural appropriation has become part of the white national identity. This section then recounts the invention of Chief Illiniwek specifically and finally discusses the theory of cultural hybridity, which may lead to a different, more dynamic way of mediating competing claims to cultural meaning.

While cultural hybridity is not a panacea and it comes with its own dangers, it is an important corrective for the paradoxes of cultural property. Cultural property law has been well intentioned; it has been an attempt at forging a new common sense about respect for cultural differ-

6. I do not want to draw too firm a distinction between dignity and equality claims on the one hand and property claims on the other. The law is not so formal; property and dignity are not embodied in coherent divisions of rights, but bleed into each other. Yet even if the law is not so formal, popular logic can be, and it is in the translation of legal ideas into the logic of cultural property that the dangers of cultural property are most formalized and acute.

7. I recognize that law is intricately bound up with culture and that it contributes to changes in common sense. See, e.g., Naomi Mezey, *Law as Culture*, 13 *Yale J.L. & Human.* 35, 37 (2001).

ence. But grounding this common sense respect in the logic of cultural property does too much damage, not just to culture in the abstract, but ultimately to tribes, Indians, and everyone else for whom cultural survival depends on change. This Essay is an attempt to help create a new common sense about culture—one that allows cultures to change and stay meaningful rather than letting white stereotypes, guilt, and nostalgia create museum pieces out of indigenous cultures in the name of cultural property and collective identity.

I. CULTURAL PROPERTY LAW

The evolution of cultural property law is fascinating and complex.⁸ This 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. Part I.A briefly charts the emergence of cultural property law out of the laws of war and the protection of antiquities. Part I.B explores how cultural property law has been refined and specifically applied to Native Americans.

A. *The Emergence of Cultural Property Law*

Cultural property's founding document is the 1954 Hague Convention on the Protection of Cultural Property.⁹ 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.¹⁰ The 1954 Hague Convention coined the term "cultural property"¹¹ and was the first international convention to deal exclusively with the protection of cultural property.¹² This 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 war-time.¹³ In this Convention cultural property is defined as "moveable or immovable property of great importance to the cultural heritage of every

8. A particularly astute and accessible account is Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (2005).

9. Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. The United States has not ratified the Convention.

10. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 *Am. J. Int'l L.* 831, 835–36 (1986) (recounting evolution of Hague Convention).

11. Lyndel V. Protz & Patrick J. O'Keefe, "Cultural Heritage" or "Cultural Property?," 1 *Int'l J. Cultural Prop.* 307, 312 (1992).

12. Merryman, *supra* note 10, at 836.

13. 1954 Hague Convention, *supra* note 9, arts. 3–4 (obligating parties "to prepare in time of peace for the safeguarding of cultural property" and, during armed conflict, to "undertake to prohibit, prevent and . . . put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property").

people” and includes buildings or areas that contain cultural property.¹⁴ Particularly interesting is the Convention’s preamble, which states that “damage to cultural property belonging 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.”¹⁵

In 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.¹⁶ 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.¹⁷ 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, and 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.¹⁸ Again, what is most interesting here is the part of the text that 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 “its true value can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting.”¹⁹ 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.”²⁰ 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 read the 1954 Hague Convention as a “charter for cultural internationalism,” a cosmopolitan take on cultural property that understands it as primarily important in the contribution it makes to “the cultural heritage of all mankind.”²¹ In this view, it represents a kind of endangered species approach: We humans should save species not because of the interest each species has in its own survival, but for the sake of diversity and the contribution of each species to a diversified global ecosystem. In con-

14. *Id.* art. 1.

15. *Id.* pmb.

16. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

17. *Id.* art. 7.

18. *Id.* art. 1.

19. *Id.* pmb.

20. *Id.*

21. Merryman, *supra* note 10, at 837.

trast, Merryman argued that the 1970 UNESCO Convention was a document of “cultural nationalism” in both its text and its subsequent interpretation.²² 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.²³ On this reading, cultural property is primarily important to individual states because it expresses the “collective genius of nationals of the State concerned.”²⁴

Upon closer inspection, however, both of these conventions imply that cultures belong in some way to particular groups. Despite the cosmopolitanism of the 1954 Hague Convention, there are seeds of cultural nationalism. It asserts that “*each people makes its contribution to the culture of the world.*”²⁵ While we may value those contributions for what they bring to the collective table, and for their diversity value, 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 1970 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.”²⁶ Twenty years later, cultural nationalism is still in its ascendancy, in part because of the paradoxes 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 and UNESCO has amassed an impressive collection of conventions to protect these intangible expressions of culture. In 2003, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage.²⁷ Although it changes the term of art—from cultural property to cultural heritage—this Convention nonetheless turns the logic of cultural property into an art form. The 2003 UNESCO Convention established a committee within UNESCO to promote and help implement the Convention and requires parties to the Convention

22. *Id.* at 846.

23. *Id.* at 844.

24. 1970 UNESCO Convention, *supra* note 16, art. 4(a).

25. 1954 Hague Convention, *supra* note 9, pmb. (emphasis added).

26. Merryman, *supra* note 10, at 850.

27. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (last visited Oct. 21, 2007) (on file with the *Columbia Law Review*).

to inventory and safeguard intangible cultural heritage.²⁸ 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, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This 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 provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.²⁹

In its definition of cultural heritage, the 2003 UNESCO Convention is the legal fruition of the popular logic of cultural property: Cultural heritage always aligns unproblematically with a particular group and that group’s culture emerges as a response to environment, nature, and history, but not in response to contact, interaction, and conflict with others. Culture evolves but it is not shared. If the reference to history is meant to imply cultural 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 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. The Convention assumes that when culture engenders the deepest feelings of belonging then culture itself must in turn belong. 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.

B. *Refinements and Applications of Cultural Property Law*

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,³⁰ including some of the limitations that I sketch here. Those who favor using “cultural heritage” over

28. Id. art. 5.

29. Id. art. 2(1).

30. See Prott & O’Keefe, *supra* note 11, at 307.

“cultural property” tend to favor it because it “creates a perception of something handed down; something to be cared for and cherished.”³¹ That preservationist rhetoric of cultural heritage, however, replicates much of the problematic logic of cultural property. It gives us a more complex picture of culture, one that includes intangible practices and change over time,³² 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 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.³³ The fact of the matter is that moving to the term cultural heritage does not move us very far along in unpacking the disquieting assumptions of the phrase.

More recently, in a convention to promote diversity of cultural expression, UNESCO further refined its take on culture.³⁴ Although the 2005 UNESCO Convention is primarily aspirational rather than obligatory,³⁵ it is different from its predecessors in that it articulates and promotes a vision of the world in which cultures come into contact with each

31. *Id.* at 311.

32. Intangible products and property raise 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 summarizes one way of distinguishing them: “[I]ntellectual property protects the new and innovative; cultural property protects the old and venerated.” Scafidi, *supra* note 8, at 51. In fact, the central tension I address in this Essay 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 (“American patent and copyright statutes embody this tension between granting ideas the status of private property and leaving ideas to enrich the public domain in both creative and economic terms.”). There is also a growing body of culturally attuned intellectual property scholarship. See, e.g., Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (1998); Julie Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *The Future of the Public Domain* 121 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006); Madhavi Sunder, *IP3*, 59 *Stan. L. Rev.* 257 (2006); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *Loy. L.A. Ent. L. Rev.* 651 (1997); Olunfunmilayo B. Arewa, *Culture as Property: Intellectual Property, Local Norms and Global Rights* (Nw. Univ. Sch. of Law Pub. Law & Theory Series, Research Paper No. 07-13, Apr. 12, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981423 (on file with the *Columbia Law Review*).

33. 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).

34. See UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, Oct. 20, 2005, available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (on file with the *Columbia Law Review*).

35. Except for provisions relating to information sharing and public education, almost all of the rights and obligations of parties to the Convention are optional. When the Convention uses the word “shall,” it is almost always as part of the phrase “shall endeavor to.” *Id.*

other. It appreciates that cultural diversity “is nurtured by constant exchanges and interaction between cultures,” and yet the language and vision is of coherent cultures that interact but are not changed by their interaction.³⁶ It is the endangered species approach to culture in a Darwinian vacuum: Cultural diversity “is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity.”³⁷ The 2005 UNESCO Convention concedes that cultures interact, but it is a rosy and sanitized view of the conditions of contact; its objectives are “to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner,” to “encourage dialogue among cultures,” and to “build[] bridges.”³⁸ The mythic and idealized cultural world this Convention describes is one defined by mutual respect rather than persistent conflict.

Finally, there are a number of domestic laws that deal specifically with Native American cultural property, the most important of which are the Indian Arts and Crafts Act and the Native American Graves Protection and Repatriation Act (NAGPRA).³⁹ The Indian Arts and Crafts Act is not about protecting cultural property as much as protecting the value and authenticity of Indian products, but it exemplifies some of the dangers of the propertization of culture. The Indian Arts and Crafts Act, by allowing both criminal and civil actions against anyone who sells a good “in a manner that falsely suggests it is . . . an Indian product,”⁴⁰ effectively helps Indians and tribes brand themselves and protect the value of their brands. One of its virtues is that it recognizes both the market for Indian goods and the need of Indians to better control that market. But its alignment of cultural production, property, and identity comes with costs. According to the accompanying regulations, the term “Indian” or a tribal name used “in connection with an art or craft product, is interpreted to mean . . . that . . . [t]he art or craft product is an Indian product.”⁴¹ In this context, one’s tribe is also one’s brand. As Judge Posner put it, in reviewing an appeal under the Act, “the regulation makes ‘Indian’ the trademark denoting products made by Indians, just as ‘Roquefort’ denotes a cheese manufactured from sheep’s milk cured in limestone caves in the Roquefort region of France.”⁴² As I explore further below, there are costs involved in being one’s own brand, and chief among them is the perpetuation of what I am calling the paradox of cultural property, the assumed coherence and interchangeability of groups,

36. *Id.* pmb1.

37. *Id.*

38. *Id.* art. 1.

39. See 25 U.S.C. §§ 305, 3001–3013 (2000).

40. *Id.* § 305e(a); 18 U.S.C. § 1159 (2000).

41. 25 C.F.R. § 309.24(a)(2) (2007).

42. *Native Am. Arts, Inc. v. Waldron*, 399 F.3d 871, 873–74 (7th Cir. 2005).

things, and cultures. The problem with certifying authentic Indian stuff is that it requires certifying authentic Indians.⁴³

NAGPRA, passed in 1990, is the most extensive and important domestic law dealing explicitly with Native American cultural property. NAGPRA “has created the most significant and widespread return of Native American objects to date.”⁴⁴ Interestingly, NAGPRA undermines conventional views of ownership and tends to employ tribal ideas of property, but its effect is to reinforce the paradox of cultural property. As it turns out, changing the property regime does not solve the problem. Native American traditions of ownership, no less than Anglo traditions, reinforce the idea that cultures belong to peoples.

For example, NAGPRA calls for the repatriation of a whole range of Native American cultural objects held by federal agencies and museums receiving federal funds if there is a “cultural affiliation” between those objects and a particular Indian tribe.⁴⁵ Those objects include human remains and funerary objects as well as sacred objects and cultural property. Cultural property is retitled as “cultural patrimony” by NAGPRA and includes objects “having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself . . . and which, therefore, cannot be alienated, appropriated, or conveyed by an individual,” including members of the relevant tribe.⁴⁶ NAGPRA requires museums to inventory their Indian cultural items and try to determine their “cultural affiliation[s].”⁴⁷ Museums are further required to repatriate cultural patrimony if a culturally affiliated tribe requests repatriation,⁴⁸ unless they can prove a “right of possession,” which requires a showing that possession by the agency or museum was obtained with the voluntary consent of an individual or group that had the authority to alienate.⁴⁹ As Sarah Harding points out in her astute analysis of NAGPRA, by defining cultural patrimony as inalienable, the statute effectively limits a museum’s “right of possession” defense.⁵⁰ In addition to

43. See George Pierre Castile, *The Commodification of Indian Identity*, 98 *Am. Anthropologist* 743, 745 (1996) (arguing that American Indians are “the only card-carrying ethnic group in America” because of minute regulation of Indian identity through tribal affiliation and blood quantum requirements).

44. Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 *Ind. L.J.* 723, 725 (1997).

45. 25 U.S.C. § 3005(a). NAGPRA does many other things as well, including establishing tribal ownership of Native American objects excavated after the enactment of NAGPRA, *id.* § 3002(a), and requiring museums and federal agencies to inventory and publicize their holdings of Native American cultural items. *Id.* §§ 3003–3004. In addition, 18 U.S.C. § 1170 creates criminal penalties for illegal trafficking in Native American cultural items in violation of NAGPRA.

46. 25 U.S.C. § 3001(3)(D).

47. *Id.* §§ 3003, 3004.

48. *Id.* § 3005(a).

49. *Id.* §§ 3001(13), 3005(c).

50. See Harding, *supra* note 44, at 729. Harding also points out that cultural patrimony was referred to as “objects of inalienable communal property” in the legislative

shifting property entitlements, NAGPRA opens up myriad ways to show cultural affiliation, which can be established “by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion.”⁵¹ In this sense the statute uses quite flexible notions of culture.

A number of meaty issues raised by NAGPRA, particularly the problems of collective ownership, alienation, and who speaks for a culturally affiliated tribe, are evident in one of the most interesting cases interpreting the statute. *United States v. Corrow* involved a claim that the definition of cultural patrimony was unconstitutionally vague.⁵² The claim was brought by the defendant, Richard Corrow, who had been found guilty of illegal trafficking in Navajo cultural items.⁵³ Corrow had purchased Yei B’Chei *jish* from the widow of Ray Winnie, a Navajo religious singer, and sought to resell them at a considerable profit. Yei B’Chei are “ceremonial adornments . . . whose English label, ‘masks,’ fails to connote the Navajo perception [that] these cultural items embody living gods.”⁵⁴ The trial consisted mainly of expert witnesses, nearly all of whom were Navajo, who disagreed on whether the Yei B’Chei were in fact alienable. The *Corrow* trial shows how cultural meanings and practices are frequently not uniform within groups. The court noted that an amicus brief by the Antique Tribal Art Dealers Association, “a trade organization promoting authenticity and ethical dealing in the sale of Native American artifacts,” contended that “the government in this case ‘exploited a controversy between orthodox and moderate Navajo religious perspectives.’”⁵⁵ The defendant in turn contended that this disagreement within the tribe over how, by whom, and under what circumstances Yei B’Chei could be owned and alienated clouded the meaning of cultural patrimony to the point of rendering it unconstitutional.⁵⁶ The court disagreed, finding that while the parameters of cultural patrimony might be unclear “at its edges,” it clearly applied to Corrow.⁵⁷ In upholding the conviction, the court legitimated a particular account of Navajo culture within the tribe and clari-

history. *Id.* (citing H.R. Rep. No. 101-877, at 12, 25–29 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4371, 4384–88 (internal quotation marks omitted)).

51. 25 U.S.C. § 3005(a)(4).

52. 119 F.3d 796, 796 (10th Cir. 1997).

53. *Id.*

54. *Id.* at 798.

55. *Id.* at 801 n.7. As interesting as this characterization of the dispute is, missing is the widow Mrs. Winnie’s own belief that she owned the Yei B’Chei. See *id.* at 803.

56. *Id.* at 801–02.

57. *Id.* at 803. One reason the court was convinced that Corrow appreciated the status of the Yei B’Chei within the tribe was because Corrow apparently represented to the widow that he intended to pass it on to a young chanter in Utah rather than sell it, implying that he knew reselling it (at a profit, no less) would be unacceptable. See *id.* at 803.

fied the relationship of the tribe to “its” culture.⁵⁸ It did so by taking the contested and contextual understandings among tribal members of property and ownership of sacred tribal objects and reformulating it all as “cultural property.” Thus the court banished to the outside edges of the statutory categories uncertainty about the contours of a culture and its relationship to its things. The opinion reflects the desire and nostalgia behind cultural property law for pure and comprehensible cultures.

NAGPRA is a quite radical piece of legislation, and given the history of cultural theft of Native Americans by whites, it is in many ways a just and sensible approach to moving meaningful objects back into the hands of tribes. But even here, in the context of a statute with an unusually expansive and flexible sense of culture and cultural “affiliation,” the law reinforces the popular logic of cultural property. The logic of cultural property—as opposed to the nuances of the law itself—tracks the broader presumptions of the law, which is that Indian stuff belongs to Indians. Even if we agree with that presumption and care that subordinated groups reclaim control over the meaning of cultural commodities,⁵⁹ it comes with some costs and conundrums. First, it assumes that we always know what Indian stuff is and who Indians are. Moreover, it aligns Indians and *their* stuff in ways that can be problematic. As Harding puts it, “the notion that identity, whether individual or group, must forever remain attached to a particular object is unsettling. An immutable, intrinsic connection between identity and property may unduly limit, at least in theory, an ongoing process of cultural redefinition.”⁶⁰ This is not a standard anticommodification argument, nor am I necessarily opposed to many forms of commodification; rather I am concerned about the effects of making peoples and cultures coherent, static, and equivalent.⁶¹

Thus one set of costs of cultural property logic entails the effects on those within a group. Defining groups too closely around a set of shared things and practices not only limits redefinition, but also conversely encourages conformity and suggests “authentic” ways to perform one’s identity. In addition, as Madhavi Sunder has demonstrated, when the law bestows rights or control in a particular community it tends to empower one version of that community as against potential dissenters within the group.⁶² This was evident, for example, in the *Corrow* opinion, where virtually any position taken by the court would have empowered either

58. Of course, the court’s opinion would have played this role regardless of the outcome because that is what courts do—legitimate and clarify.

59. See, e.g., Regina Austin, Kwanzaa and the Commodification of Black Culture, *in* Rethinking Commodification: Cases and Readings in Law and Culture 178 (Martha M. Ertman & Joan C. Williams eds., 2005) (describing commodification and appropriation of black culture by whites and importance of black control of black cultural norms).

60. Harding, *supra* note 44, at 752.

61. See generally Austin, *supra* note 59 (showcasing sophisticated range of positions on commodification and culture).

62. See Madhavi Sunder, Cultural Dissent, 54 Stan. L. Rev. 495, 503–04 (2001) [hereinafter Sunder, Cultural Dissent] (arguing that turning to law to ensure cultural

the orthodox or moderate Navajo positions within the tribe. Another set of costs has to do with relationships between different groups. For example, cultural property law obscures cultural movement, hybridity, fusion, and the potential for competing claims to cultural objects, even as between multiple Native American tribes.⁶³ It also dissuades imitation, discussion, and critique between groups by making a group's cultural stuff off limits to outsiders.⁶⁴ And then there is the more ontological problem—to even speak about groups, cultures, and communities, as this Essay does and as cultural property law does, is to assume we know already their boundaries and their interiors, who count as insiders and as outsiders, who is us and who is them.

II. THE LOGIC OF CULTURAL PROPERTY AND THE NCAA POLICY

This Essay is as concerned with the attitudes and forms of common sense that the law inspires as it is with the law itself. Part II.A explains how the emergence of cultural property law together with identity politics has informed a common sense, or popular logic, about cultures and property. Part II.B details the NCAA mascot policy as an example of a regulatory decision based in part on the popular logic of cultural property.

A. *The Popular Logic of Cultural Property*

The popular logic of cultural property is not the law of cultural property but the social attitudes that law helps to engender.⁶⁵ 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 have dovetailed with multiculturalism to produce a common sense understanding of culture as belonging to particular groups. Seyla

survival often enforces status quo of community and suppresses internal efforts to contest cultural meanings).

63. NAGPRA provides very briefly and vaguely for competing claims to a cultural item. But even though it envisions the potential for multiple requests for repatriation, the goal is to identify the “most appropriate claimant.” 25 U.S.C. § 3005(e) (2000). Michael Brown explores how NAGPRA has contributed to conflicts between tribes as well as within them. See Brown, *supra* note 5, at 18–21.

64. Michael Brown, for one, 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.” Brown, *supra* note 5, at 7.

65. Within law and society scholarship, this is generally referred to as legal consciousness. See, e.g., Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* 34–39, 224–30 (1998) (documenting how ordinary interaction with, internalization of, and resistance to law transform legal rules into legal consciousness).

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.⁶⁶ Taken together, these accepted ideas account for the widespread belief that every human group has its own culture.⁶⁷ Moreover, according to Benhabib, 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.⁶⁸

Benhabib’s view of culture as socially and politically constructed rejects these premises because they essentialize, homogenize, and fetishize culture.⁶⁹ I would add that 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 “popular logic” of cultural property works much like Richard Ford’s “difference discourse”: It describes a constitutive relationship between social and ethnic groups and their identifiable cultures at the same time that it helps generate the very relationship it describes.⁷⁰ In the preceding section this Essay analyzed the law of cultural property in such a way as to highlight the popular logic that both produces it and flows from it. The paradoxes of cultural property law 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 and protect. The more rigid the rules for group membership, the more constraining that identity is, even for those who qualify as members. These ideas of culture and difference come with unspoken presumptions about group membership, about who belongs, and how one should act out one’s cultural identity.⁷¹ These understandings of group difference

66. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* 7–8 (2002).

67. *Id.* at 3–4.

68. *Id.* at 4.

69. *Id.* (quoting Terence Turner, *Anthropology and Multiculturalism: What is Anthropology That Multiculturalists Should Be Mindful of It?*, 8 *Cultural Anthropology* 411, 429 (1993) (quotation marks omitted)).

70. Ford is primarily concerned with the way difference discourse links race with culture, but the generative effects are the same in the sense that the discourse helps to create the relationship it purports only to describe. See Richard Thomson Ford, *Racial Culture* 28 (2005).

71. See *id.* at 39.

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.”⁷² The move from cultural property as legal claims to a popular logic about groups affects 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.⁷³ The popular logic of cultural property, the idea that human groups and cultures are coherent and correspond to each other, has informed the very language and baseline assumptions of much of cultural property law. Cultural property law, in its language and inflection as much as in its commands, has continued to fuel a popular logic of cultural property whose influence can be seen in an array of legal and nonlegal contexts, the Indian mascot debate among them.

B. *NCAA Policy on Native American Nicknames and 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.”⁷⁴ The policy eventually encompassed twenty schools, all of whom used Native American names and mascots.⁷⁵ As a private, member-based organization, the NCAA is without authority to force schools to change their mascots and imagery. The NCAA’s coercive power, however, is considerable because schools wishing to compete in intercollegiate sports have few viable and no profitable alternatives.⁷⁶

72. *Id.* at 41.

73. See Sunder, *Cultural Dissent*, *supra* note 62 at 503, 552–53.

74. Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/august/20050805_exec_comm_rls.html (on file with the *Columbia Law Review*).

75. Alcorn State University (Braves), Arkansas State University (Indians), Bradley University (Braves), Carthage College (Redmen), Catawba College (Indians), Central Michigan University (Chippewas), Chowan College (Braves), Florida State University (Seminoles), University of Illinois at Urbana-Champaign (Illini), Indiana University of Pennsylvania (Indians), University of Louisiana-Monroe (Indians), McMurry University (Indians), Midwestern State University (Indians), Mississippi College (Choctaws), Newberry College (Indians), University of North Dakota (Fighting Sioux), Northeastern State University (Redmen), Southeastern Oklahoma State University (Savages), University of Utah (Utes), and the College of William and Mary (Tribe).

76. As one college administrator put it, “We’re free to do what we want as long as we don’t care whether our students play in the postseason or not.” Doug Lederman, *Changing Nicknames, Under NCAA Duress*, *Inside Higher Ed*, Nov. 10, 2005, at <http://insidehighered.com/news/2005/11/10/mascot> (on file with the *Columbia Law Review*).

Since the policy was adopted, eleven schools have agreed to change their names or mascots and are no longer subject to the policy.⁷⁷ Five schools have received permission from namesake tribes and have been exempted from the policy.⁷⁸ One school, Bradley, is on a five-year “watch list” and three schools are subject to the policy,⁷⁹ which prohibits them from hosting any post-season NCAA sporting events or displaying hostile and abusive images at any championship competitions. The NCAA mascot policy assumes that any Indian name or mascot is hostile or abusive unless a “namesake” tribe gives its approval for use of the name.⁸⁰ Where the name is generic, such as “Indians” or “Braves,” there is no specific tribe that can give its approval and its use therefore violates the policy. Sometimes there are a number of tribes or bands that use a common name, and their approval becomes more complicated; the NCAA has not been clear on whether permission must be obtained from all of them.

For example, in rejecting the University of North Dakota’s appeal to use the “Fighting Sioux” nickname, Bernard Franklin, NCAA Senior Vice President for Governance and Membership, 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 environment.”⁸¹ Both of these schools’ final appeals were denied by the

77. Carthage College, Chowan College, Indiana University of Pennsylvania, Louisiana-Monroe, McMurry University, Midwestern State, Newberry College, Northeastern State, Southeastern Oklahoma State, and William and Mary, have either agreed to change their nickname or logo, and Illinois was given permission to use its nickname. Press Release, Nat’l Collegiate Athletic Ass’n, Native American Mascot Policy—Status List (Feb. 16, 2007), available at http://www2.ncaa.org/portal/media_and_events/press_room/2007/february/20070220_mascot_status_report.html (on file with the *Columbia Law Review*) [hereinafter NCAA Status List].

78. Catawba College, Central Michigan University, Florida State University, Mississippi College, and the University of Utah have been exempted from the policy. *Id.*

79. Alcorn State, Arkansas State, and North Dakota are all subject to the policy. Arkansas State is considering a name change, Alcorn State has not made any public statements on the issue, and North Dakota has filed suit. *Id.*

80. Press Release, Bernard Franklin, Senior Vice President for Governance and Membership, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review (Sept. 28, 2005), available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/september/20050928_franklin_stmnt_und.html (on file with the *Columbia Law Review*) (“One primary, but not exclusive, consideration in the review process is documentation that a ‘namesake’ tribe has formally approved of the use of the mascot, name and imagery by the institution.”).

81. Press Release, Bernard Franklin, Senior Vice President for Governance and Membership, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Bradley University Review (Oct. 20, 2005), available at <http://www.ncaasports.com/story/8987213> (on file with the *Columbia Law Review*).

NCAA in April of 2006.⁸² The University of North Dakota filed suit against the NCAA in October 2006.⁸³ In October of 2007 the University of North Dakota and the NCAA settled the lawsuit. Under the terms of the settlement UND has three years to get permission from all local Sioux tribes for continued use of its name and imagery.⁸⁴

Many teams simply changed their nicknames or plan to change their nicknames in response to the policy. In one interesting example, Carthage College 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.”⁸⁵ Carthage is either in the process of developing a new policy statement or has abandoned their policy statement altogether.⁸⁶ Given the early American fraternal societies of the same name,⁸⁷ it seems unlikely that the name has no association with Native Americans.

82. 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.

NCAA Status List, *supra* note 77.

83. Complaint at 27, *North Dakota v. NCAA*, No. 06-C-1333 (N.D. Dist. Ct. Oct. 2006), available at <http://www.ag.state.nd.us/NCAA/Complaint-State-Court.pdf> (on file with the *Columbia Law Review*).

84. Steve Wieberg, *North Dakota Granted Three Years to Get Permission for Mascot*, USA Today, Oct. 26, 2007, at http://www.usatoday.com/sports/college/2007-10-26-north-dakota-mascot_N.htm?POE=click-refer (on file with the *Columbia Law Review*).

85. Press Release, Bernard Franklin, Senior Vice President for Governance and Membership, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Carthage College and Midwestern State University (Nov. 9, 2005), available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/november/20051109_carthage_midwestern_stmt.html (on file with the *Columbia Law Review*). According to Carthage administrator Robert Rosen, “[t]he college, which was originally based in Carthage, Ill., adopted the Redmen nickname in the 1920s to differentiate them from the local high school’s teams, which wore blue uniforms and were known as the Blueboys Over time . . . the name took on Native American undertones, and the college incorporated feathers into its logo.” Lederman, *supra* note 76.

86. 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. Oddly, that policy statement nowhere mentioned that Red Men meant anything other than Native Americans, only that Carthage treated Native Americans with respect. Carthage College, Policy Statement on the Redmen Name (March 18, 1994) (on file with the *Columbia Law Review*).

87. See *infra* note 115 and accompanying text.

In August of 2005, Franklin announced that Florida State University had been removed from the list of schools with hostile or abusive mascots after obtaining the approval of its name and mascot from the namesake tribe: Franklin cited the “unique relationship between the university and the Seminole Tribe of Florida as a significant factor.”⁸⁸ The statement made no mention of the Seminole Tribe of Oklahoma. That tribe has not taken an official position on the Florida State mascot but its members have been less than supportive.⁸⁹ 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.”⁹⁰ 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.

The University of Illinois’s 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 emblem-

88. Steve Wieberg, NCAA Allowing Florida State to Use Its Seminole Mascot, USA Today, Aug. 23, 2005, available at http://www.usatoday.com/sports/college/2005-08-23-fsu-mascot-approved_x.htm (on file with the *Columbia Law Review*) [hereinafter Wieberg, Seminole Mascot]. There appears to be very little public information about the negotiations between the Seminole tribe and Florida State on this issue, but Florida State has established scholarships for Seminole students recruited from reservations and is considering opening “a museum of Seminole heritage and culture on the Florida State campus.” Steve Wieberg, Indian Nicknames Face NCAA Scrutiny, USA Today, June 23, 2005, available at http://www.usatoday.com/sports/college/other/2005-06-23-indian-nicknames_x.htm (on file with the *Columbia Law Review*). Additionally, there is now a course on Seminole history offered at FSU. Bill Kaczor, FSU Launches Seminole History Class, Associated Press, Nov. 28, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/28/AR2006112800109_pf.html (on file with the *Columbia Law Review*). According to the Seminole Tribe chairman: “We could give tribal members tangible items that could possibly one day be taken away from them . . . [b]ut Florida State can give education to our people and that is something that no one can take away.” Vida Volkert, Seminole Tribe Chairman Stands with FSU Seminoles, Fla. St. Times, Aug. 8, 2004, available at http://www.fsu.com/pages/2004/08/04/mitchell_cypress.html (on file with the *Columbia Law Review*).

89. See Wieberg, Seminole Mascot, *supra* note 88. 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.*

90. Press Release, Bernard Franklin, Senior Vice President for Governance and Membership, Nat’l Collegiate Athletic Ass’n, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Central Michigan University and University of Utah Reviews (Sept. 2, 2005), available at http://www2.ncaa.org/portal/media_and_events/press_room/2005/september/20050902_cmu_utah_franklinstmt.html (on file with the *Columbia Law Review*).

atic of the state, but stressed at the time that the University had to engage in a public educational effort to disassociate the school from Chief Illiniwek, its Native American mascot or symbol. The University of Illinois's 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 University after the last home basketball game of the season.⁹¹ The Chief was officially retired on February 21, 2007, after his halftime performance in a game against Michigan.⁹² 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 an example of an application of the popular logic of cultural property. This policy is emblematic of the way that the paradoxical logic of cultural property has been popularized and has become itself a basis for action. In other words, cultural property law did not motivate the NCAA policy, but cultural property logic certainly did. The NCAA mascot 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 admittedly not about property, but were based on the discrimination, racism, and hostile environment that the committee felt such images perpetuated.⁹³ Yet other rationales for the policy clearly sounded in cultural property, such as claims that Indian mascots are sacrilegious in that the feathers, paint, and costumes are misappropriations of Native American religious practices.⁹⁴ Most telling, however, was simply that the NCAA policy, once adopted, exempted those schools which could show that their names or mascots were approved by the namesake tribe. In other words, however racist or discriminatory an Indian mascot might be, so long as it does not bother the tribe whose name or image it bears, there is no injury. In effect, the NCAA made tribal names a significantly more rivalrous form of

91. See Press Release, University of Illinois, Chief Illiniwek Will No Longer Perform (Feb. 16, 2007), available at <http://www.uillinois.edu/chief/ChiefRelease2-16-07.pdf> (on file with the *Columbia Law Review*).

92. Vincent M. Mallozzi, *Mascots in Court, Not on the Court*, N.Y. Times, Mar. 4, 2007, § 8, at 9. For Illinois fans, the last performance of Chief Illiniwek was very emotional, but it also appeared to have the added excitement of a media event: The cheerleaders took photos while taking part in the halftime performance and the announcers played up the emotion of the fans and the Chief himself. For a video of the last dance of Chief Illiniwek, see *Watch Chief Illiniwek's Last Dance*, at <http://fightingillini.cstv.com/genrel/022107aaa.html> (University of Illinois, 2007) (on file with the *Columbia Law Review*).

93. See Nat'l Collegiate Athletic Ass'n, *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* (2002), available at http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/moic/2003/mascot_report/mascotreport.htm (on file with the *Columbia Law Review*).

94. *Id.*

property than they had been in the sports market.⁹⁵ It gave tribes an important property right in their names, images, and cultural representation, which is the right to exclude in the context of college sports. The Supreme Court has called the right to exclude “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁹⁶

The idea behind this key aspect of the NCAA policy is precisely the logic of cultural property: that the images, rituals, and cultural identities 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.⁹⁷ This Essay is concerned with a subset of this claim: Do images of Indians that white Americans have invented, appropriated, and refashioned to serve the often hostile purposes of mainstream American culture make sense as the cultural property of 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 inform our response. First, a cultural property rationale would require that such images belong to tribal cultures. Yet mascots are at least as much products of white American culture as they are of tribes. They are much more than stereotypes; they are cultural hybrids whose referent has long since been lost and whose significance can only be mined by looking at a white cultural project of native subjugation and nation-building. Mascots certainly “indicate moments of writing and re-writing a Euro-American identity in terms of conquest, hierarchy, and domination.”⁹⁸ But for that to be true they must also be partly constitutive of a Euro-American identity. We miss the meaning of mascots if we misidentify their cultural influences. Second, and more insidiously, a cultural property rationale reinforces its own perverse logic—that cultures are the property of groups, and that particular groups correspond in

95. Brett M. Frischman, *An Economic Theory of Infrastructure and Commons Management*, 89 *Minn. L. Rev.* 917, 945 (2005) (explaining that rivalrous goods are goods whose use by one person affects ability of others to use them; apples are rivalrous and ideas are nonrivalrous).

96. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Thomas Merrill argues that the right to exclude is the essential element of property rights. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 *Neb. L. Rev.* 730 (1998).

97. The photographs taken of Hopi Indian rituals by the Rev. H.R. Voth at the turn of the century strike me as a less problematic case. To the extent that the Hopi claim these photographs using the cultural property logic, however, these demands tend to create the same problems I describe in this Essay. For an excellent discussion of the Voth photographs and the Hopi claims, see Brown, *supra* note 5, at 11–24. Brown characterizes the Hopi claims in this instance as invoking a right to “cultural privacy.” *Id.* at 27–28. One reason the Hopi claim is stronger to my mind than the mascot claims is the ironic fact that the photographs have been useful to the Hopi in understanding their own history and may add meaningfully to their contemporary sense of themselves. See *id.* at 13.

98. C. Richard King & Charles Fruehling Springwood, *Introduction: Imagined Indians, Social Identities, and Activism*, in *Team Spirits: The Native American Mascot Controversy* 1, 8 (C. Richard King & Charles Fruehling Springwood eds., 2001).

some unproblematic way to particular cultures.⁹⁹ To make the argument that Indian mascots are not the cultural property of Indians but are cultural hybrids requires a thorough explanation of their hybridity. The account is one so full of brutality against Indians that it is no wonder the liberal instinct is to give mascots back. But back to whom exactly and on what theory? This account shows that the cultural property theory does not work and its use may be simply another disservice to Native Americans.

III. 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. This section offers one potential corrective to the popular logic of cultural property, a cultural counternarrative about Indian mascots that emphasizes hybridity and change over coherence and stasis. Part III.A presents a paradigm of cultural hybridity, which is the long tradition of whites playing Indian as a way of coming to understand and legitimate themselves as American citizens. Part III.B argues that Chief Illiniwek fits perfectly within this tradition of Indian play. Part III.C steps back to link the cultural friction that Indian mascots engender to the logic of cultural property, and Part III.D then uses hybridity theory to make sense of Indian mascots as cultural fusions and to disrupt the effects of the popular logic of cultural property.

A. *A Hybrid Paradigm: Playing Indian*¹⁰⁰

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. 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 dispossessing and

99. It may be that this concern applies with equal force to even more standard cultural property claims. For example, an antiquity looted from the Iraqi National Museum in Baghdad is not obviously the cultural property of Iraq. We would want to ask how the museum came to possess it, the journey it took to get there, the history of the region in which the antiquity was found, what cultural connections modern Iraqis have to ancient Mesopotamians, what historical or current connections and claims other human groups have to the region or to this artifact, etc.

100. The phrase as well as much of the subsequent discussion is borrowed from Philip Deloria. Philip J. Deloria, *Playing Indian* (1998).

killing them. 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.¹⁰¹

Philip 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 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.¹⁰²

This claim is consistent with accounts by other cultural historians, such as Richard Slotkin, who describes 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.¹⁰³

Every new national identity must, in Eric Hobsbawm’s famous phrasing, “invent the traditions” in which it grounds that identity and lays claim to a shared past.¹⁰⁴ For the colonists in North America, reference to Indians helped connect them to the land and to customs that existed long before they arrived.¹⁰⁵ Symbolic Indianness helped them reject and

101. *Id.* at 7–8.

102. *Id.* at 21–22.

103. See Richard Slotkin, *Gunfighter Nation: The Myth of the Frontier in Twentieth-Century America* 14 (1992) (“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.”). See generally Richard Slotkin, *Regeneration Through Violence: The Mythology of the American Frontier, 1600–1860*, at 17 (1973) (“The story of the evolution of an American mythology is, in large measure, the story of our too-slow awakening to the significance of the American Indian in the universal scheme of things generally and in our (or his) American world in particular.”).

104. Eric Hobsbawm, Introduction: *Inventing Traditions*, in *The Invention of Tradition* 1, 13–14 (Eric Hobsbawm & Terence Ranger eds., 1992) (explaining how modern nations invent traditions in order to deny their modernity and lay claim to continuous, historical existences as single, unified communities).

105. Deloria, *supra* note 100, at 25. The important point was not that they shared these customs or even knew what they were, but that these customs existed at all as part of the heritage of the continent they laid claim to.

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.”¹⁰⁶ The rhetoric, images, and performances of Indianness were at the heart of American identity, and they always had a duality to them. If Indian disguise allowed colonists to act out rebellion and dump tea into Boston harbor, it also allowed them to claim an anti-European, aboriginal citizenship.¹⁰⁷

It must be remembered, of course, that rhetorical, symbolic, and mythic Indians are ideas, narratives, or gestures, but not real humans, and that it was the idea of the Indian rather than Indian people, which 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 fantasies and images that were often as mistaken as the name itself.¹⁰⁸ The descriptions of these misnamed Indians, first by explorers and later by colonists, distilled thousands of unrelated societies into a set of traits that were fertile to the European imagination.¹⁰⁹ The verbal and visual rhetoric by which Indians were conveyed was not only powerful, but astoundingly consistent and enduring. Today, centuries after Columbus briefly described Indians in his 1493 letter,¹¹⁰ after much contact and better knowledge of many different Native American tribes, and in the face of dramatic changes in the way Indians 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.¹¹¹ One obvious explanation for the endurance of these images is that they have become part of mainstream American culture, not just as a story we tell about “them,” but also as 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 were used at different times for different purposes, it sometimes evoked quite contradictory themes.¹¹² 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 partici-

106. *Id.* at 26.

107. *Id.* at 36.

108. See Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (1978).

109. *Id.* at 3.

110. *Id.* at 5–6.

111. *Id.* at 28–29.

112. Deloria, *supra* note 100, 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.”).

pants in the Boston Tea Party dressed up as Mohawk warriors.¹¹³ 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 nineteenth century contributed to a “fundamental shift in representations of Indians, from ‘savage’ foe to ‘first American’ and ancestor to the nation.”¹¹⁴ It was precisely at this time 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 Indian-ness. Indian costume now signified an American identity based upon republican order rather than revolutionary potential.”¹¹⁵

At the same time that these societies flourished, genocidal federal policies physically removed Indians from the eastern United States,¹¹⁶ 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 an essential piece of America’s native past.¹¹⁷ 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

113. *Id.* at 31–32.

114. Alan Trachtenberg, *Shades of Hiawatha: Staging Indians, Making Americans 1880–1930*, at 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 American, imagining oneself a member of the nation?” *Id.* at 13.

115. Deloria, *supra* note 100, at 56.

116. Of all the issues that became submerged in the phrase “the Indian problem” the most important was the need to convert Indian land into American land. The United States accomplished this through military, legislative, and economic dispossession. See, e.g., Stephen Cornell, *The Return of the Native* 40 (1988) (detailing how dispossession was accomplished through both assimilation and removal). Dispossession and removal became American policy in the nineteenth century, from the Cherokee Trail of Tears to the General Allotment Act. See, e.g., Brian W. Dippie, *The Vanishing American: White Attitudes and U.S. Indian Policy* 56–78, 161–76 (1982) (showing how isolationism of removal policy at start of nineteenth century and assimilationism of allotment near century’s end were both motivated by whites’ desire for more land).

117. See Deloria, *supra* note 100, at 63–65. The ideology of the vanishing Indian was used to naturalize the extinction of Indians in the face of a higher civilization and mask the central role of federal policy in their disappearance. Justice Story forcefully articulated this position: “By a law of their nature, they seem destined to a slow, but sure extinction. Everywhere, at the approach of the white man, they fade away.” See Dippie, *supra* note 116, at 1 (quoting Joseph Story, *Discourse, Pronounced at the Request of Essex Historical Society* (Sept. 18, 1828)).

then in allotting their land in an effort to make them disappear through assimilation.¹¹⁸ The end of the nineteenth century saw the passage of the General Allotment Act,¹¹⁹ which sought to civilize Indians and gain more land for white settlers by parceling out communal Indian land. 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.¹²⁰ In addition, 1890 marked the slaughter of Lakota Sioux by the U.S. Cavalry at Wounded Knee.¹²¹ Shari Huhndorf specifically links the proliferation of white Americans “going native” at the end of the nineteenth 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.”¹²²

Thus it is not surprising that Indian play by whites links up in important ways with national ambitions and federal Indian policy. Indeed, 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.¹²³ Perhaps not surprisingly, the authenticity, naturalness, and self-reliance that Americans had lost to modernity were potently symbolized and available to be 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.¹²⁴ 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 influ-

118. Dippie, *supra* note 116, at 70–71, 171–76. As Dippie points out, there were always “[n]oble motives” articulated to serve the “opportunistic ends” of federal Indian policy. *Id.* at 70.

119. Ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331–334 (2000)).

120. Trachtenberg, *supra* note 114, at 31.

121. See Shari M. Huhndorf, *Going Native: Indians in the American Cultural Imagination* 21 (2001) (discussing Wounded Knee Massacre).

122. *Id.* at 14.

123. Deloria, *supra* note 100, at 100–01.

124. *Id.* at 96–97, 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.”).

ences; to Lord Baden-Powell's military uniforms and hierarchy were added Seton's nativism and Beard's patriotism.¹²⁵

This section recounts 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 have been central to "the creative assembling of an ultimately unassemblable American identity."¹²⁶ In this sense, his account tends to dismantle cultural property claims by Indians to white Indian play by making evident how constitutive such images are for white Americans. 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."¹²⁷

B. *The Illustrative Hybrid: 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 custodial relationship to the land they occupied. The story of this invented Chief disrupts the logic of cultural property.¹²⁸ It brings questions of power, appropriation, and hybridity to the forefront. It complicates the assumptions of cultural property.

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 most directly at the hands of the Iroquois. The Illinois allied themselves with the French explorers and traders in the seventeenth 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.¹²⁹ At the end of the seven-

125. Id. at 109–11. For a history of the Boy Scouts, see generally Jay Mechling, *On My Honor: Boy Scouts and the Making of American Youth* 38 (2001) (naming Beard and Seton as two of "the five main figures who came together to create the Boy Scouts of America"). If playing Indian was important to boy scouting, it was even more central to Camp Fire Girls, which used Indian play explicitly to teach girls an American gender identity based on domesticity. Deloria, *supra* note 100, at 111–14.

126. Deloria, *supra* note 100, at 5.

127. King & Springwood, *supra* note 98, at 9 (citations and emphasis omitted).

128. I mainly rely on Carol Spindel's definitive book on the subject. Spindel's book is exhaustive and sophisticated, and also anti-Chief. Carol Spindel, *Dancing at Halftime: Sports and the Controversy over American Indian Mascots* (2000).

129. Id. at 40–41 (citing *The Jesuit Relations and Allied Documents: Travel and Explorations of the Jesuit Missionaries in New France* (Reuben Gold Thwaites ed., 1896)).

teenth century there were some 10,000 Illinois.¹³⁰ After half a century of disease, splintering, and the war over the new world, there were about 2,500.¹³¹ Increased settlement, Illinois statehood, and disastrous treaties in the nineteenth century did the rest.¹³² The 132 remaining Illinois Indians were removed to Kansas in 1833.¹³³ Little more than twenty years later a number of small Illinois groups came together as the Confederated Peoria and were displaced again—this time to Oklahoma—in 1867.¹³⁴ 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 who remained had forgotten so much of their rituals and their language that the Illinois Indians were effectively extinct.¹³⁵ 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 also to better appropriate their history and culture for their own purposes. The history of the Illinois is another instance of the myth of the vanishing Indian allowing white Americans to become custodial historians of a mythic Indian past.¹³⁶

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 as 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 as the Tribe of the Illini.¹³⁷ Just as the fraternal societies of the time used mock Indian ritu-

130. *Id.* at 42–43.

131. *Id.*

132. *Id.* at 43–44.

133. *Id.* at 44–45.

134. *Id.* at 45.

135. *Id.* at 45–46; see David Prochaska, *At Home in Illinois: Presence of Chief Illiniwek, Absence of Native Americans*, in *Team Spirits*, *supra* note 98, at 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* 333–35 (1988) [hereinafter Clifford, *The Predicament of Culture*].

136. See *supra* notes 116–117 and accompanying text. 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. See Spindel, *supra* note 128, at 61. The tribe ended there in noble self-sacrifice.

137. *Id.* at 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.

als to grant their members identity and distribute honors, the University of Illinois named its honor societies the Sachem and the Ma-wan-da and initiated new members by wearing Indian blankets and smoking peace pipes.¹³⁸ When football was first introduced at the University at the end of the nineteenth 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 modern children and prepare them to be leaders.¹³⁹ 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.¹⁴⁰

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 “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, 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.¹⁴¹

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, Christian, and very white ancestor who passes on native title to the land, and serves also as a physical and spiritual role model for the modern white American. These performances of mythic Indian identity,

138. *Id.* at 49.

139. *Id.* at 69–71.

140. *Id.* at 72.

141. *Id.* 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, *supra* note 135, at 167 (quoting Cary Clive Burford, “We’re Loyal to You, Illinois”: The Story of the University of Illinois Bands 407 (1952)).

whether at Boston Harbor or on the Illinois campus, serve a larger claim of aboriginal citizenship and national identity.¹⁴² 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’s 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 band members had suggested that Illinois members 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 the assistant band director recruited him to lead the band onto the field and smoke a peace pipe with William Penn.¹⁴³ The Chief was an immediate and huge success and would appear at halftime for the next eighty years. 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.¹⁴⁴ Borchers raised money to replace his homemade costume with “authentic” Sioux regalia which he had made at the Pine Ridge reservation in South Dakota.¹⁴⁵ 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.¹⁴⁶

These mascots also perform another history—the sacred history of playing sports. Sports are often discounted as a superficial leisure activity and yet they are also a powerful source of meaningful identity for many people. To make sense of mascots requires taking account of the abiding loyalty and deep identification people have with communities that form

142. See *supra* notes 104–107 and accompanying text.

143. Spindel, *supra* note 128, at 80–81; see also Prochaska, *supra* note 135, at 162–63 (describing Leutwiler’s recruitment).

144. Spindel, *supra* note 128, at 93–95.

145. University of Illinois Athletics, Chief Illiniwek, at <http://fightingillini.cstv.com/trads/ill-trads-thechief.html> (last visited Oct. 23, 2007) (on file with the *Columbia Law Review*) [hereinafter University Athletics]. According to the University, since Borchers’s regalia was made, “five different authentic outfits have been used by Chief Illiniwek. The [last regalia] was purchased in 1983 from Sioux Chief Frank Fools Crow, and [was] topped by a headdress of turkey feathers.” *Id.*

146. As Spindel observes:

On the prairies of central Illinois, with the state’s largest educational institution asserting that Chief Illiniwek is a sacred invocation of the vanished Illinois, and in Tallahassee, where the rider who carries a flaming lance is supposed to represent the Seminole war leader Osceola, it is forgotten or ignored that these performers trace their genealogy not to the Illinois or Seminole tribes but to midway exhibits, Wild West performers, Indian hobbyists, and Boy Scouts.

Spindel, *supra* note 128, at 95.

around sports teams.¹⁴⁷ For some fans, their team is more important to them than their religion.¹⁴⁸ For others, it is their religion. There are, in fact, many religious aspects to team worship. “For nearly every symbol of religion, there is a corresponding sports analog: Each has its own sacred days, pilgrimages, meals, uniforms, language, high priests, music, ritual and pageantry.”¹⁴⁹ This intense identification through sports is magnified and encouraged at universities,¹⁵⁰ in cities, and at the national level. Sports are often an important mechanism of regional and national identity projects as well. For example, the branding of baseball as the American national pastime was meant to induce national identity and was used to “Americanize” immigrant groups in the early twentieth century.¹⁵¹ Sports are a vehicle for producing and mediating the powerful impulses of community, masculinity, and race.¹⁵² It should therefore come as no surprise that Illinois fans have been fiercely attached to Chief Illiniwek as an iconic element of their identity.

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

147. For many fans, these communities deeply inform their sense of self and play a significant, even central, role in their lives. This relationship is reflected in the clothing these fans wear, “the adjectives they use to describe themselves, and in some cases the color of the car they drive or the place they live.” Heather Gibson, Cynthia Willming & Andrew Holdnak, “We’re Gators . . . Not Just Gator Fans”: Serious Leisure and University of Florida Football, 34 *J. Leisure Res.* 397, 398 (2002).

148. See Tim Delaney, *Community, Sports and Leisure* 82–87 (1999). This is based on a survey of 506 members of the Southern California Browns Backers Association, a sports booster group. Of that group, thirty-one percent of fans who “highly identified” with the team and eighteen percent of those who “moderately identified” with the team said the Browns were more meaningful to them than their religion. *Id.*

149. Mike McKenzie, *Mascot Policy Tantamount to Blasphemy*, *Nat’l Collegiate Athletic Ass’n News*, Oct. 10, 2005, at http://www.ncaa.org/wps/portal!/ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4g3NPUESUGYHvqRaGLGpvhCjggRX4_83FR9b_0A_YLc0NCIckdFACrZHxQ!/delta/base64xml/L3dJdyEvUUd3QndNQSEvNEIVRS82XzBfMTVL?New_WCM_Context=/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2005/Editorial/Mascot+policy+tantamount+to+blasphemy++10-10-05+NCAA+News (on file with the *Columbia Law Review*).

150. Not surprisingly, universities also encourage identification with their sports teams as a way to induce emotional and financial commitments to the school whose culture the teams often come to define. See, e.g., J. Douglas Toma, *Football U.: Spectator Sports in the Life of the American University* 78–79 (2003) (“Developing strong community is at the core of the student affairs function in higher education, as well as central to the connections to an institution that cause former students to retain such strong attachments and become active alumni.”).

151. Alan Bairner, *Sport, Nationalism, and Globalization: European and North American Perspectives* 99 (2001). Since teams were comprised of distinct ethnic groups, it also encouraged ethnic group identities among the immigrant populations.

152. See Kenneth S. Zagacki & Dan Grano, *Radio Sports Talk and the Fantasies of Sport*, 22 *Critical Stud. Media Comm.* 45, 46 (2005) (analyzing radio talk shows in Baton Rouge, Louisiana, to show how discussions of Louisiana State University football solidified community identity and tied that identity to regional pride, race, and masculinity).

have transformed.”¹⁵³ 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 made possible only by the virtual elimination of “real” Indians from the cultural landscape.¹⁵⁴ It is not by accident that playing Indian “necessarily went hand in hand with the dispossession and conquest of actual Indian people.”¹⁵⁵ Like Worlds Fairs,¹⁵⁶ 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 by those who had a hand in destroying that past. 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 a robust notion of culture in order to make culture into a more usable commodity.

C. *Mascots as Cultural Friction*

Given the history of playing Indian, the role of sports mascots in that history, and the deep identification by whites with Indians and sports, it is not surprising that Indian mascots feel like important cultural icons for many whites. Given the efforts by Indians to reclaim what they feel to be misappropriations of tribal names and images, as well as the strategic advantages of articulating their claims through the logic of cultural property, it is also not surprising that many Native Americans claim these mascots as their own. Indeed, it is hard to exaggerate the tensions, hostilities, and cultural warfare that Indian mascots inspired long before the NCAA got involved. 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 against¹⁵⁷—exemplify the cultural friction occasioned by

153. Prochaska, *supra* note 135, at 165 (quoting Renato Rosaldo, *Culture and Truth: The Remaking of Social Analysis* 69 (1989)).

154. See Deloria, *supra* note 100, at 63–65.

155. *Id.* at 182.

156. The 1893 World’s Colombian Exposition was in Chicago, Illinois, and featured an abundant array of Indian performances that exhibited the most salient fantasies of the Indian: the warrior, the primitive, and the civilizing colonial. See Rosemarie K. Bank, *Representing History: Performing the Colombian Exposition*, 54 *Theatre J.* 589, 594–96 (2002). Right outside the fairgrounds, Buffalo Bill’s Wild West Show also featured hundreds of Indians in historical dramatizations. Erik Larson, *Devil in the White City: Murder, Magic, and Madness at the Fair That Changed America* 222–23 (2003).

157. Indicative of the sites that support Chief Illiniwek are Chief Illiniwek Educational Foundation, at <http://www.chiefilliniwek.org/> (last visited Oct. 23, 2007) (on file with the *Columbia Law Review*) [hereinafter Chief Illiniwek Educational Foundation], and Honor the Chief Society, History, at <http://www.honorthethechief.org/history.html> (last visited Oct.

this one example of 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 the root of the controversy is the view of many Native Americans and others that the symbol/mascot was a misappropriation of indigenous cultural figures and rituals . . ." ¹⁵⁸ 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." ¹⁵⁹

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." ¹⁶⁰ Similarly, one of the main pro-Chief websites notes that Chief Illiniwek has "proudly and majestically represented the University and the State for almost [eighty] years." ¹⁶¹ 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. ¹⁶²

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)." ¹⁶³ 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

23, 2007) (on file with the *Columbia Law Review*). 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 Progressive Resource/Action Cooperative, Anti-"Chief" Events and News, at <http://www.prairienet.org/prc/prcanti.html> (last visited Oct. 23, 2007) (on file with the *Columbia Law Review*), and Retire the Chief, at <http://www.retirethechief.org/> (last visited Oct. 23, 2007) (on file with the *Columbia Law Review*).

158. Wikipedia, Chief Illiniwek, at http://en.wikipedia.org/wiki/Chief_Illiniwek (last visited Oct. 23, 2007) (on file with the *Columbia Law Review*).

159. Chief Illiniwek Educational Foundation, *supra* note 157.

160. See University Athletics, *supra* note 145.

161. Chief Illiniwek Educational Foundation, *supra* note 157.

162. Prochaska, *supra* note 135, at 174–75. For obvious reasons, the University stopped selling Chief Illiniwek toilet paper. *Id.* at 163.

163. C. Richard King, This is Not an Indian: Situating Claims About Indianness in the Sporting Worlds, 28 *J. Sports & Soc. Issues* 3, 3 (2004).

mascots, “[i]ndeed, Native American mascots misappropriate sacred ideas and objects, such as the headdress war bonnet, relocating them in sacrilegious contexts.”¹⁶⁴ 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?”¹⁶⁵

These arguments are deeply committed to the logic of cultural property and they perpetuate its paradox—only from a strange and static view of culture can this claim make 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 precisely what is wrong with the proprietization 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.¹⁶⁶ 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 an 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 illustrates the poverty of cultural property’s prevailing logic.

D. *Mascots as Cultural Fusion: Theorizing Hybridity*

Cultural conflict, change, and calls for cultural preservation are not just the result of globalization. For centuries, cultural practices, icons, and 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. The impetus for this influence is often 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

164. King & Springwood, *supra* note 98, at 7.

165. Prochaska, *supra* note 135, at 173–74.

166. See *supra* notes 100–102 and accompanying text.

of a society can survive through these changes. Societies without change aren't authentic; they're just dead."¹⁶⁷

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. 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 Indianness or their tribal continuity because they do not look like our mythic images of "authentic" Indians. One of the best known examples of this is the effort by the Mashpees to gain federal recognition as a tribe. Every example of their voluntary and involuntary assimilation—that they wore jeans, had lost their language, and had become Christian, for example—was used against them to defeat their claim for recognition.¹⁶⁸ 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 significance 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 minority cultural contributions to that society. Not only are cultural change, hybridity, and fusion inevitable, but they also give us plenty to celebrate and plenty to decry.

The dynamic view of culture advocated by this Essay stands in stark contrast to the essentialist vision of culture embedded in the popular logic of cultural property. It also complicates the standard narratives of cultural appropriation, influence, and interference. Nomi Stolzenberg and David Myers articulate the antiessentialist position and its pitfalls lucidly:

In the absence of fixed cultural identities, separated by sharp boundary lines and transgressed by clear vectors of causation or cultural influence, the basis for challenging "cultural imperialism" or forced assimilation becomes unclear. By the same token, it becomes questionable which, if any, of the dynamic interactions that continually constitute and reconstitute a cultural group (or subgroup) should be singled out for defense. The

167. Kwame Anthony Appiah, *The Case for Contamination: No to Purity. No to Tribalism. No to Cultural Protectionism. Toward a New Cosmopolitanism*, N.Y. Times, Jan. 1, 2006, § 6 (Magazine), at 34.

168. Clifford's essay on the Mashpee is one of the best accounts of this double bind. Clifford, *The Predicament of Culture*, *supra* note 135, at 341–43.

anti-essentialist view of culture calls into question the very notion of cultural “influence.”¹⁶⁹

Cultural hybridity is part of this antiessentialist tradition of cultural theory. It 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,¹⁷⁰ much of it intended to highlight the resilience and adaptability of minority cultures while critiquing the forces of assimilation. And like many productive shorthand terms, the notion of hybridity has already generated its own debate and backlash.¹⁷¹ For our purposes it is enough to explore the ways in which “hybridity evokes all manner of creative engagements with cultural exchange.”¹⁷²

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.”¹⁷³ 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,¹⁷⁴ 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.”¹⁷⁵ Most theorists agree that what precedes hybridity is only more hybridity.¹⁷⁶ Mixed in processes of cultural exchange are elements of cultures that are themselves in flux, that are themselves the products of cultural exchange. As Appiah puts it, “[l]iving cultures do not, in any case, evolve from purity into contamination; change is more a gradual transformation from one mixture to a new mix-

169. Nomi Maya Stolzenberg & David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehilah*, 25 U. Mich. J.L. Reform 633, 634 (1992) (exploring tensions between assimilation and liberal rights on one hand and strong group cohesion and disenfranchisement on other in context of Jewish identity).

170. John Hutnyk, *Hybridity*, 28 *Ethnic & Racial Stud.* 79, 80–81 (2005); see also Homi K. Bhabha, *The Location of Culture* 168–69 (1994) (discussing hybridity in context of negotiating colonial authority); Gilroy, *supra* note 33, at 2, 33 (discussing hybridity in cultural production of hip hop); Appiah, *supra* note 167 (understanding culture as always product of mixture and exchange).

171. See, e.g., Pnina Werbner, *Introduction: The Dialects of Cultural Hybridity*, in *Debating Cultural Hybridity* 1, 12 (P. Werbner & T. Modood eds., 1997) (stating that hybridity is seen by some as “potentially threatening to their sense of moral integrity, and hence subject to argument, reflection and contestation” and describing it as “a reflexive moral battleground between cultural purists and cultural innovators . . .”). 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.

172. Hutnyk, *supra* note 170, at 83.

173. Gilroy, *supra* note 33, at 2.

174. See Robert J.C. Young, *Colonial Desire: Hybridity in Theory, Culture and Race* 18–19 (1995).

175. Gilroy, *supra* note 33, at 7.

176. See, e.g., Appiah, *supra* note 167.

ture, a process that usually takes place at some distance from rules and rulers, in the conversations that occur across cultural boundaries.”¹⁷⁷

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, “[f]ixity of identity is only sought in situations of instability and disruption, of conflict and change.”¹⁷⁸ 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.”¹⁷⁹ Ironically, this mirrors 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.¹⁸⁰ Likewise, cultural property law is a way of distancing anxiety over identity and cultural change by making culture seem solid, of realigning it with clear identities and group membership.

Cultures, like people, are now thought of in terms of movement and migration. Thus there is an emphasis in the scholarship on tracing cultural routes rather than roots.¹⁸¹ 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.¹⁸² Indian nations, as “wards” of the state, were America’s first colonial subjects.¹⁸³ 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.¹⁸⁴ Both recognized that it was white imperial knowledge that created “the Orient” as well as “the Indian” and that there was often very

177. Id.

178. Young, *supra* note 174, at 4.

179. Gilroy, *supra* note 33, at 7.

180. 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, *supra* note 8, at 63.

181. See, e.g., James Clifford, *Routes: Travel and Translation in the Late Twentieth Century* 2–13 (1997) (explaining how book “tracks the worldly, historical routes which both constrain and empower movements across borders and between cultures”).

182. See, e.g., Bhabha, *supra* note 170, at 114 (arguing that hybridity is produced by colonialism).

183. Trachtenberg, *supra* note 114, at xx–xxi.

184. Said’s *Orientalism* and Berkhofer’s *The White Man’s Indian* were both published in 1978. Edward W. Said, *Orientalism* (1978); Berkhofer, *supra* note 108.

little in common between that knowledge and its object. Said's *Orientalism* describes "a kind of Western projection onto and will to govern over the Orient" in much the way *The White Man's Indian* recounts white fantasies and control over Indians.¹⁸⁵ 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."¹⁸⁶ 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.¹⁸⁷

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.¹⁸⁸ Thus, rather than taking hybridity to mean the resolution of conflict or tension between two cultures, Bhabha understands cultural hybridity as a product or excess of colonial power itself.¹⁸⁹ Hybridity and the threat of the hybrid subject are the products of power that at the same time displace that power by making colonial authority visible. "The paranoid threat from the hybrid is finally uncontainable because it breaks down the symmetry and duality of self/other, inside/outside."¹⁹⁰ Modern American Indians, our native hybrids, are the products of authority and desire in mainstream American culture at the same time that they both assimilate and resist that authority and desire. It is also authority and desire that have generated the mythic Indians and native images we have internalized and fetishized. The native hybrid is not the same thing as the white mythic image, but not absolutely different either because he is a product of colonial power and imagination. The native hybrid can be a threat; the mythic image and the mascot are pure fantasy. Like other examples of Indian play, these 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.¹⁹¹

Bhabha's focus is on the "discursive disturbance[s]" created by the hybrid demands of natives, demands which both mimic and disavow colo-

185. Said, *supra* note 184, at 95. See *supra* note 108 and accompanying text.

186. Prochaska, *supra* note 135, at 172.

187. See *supra* notes 116–120 and accompanying text. As Trachtenberg puts it: "Annihilated as persons, subsumed as 'Indians' in repeated rituals of symbolic sacrifice, the indigenous population seemed in certain eyes to promise national redemption" Trachtenberg, *supra* note 114, at xxiii.

188. Bhabha, *supra* note 170, at 114.

189. *Id.* at 112–14 (characterizing effect of colonial power as "the *production* of hybridization rather than the noisy command of colonialist authority or the silent repression of native traditions").

190. *Id.* at 116.

191. See *supra* text accompanying note 102.

nial knowledge.¹⁹² The Indian mascot is very differently inflected. It is not the mimicry by the colonized that presents the “ambivalence” of “colonial discourse” but an act of mimicry by the colonizer itself.¹⁹³ The mascot attests to the fact that the colonizer is not unchanged by its contact with the colonized and it arises from the hybridized colonizer, but what does it mimic? Not the hybrid native and native knowledge, but the internalized and fetishized mythic Indian of the white imagination. It is a kind of self mimicry, a circular chase fueled by the desire for an authentic referent that was long ago rendered extinct if it ever existed at all. This is certainly different from the colonial mimicry by natives that resists colonial authority. The Indian mascot is more of a reassertion of colonial power, a performance of the power to both destroy and create the Indian. But it is also like the mimicry by the native, a testament to the absence and ambivalence at the heart of white authority. The absence to which Indian play so often attests is the lack of authenticity of the white self and the desire for the rebellion, freedom, and individualism of American mythology. Thus the mimicry ends in pathos—the dog chasing not the cat, but its own imagined tail.

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.¹⁹⁴ What is interesting about Indian mascots is the way in which the blatant inequalities at the heart of these cultural hybrids flow through the gaps of cultural theory. Even within the argument presented here that mascots are not Native American cultural property, it is abundantly clear that they are neither banal nor easily celebrated products of multicultural America. They are contested precisely because they are the products of a process of cultural domination and fusion that continues to inspire collective identity as well as 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. In this sense they continue to create discursive disturbances.

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 of hybridity—in Salman Rushdie’s words, “how newness enters the world”—as well as to highlight the indivisibility

192. Bhabha, *supra* note 170, 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 103–04.

193. See *id.* at 86.

194. Hutnyk, *supra* note 170, at 92.

of cultural products.¹⁹⁵ 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, the “authentic” Sioux regalia, and the idea of the Indian itself all owe something to real tribal practices. But Chief Illiniwek’s real inspiration is the mythic Indians of the white imagination; he simply 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.

Hybridity also undoes the authoritative logic of cultural property. The same critique of hybridity applies with even greater force 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 the survival strategies of the colonized. It also carries with it the danger of legitimating all sorts of appropriations of minority cultures. Yet accepting that appropriation is a “multidirectional phenomenon” does not mean that we must assume that all appropriations are symmetrical; it is both possible and desirable to take into account the politics and power that are part of all cultural borrowings.¹⁹⁶

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. To look at cultural icons and objects for their hybridity rather than their origins and ownership tells us about their histories of inequality at the same time that it resists the trap of static and oppressive cultural models. To “preserve” cultural practices and performances can easily bleed into narrowed options and compelled forms of expressing one’s identity. As Appiah puts it, “preserving culture—in the sense of such cultural artifacts—is different from preserving cultures.”¹⁹⁷ Preserving cultures brings us back to the trap of cultural purity and authenticity—what constitutes the culture we wish to preserve? What is clear is that cultural property cannot solve the problem of cultural conflict and inequality, and it almost certainly makes the problem of cultural authenticity worse and therefore limits the options for reimagining ourselves and our communities. “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

195. See Bhabha, *supra* note 170, at 227 (quoting Salman Rushdie, *The Satanic Verses* 281 (1988)).

196. Bruce Ziff & Pratima V. Rao, Introduction to Cultural Appropriation: A Framework for Analysis, *in* *Borrowed Power: Essays on Cultural Appropriation* 1, 1–3 (Bruce Ziff & Pratima V. Rao eds., 1997).

197. Appiah, *supra* note 167.

of law. To conceptualize the harm of mascots as a cultural property harm, to make culture law's subject, is to invent something that we are worried about losing (culture) in order to protect it from theft.¹⁹⁸

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 and the specific cultures of these universities. 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 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 of Illinois culture. While Illinois has insisted that he was inspired by the cultures of Native Americans generally and the Illini tribes in particular, his significance derives more from white fantasy than from tribal culture. 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 has helped create the intransigent debate over who has 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 for 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. The impoverished and static view of culture that is perpetuated by the logic of cultural property is oppressive and constraining for any group; it is particularly detrimental to the very communities cultural property law aims to help, communities that more than others have depended on cultural accommodation and redefinition to survive.

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

198. I'm indebted to Martha Umphrey for suggesting this articulation of the problem. Telephone Interview with Martha Umphrey, Assoc. Professor of Law, Jurisprudence, and Soc. Thought, Amherst Coll., in Amherst, Mass. (Aug. 6, 2007).

culture.¹⁹⁹ 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.²⁰⁰

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 charting the appropriation of cultural images and practices in the case of Indian mascots is to show both how cultural change occurs and to make the stronger claim that culture will change, even when we cannot agree about it. If the use of Indian mascots is one example where the cultural practice should change, then it is important to think about how to make that happen in ways that do not undermine the ability of Native Americans and others to revise their identities and their practices in light of cultural change. Reliance on cultural property—giving Native Americans exclusive use of tribal names and images—is often a nostalgic refusal to accept cultural change and its inevitable hybridities.

It may well be that all cultural property analysis is incoherent for the reasons I elaborate in this Essay, but my concern is that the law and logic of cultural property is particularly worrisome in the context of more intangible forms of cultural expression. That is why the somewhat atypical example of mascots is useful—because it is especially important that performances of cultural identity be open to adaptation, revision, and even appropriation. While the turn to hybridity is not without its dangers, its dangers are less pressing than those that cultural property invites. A retreat to the law and logic of cultural property is a retreat to the impossibility and prison of purity.

199. The debate over Indian mascots is not unlike the debate over the Confederate flag and the extent to which its meaning depends on a history of slavery. With respect to cultural disputes over national symbols, monuments, and flags, Sanford Levinson's assessment is that "whatever the value of courts—and constitutions—in limiting tangible oppression, I think it is 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*, 70 *Chi.-Kent L. Rev.* 1079, 1106 (1995).

200. Brown, *supra* note 5, at 8.